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STATE v. COWEN ET AL.
Md. 1896.

Court of Appeals of Maryland.
STATE
v.
COWEN ET AL.
Oct. 3, 1896.

Supplemental dissenting opinion. For majority opinions and former dissenting opinion, see 35 Atl. 161, 354.

***581** BRYAN, J.
It is very unusual for a judge of this court to file a supplemental opinion. But I trust that a statement of my views will show weighty and sufficient reasons for the course which I have adopted. The reasons for my conclusions will be stated with simplicity; in no controversial spirit, and most certainly with no diminution of the unfeigned respect which the judgments of my learned brothers always receive from me, and which they are justly entitled to receive. When the court, after a long advisement, determined that the priorities in the distribution of the proceeds of sale should be settled before the sale took place, and therefore ordered the question to be argued at the bar, it was natural to suppose that it had come to the conclusion to order a sale. At least this was my inference from the order. The event has shown that I made a mistake. The opinions in opposition to a sale which have been filed by the learned judges refer to matters which, when I wrote my former opinion, I did not consider as subjects of controversy in this case. In the amended bill in equity which the trustees under the act of 1844 filed in the circuit court for Washington county they alleged that the act of 1878 was invalid, and that consequently the bondholders under that act had no lien on the property of the canal; and they prayed, among other things, that the court would determine the status of these bonds. The trustees for these bondholders in their answer allege that the act of 1878 is absolutely valid and binding, and that the bonds issued under that act are a first lien on the whole estate and property of the canal; both corpus and revenues. They further allege that the act of 1878 was passed at the earnest request and solicitation of the canal company, and with the privity and assent of the then trustees under the act of 1844. They further state and insist that the mortgage under the act of 1844 given to secure the bonds issued under that act, and the statute authorizing its execution confer no lien whatever on the corpus of the canal, but only on such surplus of its revenues as might remain after paying the necessary and proper repairs and expenses of the work under the administration of the canal company. The answer of the state of Maryland alleged, among other things, that the lien of the bondholders under the act of 1844 was on the tolls and revenues of the canal, and not on the “canal property itself,” and it prayed for a decree for sale. The trustees under the act of 1878 filed a bill in their own behalf, praying also for a sale. The two cases were consolidated by the order of the court, and were heard as one case. The trustees under the act of 1844 filed a petition praying that the case should be referred to an auditor to report on the priority of the liens on the canal so that the bondholders whom they represented might know before the sale what rights they had as to the proceeds of sale, and thus be enabled to protect them; and alleging that a sale, when the creditors' rights were unknown and unsettled, would be equivalent to turning the property over to a certain named bidder, who would have no

competitor. The court determined that it was reasonable and proper to settle the question as to the right and position of the bondholders under the act of 1844 before decreeing a sale. The question being thus presented with all possible clearness and distinctness, it was decided that the lien given by the act of 1844 was limited to the net tolls and revenues of the canal company; and that upon failure of that security the bondholders under that act occupied the position only "of ordinary non-lien creditors of the company."It was also decided that the act of 1878 was valid. And thereupon, in pursuance of these decisions, a decree for sale of the canal was passed, with the suspensory ***582** clauses so often mentioned in the discussion of this case. This decree has never been reversed. It was affirmed in the only appeals which have been taken from it. It must have the effect of settling conclusively and absolutely the questions decided, so far as the parties to the suit are concerned. They can never litigate them again in this case, or in any other. The matter decided is res adjudicata. In Henderson v. Henderson, 3 Hare, 115, the vice chancellor said: "In trying this question, I believe I state the rule of the court correctly that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted a part of their case. The plea of res judicata applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."This decision was approved and adopted by the supreme court of the United States in Beloit v. Morgan, 7 Wall. 622, and also in State v. Brown, 64 Md. 204, 1 Atl. 54, and 6 Atl. 172;Trayhern v. Colburn, 66 Md. 279, 7 Atl. 459;Albert v. Hamilton, 76 Md. 309, 25 Atl. 341;Barrick v. Horner, 78 Md. 258, 27 Atl. 1111.I think, then, that it is thus settled beyond any further controversy that the bondholders under the act of 1844 have no lien, and that the act of 1878 is valid, and that the canal must be sold. And every other question is settled which is involved in these conclusions. It cannot escape attention that the act of 1878, by its third section, granted to the bonds then proposed to be issued a lien on the property, tolls, and revenues in preference to any rights or liens which the state had on the same, "and also in preference to any other claims or liens upon the said Chesapeake & Ohio Canal Company, or its works or property."Now the state could not grant such a lien, unless at the time it held a lien superior to all other claims on the canal. Consequently the validity of this act is founded on the fact that the state had a lien on the corpus of the canal superior to any claim of the bondholders under the act of 1844.

As nothing can be added to the binding effect of a valid decree by a court of competent jurisdiction, it may be said that it is superfluous and unnecessary to say anything in support of its correctness. And so it would be in ordinary cases. But in questions of such vast public interest as those involved in this litigation the judges would gratify a reasonable expectation by stating the grounds which, in their opinion. show the justice and propriety of decrees which have been rendered. It was from a consid-

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eration of this kind that I devoted a large portion of my former opinion to a discussion of the priorities. I do not desire to add anything to what was then said. But some other questions must now be considered. Much stress has been laid on the fourteenth section of the charter of the canal company. It is in these words: "And be it enacted, that the said canal, and the works to be erected thereon in virtue of this act, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities and produce whatever, on payment of the tolls to be imposed, as provided by this act, and no other toll or tax whatever for the use of the said canal and the works thereon erected, shall at any time hereafter, be imposed but by consent of the said states, and of the United States."By the third section of the act it had enacted that the "Chesapeake and Ohio Canal Company" should be incorporated, and should have perpetual succession. So the fourteenth section could not have been intended to grant it the right to hold the canal in perpetuity, inasmuch as it necessarily had this right under the third section. It was rather a perpetual restriction on the right of the corporation to impose any tolls or taxes whatever for the use of the canal and its works except those provided by the act of incorporation. It manifestly was not intended to protect the canal property from the claims of creditors who might, by the ordinary processes of the law, acquire a right to have it sold for payment of debts due to them. The charter was granted by the legislatures of Virginia and Maryland and by the congress of the United States, acting in concert for the purpose. It was a contract with the canal company, and was not repealable by any or all of the legislatures which granted it. But they could amend it with the consent of the canal company. It was amended by the act of the legislature of Virginia passed January, 1844, confirmed by the act of the legislature of Maryland passed February, 1844, known as "chapter 124 of the Laws of 1843," likewise confirmed by an act of congress approved February 7, 1845, and the amendment accepted by the stockholders of the canal company in general meeting. This amendment gave the canal company the power to borrow money to carry into effect the objects authorized by its charter, to issue bonds or other evidences of such loans, and to pledge its property and revenues for the payment of the same in such form and to such extent as it might deem expedient. Whatever might have been thought before the passage and acceptance of this amendment, there can be no doubt that afterwards the canal company had full power to execute mortgages of its property. When the canal company, in accordance***583** with its corporate powers, executed mortgages on its property in the usual form, it ought not to be seriously questioned that the mortgagees had the right to foreclose them, and sell the property. The charter granted to the canal company perpetual corporate existence, and it had, therefore, the right to hold the canal in perpetuity as a navigable highway. But a perpetual charter does not exempt a corporation from the obligation to pay its debts, and from the claims of its creditors. An individual has the right to hold his land to him and his heirs forever, but this right is subordinate to the claims of his creditors, and does not prevent them from selling it. It would be a most anomalous conclusion to hold that when it acquires a power to mortgage its property, and does voluntarily mortgage it, the creditor is debarred from the rights universally arising from a contract of mortgage.

In the able opinion of the chief justice the position is taken with great strength that we ought to look at certain documents and

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statements (which he mentions in his opinion) for the purpose of ascertaining the views and purposes with which the parties entered into the contract made by the act of 1844. It is true that the meaning of the contract is what both parties intended at the time it was made. But this meaning must be expressed on the face of the contract itself, and it cannot be affected by anything said before or at the time of the contract or afterwards. The rule of interpretation applicable to written contracts is thus stated in 1 Greenl. Ev. § 275: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."It must be observed that the learned author speaks of "oral" testimony of a colloquium, or of conversations or declarations, etc. Of course, he does mean to imply that, if either of the parties should reduce to writing such conversations or declarations, the rule of interpretation would be different. This is obvious enough from the reason of the case. He was noting the difference between oral and written evidence, and his meaning is made perfectly clear by the two sentences immediately preceding the passage quoted. "By 'written evidence,' in this place, is meant not everything which is in writing, but that only which is of a documentary and more solemn nature, containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. Fiunt enim de his (contractibus) scripturæ, ut, quod actum est, per eas facilius probari poterit."We must also bear in mind that the instrument embodying the contract is a public statute, which no one except the legislature has power to alter, vary, or modify in any particular. And the legislature could not do so except by another statute. Therefore none of the documents and statements mentioned by the chief justice were made by any authority which could bind the state. I infer that the act of 1844 is to be construed in the ordinary and accustomed manner; not forgetting that the surrounding circumstances and the public history of the times are to be considered. The supreme court of the United States in construing an act of congress said in Aldridge v. Williams, 3 How. 24:"In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intentions from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."And to the same effect was the opinion in U. S. v. Union Pac. R. Co., 91 U. S. 72.The documents referred to by the chief justice do not appear in the record, and were not brought to my attention. This must be my excuse for not noticing them in my former opinion. Counsel sometimes indulge themselves in a loose practice of stating matters which do not appear in the record, but every paper should be inserted in the re-

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cord which it is desired that we should pass upon, or it should, by leave of the court and agreement of counsel, be exhibited, and left with us, as if it had been so inserted. I see no agreement of counsel in the record with reference to any additions or amendments except on the 228th page; and that refers to the annual reports of the canal company from the fiftieth to the fifty-ninth, inclusive, and to the sixty-first. These have never been filed in court, and their dates show that they are long subsequent to the documents and statements in question.

Some criticism has been made respecting the right of the attorney general to insert in his answer a prayer for the sale of the canal. The legislature of 1890, by joint resolution No. 1, among other things, stated as follows: "For the last twelve years the said canal has been maintained and operated at an average annual deficiency of fifty-six thousand dollars, and it is now apparent that in its ***584** present deplorable condition its restoration as a waterway capable of earning annual revenues sufficient to pay its ordinary current expenses is wholly impracticable, and that a sale or lease of said work is sooner or later inevitable."It also passed joint resolution No. 2, as follows: "Joint resolution authorizing the attorney general to intervene in pending suit to protect the state's interest in the Chesapeake and Ohio Canal. Whereas, the proceedings now pending in the circuit court for Washington county and in the supreme court of the District of Columbia, for the appointment of a receiver of the Chesapeake and Ohio Canal Company, and for a decree of foreclosure of the mortgage executed by the canal company under the act of eighteen hundren and seventy-eight, chapter fifty-eight, affect most vitally the interests of this state; and whereas, if a receiver should be appointed and receiver's certificates should be issued for the purpose of raising funds to restore the canal, a heavy additional debt must necessarily be created, which will take priority over the liens now held by this state to the great prejudice of her claims; and whereas, it is necessary that the rights and interests of the state should be represented in said proceedings: Therefore, be it resolved, that the attorney general be and he is hereby instructed to intervene in said proceedings in the name of the state of Maryland, and to take such steps after consultation with the board of public works, as may be necessary to resist the application for a receiver, and the creation of any additional debt to take precedence over the claims and liens of this state."The attorney general made known this authority to the court, and was admitted to appear for the state of Maryland as a party defendant. He answered both the bills filed in the court for Washington county. And afterwards, on his petition, he obtained leave to amend both of his answers, and insert a prayer in each of them for a sale of the canal; and he accordingly made the amendments. The legislature stated that proceedings were pending for the appointment of a receiver and for a foreclosure of the mortgage, and the instructions to the attorney general were that he should resist the application for a receiver. The only way to defeat this application was to obtain a decree of sale, and he knew that the legislature had declared that a sale or lease was inevitable. It was a necessary part of his duty to exercise his best judgment to determine the proper means of preventing a receivership. And no one had a right to control his judgment as counsel in regard to the proper management of his case. The court decided that he had a right to amend his answers and pray for a sale, and it made this prayer, thus authorized, one of the grounds of its decree. No objection was made to this decision of the court at the time or afterwards by any of the parties to the suit, but the suit went on in regular

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course to a final decree. If any objection existed, it ought to have been made at the time, and brought to the attention of the court. No rule of practice would authorize the other parties to the suit to go to trial on this prayer without dissent, and then raise an objection for the first time after a final decree had been rendered. This would be far more inadmissible than joining issue on a plea, and then moving to strike it out for irregularity. It is a familiar practice that this cannot be done. Stockett v. Sasscer, 8 Md. 374.Many cases are mentioned in Hutton v. Marx, 69 Md. 255, 256, 14 Atl. 684, where a party loses the benefit of a right if he does not claim it at the proper time and in the appropriate manner. The proceedings in this case have been well known to all persons interested in the public affairs of this state, yet three sessions of the legislature have passed since the decree for sale was rendered, and no dissatisfaction has been expressed in regard to the action of the attorney general. At the last session in section 2 of chapter 136 1/2 this decree is mentioned, and provision is made for a disposition of a portion of the proceeds of sale to which the state would be entitled. So we may fairly infer that the legislature sanctions the construction given by the attorney general to joint resolution No. 2. I may dismiss the further consideration of this question by the remark that this decision of the court is involved in the decree which stands unreversed.

Even if the state had opposed the granting of the decree, its effect and operation would have been the same. All the lienors are entitled to the benefit of it. Where several mortgagees are parties to a suit, and a sale is decreed on the prayer of one of them, the rights of all are respected and protected; and each one has a vested interest in the sale to the extent of his debt. It would be very singular if it were otherwise, inasmuch as, after the decree, none of them could maintain a foreclosure suit on his mortgage. It would be merged in the decree. The state having the first lien on all the lands, property, and rights, net tolls, and revenues of the canal company makes the contract contained in the act of 1844. I think that I have shown in my first opinion that this contract secured to the bondholders under the act of 1844 "the surplus net revenues," as they are styled in the fifth section of the act, and nothing more. It did not give them the right to take possession of the canal in any contingency. The mortgage given by the canal company to the trustees under the act of 1844 (which was executed in 1848) gave this right under certain conditions which have been frequently mentioned in the discussion of this case. But this right, although good against the canal company, could not be asserted in opposition to a prior mortgagee whose title was paramount to that of the canal, and to all interests derived from it, whether by mortgage or otherwise. According to the opinion of this court in Virginia v. Canal Co., 32 Md. 538, the security of these bondholders was "only upon expected tolls ***585** and revenues, and only on so much of them as might remain after repairs and other expenses were first provided for."And it was also, in the opinion of the court in the same case, subject to the right of the canal company to issue bonds for the purpose of obtaining the necessary funds, and subject to the right to pledge its after-accruing revenues for the payment of such bonds. And in the mortgage of 1848, given to secure these bondholders, it is expressly stated that their claims are to be provided for "after the payment of the debt now existing, and that may hereafter be contracted and in arrear for repair of the canal, and for officers' salaries."When the storm of 1889 had wrecked the canal, it was the duty of the canal company to restore it, if it could obtain the means to do so by pledging its

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future tolls and revenues. But this was entirely impossible, and the company itself was hopelessly insolvent. It has not even yet been suggested that any one would have loaned the necessary funds on such security as it was in the power of the company to offer. The future tolls and revenues could have been pledged with priority over the pledge made by the act of 1844, but the act of 1843, c. 124, which authorized the canal company to pledge its property and revenues, expressly provided that the prior rights and liens of the state of Maryland under mortgages theretofore made to it should not be impaired, except in so far as the same should thereafter be waived, deferred, or postponed by the legislature. When there were no means of operating the canal any further, there was no legal or rightful impediment to a sale. But the court, at the request of the trustees under the act of 1844, suspended the sale, and allowed them to make the experiment which has already been mentioned, at their own expense. It has been made, and has failed. The canal has not earned anything approximating its expenses. The time for which the sale was postponed expired on the 1st day of May, 1895. And the proposition now before us is for a further postponement. The rights of these parties are matters of contract. The engagements of the state were completely fulfilled by relinquishing the net tolls and revenues and by permitting the canal company to remain in possession of the land, and use every attainable and possible means to earn tolls and revenue. When its existence had terminated as a living agency capable of carrying on its work, the possibility of net tolls and revenues was gone forever; and the decree was passed for a sale of its property. The further postponement of the sale enables subsequent mortgagees to hinder, delay, and defeat liens prior in time and superior in title, which have been adjudicated in the most authoritative manner known to law. A prior mortgagee, whose right of sale has been matured, is entitled to a sale without delay, and his right cannot be postponed to suit the convenience or interest of a subsequent lienor, who may suppose that by being put in possession of the property he may make enough from it to pay his own claim. The rights of the prior mortgagee are secured by solemn contract, and in my humble judgment no court has the right to impair or delay them. And certainly no court has the right to impose as a lien on the property, prior to those already existing, the expenditures which a subsequent lienor has made for the promotion of his own interest in carrying out an experiment which was made against the earnest opposition of a prior mortgagee.

I have thought it due to myself that I should state the reasons for the judgment which I have formed on the questions which have been discussed. But it is also due to myself in a far higher degree that I should put on record my cheerful testimony that the opinions of my brother judges are eminently entitled to great consideration and respect.

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