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Date/Time of Request:	Monday, December 3, 2007 14:12 Central
Client Identifier:	1000210861
Database:	MD-CS-FIND
Citation Text:	35 A. 354
Lines:	1370
Documents:	1
Images:	0

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STATE v. COWEN ET
AL.FN;B0011FN;F0011
Md. 1896.

Court of Appeals of Maryland.

STATE

v.

COWEN ET AL. [FN1](#)

[FN1](#). For supplemental dissenting
opinion, see [35 Atl. 581](#).
July 22, 1896.

Concurring opinion. For majority opinions,
see [35 Atl. 161](#).

***354** McSHERRY, C. J.

I assented to an affirmance of the order appealed from for the reasons I am now about to set forth. With one of the views expressed in both the opinions that have been filed I find myself wholly unable to agree, and upon another question I go much further than the judges who concurred in the opinion prepared by Judge FOWLER. With the most profound deference and respect for the judgment of all my brothers, I am, after a patient and thorough examination of the whole case, driven to a conclusion on that branch of it relating to the priorities of the liens on the canal which is diametrically opposite to the determination reached by all the other judges who sat in the case; and this, too, in spite of a strong inclination on my part to yield my own views to their better and much more reliable judgment. As every suitor is entitled to have each judge who hears his case investigate and pass upon it to the utmost of his ability, I feel no reluctance in stating what the convictions resulting from my investigations are, and in setting forth somewhat at length the reasons which led me where I stand. That I may be in error and that my brothers

may be right upon the question of priorities, is entirely likely; but as neither the arguments at the bar, nor the discussions in the consultation room, nor my own reflections have enabled me to see to my satisfaction that I am wrong, I feel bound to adhere to my own conclusions, arrived at after much thought and deliberation, rather than to tacitly acquiesce in a determination which I cannot persuade myself is right.

If the bonds issued under Act 1844, c. 281, and secured by the mortgage of June 5, 1848, are entitled to a priority over the liens held by the state of Maryland, then a decree directing the sale of the canal without making provision for the payment of those bonds as a preferred lien would obviously be erroneous; and as both opinions hold that those bonds are subordinate to the mortgages executed to the state, and as I entertain the directly opposite view, I could not concur in a reversal of the order appealed from without consenting to a sale of the canal free and discharged of the very lien which, as between the state and the bondholders of 1844, I believe to be the paramount lien, and therefore the lien entitled, at law and in equity, to be first paid and satisfied before the state could justly claim a dollar. Consequently, but not for that reason only, I united with Judge FOWLER, Judge ROBERTS, and Judge RUSSUM in affirming the order extending the time allowed the trustees of the bondholders of 1844 to hold possession of and to operate the canal. To have done otherwise would have resulted not only in dispossessing the trustees, but in stripping them of that which, in my estimation, is their just priority.

Are, then, the bonds issued under Act 1844, c. 281, a lien on the entire canal, and entitled to payment, in the event of a sale,

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in preference to the claims held by the state of Maryland under her mortgages? To intelligently answer this inquiry it is absolutely essential, it seems to me, that we should look back *355 briefly into the history of the canal from its origin, know the powers the company possessed under its charter, appreciate the struggles encountered in the progress of its construction, understand its financial condition before and at the time the bonds were issued, and learn the expectations and hopes shared by its friends and projectors as to the ultimate benefits which its completion to Cumberland, it was confidently predicted, would realize. In a word, we ought to consult the contemporaneous understanding of all the parties to the transaction, as evidenced by their acts, in seeking for the meaning of the contracts under which the bonds were issued. Informed by these means of those things which more than half a century ago influenced the conduct and shaped the judgment of the individuals who, as representatives of the state, and as the officers of the canal company, engaged in consummating the contracts about to be considered, a safer and surer guide for interpreting the meaning of those contracts will be afforded than there can possibly be obtained when, unaided by foreign circumstances, "their naked language," written more than 50 years ago, alone is looked to and construed. It may not be uninteresting to observe at the outset that the project of a claim of internal improvements by way of the Potomac river and across the mountains to the navigable waters which flow into the Ohio originated with Gen. Washington, probably anterior to 1774. At all events, he obtained from the legislature of Virginia in that year a law authorizing such persons as were disposed to undertake the scheme to open the Potomac so as to render it navigable from tide water to Wills' Creek; and, notwithstanding

the legislature of Maryland interposed objections to a concurrence in the law, some progress had been made when the battle of Lexington turned the attention of all the colonists to the struggle which finally resulted in our independence. After the revolutionary contest had ended, Gen. Washington again took up the subject of the improvement of the navigation of the Potomac up the north branch, or to Ft. Cumberland, and at his suggestion deputies were appointed by the legislatures of Virginia and Maryland in 1784 to confer and agree upon the provisions of a bill having that object in view. Such a bill was accordingly prepared, and was adopted by the legislature of Virginia in October, 1784, and by the legislature of Maryland at the November session of the same year, and on the 17th of May following the Potomac Company was duly organized. By the tenth section of its charter it was provided "that the said river 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 or produce, whatsoever, on payment of the tolls imposed by this act." And this language, changing the word "river" into "canal," was incorporated in the fourteenth section of the charter of the Chesapeake & Ohio Canal Company. Gen. Washington became the Potomac Company's first president, and continued to hold that position until called to fill the exalted station of president of the United States. The time limited in the acts of incorporation for the completion of the work having expired, and the work not having been finished, various extensions were granted by the legislatures of the two states that had chartered the company, until finally, in 1820, after Maryland had passed five and Virginia ten different acts extending the period for constructing the work,

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and after 37 years of labor and experience and the expenditure of over a half million of dollars, it became evident that the river could not be so improved as to answer the purpose intended. But a strong sentiment as to the feasibility of a continuous canal to the Ohio had grown up, and was fortified by the report of the civil engineer of Virginia; and the project was commended in a report of a committee of congress in May, 1822. As a result of this sentiment and the impetus it had received from the sources just named, public meetings were held in various places, and delegates were selected from Virginia, Maryland, Pennsylvania, and the District of Columbia to assemble in convention. The convention met, and drafted memorials to the legislatures of the states named and to the congress of the United States seeking an incorporation of a company for the construction of a canal from the tide water of the Potomac by way of Cumberland to the mouth of Savage river, and ultimately to the navigable waters of the Monongahela or Ohio rivers, and asking the assistance of these states and of congress in providing the requisite means to construct the work. On the 27th of January, 1824, an act incorporating the Chesapeake & Ohio Canal Company was passed by the legislature of Virginia, but its vitality was made to depend upon the assent of the legislatures of Maryland and Pennsylvania and the congress of the United States. On the 31st of January, 1825, the legislature of Maryland passed an act reciting and setting forth in full the Virginia act, and confirming it, but at the same time declaring that it was not intended by the legislature of Maryland to deny to congress the constitutional power to legislate on the subject of roads and canals. On the 3d of March, 1825, the congress of the United States ratified and confirmed the act of the Virginia legislature. The application to Pennsylvania was twice rejected, but fi-

nally, on February 9, 1826, a confirmatory act was passed. Various other acts were procured, numbering 16 with those already mentioned. The legislative history of the company is traced step by step in the lucid and exhaustive opinion delivered by Chief Justice Buchanan in *356 *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 1. Thus the Chesapeake & Ohio Canal Company stood incorporated by three sovereign states and by the federal government, the outgrowth of their concurrent action; and on the 4th day of July, 1828, John Quincy Adams, then the chief magistrate of the republic, in the presence of a vast and enthusiastic concourse of citizens, dug the first spadeful of earth from the site located for the channel of the canal. The capital stock of the company consisted of \$6,000,000, with power of future enlargement, and authority was given to take payment of subscriptions in the certificates of the stock of the Potomac Company, not exceeding the sum of \$311,111.11, and in claims held by creditors of that company not exceeding \$175,000; and on the 15th day of August, 1828, the Potomac Company, by deed duly executed, and under authority duly obtained, surrendered to the Chesapeake & Ohio Canal Company its charter and all its property, rights, and franchises, and thenceforth ceased to exist as a separate entity. The powers acquired by the Chesapeake & Ohio Canal Company under its charter and in virtue of the surrender made to it by the Potomac Company were large and liberal, and the duration of its existence was without limit. Its objects were more than merely local in their character, for, besides stimulating the development of the coal fields of Alleghany, and throwing open a means of transportation for the products of a vast agricultural region, it was, as declared in the preamble to its charter, designed "to establish a connected navigation between the eastern and

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western waters, so as to extend and multiply the means and facilities of internal commerce and personal intercourse between the two great sections of the United States; and to interweave more closely all the mutual interests and affections that are calculated to perfect the vital principle of union." And President Monroe, in his annual message to congress on December 2, 1823, adverted to the projected measure as one intended to connect "the Atlantic with the Western country in a line passing through the seat of the national government," which "would contribute essentially to strengthen the bond of union itself." With these extensive objects in view, and to perfect the organization of this great undertaking, the legislature of Maryland at the December session of 1825 passed an act authorizing a subscription to the company's capital stock to the full amount of stock owned by the state in the Potomac Company and of the debts due to the state by the same company, and, in addition, a half million of dollars, payable in current money. Under an act of congress approved May 24, 1828, the general government subscribed \$1,000,000 to the capital stock; and by another act, passed the same day, congress authorized the cities of Washington, Georgetown, and Alexandria to subscribe to the stock. Accordingly, Washington city subscribed one million, and Georgetown and Alexandria each a quarter of a million of dollars. Subsequently the general government liquidated the bonds issued by these cities to pay their respective subscriptions, and became, in 1836, possessed of their shares of stock. Besides these subscriptions, the corporation of Shephardstown took 20 shares of the par value of \$2,000, and individuals subscribed for 6,074 shares, of the par value of \$607,400. In February, 1833, the state of Virginia subscribed for \$250,000 of the company's stock. On the 14th of March, 1834, the

state of Maryland subscribed for \$125,000 of additional stock, payable in 5 per cent. bonds of the state. The total stock subscriptions up to this period aggregated \$3,984,400, with the controlling interest in the general government and the city of Washington. Up to June, 1834, \$4,062,991.25 had been expended, and though scrip, supported by pledges of stock, had been resorted to for raising additional funds, the company was without sufficient means to open navigation beyond a point 107 miles west of Georgetown, and only 86 miles of this distance had been actually finished. Seventy-eight miles of the work extending eastward from Cumberland, and covering some of the heaviest sections between Georgetown and Cumberland, remained untouched. In its straitened condition, resort was again had to public meetings, and committees were appointed to memorialize congress and the legislatures of Maryland, Virginia, and Pennsylvania and the corporate authorities of Baltimore city for the necessary means to complete the work to Cumberland. When it became apparent that aid could be expected from no other quarter, and that the burden of providing for the completion of the canal had fallen on Maryland, her legislature promptly met the emergency, and on the 18th of March, 1835, passed an act (Act 1834, c. 241) appropriating \$2,000,000 for the completion of the canal; that being the estimated amount required to finish the work. This aid was not given, as on previous occasions, by way of a subscription to the capital stock, but was put in the form of a loan by the state to the company, coupled with a requirement that a mortgage be executed on the whole of the net revenues, lands, property, and water rights of the company to secure the repayment of the loan and the quarterly interest to accrue thereon. On April 23, 1835, the mortgage was executed. Up to the passage

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of this act the total amount invested by the state in the canal was, apart from the sum represented by the Potomac Company's stock and debts, but \$625,000, and the whole funded debt of Maryland was something less than \$2,000,000. Her credit was high, and the stock issued by her to raise the two millions for the loan was sold by the state treasurer for \$116.40. The aid thus furnished fell far short of completing the work, and consequently*357 at the next session of the general assembly additional help was solicited. After many vicissitudes, an act was passed on June 4, 1836, it being chapter 395 of the Acts of 1835, and known as the "Eight Million Bill." It authorized subscriptions to the capital stock of several internal improvement companies, including the Baltimore & Ohio Railroad Company and the canal company. The amount directed to be subscribed to the latter was three millions of dollars, coupled with a requirement that a written instrument should be given to the state guarantying a dividend of 6 per cent. after the expiration of three years, to be paid out of the net profits of the canal and its works. The aid thus given was in the form of a subscription to the capital stock, and secured to the state from thenceforth, as the majority stockholder, the control and government of the company. Owing to the financial embarrassments which then affected the money markets of Europe and America, and the suspension of specie payments by the New York banks in May, 1837, quickly followed by the other banks throughout the country, it was found impossible to float the bonds of the state at the high premium fixed by the act of 1835, and hence, under joint resolutions passed by the legislature of 1837, but \$2,500,000 in bonds were turned over to the canal company in full of the \$3,000,000 subscription, and \$500,000 of the bonds were retained by the state treasurer. The bonds delivered to the canal

company in payment of the state's subscription were hypothecated for loans by the company, and by this means the work on the canal was measurably kept up. By Act 1838, c. 386, \$3,200,000 of 5 per cent. sterling bonds were authorized to be issued by the state treasury in exchange for the \$2,500,000 of 6 per cent. certificates or bonds delivered to the company under the act of 1835 and the \$500,000 of bonds retained by the state treasurer. By another act of the same session (chapter 396) a further subscription by the state to the capital stock of the company to the amount of \$1,375,000, payable in 5 per cent. sterling bonds, was authorized. This act, as did the act of 1835, required a guaranty of 6 per cent. dividends on the stock subscribed for, payable out of the net profits of the work, after the expiration of three years. This was the last subscription ever made to the stock of the canal company. The total amount of all the stock ever subscribed was \$8,359,400, and of this aggregate the state of Maryland took and became the owner of \$5,000,000. At the December session of 1839 another application was made by the company to the legislature for aid, but without success. In the meantime the financial affairs of the company were growing desperate. The bonds issued by the state to the company in payment of the state's subscriptions were disposed of at forced sales; scrip was issued, without any provision being made for its redemption, and was actually received in payment for tolls; by which ruinous methods the company was compelled to submit to heavy sacrifices, and was deprived of much of the available means upon which alone it could rely for keeping the canal in operation. At the extra session of 1841 and at the regular December session of the same year renewed applications were made to the general assembly for aid, but without avail, and by the close of the year 1841 there was not a

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solitary laborer employed between dam No. 6 and Cumberland, nor was work again resumed until some considerable time after the passage of Act 1844, c. 281, under which were issued the bonds held by the persons for whom the appellees are the trustees; and these are the bonds now claimed to have a priority over the liens of the state.

In August, 1843, Gen. James M. Coale was elected president of the canal company, and under his wise, broad, and sagacious management the work was completed to Cumberland in October, 1850. At the period of his election the company had reached its lowest depth of depression. It was utterly overwhelmed with difficulties, was without means and without credit, and, in addition to its enormous liabilities to the state, it was beset and borne down with debts and obligations evidenced by scrip, certificates of debt, ordinary bonds, and open accounts stated by the treasurer on October 1, 1843, to aggregate \$1,174,566.31. Assistance, though sought in all directions, could be obtained from no quarter whatever, and the company was powerless to extricate itself, and had nothing to depend on to sustain its feeble existence but the small annual revenues derived from tolls and water rents collected between Georgetown and dam No. 6. At this critical period of its history a special report, prepared by Gen. Coale, and submitted to the stockholders on November 16, 1843, suggested the feasibility of procuring legislation from the general assembly waiving the state's liens under her mortgages, and authorizing the company to issue its own bonds to the extent of \$2,000,000, with preferred liens on the tolls and revenues. It was then estimated that it would require \$1,545,000 to complete the canal from dam No. 6 to Cumberland. I quote from the special report of November 16th as follows: "In order,

however, to give full strength to the credit of the company, so as to enable it to procure the required sum upon fair and advantageous terms, it will be indispensably necessary to waive the state liens to a much larger amount, so that a broad and tangible basis may be presented for the bonds to rest upon. * * * The better fortified the bonds are, the greater will be their value; and, as no more will be issued than will be necessary to finish the work and pay the interest on the cost thereof, in aid of the net tolls of the canal, until they become sufficient for the purpose, together with a small outlay for repairs and improvements on the finished portion*358 of the line, it will be the interest of the state to leave a broad margin to the credit of the company. With this view, and to provide against all contingencies, we would recommend a waiver of the state liens to such amount as may be found necessary for those purposes, not exceeding the sum of two millions of dollars."Report, p. 15. But the legislature of 1843 adjourned without acting on this suggestion. It was renewed at the next session, and after a long and arduous struggle, led by William Cost Johnson, of Frederick county, in the house of delegates, the act waiving the liens of the state was passed, and under that act the canal was ultimately completed to Cumberland. The act to which I refer is Act 1844, c. 281, and it was passed on March 10, 1845, the last day of the session. Upon its terms and provisions, interpreted in the light of the events that preceded, surrounded, and influenced its adoption, and upon the terms of the mortgages made in pursuance of it, turns the question whether the bonds which it authorized to be issued have a lien that is prior to the liens held by the state on the canal or on the proceeds of a sale of the canal should the canal be sold. I have sketched this imperfect outline of some of the events in the canal's history that the inquirer of to-

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day might be placed in possession of the facts which were familiar to the persons who procured this legislation and made the mortgages to the state and in behalf of the bondholders; and, being thus placed, that he may look at the question of priorities from the same standpoint, as nearly as may be, that they occupied.

By the first section of the act of 1844 the canal company was authorized and empowered "to borrow or raise upon the bonds of the said company, with preferred liens on its revenues as hereinafter mentioned, to secure the payment of the same and the interest to accrue thereon, such sum or sums of money as may be required to pay for the completion of the Chesapeake and Ohio Canal to Cumberland," provided that the whole amount of bonds authorized to be issued shall not exceed the sum of \$1,700,000. The second section, after prescribing the denominations of the bonds, and the mode of attestation, provided: "And the said bonds so issued as aforesaid shall appear on the face of the same to be preferred liens on the revenues of the company and * * * shall be preferred liens on the revenues and tolls that may accrue to the said company from the entire and every part of the canal and its works between Georgetown and Cumberland, which are hereby pledged and appropriated to the payment of the same and the interest to accrue thereon. * * * Provided the president and directors shall have the power to use and apply such portion of said revenues and tolls as in their opinion may be necessary to put and keep the canal in good condition and repair for transportation," etc. By the fourth section it was enacted: "That the rights and liens of this state upon the revenues of the Chesapeake and Ohio Canal Company shall be held and considered as waived, deferred and postponed in favor of the bonds that may be issued under the foregoing sections, so as to

make the said bonds and the interest to accrue thereon preferred and absolute liens on said revenues, according to the provisions of the second section of this act until said bonds and interest shall be fully paid." And by section 7 it was provided: "That the Chesapeake and Ohio Canal Company shall execute to this state and deliver to the treasurer of the Western Shore of Maryland, a further mortgage on the said canal, its lands, tolls and revenues, subject to the liens and pledges by the foregoing provisions of this act made, created or authorized, as an additional security for the payment of the loan made by this state to the said company under the act of December session, 1834, c. 241, and the interest due and in arrear, and which hereafter may accrue thereon." Prior to the year 1845, the power of the company to borrow money had been gravely questioned, and the validity of its mortgages to the state securing the \$2,000,000 loan had been seriously doubted; but by an amendment to the charter, passed by Virginia on January 20, 1844, confirmed by Maryland on February 8th of the same year, and ratified and assented to by congress on February 7, 1845, all questions and doubts on this subject were finally set at rest. After the conditions upon which the effectiveness of Act 1844, c. 281, was made to depend had been fully complied with, and a contract for the completion of the canal had been executed, the bonds were issued in payment for the work done as it progressed, and they subsequently found their way into the hands of the present holders. But for these bonds, the canal would not, it may fairly be assumed, have been completed at all, and the state's large interest, then amounting, with accrued interest added, to nearly \$11,000,000, would, in all probability, have been lost a half a century ago. Before the bonds were all issued, a mortgage to the state, drawn under the seventh section

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of the act of 1844, was executed. It bears date January 6, 1846, and, after reciting the several provisions of the act, conveyed in mortgage the lands, tenements, revenues, tolls, and property of the canal to the state, "subject, nevertheless, to all and singular the liens and pledges by the provisions of the before mentioned act of 1844 (chapter 281), made, created, or authorized, or that have been or may hereafter be made, created, given, or granted, by the said Chesapeake and Ohio Canal Company, or the president and directors thereof, under or in pursuance of the provisions of said act, which said liens and pledges are in no wise to be lessened, impaired, or interfered with by this deed, or by anything herein contained, and subject also to all the other provisions of *359 said act."The mortgage securing the bonds issued under the act of 1844 was executed to named trustees on June 5, 1848, and conveyed the revenues and tolls of the entire and every part of the canal and its works between Georgetown and Cumberland in fee and in mortgage to secure the payment of the interest on the bonds and ultimately the principal of the bonds themselves. And it was further provided that if the company failed to pay the interest as it fell due, and failed to provide a sinking fund for the redemption of the bonds at their maturity from any cause, except a deficiency of revenue arising from a failure of business without fault on the part of said company,--the fault to be made to appear by the grantees,--the grantees might demand and take possession of the canal, and appropriate the tolls and revenues in the manner provided in antecedent clauses.

Now, the statutory lien created by the act of 1844 and reiterated in the mortgage of 1848 was a preferred lien on the revenues and tolls that might accrue from the entire and every part of the canal and its lands between Georgetown and Cumberland; and

those revenues and tolls--that is, the whole and entire, and not merely the net, revenues and tolls--were pledged and appropriated to the payment of the bonds and the interest thereon, though the right was reserved to the company by the second proviso in the second section to apply such portions of these same revenues and tolls as might be necessary to keep the canal in condition for transportation. The mortgage of 1848 "doth give, grant, bargain, sell, and convey" to the named trustees "the revenues and tolls of the entire and every part of the canal and its works between Cumberland and Georgetown."What estate or interest, then, was pledged, or upon what estate and interest did the lien fasten? "It is an established rule," said Lord Chief Justice Tenderden, "that a devise of the rents and profits is a devise of the land."Doe v. Lakeman, 2 Barn. & Adol. 42. And in Washburn on Real Property it is laid down with respect to grants that it is not "necessary that the deed should, in terms, convey the land or thing intended to be granted, if such grant is implied from what is described. Thus a grant of the rents, issues, and profits of a tract of land is the grant of the land itself. If the grant be of the uses of and dominion over land, it carries the land itself."Volume 3, c. 5, § 4, pl. 23. "A devise of the rents and profits or of the income of lands passes the land itself both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits." 2 Jarm. Wills (Am. Ed.) 403; Lord Cranworth in Blann v. Bell, 2 De Gex, M. & G. 781. "But if a man, seised of lands in fee, by his deed granteth to another the profit of those lands, to have and to hold to him and his heirs, and maketh livery secundum formam chartæ, the whole land itself doth pass; for what is the land but the profits thereof? for thereby vesture, herbage, trees, mines, and

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all whatsoever, parcel of that land, doth pass." 1 Co. Litt. 4b, *200. To the same effect, [Johnson v. Trust Co.](#), 79 Md. 18, 28 Atl. 890; [Cassilly v. Meyer](#), 4 Md. 11; [Reed v. Reed](#), 9 Mass. 372; [Blanchard v. Blanchard](#), 1 Allen, 225; 29 Am. & Eng. Enc. Law, 404, and the numerous cases collected in note 1. See, also, [Pollock v. Trust Co.](#), 157 U. S. 429, 15 Sup. Ct. 673, and particularly the opinion of Mr. Justice Field, wherein, after quoting from Washburn, Jarman, Coke, Lord Tenterden, Lord Chancellor Hardwicke, and after referring to many adjudged cases, he observes: "Similar adjudications might be repeated almost indefinitely. One may have the reports of the English courts examined for several centuries without finding a single decision, or even a dictum of their judges, in conflict with them." And in the brief of Mr. Joseph H. Choate filed on the reargument of [Pollock v. Trust Co.](#), 158 U. S. 601, 15 Sup. Ct. 912, many authorities to the same point are cited. The case of [Railway Co. v. Jortin](#), 6 H. L. Cas. 424, is strikingly analogous. Obviously, then, according to this firmly settled and long established doctrine, the pledge, by the statute of 1844 and by the mortgage of 1848, of the whole and entire revenues and tolls, was a pledge or mortgage of that out of which the revenues and tolls issued or were to issue,—that is, the canal, the land, the works, the physical structure; and as the state waived, deferred, and postponed its prior liens to let in this pledge as a preferred and absolute lien, this lien took precedence over the others, and became by virtue of the state's own deliberate and solemn act the first and predominant lien upon the whole and entire canal. The right to the rents and profits of land involves and carries with it all the beneficial interest of every kind which can possibly exist in the land, and hence when there has been granted to one person all the revenues derivable

from land there is, of necessity, no beneficial interest of any kind left in that particular land for any one else. Consequently, when the state, with outstanding mortgages on the land, the property, and the revenues of the canal company, with a view of enabling the great work to be completed so that the vast amount invested by her in its construction might yield her treasury some return, unequivocally declared by the act of 1844 that she thereby waived, deferred, and postponed all her rights and liens upon all the revenues of the company in favor of the bonds to be issued under the same act of assembly; and when she further declared that those bonds should be preferred and absolute liens on those same revenues until the bonds and the interest thereon were fully paid,—she necessarily and in unmistakable terms proclaimed that while those bonds *360 were unpaid she would and could have no beneficial interest whatever in, or right to, the property out of which those very revenues so pledged were to issue. This is inevitably true, unless the grant of the rents and profits of land does not carry the land. The seventh section of the act of 1844 strengthens this conclusion. Doubts having arisen as to the validity of the state's mortgage made in 1835 to secure the \$2,000,000 loan under Act 1834, c. 241, as already stated, the seventh section of the act of 1844 provided that the canal company should, as additional security for the payment of that loan, execute to the state a further "mortgage on the said canal, its lands, tolls and revenues, subject to the liens and pledges by the foregoing provisions of this act made, created or authorized," etc. By the terms of this section the mortgage to the state on the canal, its lands, tolls, and revenues was to be subject to the liens made, created, and authorized in favor of the bonds of 1844; and if the state's mortgage on the canal and its lands was to be subject to the lien of these bonds,

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the lien of the bonds must of necessity have been considered, and intended to be, a lien on the canal and its lands by reason of being the first and preferred lien on the revenues and tolls that issued and were to issue from and out of the same canal and its lands. It was not possible for the state's mortgage on the canal and its lands to be in law or in fact subject to the lien of the bonds, if the lien of the bonds was not a prior lien on the canal and its lands. This provision of the act of 1844 is an express declaration that the lien of the state on the canal and its lands--on the physical structure as well as on the revenues and tolls--was designed to be subject (that is, subordinate) to the lien of the bonds of 1844; but how could the state's mortgages be subject or subordinate to the lien of those bonds as respects the physical structure if the bonds were not liens on the same physical structure at all, and the state's mortgages were a first and only lien on the canal and its lands apart from the revenues and tolls? The bare fact that the state's mortgage on the canal and its lands is expressly declared to be secondary to the bondholders' lien is equivalent to a declaration that the latter lien is a prior lien on the very things on which the state's mortgage is made a secondary or subordinate lien. By providing that the pledge made to the state should be subject or subordinate to the pledge made to the bondholders, the state in express terms affirmed that the thing--the property--she claimed a lien on was already included in an antecedent or prior lien, and, being so included, was included by virtue of the language used in the creation of that antecedent lien; because for one lien to be subject to another lien, the latter must, in the nature of things, be prior to it, and upon the same property. If one lien be upon one piece of property, and another lien be upon a different parcel, though both properties be owned by the same individual, neither

lien can be said to be subject to the other; but when both are on the same estate or thing, and they are not coincident in date, or contemporaneous, one must be subject to the other. Had the legislature designed to distinguish between a lien on the revenues and tolls as a separate thing from that which has been called the "corpus" of the canal, it would assuredly have said that the lien of the state should be subject to the lien of the bondholders in so far as the revenues and tolls were concerned, instead of employing the broad and comprehensive language which was used in the second and seventh sections of the act of 1844.

While it was conceded on behalf of the state that, as a general rule, the grant of the rents and profits will carry the land out of which they issue, yet it was insisted that there were exceptions to the doctrine. It was accordingly contended that whenever it distinctly appears there was no intention to grant more than the rents and profits, nothing but the rents and profits will pass. And it has been further maintained that in the case at bar it was the evident design of the act of 1844, and of the parties to the contract which its terms contain, to grant no lien to the bondholders except a lien on the revenues and tolls, reserving to the state a separate, distinct, and paramount lien on the property out of which those revenues and tolls were to issue. I admit it has been held that, though ordinarily the devise of the rents and profits will pass the real estate absolutely, yet such construction will not obtain when the intention of the testator appears from the whole will to be different. [Cooke v. Husbands](#), 11 Md. 492; [Magruder v. Peter](#), 4 Gill & J. 323. I do not understand these cases to be in conflict with those hereinbefore cited. The question is one of intention, and the grant of the rents and profits is held to be sufficient to carry the estate, because by granting them the intention to convey the estate is manifested,

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unless the instrument making the grant or devise shows a different purpose on the part of the testator if there be a will, or on the part of the contracting parties if there be a conveyance or other like instrument to be interpreted. But I am wholly unable to perceive how it can be maintained that the design of the act of 1844, and the intention of the parties to the contract, which its provisions embrace, manifest a purpose to restrict the pledge of the revenues and tolls to the revenues and tolls alone, and to exclude the property from which those revenues and tolls were to issue. In a word, I see no reason for holding that the grant of the revenues and tolls was not intended to carry, in accordance with the general rule, the whole beneficial interest and estate of the canal company in the property that was expected to yield the revenues and tolls that were pledged. On the contrary, my reading of the *361 act of 1844, looking at it as I do in the light of the “foreign circumstances” ([Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.](#), 4 Gill & J. 152), which may legitimately be consulted for the purpose of discovering its real meaning, leads me, in spite of my disinclination to differ from my brothers, to the fixed conclusion that the purpose of the act of 1844 was to give a lien to the bondholders upon the whole and every part of the canal, and not simply on its revenues and tolls. By reference to the various reports of the president and directors of the canal company, and the numerous and voluminous documents accompanying them, which, though not printed in the record, are by agreement a part of it, the design that the officers and stockholders of the company had in view in seeking the passage of the act of 1844, and the sense in which these officers and these stockholders, including the state herself as the holder of a majority of the issued shares, understood its terms after its passage, will, I think, clearly ap-

pear. In the special report of November 16, 1843, from which I have already quoted, the subject of waiving the state's liens is considered and discussed. An estimate of the cost of completing the work to Cumberland had been made, but the officers of the company, fearing that the sum named might fall below the actual amount ultimately needed, say in the report: “In order, however, to give full strength to the credit of the company, so as to enable it to procure the required sum upon fair and advantageous terms, it will be indispensably necessary to waive the state liens to a much larger amount [than the sum estimated] so that a broad and tangible basis may be presented for the bonds to rest upon.”Further on, in discussing the proposed sale of the state's interest,—a subject then much agitated and theretofore directed by act of assembly, to be made at a designated price,—the report proceeds: “But, even if the policy of authorizing an immediate sale be adhered to, a waiver of the liens to an amount necessary to complete the canal and pay the accruing interest on the cost of completion to the extent and for the time mentioned, can in no way prejudice the measure.”Then, after showing that, even should the state's interest be sold, the purchaser would have either to advance to the company the sum necessary to finish the canal, and take a secondary lien, which to him would be the same thing as a preferred lien, or he would have to waive his lien so as to enable the company to borrow money elsewhere, it continues: “In either event, the existing liens,”—that is, the liens held by the state,—“must and will be regarded by capitalists, in estimating their value, as of a deferred or secondary dignity to the sum that may be necessary to complete the canal. * * * There can, then, we think, be no shadow of objection to an immediate postponement of the state liens in favor of the required amount, so as to en-

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able the company at once to enter into a fair and properly guarded contract to finish the work."Report, p. 21. On August 28, 1843, Gen. Coale, then but recently elected president of the company, wrote to Baring Bros. & Co., bankers of London, inquiring whether, if the state's liens were removed, a sufficient sum to complete the canal could be secured on the company's bonds. He asked whether these bankers would be able to negotiate the loan "provided the legislature of Maryland at its next session will waive its liens so as to enable the company to give preferred liens on the net revenues and tolls of the entire canal to secure the payment of principal and interest."And he continued, showing his and the directors' understanding of the effect of the proposed legislation: "The Maryland state liens on the canal would become, by this arrangement, secondary liens."Going back to a still earlier date,--June 28, 1843,--the president and directors, by resolution adopted on that day, declared "that whenever the priorities of the state shall be waived and postponed, and the company be thus placed in a condition to exercise exclusive control over the revenues and property of the company, the board will promptly enter into a contract for the completion of the work."And in the report of the agents representing the state, made to the legislature of Maryland on February 5, 1844, it was said: "That a pledge of all the revenues of the company cannot be construed to mean merely the net revenues is too plain to admit of argument;" while in concluding the report, which was signed by Samuel Sprigg, A. B. Davis, and John Van Lear, Jr., and in referring to the special report of November 16, 1843, the state agents say: "That it is therein [the report of November 16th] made manifest that the work can now be completed if the liens of the state are postponed, as has been asked for."In a communication addressed by the president

of the company to the house of delegates on February 24, 1844, in explanation of the views of the company's officers respecting the scope and purposes of the act of assembly then pending before the legislature, and providing for a waiver of the state's liens, it was stated: "It must be borne in mind that the state is not now appropriating money, nor authorizing an issue of state bonds, as heretofore, nor pledging the faith and credit of the state for the repayment of the money that may be raised. She does nothing more than postpone her present unavailable liens, so as to enable the company to give a preferred lien upon the prospective revenues of the canal for the repayment of the bonds that may be issued to complete it, and render it productive."In January, 1844, the company presented a memorial to the legislature of Virginia seeking an amendment of the charter in several respects, but particularly asking that express authority to borrow money be conferred. The memorial, after suggesting that the authority should be given in such *362 terms as not to be susceptible of being construed into an interference with existing liens, proceeded in these words: "We feel confident, however, that if this be done, Maryland will waive and postpone her claims upon the company by a separate law, as that is the only mode now remaining by which the work can be finished," etc. While the act of 1844 did not allow the issue of bonds to the limit requested, viz. \$2,000,000, it did permit an issue to the extent of \$1,700,000 upon a pledge, not of the net revenues and tolls, but of all the revenues and tolls from the entire canal, precisely as had been asked for; and such a pledge was obviously understood, when the state waived, deferred, and postponed her liens, to mean a prior or first lien on the property out of which the revenues and tolls were to arise, because in no other way, as the lawyers of that day perfectly

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understood, could the state's liens become by this arrangement secondary liens, or be regarded "as of a deferred and secondary dignity to the sum that may be necessary to complete the canal." It was the manifest understanding of the stockholders and officers of the canal company that to the extent of \$1,700,000 and accruing interest these bonds were to be prior in all respects to the liens of the state, and the bondholders unequivocally entertained the same view. In a lengthy and able report made by William H. Swift and Nathan Hale for Thomas W. Ward, agent of Baring Bros. & Co., in February, 1846,--after the act of 1844 had been passed,--that act was thus interpreted: "The state of Maryland thus releases its claims upon the canal company for all advances made to it, and the interest thereon, so far as to give a preference to this loan." Again: "It is now proposed to pledge the whole property, with its entire income, after deducting the necessary expenses of repairs and management, as security for the loan still necessary to complete the canal." And the understanding which the legislature must have had, with all the sources of information which it possessed before it, is correctly set forth, I think, in the second and seventh sections of the act of 1844. From these events and expressions, some immediately preceding, some accompanying, and some following the passage of the act of 1844, which embodied language whose legal significance was thoroughly understood when it was used, it appears to me clear that the state of Maryland through her legislature, the canal company through its stockholders and officers, and the persons who subsequently became holders of the bonds, designed and intended that the lien of the bonds should extend to the "whole property" as well as to "its entire income." Assuming, without conceding, that there is a doubt as to the meaning of the terms of the contract em-

bodied in the act of 1844 and in the mortgage of 1848, I have just above, as is permissible in such instances, invoked the construction which all the parties interested in that contract put upon it, because the construction which the parties themselves adopted is entitled to great consideration. *Insurance Co. v. Doll*, 35 Md. 89; *Mitchell v. Wedderburn*, 68 Md. 145, 11 Atl. 760. It seems to me, then, from this very imperfect review of the history of the canal, its objects and purposes, the difficulties that beset its construction and which had to be surmounted to secure its completion, the expected benefits which the state looked forward to the realization of from her large investments in the enterprise, and the clear and consistent construction placed by the state, the stockholders, and the bondholders upon the terms of the act of 1844, that the legislature did not design, when waiving the state's liens and permitting bonds to be issued on a pledge of the revenues and tolls, to draw the distinction which is now advanced, to the effect that the bondholders have a lien only on revenues and tolls, and the state a paramount lien on what the attorney general calls the corpus of the canal.

Apart from all that I have said, the act of 1844 on its face furnishes a strong reason why the lien of the bonds was placed on the entire property through the medium of the revenues, rather than by any other mode of description. This reason, and the grounds in support of it, are so ably and forcibly set forth by that distinguished and accomplished lawyer, Mr. Bernard Carter, in his brief filed in the case of *State v. Brown*, 73 Md. 484, 21 Atl. 374, that I take the liberty of quoting some passages from it: "The state of Maryland in chartering the canal company, and in assisting with the large sums of money it had spent on it, was moved by large expectations of great benefit to the state and its people, by the construction of what in those days was looked

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upon as a great public work; and it was well known that, even when completed, it might, in its early history, have to struggle with difficulties which might prevent prompt payment of the interest on the bonds about to be issued. This is apparent on the very face of the act of 1844. Therefore the state determined that it would, while waiving all beneficial interest or ownership on its part in the property of the canal company by giving to the bonds to be issued to complete the canal an absolute and preferred lien on all the revenues of the company, at the same time make such provision that every opportunity should be given to the company to live, and under its management, controlled by the state, through its ownership of the majority of the stock, to serve the great public purposes for which it had been created. Acting upon this view, there was incorporated those provisions in the act of 1844, which declared that, while all the revenues of the company should be devoted to the payment of the interest on the bonds, and eventually to the payment of the principal, yet enough of these revenues should, in the first place, be taken for the purpose of paying the expenses and repairs necessary to keep *363 the canal in operation and as a going concern; in other words, that as long as the canal company could, from its earnings, pay its expenses, and keep its works in repair, so as to keep open and in operation this great (as it was expected to be) waterway, it should be so kept open and in operation; and if it took all its earnings to do so, so that there was nothing left of said earnings to be applied to the interest and principal of said bonds, the bondholders must be content, as long as the canal was thus running, to go without payment; provided, always, such failure of earnings was not owing to want of business caused by faulty management by the company. The two great objects which the state sought to ac-

complish in the plan embodied in the act of 1844 (and which are apparent on its face) were: First, to get the canal completed to Cumberland; second, to so arrange matters that the highway should be kept in operation to subserve the great public benefit which it was supposed it would be to the state at large and her people, and that it should be in charge of the company, in which she had a controlling voice; and, provided any persons could be found to advance the money on terms which would accomplish these two objects, she was perfectly willing, in their favor, to subordinate all pecuniary claims which she had in the property of the company, under her mortgages. Therefore, in pursuance of this plan, and to accomplish these objects, the bondholders were not given a mortgage on the land and works of the company, which, if accompanied with the rights usually attendant on such mortgages, would have given the mortgagees the right, on default, to sell the canal property, and thus oust the company and the state from its control; but a first and absolute lien was given on the entire revenues derivable from the property of the company, which as effectually transferred to them all the beneficial interest in the property of the canal held by the state, until their debts were paid, and yet retained the control of the management of the canal in the company, and so, under the control of the state."Obviously, then, the form of the mortgage that was executed in 1848 was adopted for the purpose of preventing the mortgagees from disturbing the management of the company by the state,--the majority stockholders,--at least until the maturity of the bonds; rather than the usual mortgage under which the mortgagee could foreclose upon a default and destroy the state's interest. This was the reason that induced the legislature to fasten the lien on the canal through the revenues and tolls, and the creation of the lien by the pledge of

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the revenues and tolls was consequently not designed to restrict the scope of that lien simply to the revenues and tolls divorced from the property out of which they were to issue.

But assuming I am altogether wrong in supposing that the lien of the bonds of 1844 extends to the canal itself, and conceding that it does not, but that the state alone has a lien on the physical structure, I come to another question, upon which my views go much further, and are perhaps more radical, than those expressed by Judge FOWLER. That question is: Would a decree ordering a sale of the canal under existing conditions, and directing the proceeds of sale to be distributed to the state in preference to the bondholders of 1844, impair the obligation of the contract under which the bonds of 1844 were issued and are held? To answer this question intelligibly it will be necessary to allude briefly to the origin and progress of the litigation which led up to the decision in [State v. Brown](#), 73 Md. 484, 21 Atl. 374, and incidentally to recur to some of the facts narrated in an earlier part of this opinion. The great and disastrous flood which caused such widespread and appalling destruction in the spring of 1889 completely wrecked and demolished the canal as a navigable waterway. Navigation upon it was suspended, and the company was utterly bankrupt. It was not only receiving no revenues and tolls, but it was wholly unable to earn them; for little of the great work, whose construction spanned a period of 22 years, and cost \$11,071,176, was left when the swollen waters of the Potomac subsided. Being hopelessly insolvent, the company was without means to make repairs, or even to arrest the progressive decay which disuse promoted and accelerated. In this condition of things a bill setting forth these facts was filed on the equity side of the circuit court for Washington county on the

last of December, 1889, by the trustees of the bondholders of 1844, against the Chesapeake & Ohio Canal Company and the trustees named in the mortgage of 1878, praying that a receiver be appointed to take charge of the property and works of the company, and to repair and operate the canal for the purpose of raising revenue with which to pay off the debts of the company; and also praying for general relief. In January, 1890, the trustees under the mortgage of 1878 filed their answer. A few days afterwards the canal company answered, protesting against the appointment of a receiver, but urging and insisting on an immediate sale of the entire property. On the same day the attorney general of Maryland, acting under authority of joint resolutions adopted by the legislature on the preceding day, made application to the court for leave for the state of Maryland to become a party defendant, and, upon leave being granted, he filed in behalf of the state an answer resisting the appointment of receivers, and insisting on a sale of the canal and all the property of the company. In the meantime--that is, on January 15, 1890--the trustees under the mortgage of 1878 (which I have not thought it necessary to allude to heretofore because it has no bearing on the questions I started out to discuss) filed a bill in the same court against the canal company and the trustees of the bondholders of 1844 praying for the appointment of receivers and for a foreclosure of the mortgage of 1878 and a sale of the canal and *364 all its property. This bill was answered by the defendants, and the state also became, after leave, a party defendant. The cases were subsequently consolidated, and on March 3, 1890, the circuit court appointed three receivers, with instructions to make an examination and report upon the condition of the canal, and the probable cost of repairing it, for such further action as the court might deem ne-

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cessary. The receivers made their report with great particularity and thoroughness. In August, 1890, the attorney general amended the answers filed in behalf of the state by inserting the following paragraph: "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 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 23d 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 with the answers. Thereafter the trustees of the bondholders of 1844 filed a petition asking to be allowed to take possession of the canal under their mortgage of 1848, so that they might reconstruct and restore the canal as a waterway, and then operate it. This was resisted by the state. On the 2d of October a decree was passed for a sale of the canal, but by the fifth clause of that decree it was provided that the "decree of sale shall be stayed and suspended" for four years from May 1, 1891, upon certain conditions therein named, which need not be repeated here. By the sixth clause it was declared that if at the end of four years there shall not have been tolls and revenues collected from the canal to liquidate the amount expended in restoring the canal, such deficiency (unless the time be extended by the court for good and sufficient cause shown) shall be deemed conclusive evidence that the canal cannot be operated so as to produce revenue, "and the right and power is hereby reserved to this court to order and direct the execution of the foregoing decree of sale." From this part of the decree suspending the sale the state of Maryland appealed, and, after an elaborate argument in this court, the decree was affirmed. [State v. Brown, 73 Md. 484, 21](#)

[Atl. 374.](#) Before the four years elapsed, the trustees made application for an extension of the stay under the sixth clause above referred to, and the circuit court for Washington county further postponed the sale for a period of six years accounting from the 1st of May, 1895. The state again appealed, and this appeal brings up the question of the priorities of the liens, and presents the other inquiry I am now considering, viz. the right of the state to insist on or to ask for a sale of the canal under existing circumstances. By virtue of the decree and under the provisions of the mortgage of 1848 the trustees of the bondholders of 1844 took possession of the dismantled and wrecked canal, and at an expense of \$435,000 restored the waterway, and placed it in a better condition than it had been, perhaps, since its completion in 1850. These trustees are earning revenues and tolls, and the record discloses the fact that the receipts are steadily and largely increasing, and that a recently organized transportation company has alone guaranteed \$100,000 of tolls and revenues annually.

What, then, is it that the state proposes to do? She denies that the holders of the bonds of 1844 have any lien except upon the revenues and tolls. She insists that, if there should be no revenues and tolls payable to the company by reason of a sale of the property at the state's instance, then the holders of the bonds of 1844 are entitled to nothing, and the state would be entitled to the whole proceeds of sale after the bonds of 1878 shall be paid. And she demands a sale under her mortgage (which expressly stipulates that the lien of the bonds of 1844 is "in no wise to be lessened, impaired, or interfered with by" that mortgage, "or by anything" therein contained), even though the result of such a sale would, according to her own contention and concession, render the bonds of 1844 absolutely worth-

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less. In the contract made under the mortgage of 1848 between the bondholders of 1844 and the company, whose canal it was declared by the three states that chartered it “shall forever be esteemed and taken to be navigable as a public highway,” there was a specific power and authority given to the trustees to enter and take possession of the canal and receive its revenues “upon the default of the company to fulfill its engagements in the premises,” subject to the condition that, so long as the company complied with its agreement by paying all the interest on the bonds of 1844 as that interest fell due, and by providing an adequate sinking fund, it should retain the management of the canal, but, if it failed “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 (the trustees) may demand and shall thereupon receive possession and shall appropriate all said tolls and revenues in the manner” provided in the mortgage. By the act of 1844, which embodied a contract between the state and the prospective bondholders, it was expressly provided that the liens of the state shall be held as “waived, deferred, and postponed” in favor of the bonds of 1844, so as to make the bonds “preferred and absolute liens on the revenues” “until said bonds and interest shall be fully paid.” And in the mortgage of January 8, 1846, given to the state, and accepted by it, as already set forth, the grant to the state was made distinctly subject to the provision that the liens and pledges made in behalf of the bonds of 1844 are “in no wise to be lessened, impaired, or interfered with by this deed, or anything herein contained.” This mortgage to *365 the state, approved by her then attorney general, was executed and delivered 2 1/2 years before the mortgage of June 5, 1848, securing the bonds of 1844, was signed.

Can the state of Maryland now, by these or any other proceedings, impair the obligation of these contracts?

The decree for a sale of the canal, when passed, was properly passed, because the canal was at that time a total wreck. But conditions have changed by reason of the reconstruction of the canal and its restoration as a navigable highway by the trustees of the bondholders of 1844 in the early part of the four years during which the execution of the decree for a sale was suspended. The right of the state to insist on a sale under its mortgage of 1846, as she now does through her attorney general on this appeal, must be measured by the circumstances as they exist to-day, and not by those that surrounded the question in 1890. A state can no more impair the obligation of her own contract than she can impair the obligation of an individual's contract. In entering into a contract a state lays aside her attributes of sovereignty, and binds herself substantially as one of her citizens under his contract; and the law which gauges individual rights and responsibilities gauges, with few exceptions, those of the state. [Hartman v. Greenhow](#), 102 U. S. 672; [Poindexter v. Greenhow](#), 114 U. S. 270, 5 Sup. Ct. 903, 962; [Keith v. Clark](#), 97 U. S. 454; [Canal Co. v. Beers](#), 2 Black, 448; [Fletcher v. Peck](#), 6 Cranch, 87. In [Insurance Co. v. De Bolt](#), 16 How. 416, the supreme court said: “The sound and true rule is that, if the contract when made was valid by the laws of the state as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation of the state or decision of its courts altering the construction of the law.” It is thus held that the obligation of a contract may be impaired by the decision of a state court of last resort, but when no state statute or constitutional provision affecting a contract is upheld by a

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state court of last resort, a mere decision on the contract is not, according to the recent cases, within the meaning of the federal constitution, a law whose enforcement will, of itself, confer jurisdiction on the supreme court to review the state court's ruling; but, if jurisdiction exists in the supreme court on other grounds, such ruling may be reviewed. *New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741; *Brown v. Smart*, 145 U. S. 454, 12 Sup. Ct. 958. It must be the constitution or some law of the state which impairs the obligation of a contract, or which is otherwise in conflict with the constitution of the United States; and the decision of the state court must sustain the constitution or the law of the state in the matter in which the conflict is supposed to exist, or the case for the supreme court does not arise. *Railroad Co. v. Rock*, 4 Wall. 177; *Knox v. Bank*, 12 Wall. 379. I will recur to this line of cases later on.

I take it, then, that the state can no more impair, through her judiciary, her own contract, than she can impair the obligation of the same contract through her legislature, though a mere decision impairing the obligation of a contract will not authorize the supreme court to review that judgment. But this phase of the case does not rest here. There is a preliminary difficulty in the path of the state which I wish to allude to now. The joint resolutions adopted by the general assembly on January 30, 1890, after reciting that it was "necessary that the rights and interests of the state should be represented in" the proceedings pending in the circuit court for Washington county, instructed the attorney general to intervene in said proceedings in the name of the state of Maryland, and "take such steps, after consultation with the board of public works, as may be necessary to resist the appointment of receivers and the creation of any additional debt to take precedence over the

claims and liens of this state." This resolution, in my judgment, gave the attorney general no authority to apply for a sale of the canal, and conferred upon the board of public works no power to direct the attorney general to pray for the passage of such a decree. It gives neither to the attorney general nor to the board of public works authority to take the pending appeal, or to ask that the order extending the period of the trustees' possession be reversed. Its object obviously was, not to procure affirmative relief by way of a sale, but to prevent the doing of what was sought by the bondholders of 1844,--the appointment of receivers, and the issual of receivers' certificates to defray the expense of repairing the canal. Limited, as the scope of the resolution was, to a mere resistance of the relief asked by the 1844 bondholders, the application for a sale went far beyond its terms, and was consequently unauthorized. The application for a sale was unauthorized, because the state of Maryland had not, through her legislature, directed a foreclosure of the mortgage, and no other department of the state government was clothed with authority to determine whether there should be a foreclosure and sale at the instance of the state. I have before me all the minutes of the proceedings of the board of public works relating to the Chesapeake & Ohio Canal Company between January 1 and December 31, 1890, and there is not, as I read them, a single resolution instructing the attorney general to ask for a sale of the canal. The attorney general has, therefore, no authorization from the state to ask this court now to reverse the order appealed from, and to remand the case that a sale may be had. Consequently the state is not in reality rightfully on the docket as the appellant, and hence ought not to be heard to complain of the order extending the period of the trustees' possession.

*366 But if I be wrong in placing the con-

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struction I have on the joint resolutions of 1890, and if it be said that the question as to what those resolutions did in fact authorize has been settled by the decree passed on the 2d of October, 1890, upon the prayer of the state for a sale, then the joint resolutions must have been interpreted as meaning that the attorney general, under the direction of the board of public works, was empowered to ask a foreclosure of the mortgage of 1846. That such was the understanding of its import by the board of public works is quite apparent from the fact that there is no pretense the attorney general had any other authority from the legislature to ask for a sale, and from the further fact that the state appealed from the suspension of the decree for a sale by direction of the board of public works, adopted on November 26, 1890, and through the attorney general insisted on an immediate sale; and has again appealed from the order extending that suspension till 1901, and again insists on a sale. There is no statute or resolution passed by the legislature and now in force directing any steps to be taken for the foreclosure of the state's mortgages, and it must have been upon the assumption that this particular joint resolution of January 30, 1890, did contain such a direction that the decree was asked for and obtained, and that the immediate execution of that decree is now so vigorously pressed. If this be so, then the joint resolutions, while not in express terms directing a sale to be applied for under the state's mortgages, are, in effect, a law which, in its construction and practical execution, impairs the obligation of the bondholders' contract, and is forbidden to be passed. "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited, relating to the jurisdiction of this court." [Williams v. Bruffy](#), 96 U. S. 176. That these joint resolutions do impair

the obligation of the 1844 bondholders' contract if they authorize the attorney general to ask for a sale is scarcely open to dispute. Upon the hypothesis that these bondholders have no lien on the property of the canal (and this is what the state insists on), any action by the state, under legislative authority, which results in depriving these bondholders of their lien on the revenues and tolls by a sale of the canal, at her instance, directly impairs the obligation of the contract made by the state in the fourth section of the act of 1844, wherein her rights and liens were waived, deferred, and postponed in favor of these bonds, "until said bonds and interest are fully paid." And such a proceeding at the suit or instance of the state would likewise invade the contract made by the state in the mortgage of 1846, because by that mortgage the state explicitly covenanted that the lien of the bonds of 1844 "are in no wise to be lessened, impaired, or interfered with by this deed, or by anything herein contained," whereas it is by virtue of that very deed that a sale is asked for, and a sale would, as conceded by the state, and as contended for by her, wipe out and sweep away the bonds of 1844, and would result in the proceeds of sale being turned over to the state after the bonds of 1878 were first fully paid. There could scarcely be suggested a more flagrant breach of a contract than this would be. In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the acts of administrative or executive boards or officers or the doings of corporations or individuals. [New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.](#), 125 U. S.

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18, 8 Sup. Ct. 741. Nevertheless an ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation, having all the forms of law within the municipality, that it may properly be considered a law within the meaning of the constitutional prohibition. *U. S. v. New Orleans*, 98 U. S. 381. Thus, in *Murray v. Charleston*, 96 U. S. 432, it appeared that the city council of Charleston, upon which the legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, the supreme court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and when the ordinance was passed under the supposed authority of the legislative act its provisions became the law of the state. Now, while an independent action by the board of public works, based on no legislative authority at all, and directing the attorney general to institute proceedings for the foreclosure of the state's mortgages, would not have been, technically speaking, a law of the state within the meaning of the federal constitution as interpreted by the decisions alluded to, yet the joint resolution empowering the attorney general to take steps for the protection of the state's liens, under the supervision of the board of public works, was a delegation, to some extent at least, of legislative authority. And if under that resolution, as construed by the board of public works, that board authorized an application to be made for a sale under the state's mortgages, it would be difficult to maintain that the resolution was not a law impairing the obligation of the state's contract. Were this otherwise, it would be the simplest thing in

the world for a state to evade the provisions of the federal constitution,*367 and to destroy a contract with perfect impunity by just such a resolution as that of January 30, 1890. If by refraining on the face of a legislative enactment to direct a prohibited thing to be done, while intrusting to an executive board, by the same enactment, a masked discretion and authority to do that very forbidden thing, the thing can be done without a violation of the federal constitution, substance would be sacrificed to form, and the most solemn obligations could be broken down in the teeth of the paramount law that protects them from impairment. See *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 109.

There were but three of the parties to the consolidated cases who asked for a sale of the canal, and they were the canal company itself, the bondholders of 1878, and the state of Maryland. As to the canal company, it can scarcely be heard, since the restoration of the canal as a subsisting waterway, to ask that the property be sold, when the result of such a sale might, and probably would, be the discontinuance or abandonment of the canal, notwithstanding the declaration in its charter that it should forever be a navigable highway; and certainly would culminate, at the instance of the debtor company, in a deliberate violation of a formal and explicit contract between it and its creditors, the bondholders of 1844, who furnished, upon the faith of its perpetuation, the means for the completion of the work at a time when the state of Maryland, whose credit was so impaired that her securities were selling in the money markets of Europe at 50 cents on the dollar, was, though largely interested as stockholder and creditor, powerless to render further assistance. No court of equity ought to heed the appeal of a debtor for the sale of his incumbered property, un-

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der judicial process, when by such a sale his creditor, who resists and protests against it, would, according to the debtor's own contention, be stripped of the only lien he has. Such a proceeding would permit the debtor, through a court of conscience, to repudiate his most binding obligations. This can never be tolerated. The bondholders of 1878 are eliminated from the case. They have parted with their bonds, which are now held by the trustees of the bonds of 1844, and these trustees are subrogated to all the rights of the 1878 bonds. Instead of a sale being asked for in the interest of the bondholders of 1878, the present holders of those bonds are now vigorously resisting a sale. The state of Maryland is, consequently, the only party seeking a sale. She is the only party appellant in the cause, and no one else demands a sale of the canal, or resists a further suspension of the decree of October, 1890. Her legislature has not directed that an application for a sale should be made in the state's behalf, nor has she made the request in any way except through her attorney general. Now, the attorney general was either authorized by the legislature to press for a sale, or he was not. No other branch of the state government besides the legislative possessed or possesses authority to direct a foreclosure of the state's liens on the canal. If you say the attorney general was not authorized by the general assembly to ask for a sale, then the state is not now properly in court demanding a foreclosure. And if she is not properly in court for that purpose, a sale at her request cannot be ordered. If, on the other hand, you say the attorney general was authorized to press for a sale, there is no pretense that he was given that authority by any other enactment than the joint resolutions of January 30, 1890; and if you concede that these resolutions conferred upon him the right to urge, in the name of the state, a sale, then you must admit that the

resolutions are an enactment by the legislature that impairs the obligation of a contract, and are, therefore, wholly inoperative and void. In neither event, then, could a sale now be ordered at the suit of the state; and as no other party to the cause, save the bondholders of 1878, can insist on a sale, and as the present holders of those bonds are protesting against a sale, a sale cannot now be ordered at all. And as a sale cannot now be ordered at all, it would be an utterly nugatory and meaningless form to reverse the order appealed from, and to remand the case to the court below.

There is one other view that I take of the subject, to which I wish briefly to make allusion. By the provisions of the decree of October, 1890, under which the trustees of the bondholders were placed in possession of the canal for the limited period of four years, it was declared that the trustees should repair the canal at their own proper cost and expense. Estimates of the probable cost of such repair (and very careful estimates) had been made by the exceedingly accomplished receivers, Messrs. Joseph D. Baker, Richard D. Johnson, and Robert Bridges, but because of subsequent freshets and other unforeseen causes the actual expense incurred in restoring the waterway was largely in excess of those estimates. The trustees of the bondholders undertook the work in good faith, and pushed it forward as rapidly as was possible, but unavoidable delays occurred, whereby many months of the four years allotted to the trustees as the term of their possession elapsed before navigation was reopened. They expended \$435,000, as I have already mentioned, and the four years expired before they were able to repay from the earnings of the canal this large sum of money. While it is true they took the risk, under the strict and literal letter of the decree, of getting back in four years from the tolls and revenues the money thus expended to re-

construct the canal, it is equally true that this very money placed the canal in a condition of repair which, should it be sold, would cause it to bring a vastly higher price than it could possibly have sold for had it been left in the *368 wrecked and broken state which the flood of 1889 produced. To the extent that this money, so expended, strengthened the liens of all the creditors, the trustees, by its expenditure, benefited the lienholders; and if the state be conceded to have a priority over the bonds of 1844, though deferred to the bonds of 1878, the state would be greatly benefited in the event of a sale by reason of the enhanced value of the property; enhanced at the expense of the very people who, according to the contention of the state, would in all human probability get no part of the proceeds of sale, because of their lien being so far deferred as to be beyond reach in the distribution of the purchase money likely to be bid and paid for the canal. It seems to me, then, notwithstanding the terms of the decree, if a sale were now ordered, the plainest precepts of equity and justice dictate that these bondholders or persons who advanced the \$435,000 to reconstruct the canal should be refunded, out of the proceeds of sale, the money they expended, in the highest good faith, to give the canal a salable value. Because no provision of this sort was assented to, I could not (even had I not entertained the other views I have expressed on other branches of the case) have consented to a sale of the canal.

The reasons I have set forth in this opinion are the ones that influenced me to concur in an affirmance of the order extending the time during which the trustees of the bonds of 1844 may continue to hold possession of and operate the canal.

Md. 1896.
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