

Accompanied by the Past

By Karen Gray

The Trusteeship 1906–1938

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***

In several of my columns in 2021, I dealt with the early history of the court actions, beginning with the action on October 2, 1890 that authorized the trustees for the 1844 bondholders to take control of the canal, repair, maintain, and operate it on an experimental basis. The experiment was to see if, under the trustees, the canal could earn enough income over five years to pay for the repairs, keep the canal in good working order, and begin to pay down its enormous debt.

By October 1890, the B&O Railroad controlled the majority of the 1844 bonds as well as those of 1878. Just prior to the October 2 ruling, the court permitted the 1844 bonds to be subrogated to the 1878, assuring their ongoing rights while not displacing the priority for payment of the 1878 bonds if and when the canal was sold. This meant that the 1844 trustees were closely connected with the railroad and the struggle between the two groups of bondholders was over. They now had a common legal connection.

However, the court's decisions were guided by the laws, and the trustees were subject to court oversight and orders. The result was not always favorable to the B&O and keeping the trusteeship arrangement would prove costly to the railroad. As a consequence, the pervasive belief that the B&O RR controlled the Trusteeship is an error – as the appellate court rulings that supported the lower court decisively pointed out. The B&O's role in the background was significant – but the court, not the railroad, was in control.

In an opinion and order filed July 30, 1894 by the court, the October 2, 1890 “experiment” of the operation of the canal by the 1844 trustees was extended to May 1, 1901. Then, on April 8, 1901, it was extended again to January 1, 1906. During those two extensions, the trustees contracted with the C&O Transportation Company (C&OTC) to manage the operation of the canal, initially with visionary plans for the mechanization of boat towing and other major improvements. Additionally, the C&OTC guaranteed a \$100,000 profit per year.

As 1906 approached, the trustees, as expected, petitioned again for an extension of their possession and operation of the canal. This was an arrangement that did not

affect ownership, still vested in the company's stock, of which Maryland owned a clear majority. This time, however, the trustees asked for automatic annual renewals and approval of a new contract with the C&OTC that guaranteed only that the canal would not be operated at a loss.

The court set December 27, 1905 as the date for a hearing on the petition that allowed all parties in the canal cases to give their response to what the trustees were requesting. This time, however, there were no objections. Maryland had sold its interests in the canal to Fairfax S. Landstreet, a West Virginia coal baron. Landstreet held positions with banks and railroads, including the Western Maryland Railroad, which had just won the right to cross the canal and also condemn and purchase pieces of canal land for its extension from Big Pool to Cumberland, land that the railroad needed and the canal did not.



The 1924 flood at Cumberland (shown here), followed by another in May, resulted in the trustees deciding not to open the canal for an official boating season. It was never opened again. Post card image

With the Maryland interests, Landstreet had acquired the majority of C&O Canal Company stock, and thus controlled the election of officers and directors. The C&O Canal Co. and Maryland – in the past seeking to have the canal sold – had been the reliable opponents to the 1844 trustees who sought control of the canal to operate it. Now, in Landstreet's hands, those differences disappeared, and Landstreet would shortly sell those interests to the B&O RR.

1926 and 1928 Petitions to Sell the Canal

There were minor issues that arose for the Circuit Court of Washington County handling the canal case (Equity Nos. 4191 and 4198 consolidated) from time to time. However, between 1894 and 1926 there were only two major issues: (1) the petitions by the trustees for extensions of their control of the canal; and (2) the extended court proceedings around

the Western Maryland Railroad's need for canal lands and crossing rights for its extension to Cumberland, 1903–1905. Then, in 1926 a new, major complication arose.

But first some background: Between 1877 and 1890, a large number of canal employees and persons providing supplies to the canal company had gone unpaid. In 1896, during the first extension of the trusteeship (to May 1901), many had managed to get the attention of their state legislators. The result in the January session of 1896 was the passage of a law registered as Chapter 136 ½, which provided for payment of such claims if validated in ways specified in the act.

In an effort to determine with some precision how much money was involved in these relatively small claims for labor and materials, the governor of Maryland appointed Charles A. Little of Washington County as an auditor to register and audit those claims. Unfortunately, this confused many claimants who thought that with the registration of their claim it was validated, but it was not. In 1900 the state responded with legislation in Chapter 270 of that year's session, essentially incorporating claims of those who were confused by the governor's registration system under the 1896 act and revising the validation guidelines to accommodate them.

There is evidence that the B&O RR began to buy up these claims, likely acquiring many for less than the face value from owners who regarded a bird in the hand as worth more than two in the bush. The claimants must have known payment was unlikely, as the only time the trustees had significant excess funds it was used to retire 1878 bonds and their interest coupons – with the court's approval. As it turns out, the court erred in that regard, as we'll see shortly.

On September 9, 1926, one William T. Coulehan petitioned the circuit court of Washington County to order the sale of the canal so that he might be paid \$3600.32 owed him along with interest amounting to \$3.20 – a claim that had been certified on January 5, 1891 by the circuit court of Washington County and that qualified under the 1896 act for payment. His petition for the sale of the canal included extensive documentation of the trustees' failures to operate the canal profitably as had been initially required, and that they had not even not even opened the canal for a boating season after 1923.

The court ordered a hearing on October 16, 1926 on Coulehan's petition, but before that date, on October 8, legal documents were filed in the court showing that, on October 4, Coulehan had "for value received," transferred his claim to the B&O RR Company. The predictable result was that Coulehan's lawyers sent a petition to the clerk of the court to enter Coulehan's September 19th petition on the court's record as "dismissed."

In 1926 the holder of a small claim, qualifying under a 1896 Maryland act which placed such claims in line for payment from the sale of canal lands, attempted to force the end of the trusteeship and sale of the canal. This attempt went down in flames. What was behind Coulehan's sudden decision to sell his claim rather than push for the sale of the canal is a matter of speculation.

Less than two years later, on May 29, 1928, a new petition was filed also asking for the termination of the trusteeship and sale of the canal so that the petitioners' claims could be paid. Much of the text in that document reiterates almost word-for-word the same accusations and details of the trustees' failures as had appeared in Coulehan's petition.

The charges against the trustees included their failure to comply with some of the court's orders, such as submitting annual statements of receipts and expenditures showing the accounts in the black, as mandated in the 1905 court ruling allowing automatic annual extensions. Indeed, there had been a number of years when those reports were submitted a year or more late. (Although, of course, the court should have ordered the trustees to produce a report when one failed to be filed on schedule.)

This new petition was filed not by one claimant under the Maryland 1896 and 1900 acts, but by a group of them. Some, unsurprisingly, were administrators for the estates of the original claimants who had died in the intervening decades. In significant ways, this petition appeared more likely to succeed than had Coulehan's.

The final court opinion on this petition was issued jointly by the two sitting judges of the Circuit Courts of Washington and Allegany Counties. Among the issues with which the court concerned itself were how claims would be validated and whether interest was due on them. With regard to the first, the judges ruled that "*the [1896] Act itself requires the judge to pass the order whenever any such judgment or claim 'authenticated, proven or certified', shall be presented to him.*" The act's prescribed methods were followed when possible, but this allowed the court latitude due to such difficulties as the fact that "*the books and papers of the canal company were no longer accessible.*" The court also ruled that the debts would accrue interest and specified the amount.

Further, the judges noted with regard to the original October 2, 1890 ruling establishing the trusteeship: "*This decree directs that the tolls and revenues received from the use and operation of the canal shall be applied by the trustees ... (1) to pay all current and ordinary expenses incurred in operating the canal and for keeping the same in good working order.*" Five more categories followed, establishing the order in which long unpaid claims for certain "current and ordinary expenses" were to be paid.

Importantly, the judges in this opinion state that these small individual claims “ought to have been paid by the trustees before the application of any of the funds from tolls and revenues to the bonds.” The perfect occasion to have done so was 1905 when the trustees received \$500,000 from the Western Maryland RR for the canal land it acquired for its Cumberland extension. While the court at that time had allowed the trustees to use that money to retire 1878 bonds and their interest coupons, this court states that it should have paid the 1896/1900 claimants first.

It was found that one of the claims had actually been paid, but the judges ordered that “the remaining petitioners are entitled to payment with interest.” Thus, any surplus income in the future should be applied to these debts. At this time, however, it is unclear how many were still held by individual claimants or their estates, and how many the B&O RR had bought. In any case, as the canal was not making any money and at that time there was no expectation of a significant sale of canal lands, the petitioners were left with the priority of their claims clearly established, but still unpaid.



The trustees annual reports during the years without a boating season (1924–1937), frequently mentioned that, if the canal were reopened, “there would be some considerable expenditure required in the matter of the lock gates and lock tender houses.” The photo of Lock 71 from after 1938 was made by HABS-HAER’s prolific photographer, Jack E. Boucher. C&O Canal NHP, National Park Service

1938 and the B&O RR Petition

By 1936 the B&O RR was deeply in debt and negotiating with the government that was interested in acquiring canal lands, in particular for extending a parkway beyond Great Falls. The B&O, however, sought clear title to canal land in the district and above Point of Rocks where their mainline was constricted between the canal and the ends of ridges at the four points over which the famous B&O/C&O court battle had raged from 1828 to 1831.

The result of this activity was an opinion from the office of the U.S. Attorney General on the B&O’s offer to sell the District of Columbia to Point of Rocks segment of the canal.

On November 14, 1936, the Attorney General’s memorandum *On the Title to the C&O Canal from the District to Point of Rocks* was issued. It clearly stated in the second paragraph:

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 ... 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.

On October 15, 1937, Herbert Preston, the last of the final three men to serve as trustees for the 1844 bondholders, died without having provided for successors. On April 29, 1938 the B&O RR filed a “Petition for the Appointment of Receivers” to sell the canal. Back early in 1890, receivers had been appointed by both the DC court and the Circuit Court of Washington County to take control of the canal and its records and obtain for the courts the information they required to make their decisions. However, on October 2, 1890, when the control of the canal was moved to the 1844 bondholders’ trustees, the receivers were set aside along with an order to sell the canal. In the legal record the order to sell was simply in abeyance and left the receivers without anything to do. Those original receivers had long since died, making the appointment of new ones necessary.

In the petition, the B&O stated that it held “in pledge”: (1) All the 1878 bonds still outstanding, the principal of which was worth \$132,500; and (2) substantially all those little claims filed under the Maryland 1896 and 1900 acts, having a value in excess of \$450,000. It had acquired, as well, the: (3) Maryland interests that had been sold first to Landstreet in 1906, consisting of three mortgages on the canal property given by the Canal Company to the State of Maryland in 1835, 1839, and 1846—the latter confirmatory of and as further security for the indebtedness in the earlier mortgages. Finally, (4) the RR owned \$1,320,000 of the bonds of 1844/48 and (5) the majority of the outstanding capital stock of the Canal Company.

As a consequence, the petition stated that the RR believed “the only outstanding claims not subordinate to the aforesaid claims, are “labor claims” amounting to less than \$25,000, including principal and interest; and that, with the exception here noted, The Baltimore and Ohio Railroad Company is in fact the owner of the prior liens upon the canal property aggregating an amount far exceeding the value of the property.”

So, in effect, the B&O was “the last man standing,” holding all the interests of the former parties in the canal

Nature Notes

By Marjorie Richman

The Language of Ants

In the 1977 movie *Close Encounters of the Third Kind*, intelligent beings from another planet visit Earth and our scientists have to figure out a way to communicate with them. To do this they must open up their minds and think beyond the way we communicate. Fortunately, these aliens communicate between themselves by sight and sound, just like us, but the sounds in their language are tonal variations rather than words, and colors have meanings. Music and flashing colored lights become the basis for interplanetary conversation.

Actually, we don't have to wait for the arrival of aliens to interact with creatures that have evolved very differently than we have. We encounter them in nature every day. In the late 20th century, scientists recognized the possibility of overlooked intelligence among species of insects that live in socially cooperative, highly organized communities. Even more intriguing than their organizational prowess is the ability of these species to communicate among themselves. Ants live in such communities, and for a long time scientists wondered how insects with primitive brains and few capabilities for expression are able to exhibit such complex behavior.

Ants must have done something right, since they have been inhabitants of our planet a good deal longer than we have. Ants first appear in the fossil record about 140 to 168 million years ago, tiny creatures roaming the world with dinosaurs. They began to diversify about 100 million years ago, about the same time as flowering plants diversified and well before we could even be considered an evolutionary possibility.

Ants live in what are called eusocial colonies; that is, cooperative communities in which each individual belongs to a group that performs one function essential for the survival of the colony. The first level of organization is the division of adults into reproductive and non-reproductive individuals. Reproductive females may become queens; reproductive males perform their one function before they die. Non-reproductive adults are organized into groups that perform one

Continued on page 16



While not seen on the C&O Canal, leafcutter ants are an excellent example of the cooperative behavior of ants. Photo by Marjorie Richman

Accompanied by the Past (Continued from previous page)

cases. That certainly put it in a position “to bring about a sale of the canal property” as the Attorney General’s memorandum put it. In reality, however, the B&O had no access to all this wealth as it clearly acknowledged in the petition that: “*all of the aforesaid claims of The Baltimore and Ohio Railroad Company are presently held in pledge by Reconstruction Finance Corporation*” – the RFC being a tool developed by the government to help important companies get through the depression. Thus far, it was loans from the RFC that had kept the B&O itself out of bankruptcy court by using all its C&O Canal interests to secure those loans.

The petition then reported on the B&O RR negotiations with government agencies concerning the canal and

notes that “*in the event of the purchase of said canal property by the Government the consummation of the same will be desired by the Government without delay.*” In other words: let’s hurry this process up.

Clearly the Circuit Court of Washington County was aware that this petition was coming, as on the same date that the petition was filed, April 29, 1938, the court decreed “*that the appointment of Receivers as prayed for in the foregoing petition is necessary and proper.*” It then appointed Edgar W. Young, R. S. B. Hartz and G. L. Nicolson as the new Receivers—a small but essential first step in the complex path of selling the canal that will be covered in a future column.