

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 to 1906 and Beyond: Extending the Trusteeship

As we saw in my last column, Judge Richard H. Alvey, presiding over the circuit court of Washington County, issued an important ruling on October 2, 1890, on the combined C&O Canal cases 4191 and 4198. That decision allowed the trustees of the 1844 bondholders to redeem the 1878 bonds and to be subrogated to the rights and priorities of the 1878 bonds which included the right to foreclose on the canal, requiring its sale.

In that ruling Alvey also permitted the subrogation, set aside his earlier decision to have the receivers sell the canal, and put the 1844 bondholders' trustees in possession of the canal, with right and power to repair and operate it. However, he placed several requirements on the trustees to be met by November 1, including, most importantly, proof of their acquisition of the majority of the 1878 bonds and the deposit in a bank of the \$249,311.70 to pay the minority bondholders what was due to them.

On November 28, 1890, all conditions being met and the court in the District under Judge Cox having provided the necessary ancillary decree, Judge Alvey ordered the receivers he had appointed earlier to deliver to the 1844 bondholders' trustees "all the property of the Canal Company of which they are now in charge, as provided in said decree of this Court entered on the 2d day of October 1890."

It is important to emphasize that with the transfer of management to the 1844 trustees, there was no transfer of title, and that it remained with the C&O Canal Company and its stockholders. Significantly, most of the stock was held by the state of Maryland and represented by the state's Board of Public Works. Alvey had previously recognized the state as a party in the canal cases, represented by the state attorney general.

In that lengthy November 28 decree, Judge Alvey also indicated the order in which the revenue earned, once the canal was operating again, was to be used: (1) To pay current and ordinary expenses and maintenance to keep the canal operating; (2) to reimburse the trustees the amount they paid in the court expenses; (3) to reimburse them the cost of repairing the canal; (4) "to make such payments and disbursements as said trustees may be allowed, directed or ordered to make by any subsequent order or decree of the Court in these proceedings, in accordance with the rights and priorities of all



Consolidation Coal Co. boat – Photo courtesy of the National Park Service, C&O Canal National Historical Park

parties in interest as then determined.” Importantly, this put the court in charge of the payment to lien holders from any profits.

Judge Alvey further provided directions on the records to be kept, ordering that the trustees “make full and accurate reports to the Court, under oath, of all receipts and expenditures, and of the real condition of the canal, and the amount of tonnage thereon during the preceding year.”

And finally, he ordered [emphasis mine]:

that this cause be retained for further orders and decree, as the nature of the cause may require, and for the determination of the rights and priorities of the parties hereto. And **this decree shall be without prejudice to the rights of parties claiming liens upon the resources of said canal** under contracts with said company to be determined either in this cause or in some collateral proceeding.

These aspects of the November 28 decree were critical, for they would continue to be in effect and upheld in appellate court rulings until new receivers were appointed to sell the canal as finally ordered by the court in 1938. Notably, they gave the court, not the B&O Railroad or even the trustees, final authority in major decisions about the canal that would affect “the rights of parties claiming liens” etc. Thus, while the B&O and other powerful investors such as the state of Maryland, as majority stockholder, had significant power, the rights of the others were always there as well.

In the October 2 decree, Judge Alvey had included the following critical ruling [emphasis mine]:

That if at the end of four years from the first 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 necessary 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.

In other words, if by May 1, 1895, the canal couldn’t produce enough revenue to pay its expenses, pay the previous 1890 court expenses, pay for the 1891 repair of the canal, and make payments on its debts related to its bonds, the decree of sale that had been set aside would be executed.

Significantly, parts of the canal were repaired and reopened in the summer of 1891 and the entire canal was reopened in September with the first coal boats to come down the entire canal from Cumberland arriving at 8:30 p.m. on September 22, 1891, at the Agnew & Co.’s coal docks, near the aqueduct bridge. The final cost of the repair of the canal was \$430,764.45. While clearly many parts of the canal had been critically damaged, no work on repairs had begun until late March or early April of 1891, yet a June 3 report in the *Washington Evening Star* indicated that only the 14-mile level between Four Locks and Hancock remained to be repaired. The rapidity with which the canal was again made operational (although arguably minimally so), speaks to the exaggeration in the 1889 descriptions of the canal as “a total wreck.”

In any case, on November 29, 1893, the Chesapeake and Ohio Transportation Company of Washington County (C&OTC) was incorporated by five Baltimore investors, with Judge Stake (who succeeded Judge Alvey) approving its incorporation in December. Interestingly the company would continue to exist until March 20, 1942, and at some point, the B&O RR became a significant stockholder. The purposes of the corporation were to buy and lease lands; buy and transport timber, grain, fruits, seeds, etc.; build boats and ships; mine coal, iron and other metals; open marble and slate quarries; operate canal boats by means of electricity; navigate the ocean by vessels; acquire bridges, wharves, etc., by lease or otherwise; and for other purposes.¹

The idea of a “transportation company” that would own all the boats on the canal and hire captains to operate them was being put forward in 1879 and cropped up again in the deliberation of a special Maryland legislative committee formed to look at all aspects of the increasingly troubled C&O Canal. In fact, however, the idea as written about both times was closer to what the Canal Towage Company would be when formed years later in 1903 than it was to the 1893 C&OTC.²

In the spring of 1894, Judge Stake, who had succeeded Judge Alvey on the bench of the Washington County circuit

court, was asked by the trustees to extend the time of the experiment beyond May 1, 1895. They did so, citing an agreement with the new transportation company:

to operate the canal, guaranteeing the net revenues not to be less than \$100,000 a year to the canal trustees. The transportation company desired the privileges, if it so desired, of furnishing the necessary wires and appliances, either experimentally or permanently, for the propulsion of boats by electricity.

The case was heard by Judge Stake on February 18, 1894, and on June 20, Judge Stake rendered his decision extending the deadline to May 1, 1901, or ten years from May 1, 1891. He did so, citing Judge Alvey's clause allowing such an extension, "for good and sufficient cause." Maryland's Attorney General appealed the decision on behalf of the state, but on June 16, 1896, the appeals court upheld Judge Stake's decision.

On April 29, 1901, Judge Stake again extended the deadline four years and eight months from May 1, 1901—i.e., to January 1, 1906. Maryland again appealed the decision and Judge Page, delivering the opinion of the Court of Appeals, quoted with approval the language used by Judge Fowler in delivering the principal opinion on the second appeal (June 16, 1896) as follows (*italics in the original*):³

"When 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 be asked to decree a sale under the State's Mortgage [i.e. the 1878 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 *can be supported upon* no ground legal or equitable."

Maryland's Attorney General at the time, Williams S. Bryan, Jr. commented in a report to the Maryland Senate on the future of the case. I am providing his opinion in full as it illustrates the legal reasoning behind the survival of the 1844 bondholders' Trusteeship into the 1930s (emphasis is mine):

Whether or not, the trustees of the bondholders of 1844, will be able to again convince the courts that it is proper and just to again postpone the sale of the canal after January 1st, 1906, and to permit the trustees of the bondholders of 1844 to retain still longer possession of the canal for the purpose of satisfying the debt due by the canal company to these bondholders of 1844, it is impossible for anyone to foretell.

Speaking with that reserve which is always proper to observe in endeavoring to forecast the decisions of the courts, I can, however, say that the probabilities are very strong that, **if the trustees of the bondholders of 1844 can convince the court that there is any reasonable prospect of their being, by any further operation of the canal, to obtain any net revenue (over and above the expense of operating and maintaining the canal,) which can be applied in satisfaction of these bonds of 1844, the court will still further extend the time** during which these trustees may hold and operate the canal.

It would seem to follow from the rulings of the Court of Appeals that the chance of a sale of the canal, to satisfy the State's liens within any reasonably near period, is a very remote possibility, and one of very slight commercial value.

Ultimately the situation would be continued, although with the court often failing to see that the Trustees provided the requisite annual report and records to show that the



Above and below – 1891 repairs at Big Pool – Photos courtesy of the National Park Service, C&O Canal National Historical Park



required financial minimum was met. In the reports that exist, it was met with the payment from the C&OTC.

What became clear in the appeals for extensions is that Judge Alvey's original legal reasoning continued to be accepted and affirmed both by subsequent judges and appellate court rulings. It was the opinion of the 1844 investors, and of others as well, that they would only see payment on their liens if the canal earned more than necessary to recover its costs, and that so long as that remained a possibility, the canal couldn't be sold, or, under its charter, be used for other purposes.

Understandably, the argument was made in the appeals that there were motives behind the trustees' arguments for the continuing possibility of the canal's financial success, that had little to do with the canal. To that challenge, the appellate court on February 20, 1891, in its "opinion and mandate" on Judge Alvey's original rulings in 1890, concluded decisively (emphasis mine):

A good deal was said about **the veil which conceals the real motives** that have prompted this litigation. Whatever they may be, we must deal with the case as it is presented by the record, and so dealing with it, we are of opinion that **the decree below must be affirmed.**

And the final line was simply: "Decree affirmed," referring to the October 2, 1890, Alvey decree ruling for the sale of the canal, but then setting that ruling aside and giving management of the canal to the 1844 bondholders' trustees. The trusteeship was always extended for a defined term that—it was always argued—would allow them to demonstrate that the canal still could be financially successful, maintaining itself and making payments on the bonded indebtedness and other valid liens.

While this was not achieved, the appellate ruling required those opposed to the extensions to show that there were legal and equitable grounds to proceed with the sale and that "*it clearly appears that the liens of the appellees are valueless.*"

In this and the previous two columns, I have provided an overview of the situation of the canal after the 1889 flood and the 1890 court cases that ultimately created the trusteeship that would continue until the canal was finally sold in 1938, 15 years after navigation ended on the canal. Here I've reviewed the legal actions extending the trusteeship and the appeals courts responses. These, in my opinion, disprove the original 20th Century view that the courts were responding to the desires of the B&O Railroad and that it gained ownership of the canal.

After the third extension to 1906, the records become increasingly unsatisfying in terms of the justification for not selling the canal. The increasingly lax oversight of the

Maryland court and the complex legal questions concerning the canal—in particular after navigation ceased—would lead to the B&O to attempt to sell the canal from Point of Rocks to the District line in 1936 and that, in turn, led to the extensive November 14, 1936, memorandum by the U.S. Attorney General on how the canal might be sold. The second paragraph states (emphasis mine):

It is of course **well known that the Baltimore and Ohio Railroad Company is not the owner of the Chesapeake and Ohio Canal.** By reason of certain transactions which will be dealt with in their proper place, the Baltimore and Ohio Railroad Company has come to exercise a dominant influence over the canal and may be in a position to bring about a sale of the canal property. As any such sale must be made under the direction of the court, the railroad company cannot make a binding contract for the sale of the canal property or any part of it.

Notes:

1. Cumberland *Evening Times*, Tue. 6/5/1894, p. 6.
2. Washington *Daily Times*, Mon. 3/31/1879, p. 2; and Washington *Evening Star*, Thu. 2/18/1886, p. 5.
3. Cumberland *Evening Times*, Thu. 6/21/1894, p. 6. See also p. 163, *Journal of Proceedings of the Senate of Maryland*, January Session 1906, pp. 163–65.

Note to Readers

Internet websites have become an unparalleled source of information for those interested in the C&O Canal and related subjects. But social media platforms such as Facebook now host groups with invaluable information as well. For example, the major ones for the C&O Canal include:

News and information about the canal:

Chesapeake & Ohio Canal
National Historical Park
C&O Canal Trust
C&O Canal Association

Groups especially rich in history:

C&O Canal History and Technology
Chesapeake & Ohio Canal 1828-1924
Families of the C&O Canal

I'm surprised there isn't a C&O Canal history group (though I've searched for one) and hope that before long someone with the appropriate expertise will form one.