



THE BATTLE OF THE LAW BOOKS

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ALMOST ALL AMERICANS ARE FAMILIAR with such Civil War battles as Gettysburg, Antietam, Bull Run, Shiloh, Chickamauga, Chancellorsville, and Fredericksburg. However, most have never heard of an 1863 battle that was fought between Union and Confederate forces in Greenbrier County, located in what is now southeastern West Virginia. The battle was known alternatively as The Battle of White Sulphur Springs, The Battle of Dry Creek, The Battle of Rocky Gap, and The Battle of Howard's Creek.¹ The clash has one additional name: The Battle of the Law Books.²

During the 1830-31 legislative year, the Virginia General Assembly adopted three acts that reorganized the Commonwealth's judicial system. As part of the reorganization, the legislature determined that the Virginia Supreme Court of Appeals should, in addition to sitting in the state capitol (Richmond),

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¹ ERIC J. WITTENBERG, *THE BATTLE OF WHITE SULPHUR SPRINGS: AVERELL FAILS TO SECURE WEST VIRGINIA* 16 (2011).

² *Id.* It was not unusual for Civil War battles to have two or more names. Union troops tended to name battles after natural features, while Confederate soldiers usually named them after towns or buildings.



The Greenbrier County Courthouse (pictured here circa 1908) was built in 1837 and still stands (and serves) today at 912 Court Street North in Lewisburg, West Virginia.

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hold a session annually at Lewisburg in the county of Greenbrier,^[3] to commence on the first Monday of July, and to continue ninety days unless the business should be sooner dispatched . . . for the hearing and determining all causes brought to the court by appeal . . . from the courts of the counties lying on the western side of the Blue Ridge of mountains.⁴

It was further provided that “[t]here shall be two law libraries: one at Lewisburg, the other in the state capitol.”⁵

It is not known exactly what books were included in the Lewisburg collection, but the library did have extensive holdings of Virginia legal material. The librarian in Richmond was directed to “transmit to the librarian at Lewisburg⁶ a copy of every law book which may . . . be heretofore published for the commonwealth.”⁷

Shortly after the election of Republican Abraham Lincoln to the Presidency, seven states in the deep south departed from the Union.⁸ The Commonwealth of Virginia followed on April 17, 1861, after the firing on Fort Sumter and President Lincoln’s call for troops to suppress the rebellion.⁹ “[W]hen the Richmond convention voted for secession, the western

³ Greenbrier County was formed in 1778 out of Montgomery and Botetourt Counties. It was named for the Greenbrier River. HISTORICAL ACTIVITIES COMMITTEE OF THE NATIONAL SOCIETY OF THE COLONIAL DAMES OF AMERICA IN WEST VIRGINIA, *WEST VIRGINIA’S COUNTIES AND COURTHOUSES* 14 (1972). The County Seat, Lewisburg, was chartered in 1782 and named to honor General Andrew Lewis, a colonel in the Virginia Militia during the French and Indian War and a brigadier general in the Revolutionary War. DEBRA WARMUTH AND RICHARD WARMUTH, *LIVING MONUMENTS: THE COURTHOUSES OF WEST VIRGINIA* 6 (2013).

⁴ JOSEPH TATE, *DIGEST OF THE LAW OF VIRGINIA, WHICH ARE OF A PERMANENT CHARACTER AND GENERAL OPERATION* (2d ed.) 1 (1841).

⁵ *CODE OF VIRGINIA INCLUDING LEGISLATION TO THE YEAR 1860* (2d ed.) 59 (1860).

⁶ Clerk John A. North served as the librarian in Lewisburg from 1831 to 1862, assisted by Deputy Clerk Robert Alexander Richardson from approximately 1850 to 1860. Clerk Johnson Reynolds held the position of librarian from 1862 to 1863. E-mail from Gail Warren, Virginia State Law Librarian, to author (Aug. 19, 2019 3:57 p.m. EST) (on file with author).

⁷ 1849 Va. Acts 113.

⁸ South Carolina seceded in December 1860, followed by Mississippi, Alabama, Florida, Georgia, and Louisiana in January and February 1861. Texas left the Union the following month.

⁹ Arkansas, North Carolina, and Tennessee also seceded following the firing on Fort Sumter.

members crossed the mountains and assembled in Wheeling,” choosing to remain loyal to the Union.¹⁰

Historian William Alexander MacCorkle later wrote that “[t]he mountain people were, many of them, for the Union, while those in the large valleys were slaveholders, and joined the Confederacy.”¹¹ Eventually, the western portion of the State split off and was admitted to the Union as the State of West Virginia, the nation’s thirty-fifth state, on June 20, 1863.¹² Despite strong Confederate leanings, Greenbrier County was incorporated into the new state.¹³ However, well into 1863 Confederate troops continued to control certain portions of West Virginia along the Virginia border, including Greenbrier County.

This left the law library in Lewisburg in Confederate hands. In 1863, it was determined that “[t]he new government of West Virginia needed that full law library to help develop the judicial system for the nascent state.”¹⁴ On August 12, 1863, Brigadier General Benjamin Franklin Kelley, commander of the Department of West Virginia, issued orders to Brigadier General William W. Averell directing that “[t]he law library of the court of Appeals of Virginia will be taken and brought to Beverly. Great care will be exercised by the officer placed in charge that the books are not lost or

¹⁰ SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE – FORT SUMTER TO PERRYVILLE* 128 (1958).

¹¹ WILLIAM ALEXANDER MACCORKLE, *THE WHITE SULPHUR SPRINGS: THE TRADITIONS, HISTORY, AND SOCIAL LIFE OF THE GREENBRIER WHITE SULPHUR SPRINGS* 271 (1916).

¹² KATHLEEN JACKSON COSTANTINI, *AN ALLEGHENY TRIUMPH OF JUSTICE* 12 (2019). The West Virginia Constitution provided for the gradual emancipation of slaves, making it the last slave state admitted to the Union.

¹³ This was not the choosing of the citizens of Greenbrier County, the vast majority of whom wanted to remain a part of the Old Dominion. Greenbrier County did not cast a single vote for Abraham Lincoln in the 1860 election. WITTENBERG, *supra* note 1, at 16. Henry Mason Mathews of Lewisburg wrote the governor of Virginia on April 21, 1861, telling him “[t]here is but one sentiment here. Every man, young and old is ready to start in a minute’s warning to defend the old Commonwealth.” John A. Arbogast, *The Battle of Dry Creek*, 1 J. GREENBRIER HIST. SOC. 7, 10 (1968). More than 3,000 men from Greenbrier County ultimately fought in the Confederate army. *Id.*

¹⁴ WITTENBERG, *supra* note 1, at 17. Exactly who made this determination is unknown, but it was later noted that the judges were in need of the books, indicating that the orders might have come from the Court.

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injured.”¹⁵ A follow-up dispatch noted that “[t]he law library at Lewisburg was purchased for the western part of the State, and of course rightfully belongs to the new State of West Virginia. Our judges need it very much.”¹⁶ Averell was directed “to take ten days’ rations of hard bread, sugar, and coffee, and nothing else.”¹⁷

Averell’s command, the Fourth Separate Brigade, consisted of the 2nd West Virginia Mounted Infantry, the 3rd West Virginia Mounted Infantry, the 8th West Virginia Mounted Infantry, the 14th Pennsylvania Cavalry, and an Independent Calvary Battalion.¹⁸ The brigade numbered approximately 1,300 men.¹⁹

On August 5, 1863, Averell’s command departed Winchester, bound for Lewisburg by way of Petersburg, Franklin, Huntersville, Warm Springs, and White Sulphur Springs.²⁰ His men had only recently received their horses; many of the animals were still in need of horseshoes. The men were also low on ammunition. Nevertheless, the brigade made good progress as they headed south, avoiding large military forces while taking time to destroy Confederate saltpeter works near Franklin and at Covington.²¹

Opposing Averell’s men were Echols’s Brigade – the 22nd Virginia Infantry, the 45th Virginia Infantry, the 23rd Battalion Virginia Infantry, the 26th Battalion Virginia Infantry, and Chapman’s Company of Virginia Light Artillery – as well as the 8th Virginia Cavalry and the 37th Battalion Virginia Cavalry. This force – approximately 1,900 men – were under the command of Colonel George S. Patton.²²

Colonel Patton quickly realized the urgency of the situation. His “forces marched nearly nonstop for 24 hours, arriving about one mile east of White Sulphur Springs at 9:00 a.m. August 26.”²³ There they took up a

¹⁵ 1 ser. 1, pt. 1, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 39 (1890).

¹⁶ *Id.* at 40.

¹⁷ *Id.*

¹⁸ WITTENBERG, *supra* note 1, at 141.

¹⁹ *Id.*

²⁰ *Id.* at 41.

²¹ TIM MCKINNY, THE CIVIL WAR IN GREENBRIER COUNTY, WEST VIRGINIA 260-61 (2004).

²² Col. Patton was the grandfather of World War II General George S. Patton, Jr..

²³ *Id.* at 260.

position blocking the road to Lewisburg. The Confederate soldiers tore down “fences along the road to build a barricade as a rough defense against a cavalry charge.”²⁴ Averell’s forces arrived shortly thereafter – had Patton’s forces arrived an hour later, the Fourth Separate Brigade would have controlled the battlefield.

The outnumbered Union forces immediately attacked the Confederate line. They continued attacking throughout the day but were unable to breach or flank the Rebel position. “The determined rebels knew the center of their line must be held and fought stubbornly.”²⁵ That day the battle raged for nine hours.²⁶

Early on the morning of August 27, Averell’s men attempted two additional attacks on the Rebel lines, both of which were repulsed. Patton’s forces had been resupplied overnight, while Averell’s forces had received only limited supplies of ammunition.

Almost out of ammunition as well as food, the Union forces began their withdrawal by late morning. Averell had made every possible arrangement for a fast withdrawal, including having his ambulances loaded and his caissons and wagons placed in the proper order. He had also had his men cut down dozens of trees to block the road after they had passed.²⁷ Slow to follow because of the felled trees, Patton’s subordinates allowed most of the Union forces to make good their escape. By the evening of August 29, the Separate Brigade had linked up with the 10th West Virginia Infantry, which provided them with beef for the soldiers and fodder for the starving horses.

Casualties were heavy on both sides. The Union forces suffered 31 killed, 125 wounded, and 67 captured or missing. Confederate losses were 20 killed, 129 wounded, and 18 missing or captured. Captain Noyes Rand, who later fought in “some of the severest engagements between Grant and Lee,” wrote that “in all truth and candor, the Dry Creek Battle was surpassed by none of these in the fury of its fighting.”²⁸ The historian of one of

²⁴ Arbogast, *supra* note 13, at 10.

²⁵ MCKINNY, *supra* note 21, at 261.

²⁶ *Id.* at 263.

²⁷ *Id.* at 264.

²⁸ Arbogast, *supra* note 13, at 10.

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the artillery batteries agreed, writing that “[t]he Battle of Dry Creek was one of the hottest, for the numbers engaged, of the war.”²⁹

The units met again in combat on November 6, 1863, at the Battle of Droop Mountain.³⁰ That battle, a Union victory, drove Confederate troops from West Virginia.³¹

Averell went on to command Union troops in Virginia’s Shenandoah Valley.³² He was eventually relieved of command by General Phil Sheridan “for a lack of aggressiveness.”³³ Following the war he became a successful inventor. He died on February 3, 1900.

Patton later led Confederate troops in several engagements, including the Battle of New Market and the Battle of Cold Harbor, both Confederate victories. Severely wounded in the leg during the Third Battle of Winchester, Patton refused to have his leg amputated. He died on September 25, 1864, at the age of 32.³⁴

The site of the Battle of the Law Books has unfortunately not been preserved. A fast food restaurant and a shopping center now stand at the intersection of current-day US Route 60 and WV Route 92, once the center of the Confederate line.³⁵ Three battlefield monuments stand near the restaurant along with a state historical marker.³⁶ Several marked Confederate

²⁹ WITTENBERG, *supra* note 1, at 141.

³⁰ *Id.* at 134.

³¹ Averell left a sergeant to guard Patton’s Lewisburg home as his troops marched through Lewisburg on their way to Droop Mountain. According to Patton family legend, General Averell personally stopped at the house to visit with Mrs. Patton and her children.

³² EZRA J. WARNER, *GENERALS IN BLUE: LIVES OF UNION COMMANDERS* 13 (1964).

³³ STEWART SAFIKIS, *WHO WAS WHO IN THE CIVIL WAR* 23 (1988). Averell certainly did not show a lack of aggressiveness during the Battle of the Law Books. Sheridan was infamous for his harsh treatment of subordinates.

³⁴ *Forgotten Generals of the Civil War: Confederate Colonel George Patton* (Jan. 31, 2008), mad-nessmike.blogspot.com/2008/01/forgotten-generals-of-civil-war.html.

³⁵ WITTENBERG, *supra* note 1, at 137.

³⁶ Two of the monuments were placed by veterans of the battle. Of those, one commemorates the battle itself, the other honors Union Captain Paul Freiherr von König, a German nobleman who was killed during the battle. The third monument was placed in 1990 by reenactors who portray the White Sulphur Rifles, a Confederate unit. WITTENBERG, *supra* note 1, at 137-38.



Then-Colonel William W. Averell (seated), with three junior officers – Lieutenants (left to right) W.H. Brown, H.H. King, and P. Pollard – encamped in southeastern Virginia during the Peninsula Campaign (1862).

graves can be found on the grounds of the nearby Greenbrier Resort.³⁷ Multiple unmarked graves undoubtedly litter the area.

³⁷ Id. at 114.

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At one time it was thought that the Lewisburg Law Library was moved to Richmond following the Battle of the Law Books. The Virginia State Librarian reported that it was assumed for many years that all, or almost all, of the books, along with other Supreme Court of Appeals of Virginia records, “burned in the courthouse fire during the evacuation of Richmond in April 1865.”³⁸ However, it seems possible that at least a portion of the library – perhaps all of the collection – might have remained in Lewisburg. After the Battle of the Law Books but before the Battle of Droop Mountain, General Averell was again instructed to “remove the library to a place of security where it could be had by the proper authorities.”³⁹ While the historical record does not reflect whether he did so, or to what extent, the West Virginia State Archives today contains Virginia Court of Appeals records that were once housed in Lewisburg.⁴⁰ Both the Virginia State Law Library and the West Virginia State Law Library have Virginia law books from the pre-Civil War period, but none have stamps or bookplates indicating where they were originally located.⁴¹ We do not know if they were part of the Lewisburg Law Library, but it certainly is a possibility.

Today we live in a time when so many of our law books – case reporters, law reviews and statutes among them – are finding their way into dumpsters. How ironic that there was a time when men were willing to fight and die for such books.



³⁸ E-mail from Gail Warren, *supra* note 6. Retreating Confederate Troops set fire to portions of the city in April 1865, and the flames spread out of control. Arriving Union troops fought the Evacuation Fire.

³⁹ MCKINNY, *supra* note 21, at 269.

⁴⁰ West Virginia State Archives Manuscript Collections, MS79-83 Virginia Court of Appeals, Lewisburg, records, 1776-1921.

⁴¹ E-mail from Gail Warren, *supra* note 6. E-mail from Janet M. Nicholson, Technical Services Librarian, West Virginia State Law Library to author (Sept. 27, 2019 3:55 p.m. EST) (on file with author).