

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*

1890 Part A: The Court Battles Begin:¹

During the six months after the June 1, 1889 flood, the C&O Canal Company found neither cash nor credit to repair the heavily damaged canal. The lower five miles from Inlet #1 were restored in an arrangement with the millers who relied on the canal's water to power their mills, and Frederick Merton had made the 23 miles from Okonoko to Cumberland navigable for his lumber products. 1889 reports varied from referring to the canal as a total wreck to insisting major sections had not suffered major damage. But as the end of the year approached, little was heard from C&O Canal Company president Stephen Gambrill or the directors and they had not filed for bankruptcy protection with any court.

The Primary Combatants Enter the Fields of Battle

On December 31, 1889, the first legal volley was fired when the trustees for the 1844 bondholders filed a bill of complaint against the Chesapeake and Ohio Canal Company in the circuit court of Washington County, Maryland, sitting as a court of equity, Judge Richard H. Alvey (1826–1906), presiding. That case is No. 4191. Those 1844 bonds (commonly known as "construction bonds") had been issued to raise money to complete the canal between Dam 6 and Cumberland. They mortgaged the future tolls and income of the canal.²

The foremost concern of the 1844 bondholders was to see the canal repaired and operated, as there was no chance of their recovering any of their investment if the canal was not earning income. The trustees therefore asked the court

to "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 the said Canal."

On the same date they filed a duplicate complaint in the Supreme Court of the District of Columbia (also sitting as an equity court), Judge Walter S. Cox (1826–1902), presiding. That case is No. 12,240.

On January 14, the 1878 bondholders' trustees³ filed a bill of complaint in Judge Alvey's Washington County court against the 1844 bondholders and the C&O Canal Company. That case is No. 4198. The 1878 bonds (commonly known as "repair bonds") had been issued to repair

the canal after the flood at the end of the boating season in 1877. Those bondholders' primary interest was in being allowed to activate the mortgage that is "*a lien upon the canal, works, land, water, rights, tolls, revenues, franchises and other property, real, personal and mixed*" and thus to have the court recognize them as the primary lien holders of all canal properties and assets which would allow them to sell it to recoup at least some of their investment.

Thus, to summarize: By the middle of January the canal company was a defendant or complainant in three cases. Two, brought by the 1844 bondholders (No. 12,240, District of Columbia, and No. 4191, Washington Co., Md.) asked for receivers to repair and operate the canal. The third, (No. 4198, Washington Co.), asked for receivers to be given ownership of canal assets.

Ultimately there would be others admitted as parties to the Maryland case, most notably the state of Maryland, which requested admittance as a defendant alongside the canal company on the ground of being the major holder of C&O Canal Company stock. The legislature directed the state Attorney General William Pinkney Whyte to represent the state in the proceedings.



Judge Walter S. Cox – public domain

The state and the canal company denied that the 1844 bondholders had any claim on the canal, admitting that while those bondholders could never recover any of their investment from the inoperable canal, they held no lien on its property. Further, their unfortunate situation was simply the result of “a succession of disasters” that prevented them from receiving any earnings and was not a failure of the canal company to otherwise meet the terms of the mortgage.

On January 28, 1890, Judge Cox issued the first decree in the canal cases appointing as receivers Henry C. Winship, of the District of Columbia, and Victor Cушwa, of Washington County (boat owners and businessmen well familiar with the canal and its operation). In the decree he ordered that all the books, maps and other records and documents of the canal company be turned over to these receivers who were directed to hold and manage the canal property “*subject to the future orders of this Court.*”

This District court case was primarily concerned with the nearly-five-miles of canal within the District boundary, but Judge Cox’s order that his receivers take control of all the canal company records became a complication in the Maryland court proceedings. The records, of course, were essential to determine the extent of the canal property and its financial situation—the initial task Judge Cox assigned to the two receivers.

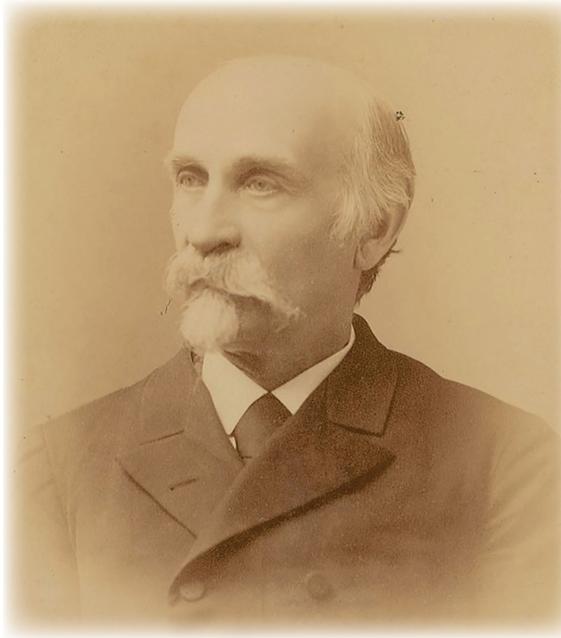
On January 30, 1890, the C&O Canal Company filed an extensive response to an Alvey court order to give reason why receivers should not be appointed to take control of the canal. In the response it acknowledged fully the canal’s destitute condition and asserted its failure to make the canal profitable was evidence that doing so was impossible, stating: “*No receiver can offer any security other or different, greater or better, than this respondent has repeatedly offered in every shape and form in vain...[and] it is clear that the revenues of the canal even when restored and repaired cannot under the most favorable circumstances be sufficient to meet the current expenses.*”

The canal company and the state of Maryland found themselves in a common bond in these cases. Most importantly there were Maryland constitutional issues around the canal as it was a work that Maryland controlled under

its Board of Public Works as the majority stockholder. Additionally, the state had invested huge sums in it through multiple legislative acts and some of the acts specified state actions should the canal be sold. Thus, Maryland declared that it: “*holding these liens, aggregating, with principle and interest, about twenty millions of dollars so far as it is advised, denies the right of this Court in this proceeding, to take possession of what is left of the corpus of the canal, and rehabilitate it at an enormous expense and then permit its use, to the injury of the State, for the benefit of [the 1844] bondholders, having no lien upon the real property of the Canal Company,*”

The canal company in its answer, stated that “*the canal and its works in their present condition are an ample security for the payment of the bonds and coupons thereon, issued under said Act of 1878, Chapter 58, that the said property if exposed to sale, will undoubtedly bring a price sufficient to extinguish and satisfy the principal and interest of said bonds*” and that “*that there is no danger of any diminution in value of said canal and its works until such time as a sale under decree of this Court can be had.*”

For the State of Maryland and the C&O Canal Company, the argument was simply that the court should order the sale of the canal without the intervention of receivers. Of course, this left hanging multiple legal issues such as the priority and rights of those with liens on the canal and the inevitability of legal challenges to whatever decisions were made concerning the distribution of the income from the sale.



Judge Richard H. Alvey – public domain

In a lengthy opinion and decree of February 21, 1890, Judge Alvey combined cases No. 4191 and 4198. This was an important legal action, as it signaled that, before the law, the complaints and concerns of the 1844 and 1878 trustees were essentially the same. Basically, it had been established that the canal was defunct and the bondholders needed court intervention to recover any of their investment. That the 1844 bondholders would try to do that by repairing and operating the canal and the 1878 bondholders by selling its real property and assets, were simply matters that would be adjudicated by the court.

In the same decree Judge Alvey appointed receivers, specifying that they did not have the power to create more “liens or charges on the property” as “the rights of the

deferred lien holders must not be sacrificed or impaired by experiments of doubtful propriety.” He therefore set aside for the moment the claims and desires of all the parties, but it is hard not to see in the reference to “experiments of doubtful propriety” an initial perspective against the request to be allowed to repair and operate the canal by the 1844 trustees.

However, in the February 21 opinion and decree, Judge Alvey also addressed the position of the 1878 bondholders, Maryland, and the canal company that the 1844 mortgagees had no claim on the canal as the failure to produce the mortgaged revenues was not “*due to default or breach of the condition in the mortgage by the company.*” Importantly Alvey ruled that the 1844 bond issue did not imagine and therefore did not provide for the current situation when, through no fault of the company, the canal was inoperable and beyond the company’s means to repair it. He stated: “*I cannot, therefore, accede to the proposition, urged by both the Canal Company and the State, that the [1844 bond] trustees would have no right to take possession under the mortgage.*”

Nevertheless, by the end of February, it was clear that the 1844 bondholders’ early effort to quickly gain the right to repair and operate the canal had failed and they were caught in both courts in the competing claims on the canal involving the 1878 bondholders, the State of Maryland, and even the C&O Canal Company. Indeed, Maryland’s interests and the mortgage of 1878 did appear to limit any strong legal claim by the holders of the 1844 construction bonds, especially with the canal company’s sworn statements that it was impossible to make the canal profitable.

The Receivers’ Search for Information

At this point in the proceedings, action in both courts slowed as both sets of receivers went about their business of

providing their courts with the details on the canal’s condition, value, and prospective use if repaired. Such information was necessary, of course, for the judges to make their decisions. One of the issues settled during this time was the legal priority of the combined 4191 and 4198 cases in the Washington County Court. That priority did not alter the validity of the District court’s actions and throughout the remaining history of the canal, both jurisdictions would from time to time require the concurrence of the other in an action, and respond to the other’s decrees and opinions when it was appropriate to do so.

I will not deal with the detailed reports of the receivers in this article with one exception to be discussed in Part B. I would note, however, that while some of the findings concerning the canal are parallel or overlap, the information in the District court’s five miles of primary concern and the nearly-180 miles of the Maryland court’s primary concern shed considerable light on the canal, its property, and those sections and structures most—and least—vulnerable to flood damage.

On August 12, 1890, the District court’s receivers, Henry Winship and Victor Cushwa, submitted a fourth report. Acting in response to July 8th instructions from Judge Cox to estimate “*the feasibility of the operation of the canal after the same has been repaired for the business of transportation.*” It was an astonishing report, and it would change everything from what the ordinary observer would most likely have expected—namely the sale of the canal properties and assets due to the nature of the 1878 mortgage, the previous evidence against the canal ever paying on the 1844 mortgage, and Maryland’s enormous claims and legal complexities. I will examine this report in a future 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. This column greatly simplifies the legal proceedings and will mention only the most important actions and will not be concerned with such details as the fact that the mortgage for the bonds authorized by the Maryland act of 1844 was not legally finalized by the Maryland and Virginia legislatures until 1848.
3. Note that George S. Brown was a Baltimore investor with a large holding of both 1844 and 1878 bonds and, as it happens, was one of the trustees for both groups of bondholders. His name appears first in both lists of trustees.