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Recommended Citation

H. H. Lewis, *The Great Case of The Canal vs. The Railroad - 4 Gill & Johnson 1 (1832)*, 19 Md. L. Rev. 1 (1959)

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Maryland Law Review

VOLUME XIX

WINTER, 1959

NUMBER 1

THE GREAT CASE OF THE CANAL

vs.

THE RAILROAD

4 Gill & Johnson 1 (1832)

By H. H. WALKER LEWIS*

This may well be Maryland's greatest case. It has unrivalled historic interest. It involved enormous stakes and brought together a galaxy of legal talent. It produced the first printed record in Maryland. It fills half a volume of our reports. But its very length repels readers, and even then its 273 pages do not tell the whole story. It is the hope of this article to so present the case that he who runs may read.

July 4, 1828 was a gala day. Automobiles were blessedly unknown, but our forefathers had their own ways of disturbing the peace. Patriotic societies paraded, bands blared, whiskey flowed and any remaining gaps of time or space were filled with oratory.

Nowhere was the thunder of speeches louder than in Maryland. It was the great day of dedication.¹ With unbounded optimism, public spirited citizens and hopeful investors launched the two most ambitious projects of their time, The Chesapeake and Ohio Canal and The Baltimore and Ohio Rail Road.² On the Maryland bank of the Potomac, just above Georgetown, President John Quincy Adams turned a ceremonial spadeful of earth for the Canal, striking a root on his first try. At the corner of Pratt and

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¹ Independence Day, 1817, had been selected as the day for ceremonially commencing the Erie Canal in New York and its success had set a fashion which only the foolhardy would have dared to flaunt.

² "Rail road" was originally written as two separate words and so appears in the B. & O. charter, but general usage has since combined them and the designation "railroad" will be used in this article.

Amity Streets, in Baltimore, Charles Carroll of Carrollton, sole surviving signer of the Declaration of Independence, laid the Railroad's cornerstone.⁸

John Quincy Adams was in fine fettle. His zeal did not carry him to the point of investing in the Canal, but he assured his listeners that

"The wonders of the ancient world, the Pyramids of Egypt, The Collosus of Rhodes, the Temple of Ephesus, the Mausoleum of Artemisia, the Wall of China, sink into insignificance before it."⁴

Charles Carroll was more circumspect, as befitted a revered patriarch in his ninetieth year, but said "I consider this among the most important acts of my life, second only to my signing of the Declaration of Independence, if second even to that."⁵ And Philip E. Thomas, the Railroad's President, painted a glowing picture in a speech that had been ghost-written for the occasion by John H. B. Latrobe, a rising young Baltimore lawyer destined to serve as counsel for the B. & O. for sixty-four years.⁶

Nothing in the high-flown oratory mentioned that the two enterprises were deadly enemies and were already locked in litigation. But this was the fact. Both projects planned to use the left or Maryland bank of the Potomac River and in some places there was not room for both. At Point of Rocks the river cuts through Catoctin Mountain and between there and Harpers Ferry there are other rocky passes. If either project were permitted to preempt the available space it might block off the other. In fact, each hoped to do this very thing. The Canal claimed priority under Acts of the Maryland and Virginia legislatures; the Railroad by virtue of being the first on the ground and the first to obtain contracts and conveyances from the local landowners.

⁸The use of a cornerstone furnishes quaint proof of the novelty of the railroad. In those days no public structure of consequence would have seemed quite respectable without a cornerstone, and no cornerstone would have been considered genuine unless laid by a Masonic Lodge in full regalia. This posed a problem for the B. & O., as Charles Carroll was not a Mason, but a gracious compromise permitted him to go through the motions and to leave the actual tool work to the Masonic officers.

⁴HARLOW (ALVIN F.), *OLD TOWPATHS* (1926) 234.

⁵1 HUNGERFORD (EDWARD), *THE STORY OF THE BALTIMORE & OHIO RAILROAD* (1928) 44.

⁶John H. B. Latrobe is the subject of a fascinating biography, published in 1917 by John E. Semmes, which is noted so often hereafter that it will be referred to merely as Semmes.

This was more than a mere struggle between corporate enterprises. The Canal would channel western commerce to Georgetown and Alexandria, then growing seaports and rivals of Baltimore, whereas the Railroad constituted Baltimore's chief hope for western trade. The completion of the Erie Canal in 1825 had put New York ahead of all tide-water cities, and Philadelphia was now working on a canal project of its own. Maryland and Virginia could not afford to remain idle.

The Potomac Valley as an Early Trade Route

Many years earlier, Thomas Cresap, great Maryland frontiersman, had learned from the Indians that Wills Creek afforded an easy route to the Ohio and had established a fortified home where the Creek flows into the Potomac. This was a natural focal point for exploration and travel and later became the base for Braddock's expedition.

In 1748 Cresap visited Williamsburg, the colonial capital of Virginia, and his enthusiasm led to the organization of the Ohio Company, called "the most powerful of all pre-Revolutionary trade corporations and the first incorporated effort to reach the great west."⁷ Lawrence and Augustine Washington were among its stockholders and their younger brother George, then sixteen, became an active explorer of the region and a frequent guest of Cresap. The route used by the Ohio Company ran by road from Alexandria to Philae, on the Virginia side of the Great Falls of the Potomac, then up the river to what is now Cumberland and from there to the Monongahela by way of Wills Creek and the Nemaquin Path, named for the Indian chief who helped develop it.

In those early days, water transport above tidewater was largely one-way and consisted chiefly of compact items such as furs and whiskey. The farmers in the Shenandoah and other inland valleys found it advantageous to convert their grain into spirits for easier storage, shipment and marketability, and to bring it down the river on shallow draft boats or rafts which were broken up at tidewater and sold for lumber or firewood. This practice not only produced an abundance of excellent, low cost whiskey⁸ but also fostered distilling talents that have lasted to this day.

⁷ BACON-FOSTER (MRS. CORRA), *EARLY CHAPTERS IN THE DEVELOPMENT OF THE POTOMAC ROUTE TO THE WEST* (Columbia Hist. Soc., 1912) 8.

⁸ During the period with which this article is primarily concerned (1828-1832) whiskey was selling in Baltimore for around 30¢ a gallon.

Increased use of the Potomac Valley as a trade route intensified the need for improving the river as a waterway, but for a long time this was blocked by sectional differences. Legislative action by Maryland was essential, due to the fact that its boundary extended to the southern shore of the Potomac and accordingly included the entire river, but there was opposition from sections of the State which would not be benefited. This situation was described by George Washington in a letter of March 29, 1784 to Thomas Jefferson, as follows:

“More than ten years ago . . . I became a principal mover of a bill to empower a number of subscribers to undertake at their own expense, on conditions which were expressed, the extension of the navigation from tide water to Will's Creek, about one hundred and fifty miles; . . . The plan . . . would have been in an excellent way, had it not been for the difficulties, which were met with in the Maryland Assembly from the opposition which was given (according to report) by the Baltimore merchants, who were alarmed, and perhaps not without cause, at the consequence of water transportation to Georgetown of the produce, which usually came to their market by land.”⁹

The end of the Revolution released new energies for westward expansion and made it imperative to develop commercial ties which would unite the new settlements with the seaboard. “Let us bind these people to us by a chain that can never be broken” argued Washington,¹⁰ and with characteristic energy he set out to do so. As a result of his efforts the Patowmack Company¹¹ was chartered in 1784 for the purpose of making the River navigable and commissioners were appointed by Maryland and Virginia to discuss problems involving its joint use. This meeting, at which Maryland was represented by Samuel Chase, Daniel of Saint Thomas Jenifer, and Thomas Stone, resulted in the Mt. Vernon Compact of 1785.¹² It also had other consequences.

As the Potomac-Monongahela route to the West led through Pennsylvania its participation was necessary.

⁹ BACON-FOSTER, *EARLY CHAPTERS IN THE DEVELOPMENT OF THE PATOMAC ROUTE TO THE WEST* (1912) 39.

¹⁰ FISKE (JOHN), *THE CRITICAL PERIOD OF AMERICAN HISTORY* (1888) 213.

¹¹ This spelling is used in the original legislation creating the Company, as see *MD. LAWS 1784*, Ch. 33, but its name and that of the River later came to be spelled “Potomac”.

¹² *MD. LAWS 1785*, Ch. 1.

Delaware's cooperation was also deemed desirable, in view of the projected canal between the Delaware River and Chesapeake Bay. To the farsighted Madison this dangled opportunity and in his recommendation to the Virginia Legislature he said:

“[M]ight it not be well enough, if we are going to have such a conference, to invite commissioners from all the thirteen states to attend it?”¹³

From the resulting meeting at Annapolis in September, 1786 came the call for the Constitutional Convention at Philadelphia.

The charter of the Potomac Company authorized it “to cut such canals and erect such locks and perform such other works as they¹⁴ shall judge necessary for opening, improving and extending the navigation of the said river above tide-water to the highest part of the north branch to which navigation can be extended.” The Company was authorized to use both sides of the river for its works and, on condition that it “shall make the river well capable of being navigated in dry seasons by vessels drawing one foot of water”, was authorized to charge tolls. It was provided that it should construct canals at Great Falls and Little Falls and it was required on pain of forfeiture to complete navigation between Cumberland and tidewater within ten years.

The only canals specified were at Great Falls and Little Falls. At small falls or rapids, such as those near Harpers Ferry and Seneca, it was planned to clear sluiceways up which boats could be pulled either from the shore or by means of chains or cables anchored and buoyed in the river.

George Washington was the first president of the Potomac Company and devoted so much of his time and interest to the construction of locks on the Virginia side of Great Falls that it has been said that

“With the exception of Mt. Vernon this spot is more intimately associated with Washington's everyday life than any other,”¹⁵

¹³ FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY* (1888) 215.

¹⁴ In referring to corporations, it was then customary to use language descriptive of aggregations of people, the personal pronoun “they” or “their” being used rather than the impersonal “it” or “its”. Somewhat more curiously, the opinions in the Great Case occasionally apply a feminine pronoun to the Canal Company, perhaps to give it a nautical flavor; see, for example, Judge Archer's opinion at 4 G. & J. 165 where he refers to the C. & O.'s act of incorporation as “the law which created her”.

¹⁵ BACON-FOSTER, *EARLY CHAPTERS IN THE DEVELOPMENT OF THE POTOMAC ROUTE TO THE WEST* (1902) 152.

These locks were a monumental task, cut in part through solid rock. They were opened in 1802 and remained in continuous use until 1830. Although now in ruins and difficult to find among the underbrush, it has been said that "the locks at the Great Falls were considered as among the great engineering feats of the eighteenth century and were commented upon by every scientific publication in Europe and the Americas."¹⁶

The time allowed the Potomac Company to complete the navigability of the river was extended by various legislative Acts until 1820. By this time it had expended over \$650,000 without fully achieving the conditions of its charter and the Governors of Virginia and Maryland were requested to appoint commissions of inquiry. The directors of the Company had also become discouraged and requested the Virginia Board of Public Works to have its engineer, Thomas Moore, re-examine the entire project. In a letter dated August 1, 1820 to John Mason, then President of the Company, Moore analyzed the situation in detail and recommended the construction of a continuous canal from Great Falls to Cumberland. He estimated that this would cost \$1,114,300 but pointed out that the level water of a canal would have great advantages over the bed of the river as a means of two-way transportation.

By this time the Erie Canal had been under construction for over three years and Moore's recommendation was so well received that the Virginia Board of Public Works requested him to make a detailed survey. He died before finishing but it was completed in January 1823 by Isaac Briggs who recommended a continuous canal all the way from the District of Columbia to Cumberland, at an estimated cost of \$2,000,000.

The Chesapeake and Ohio Canal Company

After much maneuvering and the calling of Canal Conventions to promote the project, the cooperation of the Federal government was obtained and a new Company was incorporated to build a canal, not merely to Cumberland, but all the way to the Ohio. It was to be a joint enterprise, chartered by the Legislatures of Virginia (January 27, 1824) and Maryland (January 31, 1825), with the assent of Congress (March 3, 1825) and of Pennsylvania (February 6, 1826), and was to succeed to the rights of the Potomac Company. As an initial step the U. S. Corps of

¹⁶ HARLOW, OLD TOWPATHS (1926) 23.

Engineers was directed to prepare detailed plans, but General Bernard's projected cost of \$8,000,000 to Cumberland seemed so astronomical that the promoters sought more optimistic estimates from James Geddes and Nathan S. Roberts, engineers for the Erie Canal. Their figure of \$4,500,000 was sufficiently soothing to permit the enterprise to proceed. The actual cost ultimately turned out to be \$11,000,000, but the more important point is that both sets of estimates and all legislation dependent upon them contemplated the use of the Maryland side of the river all the way from the District of Columbia to Cumberland.

The charter of the Canal Company was contingent on stock subscriptions of not less than \$1,500,000. This total was reached on Nov. 14, 1827, if the subscriptions of the District of Columbia cities of Alexandria, Georgetown and Washington could be counted, but it was clear that these municipalities did not have authority to purchase stock and Congress did not ratify the subscriptions until May 24, 1828. On June 20, 1828, the Company was officially organized by the election of a president and directors, and on August 15, 1828 the Potomac Company delivered a deed conveying all its property and rights to the Canal Company, as previously authorized by the Maryland and Virginia Legislatures.¹⁷

The Baltimore and Ohio Railroad Company

Business interests in Baltimore were not happy about the proposed new canal. Western trade had become progressively more important and Baltimore was keen to participate in it. Great hopes were placed on the new National Road from Cumberland to the West, but transportation by boat would be so much cheaper that Baltimore would be overshadowed by New York and any other seaports having direct access to a water route to the West. Pennsylvania was planning a canal system of its own, and the ports deriving the major benefit from a canal in the Potomac valley would be Georgetown and Alexandria.

The citizens of Baltimore held public meetings to discuss their dilemma and debated the merits of canals to connect the City with the Potomac or the Susquehanna. But it was apparent that a canal by either route, even if practicable, would leave Baltimore in a secondary position to Phila-

¹⁷ For a detailed history of the Canal and its background, see SANDERLIN (WALTER S.), *THE GREAT NATIONAL PROJECT* (1946).

delphia on the north and to the cities of the District of Columbia on the south.

At about this time John Eager Howard, hero of the Revolution and owner of Belvedere, entertained friends at dinner to hear Evan Thomas tell of his recent travels in England. What had most impressed Mr. Thomas were the new-fangled roads on which the ingenious British hauled coal from their mines. By placing cars on iron rails, horses could pull fantastic loads. He was so interested that he had made a special study of the Stockton & Darlington Rail Road and was able to describe it in detail.¹⁸

Mr. Thomas' enthusiasm was infectious. It was taken for granted that whatever the English could do Americans could do better, and soaring imaginations easily surmounted such obstacles as mountains and rivers. The talk spread and on February 2, 1827 a select group met to discuss the matter at the home of Mr. George Brown, banker son of Alexander Brown. This in turn led to a larger meeting ten days later, formally called "to take under consideration the best means of restoring to the City of Baltimore that portion of the western trade which has recently been diverted from it." At this meeting a committee was appointed to report on the practicability of a railroad from Baltimore to the Ohio. It reported a week later and a further committee of twenty-five headed by Charles Carroll of Carrollton, was directed to make application to the Maryland Legislature for the creation of a corporation.¹⁹ The charter of The Baltimore and Ohio Rail Road Company was drafted by John V. L. McMahon²⁰ and was enacted into law on February 28, 1827, less than four weeks after the first meeting in Mr. Brown's house. There were no flies on our forbears.²¹

¹⁸ SEMMES, 321-322.

¹⁹ For further details as to these matters, see 1 HUNGERFORD, *THE STORY OF THE BALTIMORE AND OHIO RAILROAD* (1928), *circa* 18-27.

²⁰ A brilliant young attorney of Irish ancestry, born in Cumberland, Md. on October 18, 1800. He graduated from Princeton College at the head of his class in 1817 and served in the Maryland Legislature in 1823-4 and 1827-8. See MASON (JOHN THOMSON), *LIFE OF JOHN VAN LEAR MCMAHON* (1879).

²¹ RILEY (ELIHU S.), in *A HISTORY OF THE GENERAL ASSEMBLY OF MARYLAND* (1905) 334, tells the following story of the enactment of the Charter by the Legislature:

"It was through John V. L. McMahon's indefatigable efforts that the measures necessary to inaugurate the Baltimore and Ohio Railroad were passed. On one occasion the fates seemed against him. He had counted his supporters, and had found that he had just the number of votes required to pass the bill if he could hold his forces together. In the number of his adherents were several Eastern Shore members. If the steamer Maryland came on time, they would go home and the bill would be lost; if she did not, the members would remain and the

The charter was contingent on minimum stock subscriptions of \$1,000,000, but the entire \$4,000,000 authorized by the charter was immediately over-subscribed. \$3,678,000 was taken in Baltimore alone, exclusive of \$500,000 pledged by the City Government, and shares had to be pro-rated. On April 24, 1827 the Company was organized by the election of a president, a treasurer and twelve directors.

The Race for the River

The original plans for the Railroad contemplated level tracks, without grade except where crossing mountains. There, inclined planes would be constructed, with stationary engines to pull the cars up one side and let them down the other. Just such an arrangement had been proposed for the Pennsylvania canal between Harrisburg and Pittsburgh and was to be in actual operation for many years at Hollidaysburg, Pa., hauling boats over the watershed.²²

At about this time, in England, George Stephenson invented a steam engine on wheels that made it practicable to pull railroad cars up mild grades. This, plus the expense of the original plan, led the B. & O. engineers to shift to a continuous, graded route and this in turn required them to follow river valleys into and through the mountains. The Potomac was the obvious choice.

In making this selection the Railroad was fully aware of the plans for the C. & O. Canal. The B. & O.'s President, Mr. Phillip E. Thomas, had been a promoter of the Canal Company and a commissioner to obtain subscriptions to its stock. By the end of 1827, if not before, it was obvious that the two projects would conflict and it became desirable for the Railroad to seek specific legislative support. Accordingly, on March 3, 1828 the Maryland Legislature was induced to subscribe for 5,000 shares of B. & O. stock on the express condition that the Railroad locate its route so as to strike the Potomac at some point between the mouth of

bill would pass. The steamer, therefore, must not come on her scheduled time. Captain William Taylor, a warm friend of McMahon's, was the master of the good steamer Maryland. To him McMahon stated the situation, and said to him 'the Maryland must not make that trip.' 'Why', exclaimed the excited captain, 'the boat's advertised to come at that time.' 'Well', said McMahon, 'I am a good friend of yours.' 'The boat', concluded Captain Taylor, '*can get her engines out of order, or some thing like that,*' and this she conveniently did, for the Maryland never made that trip, the Eastern Shore members remained in Annapolis, and McMahon's bill passed!"

²² For a description of this fabulous project, see HARLOW. OLD TOWPATHS (1926) 102-3.

the Monocacy and the Town of Cumberland and go through Frederick, Washington and Allegany Counties. In actual fact, the plans adopted pursuant to the sanction of this Act brought the Railroad to the Potomac just below Point of Rocks and duplicated the route of the proposed Canal from there to Cumberland.

Later, John H. B. Latrobe, one of the attorneys for the Railroad, wrote:

“The route preferred was up the valley of the Potomac, and as it was known that this would be contested by the Chesapeake & Ohio Canal Company, it was determined to obtain at once the right of way. I was employed for this between the Point of Rocks and Williamsport and Jno. V. L. McMahon between Williamsport and Cumberland. * * * I did the work sufficiently well to lay the foundation for the great case of the canal and railroad reported in 4th Gill & Johnson, page 1. I returned to Baltimore some time in June and in time to write the address delivered by Mr. Thomas at the laying of the cornerstone of the road on July 4, 1828.”²³

Mr. Latrobe had distinguished associates. On his first trip to acquire rights of way he was accompanied by Stephen H. Long, Colonel in the U. S. Corps of Engineers and famous Rocky Mountain explorer, who had been the first white man to climb Pike's Peak, and for whom Long's Peak, Colorado, had been named. On a later trip Mr. Latrobe was accompanied by Lt. Isaac Ridgeway Trimble, also of the Corps of Engineers. Then a Virginian but later a Baltimorean, he became a General in the Confederate Army and lost a leg in Pickett's charge at Gettysburg. Their work was not made harder by the fact that the Corps of Engineers had already surveyed the same route for the Canal.

The Battle Moves to Court

During this period the Canal Company was still struggling to get organized. But it, too, recognized the crucial importance of the river passes and on June 10, 1828, both the Canal Company and the Potomac Company applied to the County Court of Washington County²⁴ to enjoin the

²³ SEMMES, 333-5.

²⁴ The disputed river passes were in Frederick and Washington Counties.

Railroad from acquiring land or rights of way along the projected route of the canal. On the basis of the facts alleged, County Court Judge Thomas Buchanan granted a preliminary injunction.

The Railroad did not answer this suit but instead, on June 23, 24 and 25, 1828, brought a series of three independent proceedings before the Chancellor of Maryland, a court no longer in existence but then the highest paid judicial office in the State and occupied by Theodorick Bland, one of the most extraordinary personalities ever to adorn the Maryland bench.²⁵ In these proceedings the Railroad alleged that it was merely carrying out the purposes of its charter and that the Canal Company and the Potomac Company, without legal justification, were attempting to obstruct its progress. The first suit sought to enjoin interference with contract rights acquired by the Railroad from local landowners; the second sought to enjoin interference with condemnation proceedings; and the third sought to protect such additional rights as the Railroad had acquired by being the first to physically locate its projected route on the ground.

The reason for bringing three separate suits on successive days is not clear, but one suspects it must have been a great relief to the Chancellor when the fourth day ended without an additional filing. Waiting for a second shoe is bad enough. In any event, the Chancellor merely consolidated all three suits into a single proceeding.

Chancellor Bland, a Virginian by birth, was one of the most scholarly of men. He was also one of the most pedantic, and it was not until the end of 1831 that he got around to rendering a final decision in the case. This delay, however, was not without encouragement from the parties.

The Railroad could afford to play a waiting game. The major part of its early traffic would come from sources short of the Potomac, such as Ellicott's Mills and Frederick, and the further extension of its line would be rela-

²⁵ There is an interesting biographical sketch of Chancellor Bland by William L. Marbury in 10 Proceedings of the Maryland Bar Assn. (1905) 137-148. This was in part based on notes prepared by Francis Neal Parke, which give additional details about the Chancellor and are preserved in typewritten form in the Maryland Room of the Enoch Pratt Library in Baltimore. Before becoming Chancellor, Theodorick Bland had been United States District Judge for the District of Maryland; perhaps of greater interest for our present purposes, he had been one of the Commissioners appointed by the Maryland Legislature in 1822 to develop plans for a canal from Baltimore to the Susquehanna River and had made an extensive study of canals, as to which see 3 SCHARF (THOMAS), HISTORY OF MARYLAND (1879) 158.

tively unproductive until it could get all the way to Cumberland and to the Ohio. Furthermore, it was well aware that the Canal Company's charter required it to complete 100 miles of canal within five years on pain of forfeiture. Strangulation would be as good a way to dispose of the Canal as any other.

The Canal Company, on the other hand, realized that its position would be far stronger if it were a going concern of earth and water, firmly rooted on the Maryland side of the River, rather than a mere paper plan. This required time. It had difficult construction problems and, in addition, suffered the handicaps inherent in public enterprise. Over 80% of its stock was government-owned, and its President, Charles F. Mercer, doubled in brass as Chairman of the Highways and Canals Committee of the National House of Representatives.

Actually, before the litigation was finally decided, both Canal and Railroad had reached Point of Rocks and were brandishing shovels as well as legal documents at each other. And by this time a new issue had developed. Originally, it had been the design of the Railroad to use horses to haul its cars, but now there were fire-belching behemoths, like Peter Cooper's Tom Thumb,²⁶ huffing and puffing along its tracks. It was no longer merely a matter of how to squeeze a canal and a railroad into the narrow passes of the Potomac River. It was a matter of mule versus monster, and the Canal was insistent that the Railroad build a high board fence to protect the sensitivities of the gentle beasts on its towpath.

The Canal Company's answer in the Court of Chancery was not filed until May 16, 1829, eleven months after the suit had started, but it was monumental in scope and length. The historical development of waterway projects in the Potomac Valley was traced in detail, with thorough documentation in the form of charters, Legislative reports, proceedings of the Canal Conventions, engineering surveys, profiles, estimates, subscription books, etc., all designed to show "the notoriety of the public and early dedication of the ground in question to the ends and purposes of a canal supplied by the waters of the Potomac and its tributaries." In addition, the Canal Company pointed with pain to the alleged machinations of the Railroad's promoters. According to the answer, they had "masked" their true intentions from the Maryland Legislature by asserting their deter-

²⁶ A full page picture of "Tom Thumb" is included in I ANDREWS (MATTHEW PAGE), *TERCENTENARY HISTORY OF MARYLAND* (1925) opposite p. 748.

mination to go straight across the mountains by means of inclined planes and stationary engines; they had sent out parties to acquire lands which they knew to be needed for the Canal, doing this with precipitate haste like "a partizan corps . . . on the flank of an enemy";²⁷ further, they had "borrowed at public expense" the very engineers who had been engaged in making surveys for the Canal. For these and other reasons the Chancellor was urged to dissolve the injunction which he had temporarily granted to keep the matter in status quo.

In July and August, 1829, Chancellor Bland not only listened to counsel in the heat of midsummer Annapolis but also permitted the filing of supplemental arguments in writing.²⁸ That of William Wirt, for the Canal, was considered a classic and was printed for distribution to the public. A Marylander by birth and Swiss by ancestry, he was one of the leading lawyers and orators of the day and was then serving as Attorney General of the United States.²⁹ He was indefatigable in preparation and John H. B. Latrobe tells of seeing him through the open window of his hotel room, in shirtsleeves and by candlelight, revising and recopying his argument from supper time until far into the morning.³⁰ Mr. Latrobe, who was on the other side, must have viewed such energy with disapprobation.

Mr. Wirt's eloquence did not prevail. Roger Brooke Taney and Reverdy Johnson carried the day for the Railroad and the motion to dissolve the injunction was denied on September 24, 1829. Chancellor Bland saw no necessary inconsistency between this proceeding and the prior suit

²⁷ 4 G. & J. 47.

²⁸ This was before written briefs became customary. They were then rare, even in appellate procedure. See BOND (CARROLL T.), *THE COURT OF APPEALS OF MARYLAND* (1928) 82.

²⁹ He had the unique distinction of serving as U. S. Attorney General for twelve years, during the full terms of James Monroe and John Quincy Adams. He also had the distinction of being the first person nominated for the presidency by a national political convention, having been chosen by the Anti-Masonic party at its convention in Baltimore in 1831. In his acceptance speech he notified the convention that he had himself been a Mason but he remained the Party's candidate anyway. The election was won by Andrew Jackson.

³⁰ SEMMES, 201-202. JUDGE BOND, *IN THE COURT OF APPEALS OF MARYLAND* (1928) 124, sets out this story but says "Mr. Latrobe's recollections seem to be confused here; the Canal Company case was argued in December and January." The confusion was not Mr. Latrobe's. The argument referred to was that before the Chancellor in July and August, 1829, not the later argument before the Court of Appeals in which Mr. Wirt did not participate. In a letter to his friend Judge Carr, of Richmond, written at Annapolis on August 3, 1829, Mr. Wirt told of his participation in the argument before the Chancellor and remarked on the hot weather. See 2 KENNEDY (JOHN P.), *LIFE OF WILLIAM WIRT* (1850) 235.

in the Washington County Court. That case involved the assertion by the Canal Company of a general right of priority whereas the Railroad was merely seeking to preserve the status quo with respect to specific contract and other rights.³¹ Since both the Canal Company and the Railroad Company were authorized to acquire land for their corporate purposes, he felt that the race should go to the diligent. "Where two or more are allowed, by law, to purchase and acquire a title to lands . . . he who does the first requisite act for that purpose, shall not be hindered in his further progress; . . ."³²

The Canal Company's argument for priority on the basis of historical background, surveys, etc. involved "drawing consequences from consequence and piling notice upon notice, to a great extent and height indeed." Furthermore, a court should deal with facts, not with mere reports, pamphlets, convention proceedings, etc. Accordingly, commissions to take evidence were issued, to determine on the ground which Company was entitled to priority and the extent to which it could proceed without interference with the other.

The last of the commissions to take evidence was returned on May 27, 1831. On November 9 of that year the injunction against the Canal Company was made perpetual and it was required to pay the costs of the suit, including the expenses of the additional surveys ordered by the Court.

On this occasion the Chancellor's views were not set out in a written opinion. This was not from reticence. No one loved creative composition more than the Chancellor and he did not feel unduly trammelled by limitations of time or space, as illustrated by *Williams' Case*,³³ to which he devoted 3 years of time and 95 printed pages of opinion. To him an opinion was not merely a means of deciding a case; it was an opportunity to write a treatise and he did just that, sometimes dividing his subject into chapter headings as in a text book. The judges of the Court of Appeals

³¹ The conflict of jurisdiction as between the Chancellor and the Circuit Court of Washington County was not discussed in the later opinions of the Court of Appeals. Apparently it was the view of that Court that any such issue had been waived by the Canal Company's answer, but it is interesting to note that the Chancellor did not base his opinion on this ground. In a report to the Maryland Legislature in 1831 the directors of the B. & O. stated that both parties preferred to have the proceedings handled in the Chancery Court in Annapolis rather than in the Circuit Court of Washington County.

³² 4 G. & J. 54.

³³ 3 Bl. Ch. 186 (1828).

took a jaundiced view of these lengthy masterpieces,⁸⁴ which was not mitigated by the fact that the Chancellor, though subordinate to them in the judicial hierarchy, drew a much larger salary. At one time, caustic comments cut the good Chancellor to the quick and he announced that henceforth he would merely decide cases without stating his reasons. This brought a clamor of protests, especially from those to whom the absence of opinions would make reversals more difficult, and the Legislature specified⁸⁵ that there should be a written opinion in every case in which there had been an argument. This provision remained in the law until 1957.⁸⁶

In our particular case, Chancellor Bland's failure to state his views was not because he had run out of texts but because the Court of Appeals beat him to the punch. They advanced the case out of order and heard arguments on the Canal Company's appeal in December, 1831, before the Chancellor had even gotten a fair start on writing his opinion. Then, adding insult to injury, they observed that they had not had the benefit of his arguments.

The Court of Appeals

At that time there were six judges on the Maryland Court of Appeals: Chief Judge John Buchanan, of Washington County; Stevenson Archer, of Harford; Thomas Beale Dorsey, of Anne Arundel; Richard Tilghman Earle, of Queen Anne's; William Bond Martin, of Dorchester; and John Stephen, of Prince George's. Two of them, Archer and Dorsey, later became Chief Judges. In those less formal days, judges and attorneys lodged together during Court sessions at Annapolis and in a case as protracted and important as this the lawyers necessarily gained some inkling as to how the judges would react. This would have been especially true in the present case. The litigation had originated in the County Court for Washington County over which Chief Judge Buchanan presided when doing circuit duty and the preliminary injunction of that Court, recognizing the Canal Company's general right of priority,

⁸⁴ The 214 appeals taken from his decisions resulted in 141 reversals. In *Warfield v. Owens*, 4 Gill 364, 375 (1846), Judge A. C. Magruder, who had been counsel for the Canal Company in the Great Case, said of Chancellor Bland, "being a man of great research and industry, and perhaps, rather over-anxious to find out what could not be found out; and what, if it could have been found out, would have been of no value to a chancellor, he chose to know all about it."

⁸⁵ MD. LAWS 1832, Ch. 302.

⁸⁶ MD. CODE (1951), Art. 15, § 209.

had been granted by Judge Thomas Buchanan, his older brother.³⁷ Furthermore, the judges held office on a sectional basis and the bitter sectional feelings engendered by the case would have made it difficult to completely repress or conceal any leanings they might have. In any event, both sides seem to have reached the conclusion that the judges would disagree. In the event of an even division, the Chancellor's decision would stand and the Railroad would win.

Then, toward the end of November, 1831, Judge Martin fell ill. By this time the Canal was faced with a serious time problem. It had less than two years within which to complete a hundred miles or forfeit its charter and the Railroad could probably block any extension by the Maryland Legislature. Whether this or an accurate guess as to the probable effect of Judge Martin's absence was responsible for the Canal Company's next move is uncertain, but in any event its counsel applied to the Court on December 7, 1831 to advance their appeal and hear it out of turn. The Railroad opposed this bitterly. Its senior counsel, Roger Brooke Taney, later Chief Justice of the United States, had recently been appointed U. S. Attorney General and would be unable to participate on such short notice. William Wirt, senior counsel for the Canal, was ill, but his unavailability did not deter the Canal Company; on the contrary, Wirt's absence helped to counter objections based on the absence of Taney.³⁸

On December 10 the Court advanced the case and set it for argument on December 19 (later changed to December 26).³⁹ Taney fumed as well he might. He was blocked not only from representing the Railroad in the biggest

³⁷The Buchanans came from Southern Maryland, Thomas having been born in 1768 and John in 1772. Their parents died while they were children and Thomas was brought up locally whereas John was sent away to school in Virginia. John studied law in Southern Maryland, entering practice in Anne Arundel and St. Mary's Counties but later moved to Hagerstown, Md. John studied law, first in the office of Judge Robert White, in Winchester, Va., and later in the office of Judge John Thompson Mason in Hagerstown, where the brothers were reunited. John was appointed to the bench in 1806 and Thomas in 1815. See SCHARF (THOMAS), *HISTORY OF WESTERN MARYLAND* (1882) 1115-6. See also, McSherry (James), *The Former Chief Judges of the Court of Appeals of Maryland*, 9 Proceedings of the Maryland Bar Assn. (1904) 118-120.

³⁸The motion to advance the appeal was heard on December 9, Walter Jones speaking for the Canal Company and Reverdy Johnson for the Railroad. Mr. Jones argued that the continued existence of the Canal Company was at stake.

³⁹Judge Martin was in Annapolis during this period and the minutes show him present at daily meetings of the Court through Saturday, December 17, although he had not been able to sit with the Court in hearing arguments after November 25.

case of the day but also from receiving the handsome fee that would go with it.

The choice of a successor was not too difficult. At that time Daniel Webster, Senator from Massachusetts, was at the height of his powers and was the most renowned appellate lawyer at the American Bar. The only question was whether his services could be secured. Mr. John H. B. Latrobe described the events as follows:

“ ‘When [the case] was before the Chancellor I had taken part in the argument with Mr. Taney and Mr. Reverdy Johnson. The argument before the Court of Appeals, however, required heavier metal than I could furnish in those days; and, but two counsel being permitted to speak on the same side, I was necessarily excluded after the employment of Mr. Webster in Mr. Taney’s place as senior counsel. Mr. Webster was staying in Baltimore at Mr. Hugh Birkhead’s when it was determined to retain him, and I was sent to him for that purpose. * * * He suggested that the time for adequate preparation was short, and made some difficulty about going into so heavy a case on such short notice, for I proposed he should set out with me for Annapolis the next day or the day after. When he found, however, that several days must elapse before the case would be reached, he agreed to take part in the argument, and accordingly on the following morning, we set out in company with Mr. William Gwynn, one of the company’s counsel, for the capital of the State. The journey was performed in a hack and pair through the melancholy country lying between Baltimore and Annapolis, and occupied the greater part of the day. I had taken it for granted that the case would form the staple of the conversation, but it was scarcely mentioned. Mr. Webster soon found that Mr. Gwynn was a humorist, besides being a lawyer, and knew almost all the persons that he did, and they fell into a talk that was kept up from the commencement of the journey to the end.’ ”⁴⁰

When they got to Annapolis, Mr. Latrobe and Mr. Webster were obliged to occupy the same room, laying the foundation for a lasting friendship. Mr. Latrobe later described Daniel Webster as not only a delightful companion but also “the greatest of all the great men with whom it

⁴⁰ SEMMES, 370-1.

has been my fortune to be associated or be acquainted."⁴¹ But one wonders what the Railroad got out of it. Speaking of their days together at Annapolis, waiting for the case to be heard, Mr. Latrobe wrote that:

"One would have thought that, as my mission was to cram Mr. Webster and his duty was to be crammed, the case to be argued would be our sole subject of conversation. On the contrary we but rarely spoke of it, after I had stated in a general way what had taken place before the Chancellor, and rehearsed as well as I could, from my notes, the argument of Messrs. Wirt and Jones."⁴²

The Great Case was argued before the Court of Appeals from December 26, 1831 through January 2, 1832, with time out only for Sunday, January 1. In those days the Court heard cases in a second floor room in the State House, where the only source of heat, other than counsel, was an open fire. As the judges sat with their backs to the windows, the draft must have been considerable and Judge Dorsey wore a black skull cap to protect his bald head. On severe days it was the custom of the judges to come down from their dais and gather round the fireplace⁴³ and one wonders whether they did so in the present case. The weather was cold but the attendance was large⁴⁴ and there is no report of anyone having been crowded into the fire. In those days, too, when expansive oratory was an accepted part of appellate technique, space was essential. It would be fantastic, for example, to envision a cramped or confined Daniel Webster.

The Canal Company was represented by Walter Jones, whom Mr. Latrobe termed "one of the cleverest lawyers in the United States",⁴⁵ and by Alexander C. Magruder, later a judge of the Court; the Railroad by Reverdy Johnson, recognized leader of the Maryland Bar, and Daniel Webster. In 1826 the Court of Appeals had ordered "that

⁴¹ SEMMES, 370.

⁴² SEMMES, 373.

⁴³ See BOND, *THE COURT OF APPEALS OF MARYLAND* (1928) 113-4, 128.

⁴⁴ According to the *Baltimore American and Commercial Daily Advertiser*, almost every member of each house of the Legislature was in Court every day of the argument, the legislative session having convened on December 26.

⁴⁵ SEMMES, 369. Mr. Latrobe describes him as "a small spare man of insignificant appearance, with plain features, except his eyes, which for piercing intelligence and shrewdness of expression I have never seen surpassed."

henceforth not more than two counsel for either party shall argue any case in this Court, and that in no case shall a speech of more than six hours duration be permitted." This was considered very restrictive, but notwithstanding this rule, the arguments in the Great Case lasted seven days.

Stripped of adornment and reduced to the lowest common denominator, the major points were as follows:

1. On what dates did the parties obtain their rights? The Canal Company charter was enacted by Virginia in 1824 and was confirmed by the Maryland Legislature and by Congress in 1825, but was conditioned, among other things, upon minimum stock subscriptions of \$1,500,000. This minimum was reached on November 14, 1827, if the subscriptions of the three District of Columbia cities, Alexandria, Georgetown and Washington, could be counted, but they lacked specific authority to subscribe for stock and this authority was not granted to them by Congress until May 24, 1828. Did this operate as a ratification and relate back to 1827, or were the subscriptions ineffective until May 1828? In any event, the Canal Company was not fully organized by the election of officers and directors until June, 1828.

The Railroad Company charter was enacted by Maryland on February 28, 1827, its stock was fully subscribed by March 31, 1827, and its organization was completed by the election of officers and directors on April 28, 1827. However, the Maryland Legislature did not specifically authorize it to use the Maryland shore of the Potomac until March 3, 1828. Was this in time to supersede any previous authority conferred on the Canal Company?

The case proceeded on the basis that the claims of the parties were mutually exclusive. Each took the position that occupation of the River passes by the other would make its own further progress prohibitively expensive.

2. What rights were conferred by the Canal Company's charter? The document itself specified only the terminal points of the Canal and said nothing about which bank of the Potomac it should use. On the other hand, the detailed plans and estimates for the project contemplated its use of the Maryland side. Chancellor Bland had refused initially to consider this mass of extrinsic material. Was it properly before the Court and, if so, was it conclusive? Did the Canal Company have a prior right of selection? Or was it merely a matter of first come first served, as the Chancellor had held?

Furthermore, the charter had been adopted by both Virginia and Maryland, with the assent of Congress. Did this make it a "compact" within the meaning of Article 1, Section 10 of the U. S. Constitution, so that neither State could thereafter amend it without the consent of the other? And, if so, were the rights which it conferred effective from the date of the compact?

3. What rights did the Canal Company acquire from the Potomac Company? Did the Potomac Company have authority to construct a continuous canal? If so, did it have a prior right to select whatever ground it deemed necessary for that purpose? And if it had such rights, had they been lost through lapse of time or failure to meet conditions in its charter?

These were nice questions, on which the minds of men could differ and on which counsel could argue for as long as judges would listen and clients would pay. And millions of dollars hung on the outcome. For the Canal Company, loss of the case would probably mean extinction. For the Railroad, it would at the very least require tunnels, bridges, and the selection of a new route, plus the continued existence of a deadly rival. Both enterprises felt that they were fighting for their lives.

The arguments were completed on January 2, 1832 and the next day Daniel Webster wrote to a friend:

"You will be glad to know that I am safe back from Annapolis; arrived at sunset this evening, having come across the country and not around by way of Baltimore. We were seven days, all of us, arguing our cause; I used only part of one. It is not yet decided, though we left the judges there, and shall know in a day or two. * * * The chances of decision are thought to be about even; I incline to think they preponderate a little in our favor.'"⁴⁶

On January 4 the Court announced its decision. The Judges divided, three to two, Buchanan, Earle, and Stephen in favor of the Canal, Archer and Dorsey in favor of the Railroad. The Chancellor was reversed and the Railroad's bills were dismissed.

Roger Brooke Taney was bitter and wrote to Mr. Latrobe on January 6, 1832:

⁴⁶ Letter dated January 3, 1832 to William Paige, quoted in BOND. *THE COURT OF APPEALS OF MARYLAND* (1928) 120-1.

“The news of our defeat reached here on Wednesday night by express, and it is difficult to write to you on the subject without saying what I think about the conduct of the three judges who, it now appears, were determined to decide the case against us and resolved that they should do it, while, owing to the absence of one of the judges, the power remained in their hands.’ ”⁴⁷

Benjamin C. Howard, one of the original organizers of the Railroad and a member of Congress,⁴⁸ wrote:

“That said Potomac interest . . . has upon the final struggle proved too strong even in the Temple of Justice, into which prejudice has crept, hiding itself beneath the sacred ermine you must be strangled, or to use a modern term “burked,” that your body may be sold after life is extinct.’ ”⁴⁹

The Baltimore American — Commercial Daily Advertiser took a more diplomatic view. In an editorial on January 7 it urged the Legislature to authorize a rehearing in the case, stating:

“The Court of Appeals consists of six judges, all of whom possess a high and justly merited reputation for integrity and legal information — and each of them is truly estimable for his personal worth and amiable character — no suspicion can therefore attach to any of them, of being influenced by any improper motive in the opinion which he gave in deciding the question. It is not, however, inconsistent with the highest respect for any of the judges to suppose or believe him mistaken in his judgment — for in the present instance the three judges who decided the case as being a majority of those present, entertained and pronounced an opinion which is believed to be erroneous by the other

⁴⁷ SEMMES, 344.

⁴⁸ He was appointed Reporter of the Supreme Court of the United States in 1843, by Chief Justice Roger Brooke Taney, and gave his name to 24 volumes of its reports. He resigned in 1860 to become a candidate for Governor of Maryland.

⁴⁹ SEMMES, 346. Mr. Latrobe comments on this letter:

“The word ‘burke’ must have just been coined, for it grew out of the crimes of one William Burke who was hanged in 1829. Burke had been accustomed to sell bodies to a college for dissection. Not satisfied with disposing of the bodies of those who died from natural causes, he obtained subjects by murder, adopting a method of killing that would show no outward sign of the cause of death.”

two judges, equally respectable for integrity and information — and by the Chancellor who is as highly and justly esteemed for integrity and legal information as any of the judges.

“If all the six judges had been on the bench, as the constitution contemplated, and only three of them had entertained an opinion different from that of the Chancellor — the decision of the Chancery Court must have been affirmed — and it is well known that Judge Martin, who was unable from severe indisposition to take his seat in the Court, although in Annapolis attending for that purpose — had objected to the case being tried as it was out of the usual course, during his absence.”

Posterity has been kinder to the Court than some of the above expressions would indicate,⁵⁰ and certainly the judges themselves gave no evidence of having arrived at a snap or unsupported judgment. The opinions which they filed during the June term, 1832, were closely reasoned and went into the matter in vast detail, Chief Judge Buchanan, for the majority, taking 93 printed pages, Judge Archer 60, and Judge Dorsey 48.

Chief Judge Buchanan stated the issue as “whether the Chesapeake and Ohio Canal Company, has a priority of right, in the choice or selection of ground for the route and site of the canal in the valley of the Potomac.”⁵¹ Together with Earle and Stephen, JJ., he held that it did, for two principal reasons:

First, the Potomac Company was entitled to priority and the Canal Company had succeeded to its rights.

Second, the legislation chartering the Canal Company constituted a compact which would be impaired by the granting of any inconsistent rights to the Railroad.

Although the Potomac Company had been formed for the purpose of making the river navigable, it had been

⁵⁰ Judge Bond, for example, wrote, “The judges of that era made an able court, and, in the estimation of the bar, gave it a high position in the country * * * The judges . . . were not only lawyers of ability; they were leading men of their time, . . .” BOND, THE COURT OF APPEALS OF MARYLAND (1928) 116

⁵¹ 4 G. & J. 86.

given the specific power to cut canals and a continuous canal would be an effective way of achieving navigability. Lapse of time and failure to meet charter requirements could not be attacked collaterally but could be questioned only in a direct action by the State of incorporation; both Virginia and Maryland had affirmatively recognized the continued existence of the Potomac Company's rights and had expressly provided for their assignment to the Canal Company.

Whether the charter of the Canal Company constituted a compact was a matter of substance, not form. Nor was it material to determine whether Congress, in giving its assent, was acting as the legislature of the District of Columbia; its action in the present matter satisfied the Constitutional requirement as to compacts in any event. As the rights created by this compact antedated those of the Railroad, they were entitled to priority.

The dissenters met these issues head on, denying that the Potomac Company would have had authority to construct a continuous canal and ridiculing the conclusion that the Canal Company charter was intended to be a compact. In retrospect, the dissenting views seem more realistic, but no one reading the opinions could question the sincerity of either side.

Judge Dorsey's opinion, however, presents an enigma. He seems full of repressed indignation. His arguments are so close to those of Judge Archer that one wonders why they did not join together. But where Archer is cool and analytical, Dorsey is vehement or sarcastic. It is as if he had reached the boiling point and simply had to blow off steam.

Of particular interest is his pain at the advancement of the case, out of regular order. In the nature of things, Judge Dorsey would have been familiar with Judge Martin's views; if not before argument, at least before the filing of the opinions. Accordingly, his indignation lends color to the intimations that Judge Martin was favorably inclined to the contentions of the Railroad.

But it is customary for disappointed howls to emanate from defeated litigants. Many grains of salt should be applied to the post-mortem comments of Messrs. Taney and Howard. Shortly after the argument, Daniel Webster had written, "The chances of decision are thought to be even; I incline to think they preponderate a little in our favor". It is obvious that at the time of argument, counsel

for the Railroad did not entertain any notion that the case was already stacked against them.

And so ended the Great Case, for the decision was not appealed.⁵²

Aftermath

While the case was pending, the Canal, to which time was vital, had suggested joint construction through the disputed passes but had been rebuffed by the Railroad. Now a like proposal by the Railroad was rejected by the Canal, even though the Railroad offered to pay the entire bill. Finally, pressure from the Maryland Legislature forced a compromise.⁵³ The Canal Company undertook to build both railroad and canal from Point of Rocks to Harpers Ferry, and the Railroad agreed to subscribe for \$250,000 of Canal Company stock. In addition the Railroad agreed not to use the Maryland side of the River above Harpers Ferry until the Canal had been completed all the way to Cumberland (or before 1840, if the Canal had not been completed by that time).

As a result, the Railroad was forced to bridge the River at Harpers Ferry and to proceed up the Virginia side from there to Cumberland. This proved a boon, described by Mr. Latrobe as follows:

“The Virginia side of the Potomac is mountainous and the tracks were laid a considerable distance above the river bed. While it is true that the bridge at Harpers Ferry has been washed away on one occasion, the location of the Rail Road has saved it from being destroyed by great freshets, as has been the fate of the canal on several occasions, the waters of the Potomac covering the low ground on the Maryland side.”⁵⁴

A still more important consequence was to follow later.

⁵² Walter Jones, for the Canal, had argued as follows before the Court of Appeals: “If the case goes to the Supreme Court the only question there will be whether the State of Maryland has violated her contract, which is one that a State ought not lightly to send to a federal court to decide.” In the majority opinion (4 G. & J. 164), Buchanan, C.J. stated, without citing authority, that no appeal would lie from a decree of reversal. If the case had been remanded to the lower court for further proceedings, the decision of the United States Supreme Court in *Winn v. Jackson*, 12 Wheat 135 (U.S. 1827) would have compelled this view, but that decision would seem inapplicable where, as here, the plaintiff's case was dismissed. Counsel for the Railroad apparently acquiesced in the view that no appeal would lie; in any event, none was taken.

⁵³ Enacted into law as Chapter 291 of the LAWS of 1832. See HUNGERFORD, *THE STORY OF THE BALTIMORE & OHIO RAILROAD* (1928), *circa* 137-141.

⁵⁴ SEMMES, 345.

The Railroad's support of the Union during the Civil War, plus the natural desire of Richmond to develop the James River-Kanawha River route to the West, made it inevitable that the State of Virginia would do everything in its power to restrict and penalize the B. & O. after the War. This was a serious consideration for the Railroad and it also weighed heavily upon the new State of West Virginia which was substantially dependent upon the B. & O. for an outlet to the seaboard. Federal control of the area during the War gave the opportunity to remove the Railroad from Virginia and resulted in the creation of the so-called Eastern Panhandle.

There was no real question as to the loyalties of the people of Berkeley and Jefferson Counties, which lay at the northern end of the great Valley of Virginia. Economically and politically the area was part of the Valley and local sympathies were overwhelmingly with the slaveholding South. So clearly was this recognized that the initial hesitancy to place them in West Virginia was based upon the fear that their voters, if included in the new State, would have sufficient weight to defeat its proposed anti-slavery Constitution. Accordingly, they were excluded from the initial boundary that was to be in effect until the Constitution had been adopted, but were made a provisional part of the State, dependent upon the results of a plebiscite.

The votes to determine the status of these counties were held during the War, in 1862 and 1863, under the control of the Union Army. Known supporters of the South were disfranchised but Federal soldiers in the area were permitted to vote and, to make assurance doubly sure, employees of the Railroad were imported for the occasion. Thus was born the Eastern Panhandle of West Virginia and thus did the case of the Canal v. The Railroad play a significant part in altering the course of history and geography.⁵⁵

The Canal itself had a checkered career. It was not completed to Cumberland until 1850, some eight years behind the Railroad. It operated for almost three quarters of a century thereafter, but depletion of the coal mines in the Cumberland area cut off its major source of revenue and each recurring flood of the Potomac brought fresh disaster. Finally, the great flood of 1924 administered the coup de grace.

⁵⁵ As to the foregoing, see SUMMERS (FESTUS P.), *THE BALTIMORE AND OHIO IN THE CIVIL WAR* (1939) 182-201.

Near the turn of the century, the Railroad acquired the Canal through the foreclosure of mortgage bonds. In 1937 it was pledged to Reconstruction Finance Corporation as collateral on a loan to the B. & O. and in 1938 it was sold to the United States for two million dollars.⁵⁶ Hope springs eternal that it will be developed as a park and recreation area. Meanwhile, the Railroad continues on its course, but not in peace. One enemy is down but others have arisen to take its place.

⁵⁶ See SANDERLIN, *THE GREAT NATIONAL PROJECT* (1946) 265-281.