

**Westlaw Delivery Summary Report for PAPENFUSE,EDWARD 5140691**

Date/Time of Request:	Monday, December 3, 2007 14:12 Central
Client Identifier:	1000210861
Database:	MD-CS-FIND
Citation Text:	35 A. 161
Lines:	922
Documents:	1
Images:	0

The material accompanying this summary is subject to copyright. Usage is governed by contract with Thomson, West and their affiliates.

**H**

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

Court of Appeals of Maryland.

STATE

v.

COWEN ET AL. [FN1](#)

[FN1](#). For concurring opinion, see [35 Atl. 354](#).

June 17, 1896.

Appeal from circuit court, Washington county.

Petition by John K. Cowen, Joseph Bryan, and Hugh L. Band, Jr., trustees, etc., against the state of Maryland, for an extension of time during which the petitioners were to possess and operate the Chesapeake and Ohio Canal, in the interest of bondholders, under Act 1844. From a decree in favor of petitioners, the state appeals. Affirmed.

West Headnotes

**Canals 68** 21

[68 Canals](#)

[68I Establishment, Construction, and Maintenance](#)

[68k21 k. Mortgages. Most Cited](#)

[Cases](#)

The trustees in control of and operating the canal, in the interest of the beneficiaries whose lien extends only to the net revenue, may contract with other transportation companies for the use of the canal, where the rights of both parties, as well as those of the public, in relation to the canal, are carefully and sufficiently guarded.

**Canals 68** 21

[68 Canals](#)

[68I Establishment, Construction, and Maintenance](#)

[68k21 k. Mortgages. Most Cited Cases](#)

In a controversy between the state and various creditors having liens against the Chesapeake & Ohio Canal, it was decided by the court of appeals that trustees representing bonds whose liens extended only to the net revenue of the canal should take control of and operate the canal; that if at the end of four years from May 1, 1891, the revenues should not have paid operating and other necessary expenses, such failure was to be regarded as conclusive evidence, "unless the time be extended by the court, for good and sufficient cause shown," that the canal could not be operated by the trustees so as to produce a net revenue; and power was reserved to direct a sale of the canal. It appeared that the trustees expended almost \$500,000 in restoring the canal to a condition for earning revenue; that they had to build up the business; that, notwithstanding these difficulties and a scarcity of boats, the business had greatly increased; and that, by a proposed contract with the Chesapeake & Ohio Transportation Company, the canal would secure a guarantied fixed income, and increased facilities for earning revenue. Held, that it did not clearly appear that the canal could not be operated so as to earn a net revenue, and hence an extension of time from May 1, 1895, was properly granted to the trustees.

Briscoe, Bryan, and Page, JJ., dissenting.

\***161** Argued before McSHERRY, C. J., and BRYAN, BRISCOE, ROBERTS, PAGE, RUSSUM, and FOWLER, JJ.

Atty. Gen. Clabaugh, for the State.  
 J. Clarence Lane, for appellees.

(Cite as: 83 Md. 549, 35 A. 161)

FOWLER, J.

This appeal presents questions growing out of the controversy between the state of Maryland and various classes of creditors having liens against the Chesapeake and Ohio Canal, its property, franchises, revenues, and tolls. The state is the largest creditor, and next to it stand the appellees, who represent the bonds issued under Act 1845, c. 281, as well as those of Act 1878, c. 58, generally known as "Repair Bonds," which latter are conceded to be a prior lien on the canal, its property and revenues, so far, at least, as concerns the claim of either the state under its mortgages or of the appellees under Act 1845, c. 281. While the history of the canal, and the relation of the state to it, as creditor, and the legislation which from time to time has been adopted by the state for the purpose of waiving its liens in favor of others, are so well known that it would be useless to refer to it here, it will be necessary, in order to have an intelligent understanding of the questions before us, to examine the decree in this case, which we affirmed on the former appeal, and which is reported in [73 Md. 503, 21 Atl. 374](#), as well as to refer somewhat fully to the opinion of this court in that case, which was delivered by the late Chief Justice Robinson.

The decree, which, we have said, was affirmed in [73 Md. 503, 21 Atl. 374](#), provided that, upon certain conditions therein prescribed, the appellees should take possession and control of the canal, together with its rights and property, with power and authority to use and exercise the franchises of said company, and operate the said canal, to the same extent that said company could do. Provision was made for the disposition of the net revenue, and, in the sixth section of the decree, it was provided that if, at the end of four years from the 1st day of May, 1891, there should not be tolls and revenue over and

above the amount necessary to pay current operative expenses, and to keep the canal in repair, sufficient to liquidate and discharge the amount of repairing and restoring the canal to a working condition from its then broken condition, and the amount necessary to pay expenses and compensation to the receivers, and also certain other expenses not necessary now to mention, "such failure in the tolls and revenues was to be regarded as evidence conclusive (unless the time be extended by the court, for good and sufficient cause shown) that the said canal cannot be operated so as to produce revenue with which to pay the bonded indebtedness of the said canal company." It was also \*162 one of the provisions of that decree that, "whenever it shall clearly appear that the said canal cannot be operated by the said trustees so as to produce revenue with which to pay the bonded indebtedness of said company," the right and power was reserved to the court to order and direct a sale, as provided by that decree. Prior to the expiration of the four years mentioned in the decree, during which the appellees were to possess and operate the canal, they applied by petition to the circuit court for Washington county for the extension of time they were authorized to ask for by said decree, for the purpose, as they allege, that they might have an opportunity, under better auspices, to demonstrate that the canal would, with proper management, pay annually, out of its net tolls and revenues, something on account of and in reduction of its bonded indebtedness. The state, through its attorney general, resisted this application--First, upon the ground that it was premature; and, secondly, because, assuming that the court below had the power, upon a proper case, to grant the extension, the appellees had failed to make out such a case as called for the further interposition of the powers of a court of equity. But the circuit court, hav-

(Cite as: 83 Md. 549, 35 A. 161)

ing come to the conclusion that the appellees had shown good and sufficient cause, on the 15th February, 1895, passed an order so declaring, and directing that the said period of four years fixed by the decree should be extended to the end of six years from the 1st day of May, 1895. From this order the state has appealed.

It was not seriously contended in argument that, if a proper case was made, the court did not have power to pass the order appealed from, and we shall therefore proceed at once to consider the question presented. But, before doing so, it is proper to mention the fact that, after the question as to the extension of time (which was regarded as the only one directly presented by this appeal) was argued in this court, we acquiesced in the request expressed at the hearing that, before passing upon the question of sale vel non, the question as to the priority of liens as between the state and the appellees should be fully presented, so that, in case this court should come to the conclusion that a sale should be had, there need be no further delay caused by reason of the uncertainty of the rights of the state or of the appellees in respect to their respective liens; it being apparent, as we said in [73 Md. 503, 21 Atl. 378](#), that the question as to the priority of liens is one "which the parties are entitled, as matter of right, to have decided before a sale is made."

The principal question with which we are confronted at the very outset is whether the canal shall be sold. In order to solve this question in a satisfactory manner, it will be necessary to point out the relations of the parties to each other and to the incumbered property, and thus to ascertain their respective rights in and to said property. There can be, we think, no difficulty in so doing, for these rights and relations, with one exception, have been so clearly and fully fixed by what we said on the former

appeal ([73 Md. 503, 21 Atl. 374](#)) that we need only refer to and cite portions of that opinion to show what these rights and relations are. What, then, was decided on the former appeal? We affirmed the decree of the circuit court for Washington county, holding--First, that these appellees were, by virtue of their rights under the act of 1845 and the mortgage of June 6, 1848, which was executed in pursuance of said act, as well as because of their rights as trustees for the holders of the bonds issued under the act of 1878 (chapter 58), entitled to take possession of the canal upon the terms prescribed by the decree; second, that, the appellees being lawfully entitled to the possession of the canal under the decree, they must "be allowed to put it in a condition to produce revenue; otherwise its possession would be without benefit to them." It was, however, contended on the former appeals, as now, by the state, that whatever may be the rights of the appellees as against the mortgagor, the canal company, the state has superior rights under its long-overdue mortgage, and especially the right thereby to demand an immediate sale of the entire canal and its franchises, free from any claim of the appellees, trustees, under the act of 1845. The attempt to enforce this right was thus commented on in [73 Md. 503, 21 Atl. 377](#): "Now, upon what grounds can this right be supported? To induce the bondholders of 1844 to furnish the money necessary to complete the canal, the state not only agreed to waive its own liens upon its revenues, but agreed also that the company should pledge them by mortgage, as security for the payment of these bonds. And now, when the state and the company have operated the canal till they are no longer able to operate it, and when the canal itself is no longer in a condition to earn revenue, and the company, during all these 40 years, has been in default in the payment of its indebtedness, according to

(Cite as: 83 Md. 549, 35 A. 161)

the terms of the mortgage, and when the bondholders ask to be allowed to take possession of the canal, and to repair and operate it for the purpose of ascertaining whether it can be made to produce any revenue applicable to the payment of the mortgage, the state interposes, and insists that it shall be sold, clear of the liens of these bondholders, which the state agreed should be preferred liens upon its revenues; and, when it is sold, the state further claims, as against them, the entire proceeds of sale, because their liens, it is said, extend to the revenues only, and not to the property of the canal. In other words, the state insists that they shall be deprived of the only remedy open to them by which they may have the opportunity, at least, of reimbursing themselves for the money\*163 which they, at the instance of the state, furnished to finish the canal. So it is not the case even of a junior incumbrancer, asking for the sale of mortgaged property, and the proceeds of sale to be applied to the payment of the several liens upon it according to their priority; but it is one in which the state, holding liens upon the revenues and property of an unfinished canal, in order to induce others to furnish the money necessary to finish it, waives its own liens upon the revenues in favor of such persons, and then insists that the canal shall be sold, whereby these liens are destroyed. We do not see on what ground, legal or equitable, such a contention as this can be supported."Such being the rights of the parties, and the appellees having been in possession of the canal for the past four years, and the right of the state to demand a sale having been thus denied by us in 1891, when the canal was in a broken and useless condition, what has happened since that time which would justify us in now ordering a sale?

This brings us to the consideration of the direct question presented by this appeal, namely, should the application for an ex-

ension of time be favorably considered? The answer to this question depends upon the terms and conditions of the decree, which, as we have seen, has already been affirmed, and the facts relied on by the appellees, which we do not understand to have been seriously denied, to show that, as matter of justice and equity, the extension of time asked for should be allowed. As we have seen, we held on the former appeal (73 Md. 503, 21 Atl. 374) that not to have granted the appellees' possession of and time to operate the canal for the benefit of their cestuis que trustent would have been inequitable, as well as illegal, under the then-existing circumstances. Then the canal was a wreck, useless for any of the purposes for which it was intended. Now it has been restored. Then the appellees had not expended nearly half a million dollars, which they have since done, in restoring it to its unprecedented good condition. It is apparent, also, that it was impossible then to know definitely what would be the effect upon the future business of the canal of the conditions under which the appellees took possession. The amount of money, as well as the length of time required to repair the canal, could only be estimated; and the many difficulties encountered by the appellees, as set forth in their petition and brief, could not possibly have been foreseen, nor could they have been provided for, except by the wise provision, which was inserted in the decree, providing for an extension of time upon showing good and sufficient cause. If it was inequitable to deny the appellees possession of the canal in 1891, we think it would be even more so now, when, in addition to the loss they would then have sustained by a sale, they would, according to the state's contention, now lose also the large amount they were authorized under the decree to spend in repairs and restoration.

But irrespective of the right of the ap-

(Cite as: 83 Md. 549, 35 A. 161)

pellees to possession upon equitable grounds, based on the facts set forth in their petition, and the conditions upon which they took possession, we do not think that the state can maintain its right to a sale upon any fair or reasonable construction of the act of 1845, c. 281, its mortgage of January 8, 1846, and that of the appellees of June 5, 1848, which together contain the contract between the canal company, the state, and the bondholders of 1844. Certainly, no right to such a sale can be enforced until it appears that the cestuis que trustent can derive nothing on account of their claims from the operation of the canal by the appellees. It is manifest that, under the decree we affirmed, no sale of the canal by the state, under the terms demanded by it, can be decreed until "it shall clearly appear that the said canal cannot be operated by the said trustees so as to produce revenue with which to pay the bonded indebtedness." But the rights of the bondholders of 1844 are still more emphatically recognized in the mortgage which the state accepted from the canal company, for we find in that instrument the following provision: "Subject, nevertheless, to all and singular the liens and pledges created by the provisions of the act of 1845, \* \* \* which said liens and pledges are in no wise to be lessened, impaired, or interfered with by this deed or by anything herein contained." Assuming, then, that the contention of the state is correct, namely, that the appellees, representing the bonds of 1844, have a lien only on the net revenue, and tolls, and have no claim whatever by virtue of said bonds on the proceeds of sale of the canal, its property and franchises, it would necessarily follow, unless the canal is worthless, and cannot be operated to any advantage for said bondholders, that a sale would not only impair and lessen their lien, but would absolutely destroy it. But, so far from the canal being in such a hopeless

condition, we think enough can be found in the record before us to demonstrate that under its present management by the officers appointed by the court, and who are under its control and supervision, the business, as well as the earning capacity, of the property, has been largely increased. Notwithstanding the fact that the appellees, after restoring the property to a condition for earning revenue, had to build up the business, and win back the traffic which had been diverted to other routes of transportation, they appear to have met with success; for, during the few months of the year 1891 during which the canal was in working condition, there were carried by it 50,533.14 tons. The next year, although there was a scarcity of boats, over 250,000 tons were carried. And in 1893 the tonnage arose to 336,295, which has not been equaled during the past 10 years. Under these conditions and circumstances, we are not disposed, even if we had the power,\***164** to decree a sale at this time, and thereby destroy the only source from which, as contended, the bonds of 1844, or any part of them, can ever be paid, and at the same time, perhaps, deprive the public of one of the means of cheap transportation of coal and farm products, which the canal now affords; for it will be remembered that the state had been careful, in order to protect itself and its citizens, as well as those who should advance their money to complete the work, to provide, in the charter granted to the company, "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." When, therefore, it appears, and not till then, that the property cannot be operated so as to produce revenue applicable to the payment of the bonded indebtedness of the company, then, under the provisions of the decree affirmed by this court, the court may

(Cite as: 83 Md. 549, 35 A. 161)

be asked to decree a sale under the state's mortgage. Until that time, in other words, until it "clearly appears" that the liens of the appellees are valueless, and can therefore neither be lessened nor impaired, a sale under the conditions demanded by the state, as was said in *State v. Brown*, 73 Md. 503, 21 Atl. 374, can be supported upon no ground, either legal or equitable. We have already indicated our opinion that it has not yet been made clearly to appear that the said lien of appellees has become valueless; and therefore it would follow that no such decree of sale would be valid, because the state, acting by its officers, the courts, or through the legislature, cannot destroy or impair liens which exist by virtue of contract.

We have thus far assumed, as contended by the state, that the appellees have no claim upon the corpus of the canal, or the proceeds of its sale, in case a sale should be ordered, but that the only source from which they can look for repayment of the bonds of 1844 is from net revenue and tolls. This question has been during this term most ably and elaborately argued. But inasmuch as we have come to the conclusion that there can be no sale at present, under existing circumstances, the question as to the distribution of the proceeds of such sale ceases to have that commanding importance which would otherwise attach to it. We think, however, there cannot be any doubt as to the correctness of the views upon this question expressed by Judge Alvey (former chief justice of this court), while presiding in the circuit court for Washington county, in the former trial of this case. We can add nothing to the force and fullness of the convincing arguments so cogently presented by him in that able opinion, and, upon the views therein expressed, we are content to rest our conclusion that the lien of the bondholders of 1844 is limited to the net revenue and tolls

of the canal. Opinion of Alvey, C. J., Append. to 73 Md. 590, 600 (*Brown v. Canal Co.*) According to the provisions of the decree, the amount expended by the appellees in restoring the canal, to wit, the sum of \$430,764, with interest, is to be paid from the tolls and revenue, after paying certain other expenses, as set forth in the decree. This decree stands affirmed by this court, and is the law of this case, so far as applicable. If we had come to the conclusion to decree a sale upon the conditions asked by the state, and the source--namely, the revenue--from which this sum is decreed to be paid had been thus destroyed, another question, not now before us, might be presented.

During the argument at this term in reference to the question of priority of liens, some reference was made to what are known as the "labor claims" for labor and supplies furnished the company before the freshet of 1889, to keep the canal in repair and operation. These claims, however, were not before the circuit court for Washington county at the time of the former appeal, and they are not before us now. Hence no definite determination can be made in regard to them.

To a contract such as that proposed to be made by the appellees with the Chesapeake & Ohio Transportation Company, and approved by the court below, we can see no valid objection. The rights of both parties, as well as those of the public, in relation to the canal, appear to be carefully guarded. By means of this contract, the appellees will secure a guaranteed fixed income, of not less than \$100,000, and an increased number of boats, thus increasing facilities for transportation, and providing means for increasing the revenue and tolls. Without further reciting the various provisions of the contract, we agree with the learned judge below that there is no good reason

(Cite as: 83 Md. 549, 35 A. 161)

why a contract similar to the one proposed should not be authorized by the court. It provides that nothing therein shall be taken to give the transportation company any exclusive rights whatever on the said canal, or to prevent the appellees from making with any other person or corporation a contract or contracts similar to the one proposed in whole or in part, or that the use of electrical power, if it be found practicable, shall interfere with the use of animals or steam by individual boat owners.

It will be seen that we are of opinion--First, that, under the circumstances disclosed by the record, the appellant is not now entitled to a decree for sale of the canal, its property and franchises, and that, therefore, the order of the court below extending the time for operating the canal by the appellees, under the order and control of that court, should be affirmed; second, that the bondholders of 1844 are entitled to payment out of, and have a lien only on, the net revenue and tolls; third, that although the state has waived its lien on the canal and its revenue and tolls in favor of the labor claims, as they \*165 were not before the circuit court for Washington county, nor in manner passed upon by the order appealed from, we cannot on this appeal dispose of them; and, fourth, that the contract proposed to be made between the appellees and the transportation company is proper and appropriate to enable the former to operate the canal advantageously. And, in conclusion, we may say, as we substantially said in the opinion from which we have already quoted ([State v. Brown, 73 Md. 503, 21 Atl. 374](#)), that we have nothing to do with the alleged ulterior purposes of any of the parties to this controversy. We have endeavored to dispose of the questions considered in accordance with what appear to us to be the clearest principles of law, equity, and justice; but if, by reason of the conclusion we have reached, the appellant

shall be prevented from enforcing its claims by a sale, and, if it is thus prevented from destroying the canal as a waterway, it may be some satisfaction to remember that the view we have expressed is in strict accordance with the solemn declaration the state has made, that the canal shall forever be taken and esteemed as a navigable highway. It has, however, been doubted whether the property in question could under any circumstances be sold for enough so that, after the payment of all claims which are conceded to have legal priority over that of the state, there would be anything left to go towards a reduction of its claim of many millions. But whether this be so or not, whether the sale would produce much or nothing towards the paying of the state's claim, her contract that the liens of the appellees, created by the act of 1844, should not be lessened, impaired, or interfered with by her under her mortgage, must be recognized and enforced, and her good faith, impliedly, at least, pledged for the maintenance of the canal as a water way, by the declaration in the charter she granted that the canal should forever thereafter be esteemed and taken to be a navigable highway, must be maintained at any cost. Order affirmed.

BRISCOE, BRYAN, and PAGE, JJ., dissent.

BRYAN, J. (dissenting).

The questions which we are called upon to decide cannot be clearly understood without some statement of the previous proceedings in this case: On the 2d day of October 1890, the circuit court for Washington county, sitting in equity, passed a decree for the sale of the Chesapeake & Ohio Canal. It was decreed that the sale should embrace all the rights, title, and interest of the corporation to the entire line of the canal; all its lands, tenements, and estates, works and appurtenances, tools, implements, and boats, water rights, and fran-



(Cite as: 83 Md. 549, 35 A. 161)

chises. All the parties in interest were before the court, and the decree bound all their rights in the subject-matter of litigation. It was provided in the decree that its execution should be stayed and suspended on certain conditions, which will hereafter be more particularly considered. The parties to the suit in which the decree was passed were the trustees of the holders of the bonds issued under the act of 1844; the trustees of the bonds issued under the act of 1878; the state of Maryland; the Chesapeake & Ohio Canal Company; Bernard Carter, executor of the last will and testament of Charles H. Carter, deceased; and certain bondholders whose rights are not now in question. Appeals were taken from the decree, severally, by the state of Maryland, the canal company, and Mr. Carter, but by none of the other parties to the suit. The decree of the circuit court was affirmed by this court. The case is reported in [73 Md. 484](#), [21 Atl. 374](#). The clauses in the decree suspending its execution authorized the delivery of the canal and all its property to trustees of the bonds issued under the act of 1844, provided that they should take up, and bring into court, all the outstanding bonds issued under the act of 1878, and that they should put the canal in good repair and condition throughout its entire length, and do certain other things which it is not important now to mention. Upon the performance of these conditions the trustees of the bonds of 1844 were to be subrogated to the place of the trustees of the bonds of 1878, with all their rights and remedies, and were to have full possession and control of the canal, and to exercise all the franchises of the corporation. It was further decreed as follows: "Sixth. That if at the end of four years from the 1st day of May, next, there shall not have been tolls and revenues derived from the said canal, and the property and rights appurtenant thereto (over and above the amount neces-

sary to pay current operative expenses and to keep the canal in repair), to liquidate and discharge the amount of the cost of repairing and restoring the canal to a working condition from its present broken condition, and the amount of money required to pay expenses and compensation to the receivers, and to pay any amount that may be determined to be a preferred lien on such tolls and revenues for labor and supplies furnished to the canal company, such failure in the tolls and revenues shall be regarded as evidence conclusive (unless the time be extended by the court for good and sufficient cause shown) that the said canal cannot be operated so as to produce revenue with which to pay the bonded indebtedness of the said canal company, and, further, whenever it shall clearly appear that the said canal cannot be operated by the said trustees so as to produce revenue with which to pay the bonded indebtedness of said company, the right and power is hereby reserved to this court to order and direct the execution of the foregoing decree of sale." The 1844 trustees complied with the required conditions, and entered into possession of the canal, made the necessary repairs, and have operated it \*166 ever since. In January, 1894, these trustees filed a petition in the circuit court for Washington county, praying that the period for which the execution of the decree was stayed should be extended for an additional term of ten years. After answer by the state in opposition to the proposed extension, the court ordered that the execution of the decree should be stayed for a period of six years from the 1st day of May, 1895. The state appealed from this order, and the case was argued at the last October term of this court. It was considered that, before a sale was made, it was proper to settle the priorities of the different parties in the distribution of the proceeds. And, as some of the counsel in the cause desired to argue this

(Cite as: 83 Md. 549, 35 A. 161)

question more fully, the court granted the request, and ordered it to be reargued at the present term. The argument took a much wider range than we anticipated, tending, if we correctly understood the counsel for the appellees, to impeach the validity of the decree for the sale. This decree was passed by a court of competent jurisdiction, with all the parties in interest represented by counsel before it, and was affirmed by this court after full and elaborate argument, and upon great deliberation. It has all the sanction which the law can give to any decree, and it cannot now be disturbed. But, as the matters involved are of great public interest, we have thought it well to give our views upon the whole question.

In April, 1835, the canal corporation executed a mortgage to the state of Maryland. It embraced the following property: "All and singular the lands and tenements, capital stock, estates and securities, goods and chattels, property and rights, now or at any time hereafter to be acquired, and the net tolls and revenues of said company." In May, 1839, it executed another mortgage, and described the mortgaged property in the same terms. By the act of 1844, c. 281, the canal company was authorized and empowered to borrow a sum of money not exceeding \$1,700,000, and to execute preferred liens on its revenues, in the manner mentioned in the act, for the purpose of securing the loan with interest. The lien on the revenues was limited by the second section of the act, wherein it was enacted "that the president and directors of said company shall from time to time, and at all times hereafter, have the privilege and authority to use and apply such portion of said revenues and tolls as in their opinion may be necessary to put and keep the said canal in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents, and the current expenses of the

said company." By the fourth section the liens of the state on the revenues were "waived, deferred and postponed" in favor of the bonds to be issued, so as to make them preferred liens on the revenues, according to the provisions of the second section. By the sixth section the canal company was authorized to execute any deed, mortgage, or other instrument of writing necessary or expedient to give the fullest effect to these provisions. And by the seventh section the canal company was required to execute to the state a further mortgage on the said canal, its lands, tolls, and revenues, subject to the liens above mentioned. Mortgages were executed according to the tenor and effect of the requirements of the act. The difference is very striking between the mortgages to the state, and the mortgage to secure the bonds of 1844. The canal itself, and all its property, as well as its tolls and revenues, had been previously mortgaged to the state, while the lien of the bondholders is only on the revenues, subject to deductions from them for repairs, supply of water, salaries, and current expenses; in other words, only on the "surplus net revenues aforesaid," as they are styled in the fifth section of the act. And the revenue was liable to be still further reduced upon other contingencies which were altogether probable. The act of 1844, c. 124, gave the canal company power to borrow money for the objects of its charter, and to pledge its property and revenues for the payment of the loan, provided that the prior rights and liens of the state should not be impaired, which had been acquired under mortgages previously executed. This court, in the [Canal Case \(Com. of Virginia v. Chesapeake & O. Canal Co., 32 Md. 501\)](#), decided that this grant embraced the power to construct the canal, repair it, and keep it in order, and that, before the liens of the bondholders of 1844 should be paid, the canal company

(Cite as: 83 Md. 549, 35 A. 161)

had “power to use and apply its revenues in such way as to preserve the existence of the canal, and keep it a living, operative work, capable of earning tolls and revenues, and subserving the great public purposes for which its charter was granted.” We quote the language of the court on page 535. And, in speaking further of the position that the lien of these bondholders was prior to the claims for repairs, they say, on pages 538 and 539: “They took security only upon expected tolls and revenues, and only on so much of them as might remain after repairs and other expenses were first provided for. There is certainly no equity in the pretensions they now assert. But the conclusive answer to their whole complaint is that by the face of their bonds they were referred to the act of assembly (a public statute of a state) under which they professed to be issued, and are in law chargeable with knowledge of all its provisions, and of the true construction to be placed upon them by the courts. And, besides this, the mortgage taken for their benefit recites the proviso in the second section of this act, as well as all its other provisions, and devotes the mortgaged tolls and revenues to their security only ‘after payment of the debts now existing and that may hereafter be contracted and in \*167 arrear for repairs on the canal and officers’ salaries.’” It was in that case clearly decided that, if the receipts from tolls and revenues should be insufficient to make repairs, the canal company had the right to issue bonds for the purpose of obtaining the necessary funds, and to pledge its after-accruing revenues in preference to a pre-existing lien upon them. Now, a lien on revenues subject to regular and stated deductions of large amounts, and liable to others, of an indefinite aggregate, on contingencies which would probably occur, cannot be put in the same category with a fixed and definite mortgage on the canal

and all its property. The difference between the interests conveyed is enormous. The meaning of the fourth section of the act was that the state should not take the revenues so as to defeat the limited right to them which was pledged to these bondholders, but nothing is said about waiving its lien on the lands and other property of the canal. It was intended that the state should agree that these bondholders should have these net revenues as far as they might have them under the law, but its agreement extended no further. The language of the seventh section, requiring a mortgage to the state “of the canal, its lands, tolls and revenues,” shows that the legislature, by using a distinctly different phraseology, intended to designate a distinctly different interest from that conveyed to these bondholders. By the act of 1878, c. 58, the legislature authorized the issue of bonds which were intended to have priority over the liens of the state. It was enacted that they should be secured by a mortgage of the “tolls and revenues and other property, land, water rights and franchises” of the canal company. By the third section of the act it is declared that the said bonds and the mortgage are “liens upon the property, tolls and revenues of the Chesapeake and Ohio Canal Company, to be held and enjoyed in preference to any rights or liens which the state of Maryland may have in or upon the said property, tolls and revenues of the said Chesapeake and Ohio Canal Company, until the said bonds, provided to be issued under this act, and coupons thereon, according to the legal obligations thereof against said company, are wholly paid and satisfied.” The language is in strong contrast with that used in the act of 1844. It is morally impossible to suppose that the legislature did not intend to convey totally different meanings by expressions so widely dissimilar. When this case was in the circuit court before the decree for sale

(Cite as: 83 Md. 549, 35 A. 161)

of the canal was passed, the trustees for the bondholders under the act of 1844 filed a petition praying that there should be a reference to an auditor to report on the priority of the liens on the canal. The case was not so referred, but the learned judge who was presiding delivered a most able and exhaustive opinion, in which he held that these trustees had no lien on the corpus of the canal. This opinion is published in the appendix to [73 Md. 567](#). It was because the only security for the payment of the bonds of 1844 depended on the condition of the canal to earn revenue that the court inserted in the decree for sale the provisions for suspending its execution.

It is stated in the appellees' brief that the grant of all the tolls and revenues carries the entire beneficial ownership. It is also stated "that the right to all the rents and profits of land, or the right to the whole revenue from it, or the right to the whole interest or dividends derivable from personal property, necessarily includes all beneficial interest of every kind which can exist in such property, and for the same reason that, when to one has been granted the right to have all the revenues derivable from an estate or property, there is no beneficial interest left in that property for any one else." The authorities cited to sustain these positions will not be questioned. But there is a vast difference between a grant of all the revenues, and a grant of the kind authorized by the act of 1844,--a grant of revenues from which the grantor makes great deductions, some of them occurring at stated intervals, and others liable to occur, in not improbable contingencies, to such an amount as might extinguish them altogether. In the most favorable view which can be taken of these revenues, they are merely "surplus net revenues," and they are so styled in the act of assembly. It is not held anywhere that a grant of net revenue is a grant of the property itself. A conveyance

of land to a trustee in trust to permit some other person to take the rents and profits vests the entire legal estate in the person of the profits; but a conveyance to a trustee to pay to some other person the net rents and profits leaves the entire legal estate in the trustee, and imposes on him the duty to collect the rents and profits, and pay over the net amount after deducting expenses. The reason is that in the first instance the cestui que trust (the beneficiary) has the entire interest, while in the second he is entitled only to the profits after the trustee has deducted the expenditures which he has made.

Much reliance was placed on *Railway Co. v. Jortin*, 6 H. L. Cas. 425. The decision in that case depended on the construction of a number of acts of parliament. The Folkstone Harbor Company obtained a loan of £ 10,000 from the exchequer loan commissioners, and executed an indenture, which, after reciting certain acts of parliament, declared that the company, "in pursuance of the provisions of the Folkstone Harbor acts, assigned all and singular the rates, duties, and receipts whatsoever, then or hereafter to become payable by virtue of the said acts, and the right, title, and interest of the company in and to the same, and all freehold and leasehold messuages, lands, tenements, and hereditaments belonging to the said company, according to the nature and **\*168** quality of the same premises, respectively, but subject to the proviso for redemption hereinafter contained." Before the making of this loan the previous creditors and mortgagees of the harbor company had executed an agreement in writing that any mortgage or other security which should be taken by the loan commissioners on the rates, duties, and receipts of the harbor company to secure the payment of the loan of £10,000 should have priority over the respective securities then held, or thereafter to be held, by them, the said creditors and

(Cite as: 83 Md. 549, 35 A. 161)

mortgagees, in the following manner: That is to say, that in the first place the commissioners should be paid annually, out of the rates, duties, and receipts, interest on the loan; in the next place, that the said creditors should be paid their interest out of such rates, duties, and receipts; and after such payment of interest the surplus of said rates, duties, and receipts should be applied to the payment of the £>>10,000, in preference to, and with priority over, all claims and demands whatsoever which the said creditors and mortgagees, or either of them, might have on the said rates, duties, and receipts. The interest on the loan having fallen many years in arrear, the commissioners sold the tolls, rates, receipts, freehold, hereditaments, etc., to trustees for the Southeastern Railway Company. Mrs. Jortin, one of the creditors, claimed that she was entitled to a charge on the Folkstone harbor, and the buildings belonging to it. The principal question was whether the commissioners had power to sell the property. The house of lords decided that, by virtue of numerous acts of parliament (especially 1 and 2 Wm. IV. c. 24, § 21), the commissioners had the power to sell, and convey an unincumbered title to the purchaser. They decided further that Mrs. Jortin and the other creditors must assert their claims against the proceeds in the hands of the commissioners, and not against the property which had been sold. The lord chancellor said in his opinion: "The other mortgagees will still have all which they contracted for; that is, a right to be paid their interest before anything is paid to the commissioners in discharge of their principal. This right, however, is one which they can enforce only against the commissioners who have in their hands the proceeds of the sale." We do not find anything in this decision contrary to what we have said.

The appellees also cited [Ketchum v. St.](#)

[Louis, 101 U. S. 306.](#) The state of Missouri had the first mortgage on the property, franchises, and income of the Pacific Railroad Company of Missouri. By the act of 1865 the legislature of Missouri authorized the county court of St. Louis county to issue 700 county bonds, of \$1,000 each, and loan them to the Pacific Railroad Company for the completion of its road. The second section of the act was as follows: "Sec. 2. The fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, \$4000, and \$1000, additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad." The property and franchises of the road were sold under a subsequent mortgage without prejudice to the lien claim of St. Louis county. It was held that the county of St. Louis had an equitable lien on the earnings of the railroad, which was enforceable on the railroad property and franchises, and was paramount to any mortgage or lien thereon. We must take notice of the fact that the office of fund commissioner was established by statute, and that it was the duty of this officer to take possession of the gross earnings of the road, from every source. [101 U. S. 308.](#) The statute of 1865 was therefore a specific appropriation of these gross earnings to the payment of these bonds. This appropriation was made upon valuable consideration, by the contract of all parties who were at the time interested in the property. We think that nothing more need be said to show the great difference between gross earnings, and surplus net earnings; between the whole beneficial interest, and the fractional part of such interest pledged

(Cite as: 83 Md. 549, 35 A. 161)

by the act of 1844. The Central Ohio Railroad Company issued its bonds, containing this stipulation: "For the punctual payment of the interest and principal of this obligation, and others of like tenor, issued or to be issued, in preference to the payment of the dividends on the capital stock of said Central Ohio Railroad Company, the income arising from their road and its appurtenances is hereby specifically pledged." It was argued in this court that these bonds were, as between the railroad company and the holders, "an equitable lien on the whole income or revenues of the road," and "that it was a pledge of all the income or revenues of the road, amounting in equity to a pledge of the road itself, and creating, therefore, an equitable mortgage on the road, its franchises and revenues." Appellee's argument in [Garrett v. May](#), 19 Md. 185, 186. The appellant argued that "the word 'income,' here, means net income from the road and its appurtenances." *Id.* p. 194. The question was whether the railroad company could execute its third mortgage, which would have priority over these income bonds. This court held that it had such right. It will be seen that the execution of this mortgage conferred a power to sell the railroad, and in this way entirely defeat the income bonds. It was shown in the Canal Case, 32 Md. 501, that the bondholders of 1844 took security only on "expected tolls and \*169 revenues, and only on so much of them as might remain after repairs and other expenses were first provided for." And even this security was subject to the right of the canal company to create other debts for repairs, and make pledges of its future revenues which would have priority over it. It was also taken in subordination to the existing rights of the state upon all the property of the canal company, secured by mortgages, under which, in case of default, it might be sold, and an unincumbered title conveyed to the

purchaser. And the lien of the state on the canal, its lands and chattels, has never been waived in favor of these bondholders.

After the court had delivered an opinion stating that a decree for sale would be passed, these trustees filed a petition praying that possession of the canal should be delivered to them, and stating that if it was delivered to them they could restore it as a water way, and operate it so as to derive tolls and revenues sufficient to pay the principal and interest of the bonds of 1878 and of 1844, and they prayed that in the decree for sale there might be a provision for a postponement of it. This petition was vigorously resisted by the state. As has been already stated, the court granted a suspension of the sale, on certain terms. The opinion of the learned court shows very distinctly the grounds of its action. We quote a passage from it: "To prevent this sale, and to preserve the only security to which the bondholders, under the act of 1844, are entitled, their trustees under the mortgage come in, and pray to be allowed to take possession of the canal, and to repair and operate it at their own costs, depending alone for reimbursement of the outlay upon such revenues as they may be able to realize from the operation of the work; and to that end they pray that they may be allowed to redeem the bonds issued under the act of 1878, and be subrogated to the rights of the holders thereof under that act. Can they be denied this right? I think not." The court had already stated in its opinion of September 1, 1890, that, on account of the ruinous condition of the canal, it could not be restored with any reasonable prospect that it could be made to produce revenue applicable to its large bonded indebtedness, and saying: "But all must concede that, if the canal is to be sold, no possible good can result from delay. The condition of the work is constantly growing worse, and there is no reasonable prospect

(Cite as: 83 Md. 549, 35 A. 161)

of an enhanced price being obtained by any delay that may occur. On the contrary, any considerable delay will most certainly depreciate the salable value of the work." Among the conditions on which the sale was postponed are the following: "Third. That the said trustees, acting under the said mortgage of the 5th of June, 1848, shall by the 1st day of May next, 1891, at their own cost and expense, to be reimbursed to them as hereinafter directed, have put in good repair and condition the entire canal from one terminus thereof to the other, so that it be fit for, and capable of, safe transportation thereon, and that upon so restoring said canal to a state of good repair and condition the said trustees shall proceed to operate the same as a public water way, with all the rights, and subject to all the conditions and limitations, granted and prescribed by the charter of the said company; and the said trustees shall keep said canal in good repair and condition, and continue to operate the same, save and except when such operation may be suspended by the action of causes against the effect of which prudence and due care in management will not provide. And the tolls and revenues received or derived from the use and operation of said canal as a public water way, and from the property and rights of the canal company, shall be applied by the said trustees as follows: First, to pay all current and ordinary expenses incurred in operating the said canal, and for keeping the same in good working repair; second, to pay and reimburse the said trustees the amount of money brought in by them, with which to pay the expenses incurred by the receivers, and their compensation, with interest thereon; third, to pay and reimburse to said trustees the amount expended by them in restoring the said canal to good working order, from its present waste and broken condition, with interest thereon; fourth, to pay and reim-

burse said trustees any amount that they may be required to pay, as constituting a superior lien on the tolls and revenues of said canal company to that of the bonds issued under said act of 1844, c. 281, for labor and supplies furnished to the said canal company while said canal was operated and controlled by said company, with interest on the amount so paid; fifth, to pay the interest that has accrued and may accrue, due on the bonds issued under the act of 1878, c. 58, and then the principal of said bonds; and, sixth, to pay the interest that has accrued and that may accrue, due on the bonds issued under the act of 1844, c. 281, and then the principal of said bonds. And upon the full payment of these last-mentioned bonds the possession and control of said trustees shall cease and terminate." The postponement was to continue until the 1st day of May, 1895. That time has long since passed, and the experiment which the court considered a hazardous one has utterly failed. The petition by the trustees now before us, filed in January, 1894, for the purpose of obtaining a further postponement of the sale, contains the following statement: "These trustees have borrowed, for the purposes of making said repairs, \$435,163.34. Their receipts from net toll rents, and other sources, to December 1, 1893, have been \$270,970.73. Their expenditures have been, for the repair of the canal and its works, under the orders of the courts, \$430,764.43; for other accounts, \$250,327.17. This statement does not include \$15,000 borrowed and paid as the compensation of the \*170 receivers of this court and the supreme court of the District of Columbia." There are hopes and expectations on the part of the trustees for greater success in the future. But these hopes have signally failed in the past. The projected enterprise will be subject to all the uncertainties of the future. The adjudicated right of the state for a sale has already been

postponed for nearly six years. During this interval large arrears of interest have accumulated, which will never be paid. For a long series of years the canal company has been unable to produce more than a small amount of revenue. In the meantime the bonded debt of the state is accumulating, with the prospect of payment becoming more unfavorable every year. Unless its rights are to be entirely sacrificed, there ought to be some definite limit to the delay in obtaining the remedy which the law has given it. The bondholders of 1844 have made the experiment which they desired to make, upon conditions offered to them by the court, and made a part of its solemn judgment. By the sixth article of the suspending provision, it was decreed that if by the 1st day of May, 1895, the tolls and revenues should not be sufficient to pay the amounts mentioned in the article, "such failure in the tolls and revenues shall be regarded as evidence conclusive (unless the time be extended by the court for good and sufficient cause shown) that the said canal cannot be operated so as to produce revenue with which to pay the bonded indebtedness of the said canal company." This failure has occurred in the tolls and revenues, and the result stipulated and decreed ought now to follow. The right of a mortgagee to sell the mortgagor's property on default is obtained by a solemn contract, which the law is bound to protect. If the enjoyment of this right is delayed now, it may be delayed again and again. Repeated delays will greatly impair, and may destroy, its value. And the right of precedence belonging to a prior mortgagee will be subordinated to the inferior right of a subsequent lienor.

The result of our opinion is that the decree for sale passed by the circuit court, and affirmed by this court, ought to be executed without further delay, and that the bonds of 1878 have the first lien on the proceeds of sale; the claims of the state under its mort-

gages have the second, and the bonds of 1844 have the third. As the legislature, at its last session, enacted that certain labor claims should be paid out of the amount coming to the state, these claims will be paid according to the directions of these statutes. As it was distinctly decreed that the trustees should repair the canal at their own cost and expense, and look to the tolls and revenues for repayment of the amount expended, and as the trustees prosecuted the work on this understanding, the expenses which they have incurred will not be paid out of the proceeds of sale.

PAGE, J., concurs in this opinion.  
Md. 1896.  
State v. Cowen  
83 Md. 549, 35 A. 161

END OF DOCUMENT