

LEXSEE

STATE OF MARYLAND vs. JOHN K. COWEN ET AL., TRUSTEES.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF MARYLAND

94 Md. 487; 51 A. 171; 1902 Md. LEXIS 23

January 15, 1902, Decided

PRIOR HISTORY: [***1] Appeal from an order of the Circuit Court for Washington County (STAKE, J.), by which it was adjudged that the continuance of the contract between said trustees and the said Chesapeake and Ohio Transportation Company of Washington County is advantageous to the trust estate, and said contract should be continued in force for the balance of the term of ten years, to-wit, to January 1st, 1906. And the Court doth thereupon order, adjudge and decree, that the said trustees be and they are hereby authorized to continue said contract in full force and effect according to its terms; and doth further order, adjudge and decree that the period of four years from the first day of May, 1901, mentioned in sub-section six of section five, of the decree entered in these consolidated causes on the second day of October, 1890, be and the same is hereby, for good and sufficient cause shown, extended to the end of four years and eight months from the first day of May, nineteen hundred and one.

DISPOSITION: Order affirmed and remanded.

COUNSEL: Isidor Rayner, Attorney-General, for the appellant.

If the time is now extended as the trustees ask, and if the sale is now again suspended, that means an absolute extinction [***2] of the claim of the State which in the year 1891, according to the statement of JUDGE ALVEY, made in the case of *Brown v. The Canal Company*, amounted to over twenty millions of dollars.

According to any method of book-keeping that may be adopted and according to any application or apportionment of payments that may be devised, if the contract with the Chesapeake and Ohio Transportation

Company of Washington County is continued now, which of course means its indefinite continuance from time to time, the State's entire claim might as well be blotted from the books of her treasury. This is a matter of simple mathematical calculation. If we take the hundred thousand dollars a year received from the Transportation Company, and apply it where it is properly to be applied, to the payment of the interest on the original issue of bonds of one million seven hundred thousand dollars under the Act of 1844, the one hundred thousand dollars a year will be two thousand dollars a year short of paying the interest on said amount. Of course if interest can be calculated upon the original amount with interest, it will take nearly three hundred thousand dollars a year to pay the accruing interest. [***3] It will thus be seen, that the whole scheme according to the trustees reports, is simply juggling with figures, because all that it is necessary for the trustees to do without ever paying a cent, is to credit the interest account of the bonds of 1844 with a hundred thousand dollars a year and thus indefinitely and perpetually remain in possession of the canal. This presents a new phase of the case which was not before this Court in either of the cases in 73rd or 83rd Maryland. In the Court below, the trustees did not deny nor can they deny in this Court, the demonstrable force of these figures which show with mathematical accuracy that this arrangement which they have made with a concern which they call the Chesapeake and Ohio Transportation Company of Washington County, enables them to charge for the bondholders whom they represent, upon one side of the ledger on their interest account, one hundred and two thousand dollars a year, being six per cent on the one million seven hundred thousand dollars worth of bonds aforesaid, and a credit on the other side of the ledger of one hundred thousand dollars a year, the amount guaranteed by this enterprise called the Chesapeake and

Ohio Transportation [***4] Company of Washington County, which they have so ingeniously organized for the purpose of defeating the purpose of this honorable Court. The Baltimore and Ohio Railroad, represented by the trustees, and the Transportation Company, being one and the same concern, it would not require the payment of any money, but simply an entry upon the books to accomplish the result indicated. The conclusion therefore irresistibly follows, that there is no point of time at all at which the canal can be sold according to the contention of the trustees, because just so long as they are permitted by the Court to continue this system and that contract, so long will the Baltimore and Ohio Railroad be enabled to hold the canal without any interference from the State. If the one hundred thousand dollars is to be applied to the payments of the interest already due then it will take forty years before they can commence to pay the interest on the original issue of bonds under the Act of 1844.

The State does not believe that this Court ever intended by anything it has said in the cases in 73 or 83 Maryland to permit its decree to be evaded and trifled with in this way. This Court knows now from the trustees' [***5] report in the Record, what it did not know then. Then it was an experiment, now the experiment has been tried and has proved to be a disastrous failure. If the decree of the Court is examined, it will be found that no one of its provisions countenances the indefinite extension of the trustees' possession of the canal.

It conclusively appears from the trustees' report and petition in this case that the tolls and revenues derived from the said canal have been insufficient to liquidate and discharge the amount of the cost of repairing and restoring the same. There is a deficit now of one hundred and twenty-one thousand dollars.

There has been nothing whatever paid on account of the preferred liens for labor and supplies.

Therefore the evidence is conclusive as set forth in the order that the said canal cannot be operated so as to produce revenue with which to pay the bonded indebtedness of said canal company, and the right and power is therefore reserved under said order to the Court to order and direct the execution of the decree of sale.

It will be particularly observed, that the order affirmed by this Court in 83 Maryland, does not provide for any further extension, [***6] and it is therefore claimed that the power of the Court in reference to the extension of

time has been exhausted. Even under the original decree, which grants the extension, no good and sufficient cause whatever has been shown for again extending the time as has been heretofore set forth in this brief. The money received from the Chesapeake and Ohio Transportation Company is not sufficient to pay the interest on the bonds of 1844, and therefore it follows, that the time will never arrive when the property can be sold or the rights of the State enforced, if at the expiration of each period the time is extended.

It is therefore earnestly insisted by the State, that the experiment which was authorized by the Court having failed, the time has now arrived for the sale of the property. No one of the questions involved in this appeal was before the Court in either of the cases in 73 or 83 Maryland. The question that is now before the Court is this: Will the Court in view of the circumstances disclosed by the trustees' report and petition, grant an indefinite and perpetual extension of the contract with the Chesapeake and Ohio Transportation Company, of Washington County, and will it [***7] permit a fictitious scheme of appropriating one hundred thousand dollars a year in payment of the interest on the bonds of 1844, to frustrate the plain intent of the decree for the sale of the property?

Hugh L. Bond, Jr., (with whom was John K. Cowen on the brief), for the appellees.

The rights of the parties under their contracts, so far as those rights are involved in the present appeal, have been fully adjudicated by this Court in its decision reported in 83 Md. 572-579.

The contract, the continuance of which for five years was approved by the order of April 29th, 1901, is the same contract to which this Court said it could see no objection. No new fact is developed, proved or sought to be proved on the part of the State to show that the rights of the bondholders represented by the appellees have ceased to have any value; on the contrary, the appellees show that they have for five years been receiving a net income from their trust estate of \$ 100,000 per year, and have been enabled to discharge and pay \$ 553,922.64 of their indebtedness; that the continuance of this income for five years longer is guaranteed by the continuance of the contract, and thereby the appellees [***8] will be enabled to discharge the balance of \$ 121,000 of their indebtedness and have an additional amount of not less than \$ 350,000 for distribution under the Court's orders.

In the face of this showing, without the production of one scintilla of evidence to the contrary, the State asks this Court to hold that it clearly appears that the contract rights of the bondholders are so worthless as to enable the Court to disregard and destroy them utterly. That the Court cannot so hold, without stultifying itself, seems to us too clear for argument.

JUDGES: The cause was argued before MCSHERRY, C. J., FOWLER, BRISCOE, PAGE, PEARCE, SCHMUCKER and JONES, JJ.

OPINION BY: PAGE

OPINION

[*492] [**171] PAGE, J., delivered the opinion of the Court.

It is not necessary in this opinion to restate the facts connected with the origin of the Chesapeake and Ohio Canal Company, the creation of its property and indebtedness, or the successive steps in the litigation that this appeal again brings before us. All that has been exhaustively done in the several opinions in the two cases which are reported respectively in *State v. Brown et al., Trustees*, 73 Md. 484, 21 A. 374 *et seq.*, [***9] and *Canal's Company's case*, 83 Md. 551 *et seq.* In the first mentioned, the original decree passed by the lower Court was affirmed, this Court there holding that the trustees of the bonds issued under the Act of 1844, ch. 281, and secured by the several mortgages executed in pursuance of that Act, were, "by the default of the company to pay its indebtedness according to the terms of these mortgages, entitled to take possession of the canal upon the terms prescribed by the decree;" that this right existed as against the State; and that the said trustees ought to be allowed to put the property "in a condition to produce revenue." The decree, thus affirmed, provided among other things for a sale of the property; but by the fifth section this provision was suspended for a period of four years, and the trustees of the bondholders under the Act of 1844, ch. 281, upon their compliance with and performance of certain terms and conditions, were authorized to proceed to operate the canal "as a public water-way," and apply the revenues, after current and ordinary expenses incurred in operating the canal and keeping it in working repair, 1st. To the expenses incurred by the [***10] receivers, the amounts expended to restore the canal; 2nd. To whatever sums that were

necessary to discharge liens superior to that of their own claim for labor and supplies, &c.; 3rd. The interest accrued and to accrue, with the principal, of the bonds issued under the Act [*493] of 1878, ch. 58, and lastly, to the principal and interest of the [**172] bonds issued under the Act of 1844. When the last mentioned bonds have been paid, their possession was to terminate. The decree further provided that if at the end of four years, the revenue had not been sufficient to liquidate the amount of the cost of repairing the canal, the expenses and compensation of the receivers, and to pay "any amount" that might be a preferred lien on the tolls for labor and supplies furnished to the 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 said canal company; and further, whenever it shall clearly appear that the said canal cannot be operated by the said trustees, [***11] 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."

Upon the expiration of the four years mentioned in the decree the trustees, who had been operating the canal during that period, applied to the Court below for an extension of six years more. At that time the net revenues had been far from sufficient to liquidate any of the claims against the company. Up to the 1st December, 1893, the receipts from net tolls, rents and other sources was \$ 270,970.73, while the expenditures for other accounts than the repair of the canal were \$ 250,327.17. The trustees in their report showed to the Court that the extent of the repairs required delayed traffic for a considerable time; that by reason of long disuse the canal as a business enterprise and means of transportation had become discredited at the time they had received possession, but that they had carried on the work of repair and the canal was then in "better condition as a water-way than ever before in its history." They also reported that they had negotiated a contract with the Chesapeake [***12] and Ohio Transportation Company of Washington County, whereby the trustees were guaranteed [*494] a net fixed income of not less than \$ 100,000. The lower Court approved of the agreement and extended the period as prayed. On appeal, this Court reaffirmed what had been decided in the prior appeal, and affirmed the order of the lower Court. *The Canal Company's case*, 83 Md. 570.

The Court by JUDGE FOWLER said, it was held in the former appeal that "not to have granted the appellees possession of, and time to operate the canal for the benefit of their *cestui que trustent*, would have been inequitable, as well as illegal under the then existing circumstances." "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 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." "The State cannot maintain its right to a sale upon any fair or reasonable construction of the Act of 1844, ch. 281, its mortgage of January 8th, 1846, and that of the appellees [***13] of June 5th, 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 *cestui que trustent* can receive nothing on account of their claims from the operation of the canal by the appellees."

We have quoted freely from these opinions because of the fact that this appeal brings before us an additional proceeding in the same cause, between the same parties and affecting the same subject-matter. Whatever, therefore, has been definitely decided by this Court in the prior appeals should be regarded as settled, and the principles upon which such decision rests should be taken, as far as applicable, to control the questions now before us. They should be held to constitute the "law of the case," binding alike upon this Court as upon the Court below. In *McLaughlin v. Barnum*, 31 Md. 425, it was said by this Court, that a decision by this tribunal upon every point "to which it appears the judicial mind was applied and which was considered, adjudged and reached as a conclusion of the Court, is not only of the same authority as any other decision [***14] [*495] of the appellate Court, but on this appeal in the same cause, between the same parties, when the same relief is sought upon the same subject-matter, and where the case is in no respect variant from that presented on the first appeal, has become the *law of the case* in its further progress, binding upon this Court as well as the Court below." *Young v. Frost*, 1 Md. 377; *Hammond v. Inloes*, 4 Md. 138; *Thomson v. Albert*, 15 Md. 268; *Mitchell v. Mitchell's Lessee*, 6 Md. 224; *Preston & Hepburn v. Leighton*, 6 Md. 88.

In the *Cumberland Coal & Iron Co. v. Sherman*, 20

Md. 117, it was said to be a "cardinal maxim of justice and jurisprudence, that the Court should adhere to its own decisions in the same cause and between the same parties." *Alexander v. Worthington*, 5 Md. 471; *Mong v. Bell*, 7 Gill 244.

The opinion of the Court in 73 Maryland (*supra*) was concurred in by all the Judges who sat in the case; in the other case, (83 Md.) the rulings were made by a majority only. But whatever may have been the views [***15] of the individual members of the Court at the times those cases were decided, or whatever they may now entertain as to the particular questions then passed on, the principle then established and enforced by the rendition of judgment, not having been expressed by way of illustration or in argument only, but in direct and positive terms [**173] as applicable to the questions then before them for adjudication, constitute the law of this case, binding upon all the parties, the Court below and this Court.

Now, being so guided, what are the conditions of fact upon which the decree for the sale of the canal can be enforced? This Court in 83 Md. 577, has very clearly answered that question. "When it appears," says the Court, "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 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 [*496] [***16] * * can be supported upon no ground legal or equitable." Can it be reasonably determined from anything that is before us, that the lien has now become valueless? Has it been demonstrated as contended by the State, that the canal can never be operated so as to produce revenue that can be applied to any of the bonded indebtedness of the company? Such conclusions most certainly cannot be reached, if the facts set forth in the report of the trustees be accepted, and there is nothing in the record that in any respect casts doubt upon what they have there stated. They report that the total sum borrowed, including interest, to defray the cost of repairing and restoring the canal amounted to \$ 674,922.64, of which out of net revenues they have paid \$ 553,922.64, leaving still unpaid on that account the sum of \$ 121,000. If the same net income be received during the next four years, not only will the amount due for cost

of repairing and restoring the canal have been entirely liquidated, but there will be a considerable balance to be applied, as provided by the decree. Should the period for the suspension of the decree for a sale be still further extended, and the same net revenue be received, [***17] the trustees would at a day not far distant be in a position to pay to the bondholders of 1844, at least a part of what may be then due them. Nor is it unreasonable to suppose that the net income will be any less during the next four years. The trustees further report that "the canal is now in the highest state of efficiency at any time since its construction"; that "the general maintenance of reasonable transportation charges by the railroad companies that serve either the same coal fields from which the canal derives its traffic, or coal fields competitive with those of the canal, makes it possible to transport coal on the canal, both for local consumption and coastwise shipment, on tolls and charges remunerative to the canal and all engaged in canal transportation." They further report that the Chesapeake and Ohio Transportation Company of Washington County is willing and has agreed, that their contract shall run the full ten years, and that the guaranteed income to be derived through it, will not only provide for the

payment [*497] of the unpaid balance of the money borrowed for restoring the canal, but also a fund not less than \$ 350,000 "for distribution to such interests [***18] as the Court may find entitled to the same." Under these circumstances we cannot find the conditions of fact that must exist before we can order the sale of the property. We cannot decide that the lien of the appellees is valueless or that the property cannot be operated so as to produce revenue applicable to the bonded indebtedness of the company. No valid objection has been shown why the continuance of the contract with the Transportation Company should not be permitted, and there is certainly nothing in the present condition of the canal or in the prospect of revenue for the future, that would warrant us, in the face of the decisions of this Court heretofore made, in depriving the trustees of the right to use and operate the property, as provided by the original decree.

The order of the lower Court will therefore be affirmed.

Order affirmed and remanded.

BRISCOE, J., dissented.