

Accompanied by the Past

By Karen Gray

History is the witness that testifies to the passing of time; it illumines reality, vitalizes memory, provides guidance in daily life, and brings us tidings of antiquity. **Marcus Tullius Cicero (106–43 BCE), *Pro Publio Sestio***

1889–1890: Two Courts and a New Railroad¹

Following the great flood at the beginning of June, 1889, the canal languished in disrepair. By late July the C&O Canal Company's efforts to sell \$300,000 worth of new repair bonds (discussed in the December 2020 *Accompanied by the Past*) had utterly failed. However, the 5-mile Georgetown level was rewatered with financing arranged with Georgetown's millers, and Frederick Merton made the 23 miles from Okonoko to Cumberland navigable for his lumber products.

On September 10th a canal convention organized by leaders up and down the canal was held in Hagerstown. It resulted in an effort to lobby the state to repair the canal and then lease it to regional businessmen who, it was argued, could operate it profitably—something that had only briefly happened under Maryland's politically volatile control of the presidency and board.

By October of 1889 the possibility of the state repairing the canal and allowing private interests to lease it was getting nowhere, and the first rumors were appearing of a proposed new railroad that would be built on canal lands from Cumberland to Washington. It was also said that the holders of the 1878 repair bonds and the B&O Railroad (owning \$260,000 worth of the total \$500,000) were in favor of the appointment of receivers to sell the canal.

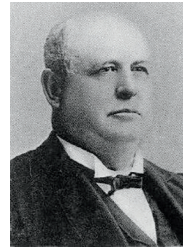
Finally, on December 31, 1889 a bill of complaint was filed in the Circuit Court of Washington County, Maryland under Judge Richard Alvey. That case was numbered 4191 and its five complainants, including George S. Brown, were the trustees for the holders of the 1844 C&O Canal bonds issued to pay for the completion of the last 50 miles of the canal. Those bonds had mortgaged the tolls and income from the canal and the fact that the 1844 bondholders could recover none of their investment if the canal were not operating and making money became particularly important in the subsequent court decisions.

In their complaint filed in the Maryland court, the 1844 bond trustees asked that the court:

... appoint receivers to take possession of the said property, its franchises, works, records, books,

accounts, papers, and everything belonging or pertaining to the said Company, **with authority to manage and operate** [emphasis mine] the said Canal, and to pay over the net revenues due to the said Bond holders until their debts shall be fully paid.

On the same date, a similar bill was filed in the Supreme Court of the District of Columbia under Judge Cox by the 1878 bondholders' trustees: George S. Brown (vested in and a trustee for both sets of bondholders), James Sloan, Jr., and Lloyd Lowndes, Jr. Those bonds had mortgaged the *corpus* (all the possessions and property) of the canal company. Those trustees also asked for the appointment of receivers but for the purpose of selling the canal.



Judge Richard Alvey

Subsequently, various people and the State of Maryland asked to be made a party in the case and by January 31 there was a second case before Judge Alvey, numbered 4178, which he consolidated with the original No. 4171. The consolidated cases involved both sets of trustees, the State of Maryland represented by its attorney general and, of course, the C&O Canal Company, represented by its president Stephen Gambrill and the company's lawyers.

It was immediately clear that the status of the physical canal and the extent of its holdings had to be determined. Judge Cox was the first to appoint receivers, both canal businessmen and users: Henry C. Winship, of the District of Columbia, and Victor Cushwa, of Washington County. He gave them authority to take control of all the canal company books and records, which created difficulties, as the Maryland court's receivers Robert Bridges, Richard D. Johnson and Joseph D. Baker attempted to acquire the same records, only to find them in the control of the D.C. receivers.

Ultimately, the reports on the physical canal revealed a mixed situation along its length. While it was popularly said to be "a complete wreck," the estimates of the repair costs varied greatly, and detailed both areas requiring major repairs and miles of canal with only minor or no damage.

However, among the issues that emerged immediately, was that of the competing rights of the two sets of bondholders as well as of Maryland as the largest lien holder and majority stockholder. As Maryland had placed its liens behind those of the 1844 bonds, it could not recover any of its investments unless the canal was earning substantially or sold at a very high price.

On the other hand, the repair bonds of 1878 had mortgaged the actual value of the canal properties, etc. Consequently, the holders of those bonds would be the first paid from the proceeds of the sale of the canal, and because the canal was not expected to sell for anywhere near the amount of the liens against it, they alone were likely to benefit from its sale.

During the first half of 1890 the receivers were busy gathering the essential information that their respective courts required and submitting reports as they did so. Meanwhile, the canal's future—to be repaired and operated as a waterway, leased or sold—hung in the balance.

The Washington and Cumberland Railroad

Back on February 4, 1890, articles were filed in the office of Maryland's secretary of state incorporating the Washington and Cumberland Railroad Company with \$2 million in initial capital stock. The incorporators were Enoch Pratt, David L. Bartlett, and John A. Hambleton, of Baltimore city; Asa Willison, of Cumberland; Martin N. Rohrbach, of Frederick; E. Kurtz Johnson, of Washington city; and H. W. Talbott, of Montgomery county.

The act incorporating the W&CRR stated specifically that it was:

... authorized to construct, maintain, equip, and operate, by steam or other power, a railroad upon and along the towpath or bed of the Chesapeake and Ohio Canal, or upon land of the Chesapeake and Ohio Canal Company adjacent to said canal, or upon land acquired for the purpose from the terminus of the said canal from the city of Cumberland to such point on the canal in or near the city of Washington, in the District of Columbia, as the corporation may select.

Subsequently, a bill was submitted to the Maryland legislature in its 1890 spring session that would further authorize the railroad "to acquire by lease from the Chesapeake and Ohio Canal Company, or by condemnation proceedings, the title held and enjoyed by it to all its properties and water and other rights between Cumberland, Md., and West Seventeenth street, in the city of Washington."

Around these legislative efforts to extend the powers and rights of the W&CRR a major political furor developed. None of the court documents or receiver reports overtly referenced it or the political machinations it triggered. But away from the courts such was not the case, as both news of what was happening in the courts and legislature became a major focus of politicians, powerful capitalists, ordinary people, and the newspapers—especially the *Baltimore Sun*.

The push for the new railroad to lease the canal was kicked off when Governor Jackson sent a message to the general assembly asking that (as the *Baltimore Sun* of Feb. 6 reported): "A bid for the perpetual lease of the Chesapeake and Ohio canal made by the Cumberland and Washington Railroad Company be accepted." The proposed lease was for 99 years "renewable forever" on terms highly favorable to the railroad. This action assumed that Maryland and/or the canal company, both of which had opposed the appointment of receivers in their petitions and responses to the courts, would be allowed to dispose of the canal without court interference.

The W&CRR appears to have been a hastily conceived affair as the only "survey" they had made for their railroad prior to February 10, 1890, was a horseback ride by Charles H. Latrobe (son of Benjamin Latrobe)—although it was said to be "not his first such journey." The incorporators were awaiting his report on the feasibility and cost of their project even as their project was being promoted in the legislature.

Latrobe's ride had included a cross-country jaunt to Baltimore associated with the railroad's seeking an amendment to the original charter allowing a branch to that city. The W&CRR promoters recognized, however, that their rates on such a line were "problematical at present in view of the existing contract between the Baltimore and Ohio and Western Maryland Companies." Also, it was widely recognized that the W&CRR might injure as well as benefit Baltimore and its B&O and Western Maryland railroad interests.

As the bill for the W&CRR to lease the canal was considered in the Maryland legislature, a deep division arose between its powerful supporters and its opponents. The latter regarded the lease arrangement as violating the Maryland constitution, insisting that in reality, under the conditions of the bill, it was a *de facto* sale of the canal.

The opponents also emphasized that the Maryland constitution required that when the state's interest in any internal improvement (such as the Chesapeake and Ohio Canal) was sold, that the state could only receive in payment "the bonds and registered debt now owing by the State equal in amount to the price obtained for the State's said interest." The W&CRR bill ignored entirely that constitutional provision designed to assure that the result of a sale of any work that had contributed to the state's large debts would directly reduce or eliminate them.

As the controversy grew, the president of the West Virginia Central Railway, Henry G. Davis, was asked if he was backing the W&CRR—a belief that had emerged shortly after the W&CRR's incorporation. On February 9 a *Baltimore Sun* reporter found him initially reluctant to be interviewed on *any* subject until "he answered without hesitation that his

company was not backing the new project, that it had all it could attend to, to develop the coal and lumber fields it now owns.”

A mere month after its incorporation, a bill was introduced to increase the powers of the W&CRR, giving it the right to borrow money and connect with other roads. At the same time the committee of ways and means was asked to introduce a bill that would authorize the C&O Canal Co. “to lease and release all the liens of this State upon the canal and all its property in favor of the lessee” (i.e., the W&CRR).

The W&CRR, however, landed in the middle of an effort to provide “for the most liberal traffic arrangements with the Western Maryland Railroad Company upon the best terms that are given the most favored customer” and ultimately, a connection with Baltimore city. And, as a director of the WMRR stated to the Baltimore *Sun*:

“It is about this time that this warfare upon the Western Maryland road, owned by the city of Baltimore, should cease. We have the Pennsylvania Railroad crippling us in Baltimore with proscriptive terminal and tunnel charges, and attempting to keep us from getting out of their clutches and reaching tidewater over our own lines. On the other end there is the Baltimore and Ohio Road wanting to put out the inference that the Western Maryland, because of a traffic contract which is not intended to give it business to Baltimore, cannot arrange with another company which wants to get to Baltimore over its own lines.”

The tensions and efforts emerging were important, but they spoke of political and economic forces not widely considered in the canal and railroad history of the time. The battle over the canal towpath and possible creation of a new railroad in the Potomac corridor actually added to such tensions, especially those from the growing competition for the carriage of coal to the seaboard ports—a competition beginning to hurt the coal mining and transportation industry.

While Walter Sanderlin in his masterful (but largely administrative) work on the C&O Canal—*The Great National Project*—erroneously saw the trajectory of C&O Canal’s bankruptcy as primarily driven by the B&ORR interests; in reality the B&O itself was caught in the intense struggles to control the Potomac route to Tidewater and ultimately, to serve coastal, tidewater, and Atlantic trade from all the great ports on the mid-Atlantic seaboard and its bays.

In the 1880s, coal mining and railroad shipping for the coastwise trade was becoming so competitive that it was creating financial instabilities for the companies operating in the industry. The first major effort at self-regulation of coal

shipment quantities and rates occurred in 1887 with the formation of the Seaboard Steam Coal Association. Although it failed in 1896 due to an inability to gain members, a new organization, the Bituminous Coal Trade Association, was formed that same year in a fresh attempt to bring order to the industry and its self-damaging competition.² The B&ORR was one of the original members of both it and the former organization.

“The Canal Lease Bill” (as the bill authorizing the W&CRR came to be known), was caught up in a deeply divisive battle that was fully comparable to the divisions among those battling each other in the courts over the rights of the various canal lien holders. The fate of these two works—a new would-be railroad and an old, financially insolvent and badly damaged canal—ultimately depended on fine points of the law and in particular the superb legal mind of Judge Alvey.

However, another bill submitted that added to the complexity of the canal’s situation provided for:

... the restoration of the C. and O. canal as a waterway and the reorganization of the canal company, and to authorize the foreclosure of the mortgages and the enforcement of the liens thereon held by the State, and to regulate the mode of judicial sale of the canal, and to authorize the Allegany and Tidewater Canal Company to purchase the same upon compliance with certain terms, and to authorize the board of public works to sell the State’s interest in the canal and transfer it to the Allegany and Tidewater Canal and Transportation Company.

If you’ve lost track of the players in this increasingly complex struggle, they were: The C&O Canal Company, its stockholders, the State of Maryland, the 1844 bondholders, the 1878 bondholders, the Washington & Cumberland Railroad Company, and the (not yet incorporated) Allegany and Tidewater Canal and Transportation Company. The story of the middle and endgame actions in this epic tale will continue in a later column.

Notes:

1. This column draws heavily from the court documents for the three cases (DC 12,240; MD 4191 and 4198 consolidated), official government documents, and newspaper reports.
2. No studies have been made of the relationship of the coal industry’s and coal-carrying railroads’ troubles at this time relative to the canal’s troubles, although it is clear in the canal company records and other sources, that the competition with the railroads impacted the canal in direct and significant ways. A major journal article on the issues is: Graebner, William. “Great Expectations: The Search for Order in Bituminous Coal, 1890-1917.” *The Business History Review*, vol. 48, no. 1, 1974, pp. 49–72. JSTOR, www.jstor.org/stable/3113197.