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IN THE
Court of Appeals of Maryland

OCTOBER TERM, 1955

No. 195

H. MILTON WAGNER, JR., ET AL.,
Appellants,

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
(JAMES MACGILL, Judge)

RECORD EXTRACT

WILLIAM L. MARBURY,
FRANK T. GRAY,
PIPER & MARBURY,
Solicitors for Appellants.

THOMAS N. BIDDISON,
City Solicitor,
LLOYD G. McALLISTER,
Asst. City Solicitor,
JOHN R. CICERO,
Asst. City Solicitor,
Solicitors for Appellees.

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RECORD EXTRACT

DOCKET ENTRIES AND PLEADINGS

March 28, 1916 — Bill of Complaint filed.

May 9, 1916 — Amended Bill of Complaint filed.

AMENDED (OR SUPPLEMENTAL) BILL

In the

Circuit Court for Anne Arundel County, in Equity

Mayor and City Council of Baltimore

vs.

John P. Bruns and Harry M. Wagner

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Your orator complaining says:

That heretofore, to wit, on the 28th day of March, 1916,
it filed its bill of complaint in this Court against a certain

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John P. Bruns, praying amongst other things to declare a patent for Reed Bird Island null and void, as is in said bill more particularly set forth and that heretofore, to wit, on the ninth day of April, 1916, this Honorable Court granted unto your orator the right to file an amended (or supplemental) bill, as by the same proceedings now in this Court will appear; that your orator has lately discovered and now charges by way of amendment (or supplement) to its aforesaid bill of complaint that:

FIRST: That this plaintiff is the municipal corporation named in the constitution of Maryland and in the Laws Public General and Local thereof by this name, to wit, the Mayor and City Council of Baltimore; and is and since the year 1888 always has been in possession and ownership of the hereinafter mentioned Light Street Bridge; and is and since the year 1888 always has been in statutory control of the Patapsco river and all its tributaries.

SECOND: That by the laws of Maryland, Acts of 1856, Chapter 215, passed on the 10th day of March, 1856, one Richard O. Crisp was authorized to build, and shortly thereafter did build that bridge, over the River Patapsco from Ferry Bar in Baltimore City and County to Anne Arundel County, that is now the plaintiff's sole property; and by the City Code, Laws of Maryland of 1888, Section 824, — now Paragraph 839 of the City Charter — it was provided in these words: "All bridges crossing the Patapsco river from said City, including the bridge known as the 'Long' of Light Street Bridge shall be maintained and kept in repair for public use at the sole expense of the said City of Baltimore."

THIRD: That by the City Charter of 1898, Chapter 123 (Edition of 1915, page 13, subsection 8), it was given to the Mayor and City Council of Baltimore "to provide for the preservation of the navigation of the Patapsco river and tributaries, including the establishment of lines throughout the entire length of said Patapsco river and tributaries, beyond which lines no piers, bulkheads, wharf pilings, structures, obstructions or extensions of any character may be

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built, erected, constructed, made or extended; to provide for improving, cleaning and deepening said river and tributaries, and removal therefrom of anything detrimental to navigation or health; to provide for and regulate the stationing, anchoring and moving of vessels or other water craft, and to prevent any material, refuse or matter of any kind from being thrown into, deposited in or placed where the same may fall, or be washed, into said river or tributaries; to make surveys and charts of the Patapsco river and tributaries, and to ascertain the depth and course of the channels of the same; and when necessary in its judgment, to affix bouys or water marks for facilitating and rendering more safe the navigation thereof, to erect and maintain and to authorize the erection and maintenance of, and to make such regulations as it may deem proper, respecting wharves, bulkheads, piers and piling, and the keeping of the same in repair, so as to prevent injury to navigation or health; to regulate the use of public wharves, docks, piers, bulkheads or pilings, and to lease or rent the same, and to impose and collect dockage from all vessels and water craft lying at or using the same, and to collect wharfage and other charges upon all goods, wares, merchandise or other articles landed at, shipped from, stored on or passed over the same"; and so forth.

FOURTH: Nevertheless on the 10th day of September, 1909 was issued out of the Land Office of Maryland and on the 10th day of September, 1909 sealed with the Great Seal by the Governor of Maryland, a patent to John P. Bruns for Reed Bird Island containing $33\frac{3}{4}$ acres of land; on a survey made for him on a special warrant for one acre obtained out of the Land Office by said John P. Bruns on the 10th day of September, 1908, this tract said to be "an island in the Patapsco river lying in Anne Arundel County aforesaid" but being in fact a merely casual obstruction of mud floated up toward and against the "Long" or Light Street Bridge over the middle branch of said Patapsco river from Light Street in Baltimore City to First Street in Brooklyn, Anne Arundel County and from time to time shifting hither and thither under the influence of the tide and being at high

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tide covered by water. A copy of said patent is filed herewith and marked "Plaintiff's Exhibit A".

FIFTH: That under the Acts of 1914, Chapter 267, the State Roads Commission was empowered to build a bridge across the Patapsco river to take the place of the "Long" or Light Street Bridge; and thereupon the Mayor and City Council of Baltimore entered into a bond in the penalty of fifty thousand dollars with the United States Government to remove the present bridge within six months after the new bridge is open to public traffic;

WHEREUPON the State Roads Commission, acting under the authority of the aforesaid act of the General Assembly of Maryland, decided to build a new bridge from a point in Baltimore City at the foot of Hanover Street, spanning the middle branch of the Patapsco river to the Baltimore County shore, and another bridge from a point on the Baltimore County shore spanning the Patapsco river to the Anne Arundel County shore at the present terminus of the Long or Light Street Bridge; and in examining the premises it was discovered by the plaintiff's agents that the patent herein set forth had been taken for land which is under the control of and already vested in the Mayor and City Council of Baltimore as in this bill hereinbefore set forth.

SIXTH: That by deed dated the 23rd day of September in the year 1910, the said John P. Bruns, together with John McLeod and Minnie McLeod, his wife, attempted to convey unto Henry M. Wagner the so-called Reed Bird Island mentioned in these proceedings, a certified copy of said deed being herewith filed and marked "Plaintiff's Exhibit B"; and by reason of said conveyance the said Henry M. Wagner might be deemed a necessary party to these proceedings and is hereby made a party hereto.

SEVENTH: That the description for the said Reed Bird Island contained in the survey upon which said patent was granted, is materially erroneous, and contains two serious mis-statements, to wit:

- (a) "The above described land is not covered by navigable waters",

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(b) "Improvements none",

which statements are so far misleading and altogether wrong that (as shown by considering other parts of said description and the actual site of the premises) the said land is both covered by the navigable waters of the Patapsco river in which the tide ebbs and flows, and is also improved with the bridge and piling of the Long or Light Street Bridge of your orator, whose property it is, which bridge is a public highway forming communication between Anne Arundel County and Baltimore City and is of sufficient strength for teams, horses, carriages, automobiles and street cars to cross and is an improvement which was purchased by the Mayor and City Council of Baltimore and the County Commissioners of Anne Arundel County for the convenience of the inhabitants thereof; and that the survey for said property began on the east side of the Long or Light Street Bridge. Certified copy of the return of said survey is filed herewith marked Plaintiff's Exhibit "C".

EIGHTH: That said statements and said survey are false and fraudulent and designed for the purpose of depriving your orator, the Mayor and City Council of Baltimore, of its rights in the said Patapsco river.

NINTH: That the said Mayor and City Council of Baltimore as the owner of the fee simple land on the Anne Arundel County side of said bridge is entitled as riparian owner to any land that may be made out of the said waters of the Patapsco river and that the grant of said patent will deprive it of access to and over its land upon the Anne Arundel County side of said bridge, when said bridge is removed as it will be an obstruction to the free use and enjoyment of said land and that said patent would, therefore, be a cloud upon the title of the Mayor and City Council of Baltimore to any accretion which may take place and to the land under said water.

To the End Therefore:

FIRST: That this Court will take cognizance of the matters and things concerning the premises.

RECORD EXTRACT 6

SECOND: And will protect the plaintiff in the peaceable enjoyment and possession of its constitutional and statutory rights in the premises, especially as against any claims or pretense of claims upon the part of the defendants.

THIRD: And that every supposed patent for that pretended Reed Bird Island to the said John P. Bruns be declared to be null and void; and especially that the patent heretofore issued out of the Land Office of Maryland on the 15th day of August, 1909 and sealed with the Great Seal by the Governor on the 28th day of August, 1909, certified copy of which patent is filed with this bill of complaint marked "Plaintiff's Exhibit A" be cancelled.

FOURTH: And that said patent and said deed from John P. Bruns, et al., to Henry M. Wagner be set aside and be declared null and void.

FIFTH: And that the States writ of scire facias issue out of this Court of Chancery directed to the sheriff of Baltimore City commanding him to make known unto the defendants and they be and appear before the Judges of this Court in Equity, upon a day certain to be named therein to show if anything they can say why the prayer of the plaintiff's bill of complaint ought not to be granted and decree thereupon put into execution.

SIXTH: AND that your orator may have such other and further relief as its case may require.

May it please your Honor to grant unto your orator the writ of subpoena directed to said John P. Bruns and Harry M. Wagner, residing in Baltimore City, commanding them to be and appear in this court at some certain day to be named therein and answer the premises and perform such decree as may be passed therein.

And as in duty bound,

(Signed) S. S. FIELD,

City Solicitor,

Solicitor for the Plaintiff.

(Affidavit attached)

RECORD EXTRACT 7

PLAINTIFF'S EXHIBIT A

JOHN P. BRUNS, HIS PATENT, "REED BIRD ISLAND",
33 $\frac{3}{4}$ ACRES, PATENTED 10th SEPT. 1909.

THE STATE OF MARYLAND:

To all persons to whom these presents shall come, Greeting:

Know ye, that whereas John P. Bruns, of Baltimore City, State of Maryland, had surveyed and laid out for him a tract or parcel of land called "REED BIRD ISLAND", (being an island in the Patapsco River) lying in Anne Arundel County, State of Maryland, and containing thirty three and three fourths acres of land, more or less, by virtue of a Special Warrant for one acre, obtained by him from the Land Office of Maryland, bearing date the tenth day of September, Nineteen hundred and eight, as appears: And the said John P. Bruns having fully compounded for the said land according to law.

The State of Maryland, doth therefore, hereby Grant unto him the said John P. Bruns, the said tract or parcel of land called "REED BIRD ISLAND", lying in Anne Arundel County aforesaid, (being an island in the Patapsco River, lying on both sides of Light Street Bridge).

BEGINNING for the same at a point on the East side of Light Street Bridge distant from the bulkhead thereof twenty-four and two thirds perches, thence North thirty-one degrees East, eleven and three-fourths perches, thence North thirteen degrees East ten and three fifths perches, thence North twenty-three degrees West sixty and three-fifths perches, thence South, sixty-nine degrees West thirty-four perches, thence South twenty-seven degrees West, sixty six and two thirds perches, thence South ten degrees and thirty minutes West, eighteen and one fourth perches, thence South eighty six degrees and thirty minutes East, thirty six and four tenths perches, thence South eighty nine degrees East, twenty-four and one fourth perches, thence North fifty degrees East, twenty-four and three fifths perches to the beginning.

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CONTAINING and now laid out for Thirty-three and three fourths acres of land, more or less, according to the Certificate of Survey thereof, taken and returned into the Land Office of Maryland, bearing date the fifteenth day of September, Nineteen hundred and Eight, and there remaining; Together with all rights, profits, benefits and privileges thereunto belonging.

To HAVE AND To HOLD the same unto him the said John P. Bruns, his heirs and assigns forever.

GIVEN under the Great Seal of the State of Maryland this tenth day of September, Nineteen hundred and nine.

AUSTIN L. CROTHERS,

Governor.

(The Great Seal)

LAND OFFICE OF MARYLAND, SCT:

I hereby certify that the foregoing Patent is proper to be issued.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Land Office of Maryland this nineteenth day of August, Nineteen hundred and nine.

THOMAS A. SMITH,

Commissioner of the Land Office.

(The Land Office of Maryland)

PLAINTIFF'S EXHIBIT B

This Deed, made this 23rd day of September in the year 1910, by and between John Peirce Bruns, of Baltimore City, State of Maryland, party of the first part, and John McLeod and Minnie McLeod, his wife, of Lansdown, in said State, parties of the second part, and Harry M. Wagner, of said City and State of the third part.

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WHEREAS said John McLeod hath an equitable interest in the Land hereinafter described, for the purpose of conveying which he and his said wife join in this Deed.

Now Therefore This Deed Witnesseth, that for and in consideration of the sum of One Dollar, and other good and valuable considerations to him paid, the said John Pierce Bruns doth grant and convey unto the said Harry M. Wagner, his heirs and assigns, all that lot of land called Reed Bird Island, situate and lying in the Patapsco River in Anne Arundel County, State of Maryland, containing $33\frac{3}{4}$ acres, more or less, and more particularly described in a Grant or Patent thereof from the State of Maryland to the said John Peirce Bruns dated 19th day of August, 1909 recorded in the Land Office of Maryland.

Together with the improvements thereon and the rights and appurtenances thereto belonging or appertaining.

To Have and To Hold the above granted property unto the said Harry M. Wagner his heirs and assigns forever in fee simple.

And the said John Peirce Bruns & John McLeod, hereby covenants with the said Harry M. Wagner that they will warrant generally the property hereby conveyed and they are seized of the land hereby conveyed and that they have done no act to encumber said property and that they will execute such further assurances of said land as may be requisite—

Witness the hands and seals of the said John Peirce Bruns, John McLeod and Minnie McLeod, his wife, the day and year first above written—

JOHN PEIRCE BRUNS (Seal)

JOHN McLEOD (Seal)

MINNIE McLEOD (Seal)

Test:

M. ESTELLE FAY:

(Acknowledgments)

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PLAINTIFF'S EXHIBIT C

State of Maryland, Sct:

By virtue of a Special Warrant for one acre granted out of the Land Office of Maryland to John P. Bruns of Baltimore City, bearing date the tenth day of September 1908, as appears.

I Certify as Surveyor of Anne Arundel County, that I have carefully surveyed for and in the name of the said John P. Bruns all that piece or parcel of land lying on both sides of Light Street Bridge, being an Island in the Patapsco River in the County aforesaid.

BEGINNING for the same at a point on the East Side of Light Street Bridge distant from the bulkhead thereof $24\frac{2}{3}$ perches, thence N. 31° E $11\frac{3}{4}$ p'r's thence N 13° E $10\frac{3}{5}$ p'r's thence N. 23° W $60\frac{3}{5}$ p'r's thence S. 69° W 34 p'r's thence S. 27° W $66\frac{2}{3}$ p'r's thence S. 10° 30' W $18\frac{1}{4}$ p'r's thence S. 86° 30' E $36\frac{1}{10}$ p'r's thence S. 89° E $24\frac{1}{4}$ p'r's thence N. 50° E $24\frac{3}{5}$ p'r's to the beginning.

Containing $33\frac{3}{4}$ Acres.

To be held by the name of "REED BIRD ISLAND"

Surveyed the fiftteenth day of September 1908.

The above described land is not covered by Navigable Water.

L. H. Green, Surveyor of Anne Arundel County.

Improvements; None

TABLE.

North 31 Degrees East $11\frac{3}{4}$ Perches

North 13 Degrees East $10\frac{3}{5}$ Perches

North 23 Degrees West $60\frac{3}{5}$ Perches

South 69 Degrees West 34 Perches

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South 27 Degrees West $66\frac{2}{3}$ Perches
 South $10\frac{1}{2}$ Degrees West $18\frac{1}{4}$ Perches
 South $86\frac{1}{2}$ Degrees East $36\frac{4}{10}$ Perches
 South 89 Degrees East $24\frac{1}{4}$ Perches
 North 50 Degrees East $24\frac{3}{5}$ Perches

| | Line | Course | Distance |
|------|------|----------------------|--------------------------|
| Beg. | 1 | N 31° E | $11\frac{3}{4}$ Perches |
| | 2 | N 23° W | $60\frac{3}{5}$ Perches |
| | 3 | S 69° W | 34 Perches |
| | 4 | S 27° W | $66\frac{2}{3}$ Perches |
| | 5 | S $10^{\circ} 30'$ W | $18\frac{1}{4}$ Perches |
| | 6 | S $86^{\circ} 30'$ E | $36\frac{4}{10}$ Perches |
| | 7 | S 89° E | $24\frac{1}{4}$ Perches |
| | 8 | N 50° E | $24\frac{3}{5}$ Perches |

RECORD EXTRACT 15

June 13, 1916 — Answer, Exhibits A and B and 25 photographs filed.

September 2, 1916 — General Replication filed.

May 28, 1954 — Petition to Substitute Parties' Respondent.

ORDER

Upon the foregoing petition, it is, this 28th day of May, 1954, by the Circuit Court for Anne Arundel County,

ORDERED that H. Milton Wagner, Jr., Amelia W. Sutton, Margaret Wagner, Henry M. Wagner, Joan Wagner, Harriet A. Sutton, Alan C. Sutton, Harry W. Sutton, Florence C. W. Mulligan, Robert B. Wagner, Jr., Richard V. S. Wagner and Hester Corner Wagner and Mercantile-Safe Deposit and Trust Company of Baltimore, Trustees under the will of Robert B. Wagner, be and they are hereby substituted as parties respondent in these proceedings in the place and stead of John P. Bruns and Harry M. Wagner, original respondents herein.

/s/ BENJAMIN MICHAELSON,

Judge.

April 12, 1955 — Amended Answer filed.

AMENDED ANSWER OF SUBSTITUTED
RESPONDENTS

The amended answer of H. Milton Wagner, Jr., Amelia W. Sutton, Margaret Wagner, Henry M. Wagner, Joan Wagner, Harriet A. Sutton, Alan C. Sutton, Harry W. Sutton, Florence C. W. Mulligan, Robert B. Wagner, Jr., Richard V. S. Wagner, and Hester Corner Wagner and Mercantile-Safe Deposit & Trust Company of Baltimore, Trustees under the will of Robert B. Wagner, substituted parties respondent herein, by William L. Marbury, Frank T. Gray and John G. Rouse, Jr., their attorneys, for an answer to the Amended (or supplemental) Bill filed in this case say:

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FIRST. These respondents admit that the plaintiff is the municipal corporation as stated in paragraph FIRST of the Amended Bill. They further admit that the plaintiff, from the year 1888 until the year 1917 operated the Light Street Bridge as a public highway, but deny that the plaintiff had any ownership of the said bridge except such as was conveyed by a deed dated May 3, 1880 from Richard O. Crisp and wife and Richard Cromwell and wife, and by virtue of Chapter 98 of the Laws of Maryland of 1888 and Chapter 82 of the Laws of Maryland of 1918. The respondents deny that the plaintiff has been in statutory control of the Patapsco River or its tributaries except such control as was conveyed to it by Chapter 123 of the City Charter of 1898.

SECOND. These respondents admit the allegations of paragraph SECOND of the Amended Bill, except that they deny that the said bridge is or has been the plaintiff's property except as mentioned above, and the respondents further allege that the plaintiff destroyed the said bridge in 1917.

THIRD. These respondents admit the allegations of paragraph THIRD of the Amended Bill.

FOURTH. In answer to paragraph FOURTH of the Amended Bill, these respondents admit the issuance of a patent to John P. Bruns on September 10, 1909, for Reed Bird Island, out of the Land Office of Maryland, and further admit that said patent was based on a survey made for John P. Bruns by virtue of a Special Warrant issued September 10, 1908, as more fully set forth in said patent and survey. These respondents deny that Reed Bird Island was or is a casual obstruction of mud or any other substance, and also deny that said Island shifted anywhere under the influence of the tide and that it was covered by water at high tide, but rather allege that said Island is and at all times relevant herein has been firm and fast land, an island in the Patapsco River, a substantial part of which is and at all times relevant herein has been exposed at high tide. These respondents admit that the Patapsco River is tidewater in the vicinity of Reed Bird Island.

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FIFTH. In answer to paragraph FIFTH of the Amended Bill, these respondents deny that the State Roads Commission decided to build a bridge from the Baltimore County shore spanning the Patapsco River to the Anne Arundel County shore, but allege that the highway between said points was determined upon as, and was built as, two separate bridges, one from the Baltimore County shore to Reed Bird Island, and another from said Island to the Anne Arundel County shore, said bridges being connected by a raised highway across said Island 1561.5 feet in length. Further, respondents deny that the property known as Reed Bird Island was or has been under the control of the plaintiff, and they deny that title to said property or any part of it is or ever has been vested in the plaintiff herein otherwise than by deed executed by Harry M. Wagner or his successors in title. The respondents admit the allegations of said paragraph FIFTH not inconsistent with allegations herein.

SIXTH. In answer to paragraph SIXTH of the Amended Bill, these respondents admit that by deed dated September 23, 1910, John P. Bruns did in fact convey unto Harry M. Wagner the property called Reed Bird Island, and that by virtue of said deed the said Harry M. Wagner became the legal owner of fee simple title to the said property. These respondents have become successors in title to Harry M. Wagner, as more fully set forth in the Petition to Substitute Parties Respondent heretofore filed in these proceedings. All allegations of said paragraph SIXTH of the Amended Bill inconsistent with the above stated facts are denied.

SEVENTH. In answer to paragraph SEVENTH of the Amended Bill, these respondents admit that the survey for Reed Bird Island stated, "The above described land is not covered by navigable waters," and "Improvements: none." They also admit that the waters of the Patapsco River ebb and flow with the tide, and that the said Light Street Bridge, at the time of said survey, was a public highway between Baltimore City and Anne Arundel County and crossed Reed Bird Island. These respondents also admit and allege that the waters of the Patapsco River, at the time of the patent

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to Reed Bird Island, were navigable waters on all sides of Reed Bird Island. These respondents deny, however, that the description of Reed Bird Island as contained in said survey is in any way erroneous, misleading or incorrect. Specifically, they deny that the said Island was or is covered by the navigable waters of the Patapsco River, or any other navigable water. Further, they deny that the Light Street Bridge crossing Reed Bird Island was an "improvement" to the said Island; and in any event they deny that the statement that there were no improvements could in any way be misleading, since the plat of the Island submitted with the survey showed that said Bridge crossed Reed Bird Island.

EIGHTH. These respondents deny all of the allegations of paragraph EIGHTH of the Amended Bill.

NINTH. In answer to paragraph NINTH of the Amended Bill, these respondents deny that the Mayor and City Council of Baltimore own the fee simple interest, or any other interest in or to the property known as Reed Bird Island, as riparian owner of other land or otherwise. These respondents further deny that the plaintiff has any right of access to and over Reed Bird Island except by way of such parts of said Island as are public highways; and they deny that the possession, ownership and occupancy of Reed Bird Island by the respondents has or will be an obstruction or hindrance to the free use of any land owned by plaintiff in any manner to which it may be lawfully entitled to use said land. Said respondents deny that the issuance of a patent upon Reed Bird Island is or can be a cloud upon the title of the plaintiff to land owned by it south of Reed Bird Island, or any accretions thereto to which it may be legally entitled.

TENTH. Further answering said Amended Bill, these respondents allege as follows:

When the State Roads Commission determined to construct a highway and bridges between the then Baltimore County and Anne Arundel County shores, across Reed Bird Island, as aforesaid, negotiations were undertaken between

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the State Roads Commission and Harry M. Wagner, for a right-of-way across Reed Bird Island. In due course the said Harry M. Wagner and wife executed a deed to the State of Maryland conveying a right-of-way for the purpose of a street or highway, reserving to the grantor the fee and reversion and the right of access to the State Road on each side thereof from his land, and the privilege of unloading material from the State Road upon his land for grading the same. Said deed is recorded among the Land Records of Anne Arundel County in Liber G.W. No. 125, folio 202. Said deed clearly recognizes Reed Bird Island as a distinct tract of land separated from the then Baltimore County shore by the main branch of the Patapsco River separated from the then Anne Arundel County shore by another branch of the Patapsco River.

In 1940, after annexation by the City of Baltimore of the areas of Anne Arundel and Baltimore Counties in the vicinity of Reed Bird Island, the City of Baltimore determined to open Race Street across the south end of Reed Bird Island connecting to the above mentioned highway constructed by the State Roads Commission. The Commission for Opening Streets, in proceedings instituted by the City of Baltimore awarded damages for the Reed Bird Island portion of Race Street to the City of Baltimore, and from this ruling the successors in title to Harry M. Wagner appealed. In due course it was agreed between the appellants in those proceedings and the City of Baltimore that a deed for the portion of Reed Bird Island lying in Race Street should be given to the City of Baltimore by the successors in title to Harry M. Wagner and the said appeal should be dismissed. In consideration, the City of Baltimore agreed that title to the balance of Reed Bird Island should be determined by prosecution of this case in the Circuit Court for Anne Arundel County. In accordance with the terms of said agreement, said deed was executed and delivered and said appeal was dismissed.

The said Harry M. Wagner was first assessed for Reed Bird Island taxes for the year 1912. Taxes were paid by him from 1912 through 1918 to Anne Arundel County, and

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from 1919 to 1928 to Baltimore City. In 1928 the Appeal Tax Court abated the assessment on Reed Bird Island and thereafter refused to accept further taxes. The said Harry M. Wagner collected rentals from certain billboard advertising companies for billboard space on Reed Bird Island from 1917 until 1928, at which time the City of Baltimore demanded that the owners of said billboards cancel any agreements with the said Harry M. Wagner.

Further answering the Amended Bill filed herein, these respondents allege that the title to Reed Bird Island is and at all times subsequent to September 10, 1909, has been vested in the said John P. Bruns, and his assignee Harry M. Wagner and successors in title to the latter, except insofar as they have by deed granted and conveyed parts of said Island to other parties; and these respondents allege that said Reed Bird Island was at the time of the filing of this case and at the time of the granting of the above mentioned patent to John P. Bruns, firm and fast land, a large and substantial part of which was at those times and for many years had been above water at high tide, the entire island as granted to the said John P. Bruns being above water at low tide, and the entire Island, at those times being surrounded by the navigable waters of the Patapsco River at both high and low tide. These respondents deny that plaintiff has any right, title or interest in or to any of the property known as Reed Bird Island except such as may have been conveyed to it or to the State of Maryland by these respondents or their predecessors in title.

WHEREFORE, having fully answered the Amended Bill of Complaint filed herein, these respondents pray that the said Bill may be dismissed with costs.

And as in duty bound, etc.

/s/ WILLIAM L. MARBURY,

/s/ FRANK T. GRAY,

/s/ JOHN G. ROUSE, JR.,

Attorneys for Respondents.

RECORD EXTRACT 21

STIPULATION

IT IS STIPULATED by and between the parties hereto as follows:

1. Chapter 215 of the Laws of Maryland of 1856 authorized Richard Owens Crisp to construct a bridge over the Patapsco River from a point on the north side of said River called Ferry Bar to such point on the south side of said River in Anne Arundel County as the said Richard Owens Crisp might select. The said Act also authorized the said Richard Owens Crisp "to enter upon and hold in fee any land necessary or proper for the abutments or piers of said bridge, and for other purposes contemplated by this Act; and for this purpose" to purchase or condemn such lands as he might deem necessary for the purposes aforesaid.

2. On May 25, 1858, Richard Owens Crisp and Richard Cromwell, Jr., purchased from Patapsco Company a certain tract of land in Anne Arundel County by deed recorded among the Land Records of Anne Arundel County in Liber W. H. G. No. 7, folio 207, a copy of which is attached hereto as Agreed Exhibit No. 1. The land described therein is shown as plot "D" on the plat attached hereto as Agreed Exhibit No. 2. The Light Street Bridge referred to in the deed of May 25, 1858, is the bridge authorized by Chapter 215, Laws of Maryland of 1856.

3. Chapter 159 of the Laws of Maryland of 1878 authorized, directed and empowered the Mayor and City Council of Baltimore and the County Commissioners of Anne Arundel County to purchase said Light Street Bridge, together with the buildings, abutments and all other appurtenances thereto belonging or appertaining, if a price could be agreed upon with the owners thereof and if unable to agree with the owners thereof the said Mayor and City Council of Baltimore and the County Commissioners of Anne Arundel County were authorized, empowered and directed to build a substantial bridge over said river. The bridge purchased or built as provided by said Act by the City and County

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and the cost of purchasing it and maintaining it was to be borne equally by the said City and County.

4. On May 3, 1880, Richard O. Crisp and Annie E. Crisp, his wife, Richard Cromwell and Elizabeth Anne Cromwell, his wife, conveyed to the Mayor and City Council of Baltimore and the County Commissioners of Anne Arundel County their interest in said bridge, together with the lot of ground hereinabove referred to, which they purchased from the Patapsco Company on May 25, 1858. The deed from Richard O. Crisp, et al., to the Mayor and City Council of Baltimore and the County Commissioners of Anne Arundel County is recorded among the Land Records of Baltimore City in Liber F. A. P. No. 887, folio 369. It is likewise recorded in the Land Records of Anne Arundel County in Liber S. H. No. 16, folio 27. A copy of said deed as recorded among the Land Records of Baltimore City is attached hereto, marked Agreed Exhibit No. 3.

5. Section 27 of Chapter 98 of the Acts of 1888 (being the Annexation Act of 1888) provides in part that the said Light Street Bridge should thereafter "be maintained and kept in repair for public travel at the sole expense of said City of Baltimore * * *", and that the said City so maintained said bridge until sometime during the year 1917, when the said bridge was replaced by the present Hanover Street Bridge. The said Light Street Bridge was a public highway between Baltimore City and Anne Arundel County used by all kinds of vehicular traffic as well as street cars and pedestrians.

6. On September 10, 1909, a patent was issued out of the Land Office of Maryland to John P. Bruns for "a tract or parcel of land called 'Reed Bird Island', (being an island in the Patapsco River) lying in Anne Arundel County, State of Maryland, and containing 33 $\frac{3}{4}$ acres of land, more or less", said patent being recorded among the Land Office Records in Liber E. S. T. No. 1, folio 217. A copy of said patent is attached to the Bill of Complaint herein marked Plaintiff's Exhibit A. Said patent was granted upon a survey of Reed Bird Island made September 15, 1908, includ-

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ing a description and plat of the Island, by L. H. Green, County Surveyor. A copy of said survey and plat is attached to the Bill of Complaint herein marked Plaintiff's Exhibit C. The Light Street Bridge shown on said plat is the same Light Street Bridge authorized and built under Authority of Chapter 215, Laws of Maryland of 1856.

7. On September 23, 1910, the said John P. Bruns, together with one John McLeod and Minnie McLeod, his wife, executed a deed to the said "Reed Bird Island" to the original defendant, Harry M. Wagner, which deed is recorded among the Land Records of Anne Arundel County in Liber G. W. No. 83, folio 184. A copy of said deed is attached to the Bill of Complaint marked Plaintiff's Exhibit B. The present defendants have been substituted as parties defendant in the place and stead of the original defendant, now deceased. The present defendants are successors in title to Harry M. Wagner, as more fully described in the Petition to Substitute Parties Respondent, heretofore filed herein.

8. Chapter 267 of the Laws of Maryland of 1914 authorized the State Roads Commission to construct a bridge from Baltimore City to Brooklyn either directly or by way of the point of Baltimore County and provided that upon completion of the said bridge and the opening of the same to travel as a public highway the Mayor and City Council of Baltimore was authorized to remove the present Light Street Bridge. The bridge authorized by said Chapter 267 is known as the Hanover Street Bridge and was completed as set forth above during the year 1917, following which the old Light Street Bridge was removed.

9. By virtue of Chapter 82 of the Laws of Maryland of 1918 there was annexed to Baltimore City certain portions of Baltimore County and Anne Arundel County, including Brooklyn in the latter. Under Section 9 of said Act the title of the County Commissioners of Anne Arundel County and Baltimore County, etc., in any school-houses and lots, etc., etc., and other public property became vested in the Mayor and City Council of Baltimore; and by Section 11 of said

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Act it was provided that all roads, streets, avenues and alleys lying within the annexed territory should be thereafter validly constituted public highways of Baltimore City, and that any bridges existing in any of said highways would be considered parts thereof. All of the area referred to in this stipulation, including that formerly occupied by the Light Street Bridge, that now occupied by the Hanover Street Bridge and the lot conveyed by Crisp and Cromwell to the County Commissioners of Anne Arundel County and the Mayor and City Council of Baltimore on May 3, 1880, hereinabove referred to, are within the corporate limits of Baltimore City as enlarged by the said Chapter 82 of the Laws of Maryland of 1918.

10. The plat of S. J. Martenet & Co. dated May 28, 1920, attached hereto as Agreed Exhibit No. 4, is a true representation of the facts which said plat purports to show, except that: (1) the said plat does not purport to show water levels or depths, and (2) the lines purporting to show Reed Bird Island as granted to John P. Bruns by patent dated September 10, 1909, are not intended to reflect a physical state of facts known to the surveyor making the plat constituting Agreed Exhibit No. 4, but are simply a transposition of the property lines as described in said patent to the geographic area included on said plat.

11. The Plat of Bureau of Surveys of the City of Baltimore showing Reed Bird Island, etc. dated April 20, 1955, attached hereto as Agreed Exhibit No. 2 is a true representation of the facts which said plat purports to show.

12. On July 8, 1924, the Mayor and City Council of Baltimore conveyed to the Standard Oil Company of New Jersey a part of the lot conveyed by Crisp and Cromwell to the Mayor and City Council of Baltimore and the County Commissioners of Anne Arundel County on May 3, 1880, reserving to itself "all riparian rights in and to the Patapsco River to which this property is in any way entitled". The said deed from the Mayor and City Council of Baltimore to the Standard Oil Company is recorded among the Land Records of Baltimore City in Liber S. C. L. No. 4250, folio

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60. A copy of said deed is attached hereto marked Agreed Exhibit No. 5.

13. On April 15, 1926, the South Baltimore Harbor and Improvement Company of Anne Arundel County conveyed to the Mayor and City Council of Baltimore for the consideration of \$50,000 certain property and riparian rights as will more fully appear from said deed recorded in Liber S. C. L. No. 4570, folio 49 among the Land Records of Baltimore City. A copy of said deed is attached hereto marked Agreed Exhibit No. 6. The tracts conveyed thereby are shown on Agreed Exhibit No. 2 as plots "A", 1st and 2nd Parts.

14. On August 20, 1941, the State Roads Commission and other proper officials for the State of Maryland conveyed to the Mayor and City Council of Baltimore the fee simple title to that lot of ground shown on Agreed Exhibit No. 2 as plot "C".

15. On May 5, 1916, after the institution of this suit, Harry M. Wagner and Harriet Cleveland Wagner, his wife, in consideration of the sum of \$1.00, conveyed to the State of Maryland "a right-of-way for the purpose of a street or highway over and across that part of the tract of land situate in Anne Arundel County, in the State of Maryland, and constituting an island in the Patapsco River known as 'Reed Bird Island' * * *". It is further provided in said deed that the said Harry M. Wagner reserves "to himself the fee and reversion in said land, subject to the easement hereby granted and the right of access to the state road on each side thereof from his land by roadways which he may hereafter construct connecting with said right of way when and as such roadways are brought up to the grade of said highway, and the privilege of unloading material from said road upon his said land for grading the same". A copy of said deed is attached hereto marked Agreed Exhibit No. 7.

16. On or about December 16, 1940, H. Milton Wagner, Jr., and others, as successors to Harry M. Wagner's title to Reed Bird Island executed a deed to the Mayor and City

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Council of Baltimore of such part of Reed Bird Island as lay in the bed of Race Street, 70 feet wide, as opened by Ordinance of the Mayor and City Council of Baltimore, which deed has never been recorded. A copy of said deed is attached hereto as Agreed Exhibit No. 8. Said deed was executed by the grantors after they had appealed from a ruling of the Commissioner for Opening Streets awarding damages for the Reed Bird Island portion of said street to the Mayor and City Council; said appeal was dismissed, and the aforesaid deed was executed in consideration for the agreement of the Mayor and City Council to proceed with the prosecution of the proceedings in the present case, said deed, and dismissal of the aforesaid appeal to be without prejudice to the rights of the parties herein. Race Street as so opened and laid out is shown on Agreed Exhibit No. 2, marked "formerly Race Street". This street is now part of Potee Street.

17. On Oct. 27, 1951, the Mayor and City Council of Baltimore opened an extension of Potee Street across Reed Bird Island, as shown on Agreed Exhibit No. 2; the land for which street the Mayor and City Council have never purchased from the successors in title to Harry M. Wagner, nor condemned. Said street is now being used without the permission or authority of the Respondents herein.

18. According to the tax records of Anne Arundel County, Harry M. Wagner was first assessed for "Reed Bird Island" for the year 1912, the said assessment totaling \$5,056.00, which was increased in the year 1918 to \$5,950.00. Harry M. Wagner paid Anne Arundel County and State of Maryland taxes, based on said assessments, for 1912 through 1918. For the years 1919 to 1928, inclusive, Harry M. Wagner paid Baltimore City and State of Maryland taxes on Reed Bird Island in the total amount of \$1,276.98. In 1926, after the City's purchase of certain Patapsco River shore land from South Baltimore Harbor and Improvement Company, et al., the City of Baltimore Law Department advised the Appeal Tax Court to abate any assessment against Harry M. Wagner or others upon "Reed Bird Island" but apparently this communication failed to reach the

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Appeal Tax Court, and it appears that taxes were paid through 1928. On May 23, 1928, the Appeal Tax Court was again notified to abate the assessment against Harry M. Wagner for "Reed Bird Island" and Harry M. Wagner was notified of such abatement and that he was entitled to a refund thereunder for the tax year 1928, of which, however, he never availed himself.

19. For some time prior to 1919 certain outdoor advertising billboards were located on Reed Bird Island. On February 21, 1919, attorneys for Harry M. Wagner wrote to the owners of these billboards demanding removal of the signs or rental from January 1, 1917. P. & H. Morton Advertising Co. paid rental from January 1, 1917, and renewed the rental for a subsequent period. American Sign Company also paid rental for sign space, paying \$70.77 for a number of signs for varying periods between January 1, 1919, and January 1, 1921, and executing a contract for an additional period at the rate of \$62.00 per annum. On January 14, 1924, General Outdoor Advertising Company entered into a contract for rental of space at the rate of \$93.00 per annum, which rental was paid until April 25, 1928, at which time the City of Baltimore demanded that the owners of said signs cancel any agreements with the said Harry M. Wagner. From that time until 1946 the City of Baltimore collected rent from owners of the signs. The City of Baltimore in 1946 ordered all billboards to be removed from the Island.

20. The twenty-five photographs filed with the Respondents' original answer are true representations of the scenes shown thereon from the point indicated on each of said photographs, at the date and time indicated.

21. Reed Bird Island lies in an area which the State of Maryland and the Mayor and City Council of Baltimore now propose to develop as the southern end of a park to be known as Patapsco River Valley Park.

22. The Plat of State Roads Commission showing location plan of the Hanover Street Bridge dated August 21, 1914, and approved by H. G. Shirley, Chief Engineer, and

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attached hereto as Agreed Exhibit No. 9, is a true copy of a survey made by the State Roads Commission in connection with the Hanover Street Bridge.

23. The Baltimore & Ohio Railroad Company was authorized by the U. S. Corps of Engineers on May 17, 1900, to fill in under the Railroad's Curtis Bay Branch Bridge across the Patapsco River, provided the Baltimore & Ohio Railroad Company left a 600 foot opening northwest of Billiken Island, shown on Agreed Exhibit No. 2. This was subsequently accomplished before the end of 1900.

24. While the facts stated herein are agreed to exist as stated, each of the parties reserves the right to object to admissibility of any of such facts on the grounds of relevancy, for purposes of which objections, if any be offered, each statement in each of the foregoing paragraphs shall be considered separately.

25. No advantage is to be taken by either party by reason of the delay in prosecuting or defending this suit.

/s/ LLOYD G. McALLISTER,

/s/ JOHN R. CICERO,

Attorneys for Plaintiff.

/s/ WILLIAM L. MARBURY,

/s/ FRANK T. GRAY,

/s/ JOHN G. ROUSE, JR.,

Attorneys for Respondents.

Note as to Agreed Exhibits attached to Stipulation:

(a) Agreed Exhibits 1, 3, 5, 7 and 8 are sufficiently described, for purposes of this appeal, in the Stipulation, and are therefore not reproduced.

(b) Agreed Exhibits 2 and 9 cannot be reproduced in this Record Extract, and must therefore be presented at Argument.

(c) Agreed Exhibit 4 is reproduced herein.

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(d) Agreed Exhibit 6, a deed dated April 15, 1926, from South Baltimore Harbor and Improvements Company of Anne Arundel County to the Mayor and City Council of Baltimore, conveying certain property as more fully described in Exhibit 2, also contains the following provisions:

AND the party of the first part does further grant unto the party of the second part its successors and assigns all of its right title and interest in and to all the riparian and acquatic rights which are appurtenant to the property herein conveyed and also all rights in and to the waters of the Patapsco River Southwest of the property of the Arundel Sand and Gravel Company whether said rights are connected with the property above described or otherwise

AND also all land covered by the waters of the Patapsco River southwest of the property of the Arundel Sand and Gravel Company in which the party of the first part has any interest as also all the right title and interest of the party of the first part acquired through the Patent of Brooklyn in the waters of the Patapsco River and 100 feet from the shore line or water edge out into the Patapsco River southwest of the property of the Arundel Sand and Gravel Company

TOGETHER with the improvements thereupon and all the rights alleys ways waters easements and Street bounding on adjoining or running through the said property privileges and appurtenances thereto belonging or in anywise appertaining and especially all the riparian or acquatic rights which are appurtenant to the property above described

TO HAVE AND TO HOLD the said ground and premises and also the riparian rights and land covered by water above described and hereby granted and conveyed to and unto the said Mayor and City Council of Baltimore its successors and assigns in fee simple forever

TESTIMONY BEFORE JUDGE MACGILL

April 28, 1955

(St. Tr. 1-11):

(Mr. Cicero) If Your Honor please, the Mayor and City Council of Baltimore ask the Court to take judicial notice of all those legislative enactments of the General Assembly of Maryland, either Public General Laws or Public Local Laws, which have been referred to in our Amended Bill of Complaint in this case. I would like to offer in evidence a map prepared by the United States Government, United States Coast & Geodetic Survey, certified to by the Department of Commerce, Office of the Secretary, as being Nautical Chart No. 549, Edition of May 1905, involving the approach to Baltimore Harbor, Maryland.

(Mr. Marbury) I will call your attention to the fact that this map which is now being offered, while dated May 1905, shows on its face, it is based on information developed during a period beginning in 1844 and ending in 1899, subject to correction and surveys, November 1904. We have no objection to the introduction of the map as simply a general description of the area as it may have been sometime prior to the time in which we speak. We object to it, however, as any evidence of the state of facts existing in 1909.

(Mr. Cicero) May we have this marked. (Marked Plaintiff's Ex. 1.) We also offer in evidence a photostatic copy of a section of Nautical Chart No. 549, corrected to May 20, 1918 by the United States Department of Commerce, certified by the Office of the Secretary, as being a portion of the map of Baltimore Harbor, showing particularly the areas in question in this case. The map is an extension of that map we have offered in evidence as Plaintiff's Ex. 1.

(Mr. Marbury) Your Honor, this photograph of a copy of a section of Nautical Chart No. 549 says that it is a section, United States Coast & Geodetic Survey, issued on May 20, 1918. That is nine years after the map, the validity of which you are called upon to determine here and we would have to object to its introduction.

(Mr. Cicero) If Your Honor pleases, this is as valid to this case as any photograph that has been handed to you. It is the only map that the United States Coast & Geodetic Survey issued to this area from 1905 and the time of this map. It shows, if Your Honor pleases, the same thing that this other map shows, except that it shows Hanover Street bridge has been put in here and it shows the soundings and depth, by that very party they asked Your Honor to consult. They asked you to take judicial notice and call up Washington. We did that in this case. Here is information here certified by the Department of Commerce. Certainly it is the best evidence that we can give Your Honor this morning. If this is not admissible in evidence, then any picture that has been offered in evidence is certainly inadmissible, because they are certainly almost identical in points of time.

(The Court) The notations referred to are on that photostatic copy?

(Mr. Marbury) It has not referred to authorities on which the survey is based. They do appear on the original, but they do not appear on this copy.

(Mr. Cicero) May I suggest this to Your Honor. We are citizens of this country. We have asked the United States Department of Coast & Geodetic Surveys to furnish us two of these maps. They are dated as late as 26th of April, two days ago. They told us they had a copy of this they could give us, but they could not give us a full copy of this one. They would photostat a copy for the areas in question. Now what difference does it make if its the same map — it is the 549 series. If Your Honor can take judicial notice of tides by telephone call, it would seem Your Honor could take judicial notice of the status upon which the United States of America founded these depths.

(Mr. Marbury) There is nothing to show when they were founded.

(Mr. Gray) I have a complete copy of that. If Your Honor would like to see the completed one instead of this

little corner, I would be glad to bring it to the Court. We have no objection to the introduction of this. We have nothing to hide, except that I don't think that this is of any significance to us, except for pin-pointing the time, a fact with which we are concerned.

(Mr. Cicero) If Your Honor pleases, I would like to offer in evidence the compilation of the tides from September 11, 1908 through and including September 19, 1908 by the hours, compiled by the United States Coast & Geodetic Survey people and certified to by the Office of the Secretary of the Department of Commerce, through its proper officers, as well as those hourly tides from September 6, 1909 through and including September 14, 1909. I ask that they be marked as Plaintiff's Ex. No. 3.

Marked Plaintiff's Ex. No. 3.

JOHN M. MACKALL, a witness of lawful age, being first duly sworn, deposes and says:

Mr. Cicero:

1. State your full name. A. John M. M-a-c-k-a-l-l.
2. Where do you live? A. 12 Marymount Road, Baltimore 10, Md.
3. How old are you? A. Sixty-nine.
4. When were you born? A. November 5, 1885.
5. Are you working at the present time? A. No.
6. What is your status now? A. I am unemployed.
7. Are you unemployed or retired? A. Retired.
8. During a period of your life and specifically 1915-1916, were you employed by the State Roads Commission of Maryland? A. Yes, from 1905.
9. What was your job-title with the State Roads Commission? A. I was, at the time of this construction of the Hanover Street Bridge, Engineering Surveyor for the State

Roads Commission; I had charge of surveys and plans and acquisitions of rights-of-ways and matters of that nature.

10. In that capacity, were you ever on the site of the island, called Reed Bird Island? A. Yes, a number of times.

11. Are you familiar with that? A. Yes.

12. Can you remember in your recollection? A. Yes.

13. I show you the original or linen copy —

(Mr. Cicero) At this point, I would like to offer in evidence, the stipulation entered into by the parties in this case, in which Mr. Gray handed to Your Honor, earlier in his comments.

I show you agreed Exhibit No. 9, and I ask you, whether or not, you have ever seen this paper before? A. Yes sir.

14. When did you see this paper? A. It was prepared under my direction; I saw it a number of times. It was in connection with the Hanover Street Bridge and it is approved by the Chief Engineer on August 25, 1914.

15. The date of this plat then would be August 25, 1914. Now the information that was charted thereon, can you tell us when it would have been obtained from your recollection? A. Well, immediately prior to that; perhaps over a period of a year and a half, two years.

16. What does this right-of-way plat, agreed Exhibit No. 9, show? A. Well, I don't believe it's correct to call it a right-of-way plat.

(Mr. Cicero) You call it whatever it is.

Well, it is a plan in profile of the Hanover Street Bridge from Baltimore over to Brooklyn.

17. When you say profile, what do you mean? A. I mean the elevation above mean low tide of the plan for the entire laying of the Hanover Street Bridge.

18. Does that include also the area known as Reed Bird Island? A. Yes, it goes directly across Reed Bird Island.

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19. I ask you to refer to that part of the chart, known as Reed Bird Island; is it shown on the chart? A. It is.

20. Will you please point, so that the Court can see what is Reed Bird Island on this chart? A. It begins over near Brooklyn and extends for about a thousand feet.

21. Would you say this irregular figure here is Reed Bird Island? A. Yes sir.

22. What you have pointed out to be Reed Bird Island has certain lines across there on the upper part; you are holding this thing in the way, where the North would be, proper, toward the East there is a line called Light Street Drawbridge, is that right; it shows Light Street Drawbridge? A. Yes.

23. Then immediately to the West of that and going off on an angle there are a series of three lines, with little markings on them, now, sir, what do those three lines indicate? A. They indicate the center and outside edge of the Hanover Street Bridge.

24. What do those little markings indicate on there; they start at 63? A. They are 100 feet apart; 63 starts from the beginning over on the Baltimore side of the survey.

25. What is the last 100-foot marker, as close to the last one as you can indicate? A. 76.

26. Now, Mr. Mackall, from this plat, can you refer to any other part thereof, and tell us whether there is a profile for the point in question? A. Yes sir.

27. Will you help His Honor follow that so he knows exactly where it is? A. Your Honor, it begins the section on the bottom of the sheet at the station that is marked from left to right in numerical order.

28. I refer you on the profile, Mr. Mackall, to Station No. 63, have you got it there? A. Yes sir.

29. I ask you to look from 63 over to 76 on the profile, and ask you, after having looked at that, to tell us what you can about the depths of this area at the time of this chart?

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(Mr. Marbury) Are you asking Mr. Mackall to tell us what the drawing shows?

(Mr. Cicero) Yes.

A. The drawing shows that no point between Station 63 and 76 is the elevation of the ground as high or higher than 00 being mean low tide.

30. I ask you, do you have independent recollection of this area other than that that you have just testified to?

A. Yes I do.

31. Can you or not state whether water covered this area that you have pointed out as Reed Bird Island at the time you stated you were on this bridge?

(Mr. Marbury) I don't think he identified that time?

(Mr. Cicero) I would like to know, of course, whether or not you can identify it in the period of 1908 to 1909, if you can tell us that?

A. Yes, a number of times in 1908 and 1909 — no I have no recollection.

32. Tell me what year you do have recollection? A. In 1912, 13 and 14.

33. Then in 1912, 13 and 14, do you have independent recollection of whether water covered the area known as Reed Bird Island? A. Yes sir.

34. You do have recollection? A. Yes sir.

35. Did water cover that island or not at that time? A. Yes sir it did.

36. Did it cover it at low tide? A. I would say except at low; I think at normal low tide, it was covered with water.

37. Would you say it was covered at high tide? A. It was always covered at high tide.

38. During the period you have just mentioned 1912, 13? A. Yes sir.

RECORD EXTRACT 38

39. Were you familiar with that area at all prior to that time? A. No sir.

40. During the period of time that you worked on this bridge, did you have occasion to observe the Light Street Bridge? A. Oh yes.

41. Was it there at that time? A. Yes sir.

42. Was there any land between the Light Street Bridge and the Hanover Street Bridge as you subsequently took down, showing at high tide? A. I would say not.

43. You stated before that you were in charge of acquisitions of right-of-ways? A. Yes.

44. Did you have anything to do with the acquisition of right-of-ways here? A. Yes.

45. Did any consideration pass hands, do you know, for an acquisition of this right-of-way? A. I would say not.

46. What I am talking about is the grant from the Wagners to the State Roads Commission, is that right? A. That's right.

(Mr. Cicero) That was agreed by stipulation entered into on or about 6 December — no, strike that out; it is incorrect. In agreed stipulation No. 15, the date of that conveyance from Harry M. Wagner and Harriet Cleveland Wagner, was May 5, 1916; that was the right-of-way. That is the date the deed was signed. The agreement would have been prior to that.

47. The deed as we stipulated had a consideration of one dollar, is that right? A. That's right.

48. No other valuable consideration? A. No sir.

49. Had you actually gone across that land and worked on it prior to the date you got the signature on the deed? A. Oh yes, the bridge was practically completed; the roadway was completed; the agreement was entered into in 1914.

50. But it was not signed and formalized by deed until 1916? A. That's correct, at which time, I believe, the bridge was completed, the fill was completed.

51. During the period of 1912, I believe you said, to — what was the last time you had worked around the bridge there? A. Well the construction was started the middle of 1921, correction 1914, August 21, 1914, this plat was signed.

52. When did you complete your work there, do you remember? A. How do you mean — completed?

53. Your duties, when did you duties terminate? A. Well they didn't terminate until the completion of the bridge.

54. During the period of time from 1912 through the completion of the bridge, did you have occasion to go down on the actual site? A. Yes, many times.

55. Did you or not see any boats going across this area, that is Reed Bird Island, in that period of time? A. We used some row-boats to do surveys; I never saw any boats actually cross it except those used by the Commission to make the survey.

56. Did those boats go over the area known as Reed Bird Island? A. Yes sir.

57. You are positive of that? A. Yes sir.

58. All during this period? A. Well I don't know about all during the period; there was never a time when it was an occasion to have a boat go across it if they were unable to go.

(Mr. Cicero) If it please the Court, I think that the State Roads Commission are rather jealous of this plat and they have asked us to please return it as soon as possible and accept the photostatic copy which is on Your Honor's desk in lieu thereof. Would that be agreeable with everybody?

(Mr. Marbury) Yes, I would just like to look at it.

RECORD EXTRACT 40

(Mr. Cicero) I recall two questions I would like to ask Mr. Mackall.

(Court) Let's get this map straightened out. You have already offered the original in evidence.

(Mr. Cicero) Is it His Honor's desire we offer in evidence each of these exhibits in stipulation.

(The Court) I suggest you take a quick look at this; I assume it shows everything it should; I don't know.

59. Can you tell us when the fill that you put across Reed Bird Island, the date and the year, if you recall? A. The work was started in August — September 1914, and I would say it was completed in 1915.

60. That fill was what in vertical height? A. Ten feet.

61. Ten feet above mean low tide? A. Ten feet above mean low tide.

JOSEPH N. JOHNSON, a witness of lawful age, being first duly sworn, deposes and says:

Mr. Cicero:

1. What is your full name? A. Joseph N. Johnson.
2. What is your address? A. No. 5 Talbott Street.
3. Where is that? A. Between Hanover and Pottee Road in Brooklyn; it's in the City.
4. It is an area called "Brooklyn", is that correct? A. Yes.
5. And it is on the South side of the Hanover Street Bridge? A. Yes sir.

* * * * *

(St. Tr. 11-14):

8. Mr. Johnson, how old are you? A. I'm seventy; I aint quite seventy-one yet.

9. When were you born? A. 1885.

RECORD EXTRACT 41

10. Are you now working? A. No sir.
11. What is your status; are you retired? A. I am retired.
12. Prior to your retirement, what kind of work did you do? A. What do you mean — when I was working; well I was a lead burner; a lead burner's rigger, chemical works.
13. Have you lived in the vicinity of Brooklyn all your life? A. Not all my life.
14. What period of time did you not live around Brooklyn? A. I moved in Brooklyn in my estimation close as I can come to it 1896, the latter part of 1896.
15. From that period of time, did you maintain your residence in Brooklyn? A. That's right. Right in that same territory.
16. I ask you, do you know the area known as Reed Bird Island? A. Yes sir.
17. Did you know it in 1905 and subsequent to that period? A. As far as that goes, I can't say, because there was no such name as Reed Bird Island until later.
18. Did you know the area which is now known as Reed Bird Island? A. Yes, sir, every inch of it.
19. Can you tell us why you know that area so well? A. Well, I was always around the water crabbing and fishing.
20. Did you have your own boat? A. Not at first.
21. When did you acquire a boat? A. I started to build my boat the latter part of 1905.
22. What kind of boat was that? A. It was one of these Eastern Shore Log Canoes, they call them, sailboat, and I converted it over into power.
23. How long did it take you to convert this boat? A. About a year.
24. Where was the boat while you were converting it? A. I had the boat in a place which is called "Adamses" now.

RECORD EXTRACT 42

25. Can you come to this plat on the blackboard and generally point out where Adamses was? A. It's about a thousand feet from the end; where I built the boat was a shed, part of it built over the water and part over the land.

26. Where is that place? A. About a thousand feet where you come over Hanover Street Bridge right along in there.

27. Take this ruler and show His Honor where it is? A. This is Hanover Street Bridge; about along in there.

28. You say a thousand feet from the old Light Street Bridge, is that correct? A. Yes, it might be a little bit more; I am just giving an estimate.

(The Court) You say a thousand feet from the old Light Street Bridge and the Hanover Street Bridge? A. Well they come pretty close together; they aint ten feet apart.

29. Before you converted this boat to motor, did you have occasion to sail it in the area? A. Yes sir.

30. What period of time would you say you sailed this boat? A. I bought it in the latter part of 1905; I sailed it during that winter.

31. That would be 1906? A. As soon as cold weather come, I stripped her and put her in the shed.

32. So you sailed this boat from 1905 until the winter of 1906, the summer, rather; did you have occasion during this period of time to sail this boat in waters around this area? A. Yes.

33. Did you ever or not sail your boat over what is known as what is now Reed Bird Island during this period? A. What is called Reed Bird Island now, I have.

34. Was there water on the island at that time? A. Yes sir, I crossed there in a boat.

35. You are familiar enough with this island, where was the channel to this island? A. It come right down back of those houses of Adamses, come down there just about where that pumping station stands just now; then when

RECORD EXTRACT 43

you got there and didn't want to come the old Light Street Bridge underneath the trestle, you made a turn and went back towards Baltimore County side, which we all used to call the "Gut".

* * * * *

(St. Tr. 15-23):

45. You could go right across the area and that was Reed Bird Island? A. Yes sir. Right where Hanover Street Bridge is now.

46. That's on the south side of the channel; it comes down from Relay? A. I have sailed my boat all across there on a medium tide.

47. I am slightly confused now; are you indicating that the main channel passes to the north or to the south of Reed Bird Island? A. It was the south. They called Reed Bird Island.

48. The main channel? A. They call it all Reed Bird Island as far as I know of.

49. I don't know whether you understand my question, but look at this plat, exhibit number 9 and tell me if you can, whether or not the channel was not up here or was it here? A. This is the old Light Street Bridge. Between here and there is where I built my boat; we come down here, right in there, make the turn and go out this way.

50. Did you point to where you went? A. I had to come around this way here and go out through here and come out this channel through here, through the drawbridge.

(Mr. Gray) For the record, the witness is indicating the stretch between Reed Bird Island and the island south of Reed Bird Island adjacent to, running to the B. & O. Railroad tracks, indicating he would go up that channel to center section of the Patapsco River out toward the main part of Baltimore Harbor.

(Mr. Cicero) May it please the Court, he is indicating that he had to go to the left. I think it would be a good idea

RECORD EXTRACT 44

if Mr. Johnson showed Your Honor exactly what he is talking about.

(Mr. Gray) Why not tack it on the board and let him set him straight.

51. Would you come over here and look at Ex. No. 9 and orient yourself. Now this is Brooklyn shore here. Here is the area known as Reed Bird Island and this is the old Light Street Bridge. These three lines here mark where the Hanover Street Bridge was subsequently put. Show us on there where you were building your boat? A. I was building it about a thousand feet from the bridge. I used to go down — I couldn't get under the old bridge because it wasn't high enough; there wasn't standing room.

52. Would it draw enough water; was there enough water under it for you to go under it? A. It would be if I got under it.

53. At what time was this? A. That was all the way from 1905 up until—

54. Until what? A. Until before that. I am speaking of myself; I used to travel it.

55. Tell us exactly what you did; the bridge was too low; you couldn't get under it? A. There was enough water to get under it.

56. What year was this? A. 1905, 1906, 1907.

57. In 1909, was there enough water for you to get across there? A. No, that's when I had to take her away.

58. Why did you have to take her away? A. My boat drew around three feet of water and it got so shallow that I struck bottom and I had to move her down to what we call Stansbury's.

59. Where was Stansbury's? A. Down on the shore; this is the old bridge; it went along in here, somewhere.

60. You are indicating, now, a point on the shore to the East of Acton's Park and that is to the East of the old Light

Street Bridge. What channel did you use; what did you recognize as the main channel in this area? A. I come down here and make a short turn; sometimes I had to make it so short I had to take an oar to push around, I couldn't make it.

61. Then which way did you go? A. I come right on out this "gut". Wait, I am a little confused on this drawing. I used to come up this "gut" and I used to come on out this channel. I had to come on up here, because that bridge was there then, come on out this channel, come on up here to the new drawbridge.

62. That is the channel you refer to as the main channel? A. No, this one up here.

63. That is in the vicinity of the old Light Street Drawbridge? A. Yes.

64. Which was, subsequently, when the Hanover Street Bridge was put in, left this 500 foot bridge there, is that right? A. Yes.

65. What did you refer to this little area in here as in 1909 when you couldn't get your boat in there, is that the channel or gut?

(Mr. Gray) Object. I am not clear myself what is the channel and what is the gut.

66. What did you call that area South of Reed Bird Island that comes in here and North of the fast land? A. Whenever we went out there, we always called that "The Flats".

67. Was there a little deeper spot in there on Reed Bird Island? A. Yes. You just come on down the old bridge; there was six or eight feet of water at times.

68. But you didn't in 1909?

(Mr. Gray) Object. It is a leading question.

(Mr. Cicero) He has already said that, Mr. Gray.

(Mr. Marbury) Where he said about nine feet, let him finish his sentence.

(Mr. Cicero) He didn't say nine; he said six.

A. If we come around to get through the old bridge, we'd have plenty of water. We couldn't get through the old bridge. It was low bridge and we couldn't get my power boat through. We could get through there in a row boat.

69. In 1909, you testified before, you couldn't get through, there wasn't enough water, is that right? A. We come out that channel; after they started to fill in, I was drawing about 3½ feet of water, and then on account of getting in and out nighttime, I was always going in and out at night scratching the bottom on account of my wheels—

(The Court) Suppose you point out to me exactly where you couldn't get through. A. What do you mean — in 1909; down that channel I would make a turn there, down in this corner here was an old blacksmith shop, and I would come right on down back by that and come on out this way, the gut.

(The Court) What do you mean by gut? A. That is where the deepest water was.

(The Court) In 1909 you would come out through there? A. Well it started to fill in here gradually. Sometimes we would go right up against the wall and have plenty of water.

70. All this time you are referring to was to the West of the Old Light Street Bridge? A. Yes.

71. And subsequent to the West of where the Hanover Street Bridge is now, is that right? A. Yes.

72. You made your left turn before you got to the bridge? A. Before I got to the bridge.

73. You used to make your turn where the new bridge comes up the shore now? A. Yes.

74. But all during this period of 1909 there was water known over the area known as Reed Bird Island? A. Yes.

RECORD EXTRACT 47

75. Was there or not? A. Yes, but as I say at times you might have two feet of water and you might have eighteen inches of water.

76. Regardless, there was water over that island? A. Yes.

77. Did you ever see any other boats go over that land known as Reed Bird Island around 1908-1909? A. Yeah lots of row boats; I never seen no big power boats, nothing like that, no large boats, but rowboats, small boats; we used to go out Reed Bird shooting.

78. Did they go on that actual area known as Reed Bird Island? A. We'd take a medium tide and go up there.

79. How about high tide? A. You would have to go up to your waist.

80. The water was above your waist? A. To your waist.

81. How can you be certain of the period of time that this existed, Mr. Johnson? A. How can I be certain as to the period of time; well I was down there practically all the time.

82. You remember moving your boat, don't you? A. Yes.

83. What year was that? A. That was the latter part of 1909, I went to Norfolk; I moved away just for awhile; I went to work down in Norfolk.

84. How long were you in Norfolk? A. About seven months, six to seven months.

85. Then what happened? A. After seven months, I come on back and got a job here?

86. One period of time you were away; when you came back, was this area covered with water? A. No sir.

87. Not covered with water? A. I mean, yes sir, it was covered with water because after that we used to go soft crabbing up there; I soft crabbed through there until about 1911, I guess.

RECORD EXTRACT 48

87. You were telling me something about carp fishing; would you tell His Honor about that, what took place on Reed Bird Island? A. We used to go out there, take pitchforks, harpoon them and everything.

88. Right on the area known as Reed Bird Island? A. Right on the area known as Reed Bird Island, yes.

89. What year was that? A. That was in the latter part of 1909, 1910.

90. When you say you think, is there anything that can recall vividly to your mind that period of time? A. Yes.

91. What was that? A. We were out there one morning; I think that was in the latter part of 1909, 1910, that Robert Stansbury was working for the—

92. Who is Robert Stansbury? A. He used to live right around there.

93. A friend of yours? A. Yes, he was going to work on the back of an old car going across the bridge; we waved to him to come on.

94. This is a trolley car that used to go across the Old Light Street Bridge? A. Yes.

95. And he was standing on the back of it? A. Yes, we hollered to him, told him to come on, not to go to work, he could make more out on the flats harpooning carp than he could at work.

96. What did he do? A. He went to work; about 11 o'clock we got word he lost his arm, had cut his arm off in one of the machines.

97. During that morning did you actually engage in harpooning carp? A. Yes sir, we were out there with old pants on, had a half a rowboat full of them.

98. That was on the area known as Reed Bird Island? A. Yes sir.

RECORD EXTRACT 49

99. Was there water on it then? A. Yes sir, sometimes we were above our knees in water.

100. Did you ever recall this area in the wintertime? A. Yes sir.

101. Did it ever freeze over? A. Yes sir.

102. Were you on Reed Bird Island during that period of time? A. I think it was 1911 the last winter we skated across there.

103. You used to skate across it? A. Yes, the leaves started to come off then. We tripped on our skates. Take 1905, 1906, 1907, we had skated right straight across from Adamses, which is Adamses now; that's where we used to get on, because they didn't have no boards or nothing. We skated right straight across them flats anywhere.

104. How about 1908, 1909? A. After the weeds fell. After the frost, after the weeds fell, the tide would come up and freeze overtop and keep on building up.

105. Even in winter then, there was either water or ice in that area? A. Yes. I come home wet where I had broken in many times.

106. In 1908, 1909, do you remember what the depth of that gut was between the South end of Reed Bird Island and the North end of the fast land there? A. Well, you had about, on ordinary tide, what I call medium tide, we had around — some places we had around three feet of water, some places we had four, just as the current washed it up.

107. How deep would you say the water was at that time over Reed Bird Island? A. Over Reed Bird Island?

108. Yes? A. On a medium tide, around twelve inches of it there.

109. What was the bottom of this area? A. Plenty of mud.

110. In other words it was a mud bottom there? A. Plenty of mud. You would be wading up there, you would be wet to your knees.

CROSS EXAMINATION

Mr. Marbury:

* * * * *

(St. Tr. 24-28):

8. * * * Your Honor, this picture, taken June 3, 1916 from the Anne Arundel shore just above the embankment looking Northwest, about 11:05 A. M. It is marked on the Stipulation that the picture is correct as of that time. Now you are looking from the Anne Arundel shore over there at the Baltimore side. Here you are over on the Anne Arundel shore. Is this the gut you were talking about? A. Yes. This is the Baltimore County side, ain't it?

(Mr. Marbury) I asked you what that is.

9. Do you know what that is, isn't that Reed Bird Island? A. Where this water is. That looks like land to me.

10. Isn't that Reed Bird Island? A. No.

11. In other words, you don't recognize it, that picture? A. No.

(Mr. Marbury) The picture he doesn't recognize is marked H 14.

(Mr. Cicero) What was the picture you handed him before?

(Mr. Marbury) The picture I handed him before is H 15. This one says it was taken at the North end of the embankment, looking Southwest at about 11:15 A. M. H 15 looks over this point here to Brooklyn. You can see water coming in there. This is looking from the Brooklyn side of the same land to the Baltimore side.

12. I ask you what that land is there that lies between the main channel; this is the Anne Arundel County side and

RECORD EXTRACT 51

I ask you what this land is? A. That there in there we used to call flats.

13. What you used to call flats? A. What we used to call flats, yes sir.

14. Are you telling the Court that you sailed over that land; this land that is between? A. Yes.

15. That you sailed over that? A. Yes. Anywhere in here, from Geises, that is the Brooklyn side going down there; you go under the old bridge up here. The old Light Street Bridge comes in here; I come down here right where this fill is; I been all over there in a sail boat.

16. You have been all over this area where you see these reeds? A. Yes.

17. And that land? A. Yes.

18. Years ago? A. Yes.

19. This picture was taken in 1916? A. In 1909.

20. You say within seven years of that time, you sailed over that? A. Yes, I went over the land in boats; reeds started to fill in there; you come down here and make this turn in here at Geises and went out that gut.

21. The gut is over here? A. This is Geises over here, isn't it?

22. Yes, but there is water between Geises and this land; the water you see goes down behind the land?

(Mr. Cicero) He is telling you what he did in 1909.

23. I think you can straighten this out and get it clear; there is still water in 1916 between Anne Arundel County and where I am talking about, and here it is; this is 1916; here is the water on the Anne Arundel County side and here is the water on the Baltimore County side; right in the middle of that water, there are the reeds sticking up? A. I have been all over that; those reeds show; that dark spot is supposed to be reeds and that channel come down here

RECORD EXTRACT 52

and went up back of there; that looks like it there; that white spot looks like the channel.

24. Isn't that the other side of the reeds, the channel?
A. You can come down here and go up behind; go back there and it is between here, the reeds between, and the fill of Hanover Street Bridge now; that's the fill; well we used to go up that gut; before I went up that gut, I come all across there in a boat, clear across Baltimore County over there.

25. Not in your boat? A. Yes sir.

26. You say you went over there in a boat with a 3½ foot draught? A. I didn't say — I said in a rowboat and I had sail on my boat; we had to use the channel, we couldn't get across there; I had sail and I used to go over there and I sailed anywhere across there and across here when she had sail on her; she only drew about 8 inches of water before this centerboard come on across.

27. Was that before or after the B. & O. Bridge? A. Before the B. & O. Bridge? Sure. That B. & O. Bridge was put across there; I was quite small when that B. & O. Bridge was put across there.

28. The B. & O. Bridge was there before, is that what your answer is? A. Yes.

29. Do I understand you to say they started the fill after the B. & O. Bridge was put in? A. That's when they started the fill.

30. In other words, when the — A. I had been all across there in a rowboat and my sailboat when I had a sail on it.

31. Can you make out what this one is marked H 11, can you make out what that is? A. Looking towards the Baltimore side.

32. Exhibit 11 is looking toward the Brooklyn shore? A. This is the fill of the old Hanover Street Bridge; that's the fill; we used to come back of them houses and go in there and make that turn and come up that channel right there

RECORD EXTRACT 53

and come on out right there. Now we are getting it clear. It didn't go right straight west, more of a southwest —

33. That's where the channel went? A. All in here and all in here, I have been up there in boats even from that channel, across in there.

34. You say you lived there in 1909? A. 1909! I taken my boat away from there in 1909.

35. Up until the time you took your boat away, you could go across that area? A. Yes.

REDIRECT EXAMINATION

Mr. Cicero:

36. About the channel which you called "the gut" which went under the bridge and out into Baltimore Harbor, is that right? A. Underneath the old bridge — you couldn't get through it on account of the old bridge stopping you.

37. I understand you couldn't get through it; you said a rowboat could go through? A. A rowboat could go under it.

38. Was it used by people? A. Oh yes.

39. How long did that use go on? A. All day; I used it up until 1914; on that end I used to keep my rowboat; a friend of mine used to go out there fishing; go underneath that, and go on out.

40. As late as 1914? A. Yes. After they built the new bridge, they left the stand and we used to go underneath that.

41. And the bridge was finished in 1916? A. I think it was; they opened it in 1916; I used to go up there fishing; I used to take the boat, had to stoop down in the boat to come underneath the concrete bridge. If the tide was real high, we couldn't get underneath. If we got caught out we had to leave the boat on the other side until the tide dropped and we could get underneath there. It was '16 when the bridge was opened because that's when I had my first "flivver".

* * * * *

RECORD EXTRACT 54

(St. Tr. 29-31):

3. State whether or not, in your opinion, the area where the 100 foot bridge was left, was or not a channel after the bridge had been constructed there, the Hanover Street Bridge? A. You mean the one on Brooklyn side.

(Mr. Gray) Object.

(The Court) Wait a minute. What his opinion is, Mr. Cicero.

(Mr. Cicero) He is certainly qualified. On cross-examination, he has been asked whether or not he could use it as a channel and they developed it through their questions and they got an answer that the only way you could go through there was to get real low in the rowboat, because the clearance wasn't sufficient. That's all I want to make sure of. I want to be able to question him on that point.

(Mr. Marbury) Isn't that a question of law?

(Mr. Cicero) I will withdraw that if you admit those are the facts.

(Mr. Marbury) I don't admit those are facts. I admit that is his testimony.

(The Court) You stated the B. & O. Bridge was built when you were very small? A. Yes.

(The Court) You don't know when it was built, do you? A. No, I can't say what year it was built.

(Mr. Cicero) That is a stipulation in here that may help you as far as the B. & O. Bridge is concerned; that is that it was filled in under their bridge in 1900, so it was there before 1900? A. That's when it was filled in.

(The Court) Do I understand then that sometime after that, this area known as "Reed Bird Island" began to fill up? A. It began to fill in there; reeds began to grow first, what we call "Wild Oats".

(The Court) When was that approximately? A. That was right after they filled the bridge in; you could see little spots here and little spots there.

(The Court) After they filled what bridge in? A. The B. & O. Bridge. I used to softcrab where they filled in the bridge.

Mr. Cicero:

4. From the period of 1900 through 1909, you state that there was water over that area, anywhere over there? A. Mostly anywhere, but about 1909 that's when it stopped going up further the railroad bridge, anywhere close up there back of those houses —

5. That wasn't Reed Bird Island? A. No.

GEORGE N. POTEE, a witness of lawful age, being first duly sworn, deposes and says:

Mr. Cicero:

1. State your full name. A. George N. Potee.

2. And where do you live, sir? A. 3611 So. Hanover Street.

3. And how old are you, Mr. Potee? A. 58 next birthday, that's in a few months time.

4. And you were born what year? A. 1897.

5. Now, have you been in Court all morning? A. Yes sir.

6. Have you heard testimony about Reed Bird Island? A. Yes sir.

7. Do you recognize the name? A. Yes sir, I didn't at that time, it wasn't called Reed Bird Island at that time.

8. Well, you know the area? A. I know the area, yes sir.

9. Now, is this the area you were referring to, I'm now looking at Exhibit No. 2, and I'm tracing my finger around an irregular line here, is that the area that you knew as Reed Bird Island? A. Yes sir.

10. You subsequently learned the name of it? A. That's it, yes sir.

11. Now, sir, did you spend your life in that area? A. Yes sir.

* * * * *

(St. Tr. 32-35):

16. Now, sir, what can you tell this Court about the area from around 1907, 1908 and 1909? A. In 1907, '08, and '09 we use to play down there in that water there, in the high tide you could walk across there, I wouldn't call it a channel because if it was a channel you wouldn't be able to walk across it, the water would be up to about our waist, a little above our waist at high tide.

17. Now, you're talking about walking across the fast land on the south? A. Yes sir.

18. Will you show His Honor or point on the map, take this ruler and show where you walked across? In order to refresh your recollection this is the base of the old Light Street Bridge here and Acton's Park is over here. A. Well, down in this section, I'm wrong here, we couldn't walk across here. I'm not talking about here, we couldn't walk across here, this was up further so we use to walk across.

19. Tell us exactly where you walked across? A. Well, right up here in back of Marshall's old home place, that was up past Patapsco Avenue, about a hundred feet past Patapsco Avenue.

20. And then where did you walk? A. We use to walk across the street here and there was what we called "flats" on the other side of that.

21. Now, what about this area in here, did you walk across the backland to this area here? A. In places you could and in some places you couldn't.

RECORD EXTRACT 57

22. Did you ever walk across that to the Reed Bird Island? A. Many times, yes sir.

23. And how old were you then? A. About eight years old.

24. And how tall are you now? A. Indeed I couldn't tell you.

25. Well, were you as tall then as you are now? A. No sir.

26. Would it be fair to say that you're 5' 7" tall now? A. I guess so.

27. You're not a tall man? A. No sir.

28. You're not above 5' 7" are you? A. No sir, I wouldn't think so.

29. Well, when you use to walk across this area where would the water come, if water came up? A. Well, the water would come up around about here on me.

30. You're designating your belt line? A. Yes sir, a little above the belt line, it would come above the belt line.

31. And that was when you were eight years old? A. Yes sir.

32. Now, sir, when you got to what is known as Reed Bird Island what, if anything, was there? A. Well, there was a lot of mud there, around Reed Bird Island there was a lot of mud. There was, I would say, in the neighborhood of three to four foot of water at low tide.

33. On the island, three to four foot of water? A. Around between two and three foot of water at high tide.

34. At high tide? A. At high tide.

35. Now, what about low tide? A. Low tide there would be about a foot, about a half a foot or foot of water there at low tide. I've never seen it without water on it at all times.

RECORD EXTRACT 58

36. Now, did you ever see any reeds or anything? A. Yes sir, you see we use to go down and we use to sit down and watch the men out there gunning for reed birds.

37. And were they in the water? A. Yes sir, they would all have hip boots on out there, gunning reed birds.

38. Did you ever hunt or fish anything? A. Did a lot of soft crabbing around there.

39. On the island itself? A. Around on the island and around over on the flats on the other side of the railroad bridge.

40. Now, how can you tie this down from a point of time so that the Court can understand what you're talking about in 1907, '08 or '09? A. Well, the only way that I can tie it down is because I was forbid to go down, my mother would forbid me going down to the water and when I'd come back I'd get fanned good for it and I'd have to go back in the water to get cooled off.

41. And you're certain of that? A. I'm positive of that because I never did forget that, that's one thing that made me remember.

42. Now, do you know where the channel was in this area? A. Well, I wouldn't call that a channel, there was a stream I would call it. The channel was over in the second trestle of the railroad bridge, that's what they call the channel.

43. Suppose you go show us on that, if you can. This mark in the brown crayon, sort of a dotted, is the old Light Street bridge. Now, orient yourself. A. Well, the channel, what I would call the channel would be along in here about half way between here would be the channel, what I would figure would be the channel.

44. Perhaps you can better point it out from this chart here, this will give you an idea of the old Light Street bridge, and this is where the draw bridge was, and this is the southern end where Brooklyn end is, and this area here, irregular shape here is Reed Bird Island. A. This

was about where the channel went through, right along about in this area here is where the channel went through and that's about where it is now, they're going through on the new bridge. That is where the stream goes through there now.

45. You're pointing at a point here between an area where it says five hundred foot (500') bridge on the proposed Light Street, and you call that the channel? A. That's right.

46. Now, you heard testimony this morning about another channel or whatever you call it — A. Well, I wouldn't call that a channel, I'd say that was a stream through there but not a channel.

47. Now, where did that run so that the Court can understand that? A. That started here, down here at Acton's Park, going through here and went on up this way with the stream.

48. And is that the stream that you walked across? A. That's right, yes sir.

(Mr. Cicero) Witness with you.

CROSS EXAMINATION

Mr. Gray:

* * * * *

(St. Tr. 36-37):

10. Did boats use to go through between Reed Bird Island and the next mud flat toward the railroad bridge? A. I've seen boats go through there, men have pushed boats through there, I've never seen them in the boats, I've seen them push them through there when they were hunting reed birds. They'd carry their shells and things in the boat, a lot of times they'd put their guns in the boat and push the boats through because the reeds were so high you couldn't row the boats through them, you'd have to push it through.

RECORD EXTRACT 60

11. Were there reeds cross Reed Bird Island? A. Yes sir.

12. And we're talking about the period around 1909? A. Yes sir.

13. There were reeds there? A. Yes sir.

14. Were the reeds pretty thick on Reed Bird Island? A. They were pretty thick, yes sir.

15. When were you born? A. 1897.

16. And you lived in Brooklyn all your life? A. Born right there in that same spot.

17. How far was your home from the shore? A. It wasn't very far.

18. About a block? A. It wasn't over a block away from there.

(Mr. Gray) That's all

REDIRECT EXAMINATION

Mr. Cicero:

1. These reeds you were talking about, were they on land above water or under water? A. They were under water.

2. They were under water? A. They were under water, the roots were under water but they grew way above the water because the birds use to go in there and feed off of them and you couldn't see the men walking through there. They were so high you couldn't see the men when they gunning walking through there.

3. You did see men pushing the boats? A. I have seen men pushing the boats through there, yes sir.

* * * * *

(St. Tr. 38-44):

RECROSS EXAMINATION

Mr. Gray:

1. When you say you walked across the stream, did you walk from the backland on the Brooklyn side, where would you walk to? A. Walked over to the flats where the reed grass was, where the water was over on the reed grass, where the grass was. We'd walk over into the grass.

RICHARD W. TYLER, a witness of lawful age, being first duly sworn, deposes and says:

Mr. Cicero:

1. Mr. Tyler, what is your full name? A. Richard W. Tyler.

2. And where do you live? A. 3236 Glendale Avenue.

3. And that is where? A. That is in Baltimore City.

4. Now, Mr. Tyler, what is your job? A. I'm principal associate engineer with Bureau of Harbors.

5. For what municipality? A. Sub-department of the Public Works for the Mayor and City Council of Baltimore City.

6. And how long have you been an employee of the Mayor and City Council of Baltimore City in that capacity? A. Well, that has only been a year or so, I mean in my duties at the present time, but I've worked for the City of Baltimore in the engineering division for the past thirty years.

7. In harbor work? A. In harbor work.

8. Now, what are your duties with the harbor board? A. I have charge of construction work for the City of the Municipal docks, piers and wharves, dredging, hydrographic survey work, and other phases of engineering work.

9. You actually work on the harbor? A. Yes.

RECORD EXTRACT 62

10. Now, in connection with this hydrographic survey work, do you actually use charts in surveys? A. Yes.

11. Are you familiar with charts in surveys and maps made up by U. S. Coast and Geodetic Survey? A. Yes.

12. Do you use those in your job? A. Yes.

13. Is part of your job knowing anything about the rise and fall of the water in Baltimore Harbor? A. We have to take the tidal change into our work at all times.

14. And that is in connection with tides? A. That is in connection with tides, yes.

15. Now, Mr. Tyler, I want you to look at Plaintiff's Exhibit No. 1, well, this is a copy of the U. S. Coast and Geodetic Survey Chart No. 549 of Baltimore Harbor, are you familiar with that chart or that type of chart? A. Yes, I'm familiar with this chart, I use this chart.

16. Now, sir, is the area in question, Reed Bird Island, Brooklyn and Hanover Street Bridge, or rather the Light Street Bridge, shown on that chart? A. Yes, this is the area here.

17. Will you refer to that area and refer specifically, sir, if you please, to the area known as the Light Street Bridge, if you can find that there? A. This is the Old Light Street Bridge, across here.

18. Now, refer to the point to where the old Light Street Bridge touches the south end of Brooklyn. A. You mean the north shore of Brooklyn?

19. That's right, the north shore of Brooklyn, have you got that? A. Yes.

20. Now, sir, by looking at that chart, in that general vicinity and going northward from that point, can you determine, can you tell the Court what that chart purports to indicate as to the depth of waters in that vicinity? A. Well, this would indicate here that on to the east of the bridge there is no fast land above mean low water at all.

RECORD EXTRACT 63

21. Is there any depth soundings along there especially by Light Street Bridge? A. There's a half a foot alongside of the bridge, a little further off into the north, one foot; two feet further south off the shore.

22. Now, sir, does that prevail as on the west side of the bridge in that area? A. Adjacent to the bridge, yes, but there are two spots that would indicate that there was a little bit of land maybe above mean low water.

23. Are they adjacent to, or do they run under the Light Street Bridge as shown on this chart? A. No.

24. Can you determine how far the closest point there is from the old Light Street Bridge? A. Well, this is a rather small scale, I think it's 1 to 40,000.

(Mr. Gray) This is the 1904 Exhibit we're talking about?

(Mr. Cicero) Yes.

(The Witness) Well, this scale is extremely small to measure from, but I would say, about fifteen hundred feet (1500').

25. The closest point of land, bit of land shown on that chart is fifteen hundred feet? A. No, I'm wrong. I'd say about three hundred, I'd say in the neighborhood of three hundred feet.

26. You'd say in the neighborhood of three hundred feet from the east end, or rather from that Light Street Bridge? A. From the west side of the Light Street Bridge, yes.

(Mr. Gray) Would you point to the point you're indicating?

(The Witness) This one right here.

(Mr. Gray) You think that's three hundred feet from the bridge?

(The Witness) I can't tell exactly, but this is, I think, thirty six hundred feet to the inch, the scale of this chart.

RECORD EXTRACT 64

(Mr. Gray) Could the witness make a mark so the record will show where he's indicating on the map as the point he has in mind.

(Mr. Cicero) Would you circle a small dotted line that you're pointing to there?

27. Can you determine from that point there how big that point is, from this map? A. I would say, no, it would be almost impossible to tell the area of that small parcel of land.

28. You mean because it's too small? A. Because it's too small a scale, yes.

29. Now, sir, I want you to look at Plaintiff's Exhibit No. 2, I think this is, and I ask you if you're familiar with that? A. Yes, this is portions of 549 chart.

30. Now, does that show the area in question, Brooklyn and the Hanover Street Bridge, and the Light Street Bridge I mean? A. Yes, the same area as the other exhibit.

31. Now, I refer you to the point on the map where you were just looking on the other map, and I ask you, if this map shows anything other than what was on the other map in the way of bridges and improvements? A. Well, this shows the new Hanover Street Causeway across there.

32. It does? A. Yes.

33. Now, sir, does it also show the depths around the causeway and the old Light Street Bridge? A. Yes.

34. Now, sir, in the vicinity of where Reed Bird Island is supposed to be, can you tell us what the depth of water, the depth of soundings are according to that chart? A. Well, just where is Reed Bird Island supposed to be, I mean there's no island shown there.

35. There is no island shown on this chart? A. No.

36. Will you go about five hundred feet north of the southern terminus of the Light Street Bridge and look in that general vicinity, and tell us what the depth of water is

there? A. This scale is bad because it's a photostat, it looks to me like it could be about a half a foot.

37. Is there a marking on there that shows a half a foot? A. I think that is it there, I can't see it too well.

38. That's a half a foot in your opinion? A. Yes.

39. And is there any land area under the old Light Street Bridge on this map which shows that is out of water? A. No.

40. Everything around the old Light Street Bridge is under water? A. According to this chart.

41. Now, look at the Hanover Street Bridge or what you refer to as the causeway, and tell us where the nearest point of land that shows above the water is?

(Mr. Marbury) That is dated 1918, and looks the same as 1905?

(Mr. Cicero) May it please the Court, I would like to continue with my examination, Mr. Marbury may have all the leeway he wants.

(The Witness) The balance of land would appear the same on this as appear on here.

42. Now, will you circle on here what appears to be the same nubbin of land that appears on the other one?

Witness marked the exhibit.

43. And that is under, all around the Hanover Street Causeway, is that right? A. Yes sir.

44. And how big would you say that area was? A. I couldn't make a guess.

45. Why? A. The scale on the chart is too small.

46. Would you say that area is anywhere in the size of 33 acres? A. I would say, no.

47. Would you say it was smaller or larger? A. I would say, much smaller.

48. Based on the chart and your scale, can you give us an estimate, or an approximation of what that size of nubbin is? A. Well, from here I would say it wouldn't be much over an acre or two acres, that one I circled.

49. And that's the only one near the vicinity according to the United States Coast and Geodetic Survey Chart that appears near the Light or Hanover Street Bridge? A. Well, no, there's another one directly north of there, there's another parcel directly north of there.

50. Does it touch the Hanover Street Bridge? A. It appears to, yes.

51. And how far north would you say that is of the nubbin that you put in on your other map? A. I'd say about 1200 feet, 12 or 15 hundred feet north of the Brooklyn shore line.

52. Now, sir, having observed both of those charts I ask you to look at these tide records that are in evidence as Plaintiff's Exhibit No. 3, and I ask you specifically, to look at the tides for the day on which the department surveyed, September the 15th, 1908, and I ask you, sir, to tell us from that, in your experience whether or not, what the depth of the water was in that vicinity of the bridge —

* * * * *

(St. Tr. 44-45):

53. All right, sir, I will give you a definite spot on this chart. Take first the chart of 1920, that is Plaintiff's Exhibit No. 2, and the area surrounding the nubbin of land which you have circled, do you understand me? A. Well, your closest sounding to that area is probably this half a foot here or this half a foot here.

54. And that is where on the chart, so that the Court can understand? A. Well, on the old Light Street Bridge I would say it would be about three, maybe four hundred feet north of the bridge, four or five hundred feet north of the Brooklyn shore line.

RECORD EXTRACT 67

55. Along the bridge? A. Along the bridge, that's the old Light Street Bridge.

56. Now, at that point and immediately to the west thereof 'til you come to the nubbin based on the hourly tide heights, tell us what the height was starting, I would assume the man didn't get out before 7 o'clock in the morning, maybe he did, let's start at 6 o'clock in the morning, so start at 6 o'clock in the morning and tell us what the depth of the water would be according to these hourly tides charts?

* * * * *

(St. Tr. 46-48):

(The Witness) Well, that is right, the only thing I have to work from is the sounding on this chart, which is a minus sounding, that is, below mean low water plus these tidal levels which are above and below mean low water. Now, on that day there were no minus readings, in other words, everything was above mean low water, so it's simply adding these figures to what were the depths as shown on this chart, to get the water depth at that time.

57. And that would be starting 6 o'clock in the morning?
A. At 6 o'clock it would be 1 foot, at 7 it would be 1.3 feet.

58. Depth of water? A. That's right, at 8 o'clock it would be 1.8, at 9 o'clock it would 2 feet, at 10 o'clock it would be 2.1 feet, at 11 o'clock it would be 2.3 feet, at noon it would be 2 feet. There were 13 hours, which was 1 o'clock in the afternoon, starting again it would be 1.9 feet, 14 hours it would be 1.7 feet, at 15 hours it would be 1.1 foot, at 16 hours it would be 1.5 feet, and that appears to be the low water period at that time. At the 17th hour it would be 1.7 feet, it is starting to rise again, at 18th hour it would be 2 feet, 19 hours it would be 2.3 feet.

59. And these points are based on tenths of a foot, is that correct? A. Tenths of a foot.

60. (Mr. Gray) On what day?

(Mr. Cicero) That is the day Mr. Green made his same survey in 1908, September the 15th, 1908.

RECORD EXTRACT 68

(Mr. Marbury) Wait a minute, you're working from a chart that's dated 1905, so what you've added is the figure from a 1905 chart that may have been made according to the source, as indicated, in 1899 to a tidal record made in 1908, and I submit, Your Honor, that you can't add those that are taken ten years apart, and that testimony ought to be stricken out.

(Mr. Cicero) Mr. Marbury's objection is answered on the very face of the 1920 chart, which was prepared way back like he says, certainly from the time 1905 chart was made showed the depths at the point to be about the same, and I submit to Your Honor that the best evidence in this case, as to the soundings and depths, are these charts that were made by disinterested parties that hold paramount positions in our government, it's their job to make these soundings, and they are accepted in navigation, and they certainly are accepted by the harbor people in Baltimore. And I humbly submit to this Court, has got to accept these because the only way you can arrive at a figure is to take the tides as they existed on that day, take the soundings, and see what you come up with. Now, if we had known, or if the U. S. Coast and Geodetic Survey had put out a chart we would have had one for 1909, and we sure tried to get one I can tell you that, or 1908, but these were the two closest charts that we could get to this thing in point of time. And Mr. Tyler can explain, and has shown this Court that what those tides should be at that period of time.

(The Court) Do I understand that the chart is 1905, the tide readings are 1908?

(The Witness) These are from September 15th, 1908, yes, for a full day.

(The Court) I'm going to let that in, Mr. Marbury, it's understood the discrepancy that you pointed out, and anything Mr. Tyler can do, going into that point, I'd like to hear from him.

(Mr. Cicero) We will follow that now with the chart of '20.

60. Now, sir, I ask you to look at the same area for the mark on Plaintiff's Exhibit No. 3, and take a close look and tell us whether the soundings shown on there correspond to the soundings as shown on the Plaintiff's Exhibit No. 1, only in that area that you have circled on both charts as the nubbin of land. A. They appear to me to be identical.

* * * * *

(St. Tr. 49-50):

62. In your experience as a harbor engineer, Mr. Tyler, and you're looking at these two exhibits, Plaintiff's Exhibit No. 1, the map of 1905, and Plaintiff's Exhibit No. 2, the map of 1920, what changes in that area took place as far as the depth soundings based on those two maps?

(Mr. Marbury) Objection, unless he's basing his testimony on what the maps show.

(The Court) I think he said that, what those two maps show. It's understood, Mr. Tyler, that's what you're doing, based on those two maps before you.

A. Those two charts show identical readings, soundings.

63. They show identical soundings? A. Yes.

64. Now, can you answer for this Court whether or not that indicates a static condition of soundings in that area between 1905 and 1920? A. That would indicate that there had been no major changes in the water depths in that time.

CROSS EXAMINATION

Mr. Marbury:

1. Mr. Tyler, looking at those two surveys, wouldn't you think it highly probable that there never was any surveys made between 1905 and 1918, as the Geodetic Surveys used the same map that they had before? A. No.

2. Why wouldn't you say that? A. There's always a check made, and if there's no major changes shown, a complete survey is not gone through with, but the area is always checked.

3. Well, now, there's nothing on this 1918 map to show it's been surveyed, is there? A. I think on all of these it shows that they have been brought up to a certain date.

4. Well, does that show it? A. I think it does.

5. Well, look at it and see if it does? A. As a rule there's a date down in here that shows where it is brought up to.

* * * * *

(St. Tr. 51-52):

(Mr. Marbury) Let me identify what we're talking about first. This is marked Plaintiff's Exhibit 1, and this is the map which says that the triangulation was executed between 1844 and 1897; the topography executed between 1891 and 1899; the hydrography executed 1896 and 1899; corrections from surveys by the Corp of Engineers, U. S. A. to Nov. 1904. I read that correctly, didn't I?

(The Witness) That's right.

7. Now, that doesn't mean that every sounding in this map were re-sounded as late as 1904, does it? A. No, it doesn't mean that every one, but it means that every area that is covered by this chart was checked to be certain that there was no major change.

8. Well, you say, major change, they didn't run all over these spots here and take soundings as they did when they originally made them? A. I couldn't say whether they did or not.

9. You don't know whether they did or not? A. I couldn't be certain of that.

10. But the fact of the matter is that 1920 and the 1905 are in this entire area, absolutely identical. Let's look at them and see if they don't correspond? A. Every single item.

11. In other words, there's been no change? A. There's been no change.

* * * * *

(St. Tr. 52-54):

12. Now, let me ask you this. You do know something about this area, you know that they had put in the new Hanover Street Bridge, and that the B. & O. Bridge had been filled in, do you think that it's possible in a period of thirteen years that there would be absolutely no change in any soundings in that body of water there? A. It's possible, yes, I mean, that is, no major change, you may have a small difference in depth here or there, some place may deepen, other places may shoal a little.

13. Well, I'd like to show you some photographs which have been stipulated they're correct representations of this area in 1916, and ask you whether they are consistent with either the 1905 map or the 1918 map. I'll select first and ask you to look at this exhibit which is marked on it's back, 11 L. Now, this says this is taken at the north end of the embankment looking southwest, on April 20th, 1916. A. The north end of what embankment?

14. The embankment is the fill which was later covered by the Hanover Street Causeway. You're looking down to Brooklyn, that's been identified by a previous witness, you're looking at Brooklyn. A. In other words, this is the west side of the bridge?

15. That's the west side of the Causeway, and we'll take this map. A. We're in here looking south.

16. That's right, we're looking south. Now, I show you this photograph, now is that consistent, could that be a correct representation and also be consistent with the map showing the half a foot of water at mean low tide? A. Well, of course, you know this could be a lot of cattails here.

17. Well, some of it looks like cattails, but some of it looks like a good deal more than cattails. A. Well, it looks to me like it's mostly all cattails.

RECORD EXTRACT 72

18. But this might correspond to this little nubbin of land that we see here? A. It could or this one.

19. Which I have admitted was at mean low water.

(Mr. Cicero) Which of course doesn't mean that it's above water at high tide.

20. Here's one called Exhibit 1-L, this is taken on the Long Bridge opposite the end of Pavillion looking northwest on April 20th, 1916. In other words, here you see to the left is the shell of the new bridge, and there are the flats that have been talked about with the advertising signs standing on them. Doesn't that appear to be fast land up there? A. That appears to be fast land, but it still has a lot of cattails on it.

(Mr. Cicero) And that is your Exhibit No. 1 L, meaning it was taken at low tide by your admission? A. With this fill going across here it was all soft material over there, putting this causeway shell across there would cause this mud to come up on both sides considerably.

21. What I'm trying to bring out, sir, at the moment is, that this 1918 map does not show what these pictures unquestionably show. Now, let's look at some more of them and see whether what I just said isn't true. Here's another picture, let me identify it first, this is H-15. H means high tide. H-15 we're looking again from the Hanover Street fill, toward Brooklyn, and I ask you if there isn't, plainly, fast land there. This is the west side of the Hanover Street fill, if that isn't obviously fast land as well as cattails? A. I couldn't say, no, I couldn't say whether that was more cattails or fast land, I honestly couldn't. It's nothing but a dark splotch, there's water areas over in here, all through it, I couldn't say.

22. Well, that is certainly not consistent with the soundings shown on this 1918 map, is it? A. It could be, because on this 1918 map you have the spots, you have this spot here, you have this spot here, which definitely shows that that water was pretty close, was at mean low water.

23. Well, this is high tides, and it comes all the way up to bridge, doesn't it? A. Well, when you get cattails that grow three and four and five feet above your bottom it takes a rather high tide to cover them.

(Mr. Marbury) Well, I'll have the Court look at them.

* * * * *

(St. Tr. 54-56):

25. Is it not a fact that this Geodetic Survey does not show any fast land on the east side of the fill in this 1918 map? A. No, there's no fast land shown.

(The Court) Mr. Marbury, where is your island on there?

(Mr. Marbury) We're looking toward Baltimore now.

(The Court) Is that a boat there?

(Mr. Marbury) Well, it looks like a hulk.

(Mr. Cicero) And this picture we're talking about is Respondent's Exhibit 1-L, in which Your Honor has asked if there is not a boat in the center of it.

26. Now, I'd like to show another one here, here is another picture taken at low tide, it's marked Respondent's Exhibit No. 5-L, and it's taken from the north end of the embankment looking southeast toward the south end of Long Bridge, that's the old bridge of course. That then would be on the east side of the Hanover Street Bridge now, would it not? This is the fill, this is a low tide picture, isn't that completely inconsistent with this 1918 map that has been brought in evidence? A. I wouldn't say so, no, because this fill looks to me like a sea of cattails, sea of moss grass, I can distinguish no fast land in that whatsoever.

(Mr. Marbury) Well, I suppose that's the question, I'll have to hand it to Your Honor to look at to form your own conclusion about it.

(Court) Are you referring to this piece right around here? Just put it in as evidence.

27. Now, I show you another picture, Respondent's Exhibit 4-L, that means low tide. This is taken on the embankment about 75 yards from the north end of Small Bridge, and that means they were looking toward Baltimore, and that means that this area between the two bridges is to the east of the Hanover Street Bridge and is an area in which the survey showed — . Let's see how much water does the survey show? It's the area between Hanover and Long Bridge in there in this area. Have we got any sounding there? What's that, 2, is that a sounding? A. It doesn't look to me like it is, no.

(Mr. Cicero) Well, you're now in the middle of a channel there. The closest point that you're showing, according to Reed Bird.

28. Now, we're looking at the two spots spreading, you're standing here and looking out.

(Mr. Cicero) Your closest sounding is a half a foot marker.

A. This is the old bridge looking west to the Long Bridge in the Brooklyn end looking north?

29. We're on the Brooklyn end, this is the fill of the Hanover Street Bridge, this is the old Long Bridge, and we're looking toward Baltimore, and this area appears at low tide to be no water on it, doesn't it? A. No, I would say there is water here, that's water in that area. This is above water here.

30. So there is land above water and there's none shown on the map, is that right? A. Well, don't lose track of this point that they're putting this causeway here which they're dumping a tremendous load of solid fill in amongst a bunch of mud which would spread that surrounding mud to the site, spread it out.

31. Now, I simply asked you whether or not this land, whatever it's cause and however it got there, is shown on this map? A. No, it is not.

* * * * *

(St. Tr. 59-61):

32. Did you ever yourself work for the Coastal Geodetic Survey? A. No.

REDIRECT EXAMINATION

Mr. Cicero:

1. Now, Mr. Tyler, you were shown several pictures that were taken at low tide, can you from those pictures determine whether or not the area was covered, that one picture was the only one you talked about that might be some land, and that was this one here, 4-L. This is the only one he identified land in.

(Mr. Marbury) No, he identified land on this one too, where the Judge thought there might be a boat on it.

(Mr. Cicero) I'd like to take an exception to that, but we'll show you both.

2. Look at both of those pictures, now, can you determine whether or not they would be covered by water at high tide? A. I would say at a normal high tide this area would be definitely covered with water.

3. And that is Respondent's Exhibit No. 4? A. And this on a tide of a little bit higher level it would probably be.

4. All right, they would both be covered by water at high tide? A. Yes.

(Mr. Cicero) I would like to reserve one witness for tomorrow morning.

(Mr. Clark is a witness for the plaintiff, and it's understood that when he gets here they will put him on.)

Plaintiff's Case.

RECORD EXTRACT 76

HENRY C. BURKE, a witness of lawful age, being first duly sworn, deposes and says:

Mr. Gray:

1. State your name. A. Henry C. Burke.
2. What is your address? A. 3717 Hanover Street.
3. Is that in Brooklyn? A. Yes.
4. How long have you lived in Brooklyn, Mr. Burke? A. Since 1909.
5. Where did you live when you first came to Brooklyn?
A. The same place I live now, 5th Street, 3806.
6. How far is that, or when you first came, how far was that from the shore of Patapsco River? A. About six squares.
7. At the time, when you first came and since you've been there, did you become familiar with the Patapsco River off the different shore? A. Yes sir.
8. How did you happen to become familiar with it? A. Well, my office was in view of it to begin with, my office and place of business is just one square from the water.
9. Where was your office located? A. 3717 Hanover.
10. Now, at that time and since then, have you become familiar with an area known as Reed Bird Island? A. Well, the exact location of Reed Bird Island is very confusing to a majority of people. I don't know if I have a fair conception of what it is or not.
11. Well, now, looking at this chart which is in evidence, Mr. Burke, there is, from where you are you may be able to see this Long or Light Street Bridge here, and the Hanover Street Bridge going across here. This is what was then the Baltimore County shore at about where my pencil is, from there on is Baltimore County, and from this point on is the Brooklyn shore, right here, where my pencil is now. The area in here is marked with a line as Reed Bird

Island, now, does that clarify in any respect the area about which I'm talking? A. I think so.

12. That is, when I refer to the Reed Bird Island area I refer to the area described by this line on that Exhibit No. 9. Now, were you familiar with that area at that time? A. Yes sir.

(Mr. Cicero) At what time?

(Mr. Gray) The beginning of 1909.

13. Now, at that time what is your recollection as to what part, if any, of that island was exposed from above water or covered by water? A. The west part, when I say west I mean west of Potee Street, to my knowledge, was always above water.

14. Now, by always do you mean even at normal high tide? A. I have never seen it below water in that area.

15. Now, Mr. Burke, was there any water between Reed Bird Island, the area I designated, and the Brooklyn shore? A. Yes.

* * * * *

(St. Tr. 63):

24. Do you know of any other use that was made of this section of water there which you have described south of Reed Bird Island aside from the canoes and sailboats, did you ever see anyone else in there, any other kind of boats? A. Yes, I've seen row boats, various row boats in there, they use to come in from fishing, all come in the stream and some use to sell the fish years ago.

25. About how late would you say that you saw fishermen? A. Well, that would be more or less guess, I couldn't say definitely when they ceased fishing there, but it was shortly after the railroad bridge filled in when they started to dump dirt, fill in between the trestle, and that stream was more or less cut off.

26. Well, was it used by the fishermen after you moved to Brooklyn? A. Yes.

* * * * *

(St. Tr. 63):

CROSS EXAMINATION

Mr. Cicero:

* * * * *

(St. Tr. 64):

4. When did you come to Brooklyn, specifically, when?
A. I don't recall, I think about the middle of 1909.

5. The middle of 1909? A. Yes sir.

6. That would put us where, you tell us the month? A.
Well, I don't know the month, I don't know whether it was
June or July or not.

7. Would you say then it was July? A. I wouldn't say.

8. Would you say it was in the summer or in the spring?
A. I'd say it was in the spring summer.

9. Had you ever been over this area before that time?
A. Oh, yes.

10. Did you know it then? A. Not too well.

11. So you don't know what the condition was in 1908?
A. No, I don't have as much information, I knew the streets
and I'd been over it, but I don't know a great deal about it.

12. How old are you, sir? A. 63.

13. And how old were you in 1909? A. About 18 or 20.

* * * * *

(St. Tr. 65-66):

18. Where did you live in 1909? A. Prior to coming to
Brooklyn?

19. No, no, when you came to Brooklyn. When you came
to Brooklyn the first time to live? A. On Sixth Street,
3600 block, Sixth Street, Brooklyn, when I first came to
Brooklyn.

20. How far was that from Reed Bird Island? A. Oh,
from Reed Bird Island it was possibly eight or nine
squares.

RECORD EXTRACT 79

21. And how often would you say that in the period of time, from the date you moved there in 1909 spring summer, until the end of 1909 that you were out in the area of Reed Bird Island? A. Practically every Saturday night, Saturday afternoon and night.

22. Weren't you working then? A. Yes sir, we'd go out Saturday afternoon.

23. What time would you quit work on Saturday? A. About 12 or 1 o'clock.

24. And then what would you do on Saturday? A. Well, I'd do different things, after we went to the City, to Baltimore.

25. Well, you didn't go boating in that area then, you went to the city? A. Not so much on Saturdays, most of the boating was done on Sunday nights, Sunday afternoon and Sunday nights.

26. Now, in 1909 on Saturday afternoons when you were going in to Baltimore, is that what you're referring to, that you were there once a week, every Saturday, is that the idea? A. Well, often times we'd go to the city on business trips during the week, we'd bank in the city and we'd have to go the city in those times to make a deposit slip, we often went two or three times a week.

27. Have you ever, during 1909, ever gotten off of a canoe and walked on to Reed Bird Island? A. No sir.

* * * * *

(St. Tr. 66-68):

29. You never got out of your canoe to get on Reed Bird Island, did you? A. I had no need to get on Reed Bird Island because I had another object in view, a place I wanted to go, I never wanted to go to Reed Bird Island when I was canoing.

30. Then as a result you have never been on this island as you were saying is out of the water? A. Never been on it?

31. Yes, on this particular piece of land that you testified was out of water, west of Potee Street. A. I don't think that I have been on it, no sir.

32. Now, how close would you say you were to that island? A. So close that we'd have to paddle through the channel to get away from it.

33. Why did you have to paddle? A. Because a canoe won't go across low water where there's mud.

34. They won't go across low water because there was water in there, isn't it? A. No sir, there wasn't any water in the area at all, but as you got closer to shore it got too shallow and we'd have to go back out in the channel, go further northeast and come around.

35. Oh, in other words, you were close to shore, you weren't out at the island? A. I was in this river, this small channel, or river or creek, or whatever you may want to call it, that's the outlet from the canoe club, you see we would get our canoes and we would go northeast into this small channel and go around mud flats on Reed Bird Island and get into the large channel.

36. You say mud flats in Reed Bird Island? A. I said what has been referred to as mud flats in Reed Bird Island.

37. You don't know whether there was mud on there or reeds or not because you were never on there. A. When you're paddling a canoe and you run into mud you know it.

38. Well, did you try to go through the island, did you ever make the attempt to go through the island? A. It would be very foolish.

39. You never made that attempt? A. With grass up to eight or ten feet high, would I want to try to paddle a canoe.

40. So you never made that effort? A. Why that would be absurd to try it.

RECORD EXTRACT 81

41. Did you ever see anybody shooting on that island?
A. Yes sir.

42. Did you ever see them wear boots? A. I don't know
as I remember them wearing boots, no sir.

43. You don't remember that? A. The man that I saw
shooting wasn't wearing boots.

44. You saw one man? A. He was shooting from a boat,
and I never saw him get out of the boat, and he was stand-
ing a distance away from me.

45. So you did see a man hunting reed birds or shooting
there in a boat, is that right? A. He was shooting at Reed
Bird Island.

* * * * *

(St. Tr. 68-69):

52. Didn't you work on Saturday afternoons? A. Not
every Saturday.

53. But you did on some Saturdays? A. Some I may
have, yes, but not every Saturday.

54. So your observation of Reed Bird Island, in that area,
is based from the period 1909, is based on those weekends,
Saturday and Sunday? A. I didn't say that.

55. Let me ask my question and then you can answer it.
From the period of time, those Saturdays and Sundays in
1909, from when you moved there until the end of 1909, is
that correct? A. Based on Saturdays? No, that isn't cor-
rect. I just told you I made deposits two or three times a
week across the bridge and was in that area sometimes
three or four times a week.

* * * * *

(St. Tr. 70):

66. I didn't understand, if you testified, whether or not
there was any land to the east of Potee Street that was not
covered? A. I don't recall much fast land on the east
side.

RECORD EXTRACT 82

67. Was there any? A. There may have been but I don't recall.

68. You don't know? A. I don't know on the east side.

69. Well, how can you be so certain about one side of this bridge and so uncertain about the other side if you went canoeing all around? A. I love gunning to start with and wherever there's shooting and reed bird shooting I'm more interested than I was on the other side where there was nothing going on.

70. Well, did you actually go out gunning on Reed Bird Island? A. No sir, I didn't.

* * * * *

(St. Tr. 72-73):

JAMES B. WOODWARD, a witness of lawful age, being first duly sworn, deposes and says:

Mr. Gray:

1. Would you state your full name please, sir? A. James B. Woodward.

2. Where do you live now? A. In Anne Arundel County.

3. What's the address? A. 335 Cherry Lane.

4. How old are you now, Mr. Woodward? A. I'm in my 91st year.

5. How long have you been living in Anne Arundel County? A. Well, since about 79.

6. Where were you living about the year 1909? A. Well, I couldn't say, I haven't got the years and dates like that.

7. Did you ever live in the town of Brooklyn? A. Lived there since 79.

8. In the town of Brooklyn? A. In Brooklyn.

9. Whereabouts in Brooklyn? A. 3436 So. Hanover Street.

RECORD EXTRACT 83

10. On what side of Hanover Street is that, is that toward the river or is it away from the river? A. Yes, my back yard run right down into the water.

* * * * *

(St. Tr. 74-75):

24. Do you remember any marsh land between the Brooklyn shore about where that bridge went across and the center of the Patapsco River? A. Oh, yes, there was some cattails out there.

* * * * *

(St. Tr. 75):

26. * * * You say there were some cattails there between Brooklyn shore and the center of Patapsco River. Now, will you tell us whether or not there was any space of water between those cattails and the Brooklyn shore?

* * * * *

(St. Tr. 75):

A. Yes sir.

* * * * *

(St. Tr. 76-77):

38. Now, Mr. Woodward, do you remember whether or not the area where the cattails were, what the situation was with respect to that being covered or not covered with water? A. Well, at a real high tide water flowed over the marsh.

39. How about at a normal high tide? A. Well, it was practically dry in there.

40. I say at a normal high tide. A. Normal high tide there was still water in there.

41. How about at low tide? A. It was still water, but not very much, kinda marshy.

* * * * *

(St. Tr. 77-78):

44. No, I'm not talking about that side, I'm talking about the Anne Arundel County side of the center of the Pa-

tapsco River. A. Oh, you mean above the Hanover Street Bridge?

45. Right at the Hanover Street Bridge. A. Oh, well, that's been cattails out there for many years, and marsh.

46. It's been marsh out there? A. Yes.

47. By "many years" how long do you mean? A. Well, ever since the bridge was build.

48. Now, before the bridge was built, do you remember whether there was any cattails there? A. I couldn't say.

49. You don't remember before the bridge was built? A. No.

(The Court) I'm still a little curious, he hasn't pinned down these cattails very closely yet.

(Mr. Gray) No, Your Honor, I decided Mr. Woodward can't recall specifically what the situation was before the bridge was built, so if he can't remember any more why I can't see any reason to try to pursue it any further.

JOHN P. HELMER, a witness of lawful age, being first duly sworn, deposes and says:

Mr. Gray:

1. Would you state your full name, please? A. John P. Helmer, 306 Jeffrey Street, at present.

* * * * *

(St. Tr. 78-83):

6. How long have you lived in Brooklyn? A. Since 1908.

7. Where did you live when you first came to Brooklyn? A. I lived at Glen Burnie.

8. And what was your business at that time? A. Well, while living at Glen Burnie I farmed with my daddy, and I moved to Brooklyn in 1908 and started a little grocery

store and then from there I was appointed in the police department in and around the County.

9. What store were you with? A. A small grocery store in the 3500 block.

10. When were you appointed in the police department? A. In 1909.

11. And what was your duty with the police department? A. Well, I was, first I was to patrol the road from Brooklyn to Glen Burnie, kept the drivers awake, that was mainly the object, kept the drivers awake when the automobiles became popular on the road, and then I was transferred to the Curtis Bay Brooklyn area, and of course, after annexation I was annexed into Baltimore City.

12. You were annexed along with Brooklyn, is that it? A. That's right.

13. Now, do you remember when annexation occurred? A. 1919, January 1st it took effect, it was passed in Legislature in 1918.

14. Now, prior to that time, however, you had been, you say a policeman in Anne Arundel County? A. Yes.

15. In the course of the time you were in and around Brooklyn, did you have any familiarity with Patapsco River in the area of Brooklyn? A. I crossed the old wooden bridge, I lived in Baltimore up until I was 8 years old, my dad bought the farm at Glen Burnie, and I crossed the bridge as a boy probably seven or eight years old, that was far back as 1890.

16. How old are you now? A. 69, going on 70.

17. Now, about the time that you started to work in Brooklyn, that would have been 1908 you said, did you have occasion to observe what the river was like at that time? A. Yes.

18. Do you know the area that we've referred to today, testimony as Reed Bird Island? A. I presume you mean the stretch between the old wooden bridge, which was

then called Light Street Bridge, and the present Hanover Street Bridge, between the two streams?

19. That's part of it, Mr. Helmer, it extends a good deal to the west of the present Hanover Street Bridge. I can show it to you on this map. A. Well, that would be west of the Hanover Street Bridge, I mean east of the Hanover Street and west of the wooden bridge.

20. It also extends west of Hanover Street. This is the old Long Bridge here, here is the Hanover Street Bridge here, they come together and form a V. Now, Reed Bird Island is the area which is between the stream, also it includes it's estuary over here to the west of the Hanover Street Bridge. A. I know the west side of the Hanover Street Bridge is known as Reed Bird, between that and the railroad bridge which is further south and also runs west.

21. Now, that's correct. Now, this chart also shows another island between Reed Bird Island and the railroad bridge, the railroad bridge is here across the bottom of this chart, here is Reed Bird Island comes down to here, then there is another island which you can see in here where the point of my pencil now is, that is between Reed Bird Island and the Railroad Bridge. A. Now, are you speaking of the east side of the stream or the west side of the stream?

22. I'm speaking of the — A. First stream, the hundred foot span?

23. Now, could you point to me what you mean by the hundred foot span? A. The nearest to Brooklyn shore there was a stream, approximately we called a hundred foot stream because it left a 100' opening in the bridge, and the other opening that that made Patapsco River with the channel that was the 500 foot span.

24. Well, I'll refer to them then as the 100' stream and the 500' stream hereafter in speaking to you. Now, then the islands I'm talking about are Reed Bird Island that lies between the 100' stream and the 500' stream, and this chart shows a second island between the 100' stream and the

500' stream at the railroad bridge. A. Well, I wouldn't be able to separate that tract in there, I know it all as Reed Bird Island.

25. All right, well, can you tell us this, Mr. Helmer, can you remember when you were first working in Brooklyn, can you tell us your recollection as to the extent to which that area you called Reed Bird Island would be covered by water at a normal high tide? A. Yes, at first that was covered by water, and the erosion, or let's call it the surf and wash coming down the Patapsco River during storms and what not washed through and around the span and began to create mud flats east of the railroad bridge, it started at the fill after the railroad filled that in, if I recall correctly because that was supposed to have been done, according to some testimony here this morning, in 1900.

(Mr. Gray) That is a fact in the case, Mr. Helmer. Now, before that the railroad was also built on trestles and the water flowed it beneath those trestles as well as it did beneath the bridge, but after the fill by the railroad between the two streams land began to make on both sides of the railroad.

26. Well, now, the time that we're concerned about is 1909, you say the land began to make. By 1909 would you say any land had made up in there? A. I would say a small portion of land had been created by 1909.

27. Which would be nine years following the fill? A. That's correct, nine years following the fill; I would say there was a small portion beginning to make.

28. Now, would you say that small portion, I'm not asking you to say how big it was, but would you say that small portion that any of it would have been exposed at a normal high tide by 1909? A. I would think so, it would protrude above the water close to the fill at first, it grew up further year by year.

29. My question is, whether any portion of this section was above water at a normal high tide, not counting an extra high tide? A. Well, if I would be permitted to say,

starting from the fill that was made by the railroad bridge when it first started, I would say, yes, that it protruded above the water in 1909.

30. Was any of it exposed at low tide? A. In 1909?

31. Yes. A. Well, naturally, I think it was beyond the water in nine years time through most all tides.

(The Court) Was it beyond the water?

(The Witness) Above the water, yes sir. This fill I presume between the two streams that the railroad made, Judge, would approximately be four or five thousand feet in length, and as the storm waters would wash down through these openings it would deposit the debris and what not around behind it. And that's how it started to make.

32. Did this area build up, did the build up extend as far out as where Hanover Street Bridge now is? A. Eventually, it's solid now, but it eventually grew until it reached that point, yes.

(Mr. Gray) Your Honor, I would like to introduce another one of these Coast and Geodetic Survey, this one is dated 1926.

(Mr. Cicero) We have no objections to this even though it's not a certified chart of the Department of Commerce.

33. Now, Mr. Helmer, I show this Geodetic Survey map of this area, the part that I'm interested in observing is the area off the Brooklyn shore in the vicinity of the railroad bridge and the Hanover Street Bridge. Now, do you see the area I have in mind? A. Is this the stream near the shore?

34. You see Brooklyn right here? A. Yes.

35. And you see the Hanover Street Bridge going across there?

(Mr. Cicero) Don't you want to mark this as an exhibit first?

(Chart Marked Defendant's Exhibit No. 1.)

(Mr. Cicero) Now, we're talking about a map 1926, April, 1926.

36. Now, I call your attention to the area, an area shown on this map as the shaded area running between the Brooklyn shore and the point, the first point north of the Patapsco River that the bridge comes to, do you see the shaded area I have in mind? A. Yes, I see, this particular one here?

* * * * *

(St. Tr. 84):

(Mr. Gray) Your Honor, that's a photograph of a portion of Defendant's Exhibit No. 1.

(Photograph of Defendant's Exhibit No. 1 filed and marked Defendant's Exhibit 2.)

(Mr. Gray) Let the record show that Defendant's Exhibit No. 2 is a photographic copy of a portion of Defendant's Exhibit No. 1, dated 1926.

40. Now, Mr. Helmer, you have referred previously to a 500 foot channel and a 100 foot channel, now as you call them. A. Right.

41. Do you or do you not see those channels on this chart? A. Yes, I do.

42. What do you see between those two channels?

* * * * *

(St. Tr. 85-87):

(The Witness) Well, as shown on the map it shows a darker shade from the lighter shade which if I may illustrate the lighter shade is presumed to be the water and the darker shade to be the grass part.

43. Now, Mr. Helmer, what was the area, could you point to the section that is shown on this chart? Now, recognizing that this chart did not attempt to show what it was like in 1909, but the same geographic area existed in 1909, what

was the area that you referred to as having built up from the railroad fill?

(Mr. Cicero) Objection.

(The Court) Let him answer it.

A. I would say that there was a horseshoe shape form between the two streams at the east side of the railroad bridge first, which eventually grew, grew over and when the Hanover Street Bridge was filled in it was all clear water and the dirt was dumped right in the clear water, but by reason of that fill also being made this land began to rise above the water more and more, year by year.

44. Now, Mr. Helmer, you say this began to build up from the railroad fill, was there any area exposed between where the Hanover Street Bridge went across and the railroad bridge? A. You mean clear water?

45. Was there or was there not any area of land exposed at a normal high tide? A. I would say nearest to the railroad bridge.

46. I understand that, and the land you call exposing above the water line? A. Well, yes, there was a small portion I'd say in nine years time that had formed at the railroad bridge, and as this shows all the way over to the Hanover Street Bridge, but that has taken place in twenty six years, that this survey shows.

47. Well, I understand that this doesn't purport to show what it was like in 1909, and my only question is whether any portion of this area was above water in 1909? A. I would say a small portion on the east side of the railroad was above water.

48. Now, Mr. Helmer, did you ever have occasion to observe any use at all being made of this channel or did you not? The 100 foot channel that you referred to. A. Well, I have seen residents that lived on the west side of Hanover Street row back and forth up this 100 foot stream. And there were several fishermen that sold shrimp to other fishermen that came through the town, and they would sell

their shrimp to these people, I think Mr. Barrett was one of the men, I rather believe Mr. Woodward was, but I'm not too positive but I think Mr. Woodward sold shrimp.

49. How late would you say that use was made as you described of this channel? A. Oh, my, that hasn't been too long back. The railroad afterwards filled in the 100 foot channel, and then of course that began to make land, closed in more and more.

50. Well, now, was use made of this channel up until the time the 100 foot span at the railroad bridge was filled in? A. Yes, and later. It became shorter all the time, at one time it went up to the Canoe Club then it was stopped by the railroad, and then the fill, kept throwing it in and it became a shallow stream all the time.

* * * * *

(St. Tr. 89):

CROSS EXAMINATION

Mr. Cicero:

* * * * *

(St. Tr. 90-95):

7. There's only one other question; as I understood you to say, when the Light Street Bridge was built across the area, the fill was put in there, it was all up in water, is that correct, at that point? A. That is correct, they dumped it right in the water.

8. And you're sure about that, that's the Hanover Street Bridge? A. That's right, that was in 1916 or '17.

9. And up until that time it was all open water right there? A. To the best of my knowledge, it was.

10. And the land that you were talking about, that was above water to the east of the railroad bridge, was a considerable distance away? A. West of that bridge, yes.

11. West of that bridge? A. A considerable distance southwest of that bridge.

12. How far would you say that was? A. Well, I just don't know the distance between those two bridges but I presume it to be a couple thousand feet.

(The Court) Mr. Helmer, let me get it clear in my mind. You say it was open water east of the Hanover Street Bridge in 1916, is that right?

(The Witness) Yes sir, before the fill. Now, the fill created the mud to come up, Judge, and I recall that even on the north side of the 500 foot span on the Baltimore County side, the fill created an island by reason of the mud, dirt being dumped pushing the mud up. And a man named, Conn, on that side claimed that by settler's rights, he put a man on it and he won his claim as a result of it.

(The Court) Was this bridge you referred to built when, 1916?

(The Witness) In about 1916 or 1917, I'm not too sure.

(The Court) And then east of where that bridge was located began to build up after that date, is that correct?

(The Witness) I would say, yes.

(The Court) You said a small portion of land on the east side of the railroad bridge was above water in 1909, is that right?

(The Witness) I'd say a small portion was created as a result of that first fill by the railroad.

(The Court) The first fill, of course, was around 1900. Was that small portion on the east side of the railroad bridge above high water as well as low water?

(The Witness) Yes, a short distance of it I would say was pushed up by the fill and I don't know how big it was, but it was small at first.

(The Court) And that was even visible above high tide, is that right?

(The Witness) Yes.

RECORD EXTRACT 93

(Mr. Cicero) If Your Honor please, I'd like to clarify that one point. Was that portion known as "mud island", do you remember?

(The Witness) It was known by various names I would say, some called it the "flats", some called it "Reed Bird Island", it was at one time a bird sanctuary.

(Mr. Cicero) No, I'm talking about, Mr. Helmer, the portion that you said was out of the water just east of the B. & O. Bridge, remember that, in 1909? I would like to have you identify that.

(The Witness) Well, you know there are a lot of islands in there as compared to the Reed Bird, one named Mud Island, one named Billiken Island, and one called Bridgeview Island.

(Mr. Cicero) Now, you know that Birdsvie Island is between the railroad bridge and Reed Bird Island, don't you?

(The Witness) Well, now, which one are you designating as Reed Bird?

(Mr. Cicero) Well, you see this is Reed Bird according to this case.

(The Witness) How far do you go out, far as the 500 foot span?

(Mr. Cicero) Yes sir. Now, in here, this is the railroad bridge, as I understood your testimony, you said there was a build up in this area here.

(The Witness) That's right.

(Mr. Cicero) And this area here, sir, is another island called Bridgeview Island, is that the island that you said was out of water in 1909?

(The Witness) If it was close to the railroad fill —

(Mr. Cicero) It was adjacent to the railroad fill.

(The Witness) Yes, and it was contrast and there was water between that fill and what was right.

(Mr. Gray) Your Honor, I would like to offer in evidence these twenty five pictures which I think they may already be in evidence by virtue of the stipulation, if they haven't I'd like to offer them as an exhibit. They can be a single exhibit.

(25 Pictures Filed as Defendant's Exhibit 3.)

(Mr. Cicero) If Your Honor pleases, we want to raise the same point as we did at the outset on these photographs. No proof has been brought in as to the tides, what the tides were when they were taken. And we submit even though they're irrelevant from the point of time, that they are not proper before this Court as showing anything unless those tides can be established and the depth of those tides can be established at that point.

(The Court) Let me ask you something about these photographs, we don't know who took them, do you know who took them and when?

(Mr. Gray) Yes, they were taken by The Hughes Company on the dates specified on the back, and it's agreed that they are true representations as of the time and date specified on the back of them.

(Mr. Cicero) As to what the picture shows, yes, but as we say it's a very important thing because the key of those pictures on the back are identified as an "L" and "H", they're supposed to show high tide and low tide, this, that and the other, we can't concede that because we don't know.

(Mr. Gray) In connection with the tides, Your Honor, I can present additional data on that, as I say, a tide is a determined thing published in public tide tables which are not subject to dispute in any way, cannot be, and I will ask Your Honor to take judicial notice of the tides on those particular days, which are a matter beyond dispute. And I would also like to offer in evidence the Plaintiff's Exhibits A, B, and C, which are already in the record being filed with the Bill of Complaint, I assume there's no objection to those.

(Mr. Cicero) Oh, no, I join in with my brother on that, I think that all the papers that have been filed in this case with the original pleadings and with the answer should be properly made a part of the case.

(The Court) Well, you do offer them as an exhibit?

(Mr. Cicero) And we do offer them as an exhibit.

(Mr. Gray) They are Complainant's Exhibits A, B, and C, attached to the original Bill of Complaint, and subsequently referred to in the amended Bill of Complaint.

* * * * *

(St. Tr. 98):

HENRY C. BOURKE, a witness of lawful age, being first duly sworn, deposes and says:

(The Court) Mr. Bourke, one thing that's been puzzling me. You say that this Reed Bird Island was above the water, could you tell me how you knew that?

(The Witness) In the canoe approaching the land we could see ground instead of water.

(The Court) In the daytime?

(The Witness) Yes.

(The Court) You could see ground?

(The Witness) Yes sir.

(The Court) When you went down that channel or got in a canoe you could see earth above water or what is known as Reed Bird Island?

(The Witness) That's right, I even remember large muskrat places that have been built up by muskrats there too.

(The Court) All right, sir.

PLAINTIFF'S EXHIBIT 1

Approaches to
Baltimore Harbor, Maryland
Chart 549

Scale: $\left\{ \begin{array}{l} 1 \\ 40,000 \end{array} \right.$

(One mile equals 4 centimeters) *

Published at Washington, D. C.

May 1905

By the Coast & Geodetic Survey

(Date of First Publication 1900)

| | | |
|------------------------|---------|---------------|
| Triangulation executed | between | 1844 and 1897 |
| Topography | " | 1891 and 1899 |
| Hydrography | " | 1896 and 1899 |

Corrections from surveys by the Corps of Engineers,
U. S. A., to November 1904.

Soundings

The soundings are in feet and show depth at mean low water. Depths of 18 feet and less are shown on a dotted surface.

Signs and Abbreviations

hrd. — hard; stk. — sticky.

Elevations

All elevations are referred to high water and are expressed in feet and by contour lines showing successive differences of 20 feet.

* Does not appear on original; inserted by agreement.

RECORD EXTRACT 101

PLAINTIFF'S EXHIBIT 3

TIDE CHART

(Based on mean low water) *

Hourly Heights — Baltimore Fort McHenry
Maximum and Minimum Tides

| | | | | | |
|------|----------|----------|----------|----------|----------|
| 1908 | Sept. 11 | Sept. 12 | Sept. 13 | Sept. 14 | Sept. 15 |
| | -.2' | -0.3' | 0.1' | 0.3' | 0.6' |
| | 1.6' | 1.6' | 2.1' | 2.1' | 2.5' |
| | Sept. 16 | Sept. 17 | Sept. 18 | Sept. 19 | |
| | 0.6' | 0.9' | 0.8' | 0.3' | |
| | 2.4' | 2.2' | 2.2' | 2.5' | |
| 1909 | Sept. 6 | Sept. 7 | Sept. 8 | Sept. 9 | Sept. 10 |
| | -0.5' | 0.1' | 0.0' | 0.3' | 0.7' |
| | 2.1' | 2.2' | 1.5' | 1.7' | 2.2' |
| | Sept. 11 | Sept. 12 | Sept. 13 | Sept. 14 | |
| | 0.1' | 0.5' | 0.7' | 0.5' | |
| | 1.6' | 1.9' | 2.0' | 1.7' | |

DEFENDANT'S EXHIBIT 1

Approaches to
Baltimore Harbor — Maryland
Chart 549

$$\text{Scale: } \left\{ \frac{1}{40,000} \right.$$

(One mile equals 4 centimeters) *

Soundings in feet at mean low water.

Authorities: Surveys to 1924

Surveys by U. S. Engineers to 1924

Heights in feet above high water.

Published Washington, D. C., April 1926 by
The U. S. Coast and Geodetic Survey

* Does not appear on original; inserted by agreement.

THE HISTORY OF THE

REIGN OF

CHARLES

THE FIRST

OF GREAT

BRITAIN

BY

JOHN

WELLES

ESQ.

OF

THE

BAR

AT

WESTMINSTER

AND

OF

THE

UNIVERSITY

OF

OXFORD

IN

1719

OPINION

The Court will adopt the following statement of facts contained in the Respondents' very able memorandum.

"This case is an action filed by the Mayor & City Council of Baltimore to remove a cloud on its alleged title to certain property called 'Reed Bird Island'. The Respondents claim title through a patent issued by the State of Maryland for Reed Bird Island and this suit is brought to have the patent declared invalid. The suit was originally filed in 1916, and at that time Reed Bird Island was located in Anne Arundel County. Although the property is now located in the City of Baltimore, the Circuit Court for Anne Arundel County properly retains jurisdiction under provisions of Section 18, Chapter 82 of the Laws of Maryland of 1918 (1918 Annexation Act).

"Reed Bird Island is located at about the point where the main branch of the Patapsco River empties into Baltimore Harbor, that is, at the point where Hanover Street crosses the Patapsco River from Brooklyn to the point on which the Maryland Yacht Club is located. The plats included with the stipulation filed herein will more carefully describe the Island.

"In 1856 one Richard Owens Crisp was authorized by the Laws of Maryland (Chapter 215, Laws of Maryland of 1856) to build a bridge over the Patapsco River from Ferry Bar, on the north side, to some point in Anne Arundel County on the south side of the River. In 1858 Crisp, together with one Richard Cromwell, Jr., purchased from Patapsco Company a tract of land in Anne Arundel County as a bridgehead for this bridge. The deed for this bridge had contained the restriction that the grant was made 'on the express condition that the said land should be only used for the purposes appertaining to the erection, construction and easement of the said bridge, and the erection of the necessary toll house and out buildings, sheds, store house for lumber or materials.' The bridge was subsequently built and became known as the Light Street or Long Bridge. This bridgehead tract is located near Reed Bird Island, being on

the Brooklyn shore of the River. By Chapter 159 of the Laws of Maryland of 1878 the City of Baltimore and the County Commissioners of Anne Arundel County were authorized to purchase the Light Street Bridge and, in due course this purchase was effected from Crisp and Cromwell. The latter parties conveyed to the Mayor & City Council, by deed dated May 3, 1880, the Bridge together with bridge-heads in both Baltimore City and Anne Arundel County, the deed specifically referring to the purposes for which the property had been acquired by Crisp and Cromwell and was being conveyed to the City. In 1918, by the Annexation Act, cited above, Baltimore City acquired all roads, streets, avenues and alleys lying within the annexed territory, any bridges existing in any of the highways being considered parts thereof. On April 15, 1926, South Baltimore Harbor and Improvement Company of Anne Arundel County conveyed to the City of Baltimore certain property along the southern shore of the Patapsco River adjacent to the bridgehead property previously described, and across from Reed Bird Island. It is on these properties that the City bases its claim as riparian owner of these properties to Reed Bird Island.

“On September 15, 1908, a survey of Reed Bird Island was made by L. H. Green, County Surveyor of Anne Arundel County, on a warrant issued from the Land Office of the State of Maryland. Subsequently, on September 10, 1909, a patent was issued out of the Land Office for Reed Bird Island to John P. Bruns. The Light Street Bridge above referred to crosses Reed Bird Island, as indicated in the Green survey. On September 23, 1910, Bruns conveyed Reed Bird Island to Harry M. Wagner, predecessor in title to the respondents in this case. It is through this patent that the respondents claim title to the Island.

“Under authorization of the Legislature in 1914, the State Roads Commission of Maryland began about 1915 to construct the Hanover Street Bridge across the Patapsco River as a substitute for the old Light Street Bridge. The portion of this Bridge running from the Baltimore County point to the Anne Arundel County shore of Brooklyn con-

sisted of a large span across the main branch of the Paptasco, a causeway elevated about 6 feet across Reed Bird Island and a shorter bridge, about 110 feet long from Reed Bird Island to the Brooklyn shore. In this connection, Wagner conveyed to the State Roads Commission a right-of-way to cross Reed Bird Island for Hanover Street, reserving to himself certain rights of access. The new bridges were completed in 1917 and at that time the old Light Street Bridge was destroyed. In the meantime, Wagner had been paying taxes on the property to Anne Arundel County, beginning in 1912, as well as collecting rents for certain billboards located on Reed Bird Island, the rents being collected from January 1, 1917. The rent collections and tax payments continued until 1928, at which time the City ordered abatement of taxes and ordered the billboard owners to pay rent to the City.

“In due course, Race Street was extended across the very southern end of Reed Bird Island to connect with Hanover Street and in connection with this extension, an agreement was reached between the Wagner interests and the City whereby a deed was given to the City for the property included in Race Street and the City agreed that the present proceedings would be prosecuted in order to determine title to Reed Bird Island.”

It should be added that counsel for the parties have stipulated, among other things, that no advantage would be taken by either by reason of the delay in prosecuting or defending this suit.

It is conceded that the facts in this case are governed by Chapter 129 of the Laws of Maryland of 1862, now codified as Sections 45, 46 and 48 of Article 54 of the Annotated Code, 1951 Edition, and which reads as follows:

“WHEREAS, Doubts are entertained in regard to the extent of the rights of proprietors of land bounding on navigable waters, to accretions to said land, and to extend improvements into said waters; for the purpose of solving such doubts, therefore,

RECORD EXTRACT 108

"SECTION 1. Be it enacted by the General Assembly of Maryland, That article fifty-four of the Code of Public General Laws, be amended by adding thereto the following sections, to wit:

"Thirty-seven. The proprietor of land bounding on any of the navigable waters of this State, is hereby declared to be entitled to all accretions to said land by the recession of said water, whether heretofore or hereafter formed or made by natural causes or otherwise, in like manner and to like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable.

"Thirty-eight. The proprietor of land bounding on any of the navigable waters of this State, is hereby declared to be entitled to the exclusive right of making improvements into waters in front of his said land; such improvements, and other accretions as above provided for, shall pass to the successive owners of the land to which they are attached, as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made.

"Thirty-nine. No patent hereafter issued out of the Land Office shall impair or affect the rights of riparian proprietors, as explained and declared in the two sections next preceding this section, and no patent shall hereafter issue for land covered by navigable waters."

The City, to support its contention that the patent was invalidly issued, since the locus in quo was covered by navigable waters at the time, offered a chart of the approaches to Baltimore Harbor prepared by the Coast and Geodetic Survey. The Respondents objected to its introduction in evidence on the ground that it did not show the status of Reed Bird Island as of the date the patent was issued. The Court felt that it had, at least, some evidentiary value. The Exhibit, published in May, 1905, was first published in 1900, and was corrected from surveys

by the Corp of Engineers to November, 1904. On it, under the heading of "Soundings", is the notation "the soundings are in feet and show the depth at mean low water. Depths of 18 feet and less are shown on a dotted surface." An examination of the matter in question, as indicated on this chart, shows that what is now known as "Reed Bird Island", was below mean low water at, or before, November, 1904.

The City called as its first witness Mr. John M. Mackall, who was born on November 5, 1885, and, beginning in 1905, was employed by the State Roads Commission of Maryland, and was, at the time of the construction of the Hanover Street bridge, engineer of surveys, plans and rights-of-way. He testified that he was on the actual site of Reed Bird Island a number of times during the years 1912, 1913 and 1914, and that he remembered it vividly. He identified "agreed Exhibit No. 9" as having been prepared under his direction in connection with the construction of the Hanover Street bridge from information and data gathered and acquired one and one-half to two years prior to its preparation. The Exhibit is a location plan of the bridge prepared and approved by the State Roads Commission of Maryland on August 21, 1914. Mr. Mackall pointed out that on the profile scale on the plan, there was no point between Stations 63 to 76, where the elevation of the ground was indicated as higher than zero, or mean low tide, and the interval between Station 63 and Station 76 was that occupied by approximately the central portion of Reed Bird Island.

He admitted that he was not familiar with the Island in the years 1908 and 1909, but he did recollect that, during the years 1912 to 1914, it was covered with water at normal low tide. The old Light Street bridge was still in existence at that time, and he stated that there was no land then showing at high tide between it and the Hanover Street bridge under construction. He and his associates used rowboats to make surveys across the area of the Island, and, although he did not observe any other boats crossing it, he did not recall that he had any trouble in doing so. The State Roads

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Commission constructed a fill across the Island site 10 feet above mean low tide.

Another witness for the City, Mr. Joseph N. Johnson, a resident of Brooklyn on the south side of the Hanover Street bridge, who was born in 1885, testified that he moved to Brooklyn in the latter part of 1896, and that he was familiar with every inch of the area known as Reed Bird Island. According to him, he was always around the water crabbing and fishing, and that he started to convert a boat in the latter part of 1905. He sailed this boat, in the summertime, during the years 1905 and 1906, in the waters around this area and over what is now known as "Reed Bird Island". According to his recollection, rowboats could cross the Island on medium tide in the years 1908 and 1909, and the water there was as high as a man's waist at high tide. The site was still covered by water in 1911, for at that time he had caught crabs there, and in 1909 and 1910, he had harpooned carp on the Island. He and his friends in the winter of 1911 had skated across it on the ice, but, after that, the reeds came up and tripped them. In 1911 the water over the Island was about 12 inches deep at medium tide, and there was a "gut", 3 to 4 feet deep, at medium tide between it and the fast land. He recalled that the area of Reed Bird Island started to gradually "build" after the Baltimore and Ohio Railroad bridge was erected.

Another witness for the City, Mr. George N. Potee, who was born in 1897, and who lived on the South Hanover Street, testified that he had spent his life in the area of Reed Bird Island, and that Potee Street had been named after his father. In 1907, 1908 and 1909, he and other boys had played in the water in that area, and were accustomed to walk across the channel or gut in certain places at high tide to Reed Bird Island. According to his recollection, there was from 2 to 3 feet of water over it at high tide, and from $\frac{1}{2}$ to 1 foot of water over it at low tide. He recalled that men, wearing hip-boots, would go out on it and gun for reed birds. He had seen rowboats in the channel or stream, which was about a block wide, between the

Island and the fast land. He remembered that there were reeds on the Island, the roots of which were under water.

Mr. Henry C. Burke, a witness for the Respondents, testified that he had lived in the area since 1909, and that he was familiar with the Patapsco River near the Brooklyn shore. According to his recollection, that part of the site known as Reed Bird Island west of Potee Street was always above water; he had never seen it under water, although there was water between it and the Brooklyn shore. He used to paddle a canoe down to the Island, but he never got out and walked on the Island itself, although he could see muskrat dens there.

Mr. James B. Woodward, 91 years old, a witness for the Respondents, testified that he had lived in Brooklyn since 1879, and he remembered when the Hanover Street bridge was constructed across Patapsco River. According to him, at that time, there were some "cattails" out there, and there was a space of open water between the cattails and the Brooklyn shore. A few people used launches in the waters thereabouts, but the majority used rowboats. He described the area as a marsh, and he said that at "real high tide" water flowed over the marsh, at normal high tide the marsh was still under water, and at low tide there was some water in the marsh, but not much.

Another witness for the Respondents, Mr. John T. Helmer, 69 years old, who had lived in Brooklyn since 1908, recalled that he had frequently crossed the old wooden bridge over the Patapsco in 1890, and that the area known as "Reed Bird Island" was separated from the Brooklyn shore by a stream 100 foot wide. The Island was, in his earliest recollection, first covered with water, and then, as silt washed through and around the spans of the Railroad bridge, mud flats began to appear in the area of Reed Bird Island, and finally in 1909 a small portion of land was beginning to "make". This portion protruded above normal high tide in 1909, and at low tide, the whole area of the Island was above water. This land kept "making" or growing until it reached the point where the Hanover Street bridge is now located.

It is apparent that it is difficult for a witness, after almost fifty years, to be accurate as to the exact status of something with which he had no reason to be particularly concerned at some certain time in the past. Of all the witnesses, Mr. Mackall, and to a lesser extent, Mr. Johnson, had reason to have their attention called to the locus in quo within the period which is important to the determination of this case.

The photographs of the locus in quo and the surrounding area taken in April, May and June, 1916, at high and low tides, and offered in evidence by Counsel for the Respondents, have been examined carefully by the Court, and it is frustrating to find that none were taken from the Hanover Street bridge fill with the camera pointed downward towards the reeds so as to give a clue as to the presence of earth or water among them. Assuming that they hid fast earth in 1916, it may also be assumed that some or all of this earth was built by erosion from the earth fill, construction of which, according to Mr. Mackall's testimony, had begun several years before, and which is shown, with erosion channels, in the photographs.

The first question to be determined from the evidence is whether or not "Reed Bird Island" was, at the time of the issuance of the patent, covered by navigable water. If it was, the patent was invalid, as falling within the prohibition of the Statute. In the case of *Mayor and City Council of Havre de Grace v. Harlow*, 129 Maryland 265, at page 272, it is said that "under the English common law navigable waters were held to be those in which the tide ebbs and flows — this fact was made the test of navigability. By the Roman law rivers in which the flow of water is perennial were held to belong to the public, and they were navigable if they were capable of being navigated, in the ordinary sense of that word. . . . The rule of the civil law is the one which has prevailed in this country . . . the test of navigability is navigable capacity without regard to the character of the craft, the business done, the ease of navigation" As has been pointed out, in the Maryland Law Review article on the case of *Gray v. Gray*

(Volume V, page 314), the question remains as to whether our Court of Appeals, in that case, went on record as abandoning the Common Law rule, which it had theretofore often followed, in favor of the Civil Law rule. As the article observes, the evidence there enabled the Court to reach its conclusion by either rule.

This Court is of the opinion that the application of both rules in the State of Maryland is not necessarily inconsistent. The Court of Appeals appears to have used the phrase "navigable water" in its technical, common law meaning for the purpose of determining whether or not its "entire property (is) vested in the public" (*Sollers v. Sollers*, 77 Maryland 148; and *Clark v. Todd*, 192 Maryland 492).

"Rivers or streams within the ebb and flow of tide, to high water mark, belong to the public, and in that sense are navigable waters; all the land below high water mark, being as much a part of the *jus publicum*, as the stream itself. . . . Looking then to the general purpose disclosed by these affirmative provisions (of the Act of 1862), it is clear that the clause in the 3rd section prohibiting the issue of any patent of land covered by navigable water should be so construed, as to apply to all lands below high water mark, or in terms still more comprehensive, to embrace any lands, to which the rights and privileges conferred by this Act could attach" (*Day v. Day*, 22 Maryland 530, at 537). It appears, therefore, that the prohibition of Section 39 of the Statute as to the issuance of patents for land covered by navigable waters means land covered by waters navigable in the technical, common law sense.

The preponderance of the evidence, in the opinion of this Court, indicates that "Reed Bird Island" was, in its entirety, covered by navigable water, as defined in the technical, common law sense, at the time the survey was made and at the time the patent was issued, whether or not the water was navigable in the civil law definition. For this reason, if no other, the patent should be declared invalid as having been issued in contravention of the provisions of the Statute.

Even if the locus in quo were fast land, and not covered by navigable waters at the time the patent was issued, this Court is of the opinion that the patent was invalid, having been issued in violation of the Plaintiff's riparian rights as defined in Section 46 of Article 54. Respondents contend that, since the evidence clearly shows the presence of a navigable channel or "gut" between the Island and the South Shore, about 100 feet wide, and, since the patent did not interfere with the Plaintiff's access to that, its rights under Section 46 were not interfered with. The evidence does indicate the existence of such a channel at the time in question, and that it was navigable by small craft, such as rowboats and sail boats, but, in the Court's opinion, riparian rights, within the meaning of the Statute, are not so restricted. These rights, so provided for, mean not merely that the riparian owner is entitled to access to navigable waters, however shallow, provided only that a skiff is floatable therein, but that he is entitled to access, by way of improvements, to the *generally* usable part of the navigable water, in other words, to the main channel of commerce of the river.

In *Melvin v. Schlessinger*, 138 Maryland 339, the Court of Appeals said "for by a grant of these (accretions) the riparian owners would not only be excluded from the use of the navigable stream, but as such accretions lie *between the shore and the channel of the stream* (Emphasis supplied), the riparian owners would be prevented thereby from making improvements in the waters in front of their lands."

In *Baltimore and Ohio Railroad Company v. Chase*, 43 Maryland 23, at page 34, the Court of Appeals said that "in addition to this right by reliction or accretion, the riparian proprietor, whose land is bounded by a navigable river, whether his title extends beyond the dry land or not, has the right of access to *the navigable part* of the river" (Emphasis supplied.) See also *Potomac Steamboat Company v. Upper Potomac Steamboat Company*, 109 United States 672, wherein the same language is used. And in the case of *Baltimore City v. Steamboat Company*, 104 Mary-

land 485, at 498, the Court said: "It is to be observed that the question before us is not that of the right of riparian owners to wharf out to the *deep water line* (Emphasis supplied) . . .", thus implying that such right is recognized. The City's right, as a riparian owner, is not satisfied by access to the "gut" or stream described in the testimony, navigable only by the lightest of craft. The possibility that the main channel or the area of deep water may in the future shift, would appear immaterial; the rights of riparian owners must be determined with reference to the situation at a specific time, if they are to have any practical value.

In *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N. E. 439, the Supreme Court of Illinois, although deciding questions not germane to those in the case at bar, discussed very thoroughly the definition and meaning of the word "channel". It quoted with approval: "The word channel, when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow." And further on it said "so far back as can be known . . . , the main channel of the Mississippi River, at the point where Complainant's bridge is constructed, was always west of Bloody Island, that is, between that island and the Missouri shore . . . and for that reason Bloody Island, although the river East of it was in fact at one time navigable for shallow draught vessels, — certainly in seasons of high water, — was always regarded as being within the limits of the state of Illinois."

But the Respondents contend that in any case the City, since it claims under a grant limited to the erection of a bridge and uses incidental thereto, cannot assert the rights of a riparian owner as set forth in the Statute. It appears doubtful that the Respondents, in this proceeding, are entitled to assert such a construction of the grant, but assuming that they are, and that their construction is correct (although there is no reverter in the grant), the rights lie somewhere and the Statute provides a blanket injunction against interference with them. It does not provide that a

patent issued in violation thereof shall be good until such rights are asserted by one having title to assert them.

"This act is one relating to the interests and property of the public, and we are bound to take judicial notice of it, whether the parties on either side rely on it or not" (Day v. Day, *supra*). "In most cases, the caveat proceeds upon the ground that some right or title of the caveator would be interfered with by the grant of the patent, but as the question is always whether it is lawful, right and just to issue the patent, this may and sometimes does depend upon other and higher considerations than the rights of the caveator, and therefore a caveat will not be dismissed merely for want of interest in the caveator in the matter in dispute . . ." (Patterson v. Gelston, 23 Maryland 432). Although the case at bar does not involve a caveat, it is near enough for the principle to apply.

Finally, the Respondents contend that the City recognized the navigability of the gut or stream by applying to the United States District Engineer for authority to close it in 1935 and 1942. In the opinion of this Court, no such recognition can be implied from such applications. It is undisputed that the Patapsco River at that point is a navigable river, by either definition. Since the Federal Government had paramount jurisdiction, its permission was required to make such encroachments into the river, whether or not water navigable in fact was involved. In fact, the requirement to secure such a permit is obviously for the purpose of enabling the Federal government to determine whether or not the navigable use of the river will be interfered with. If discretion were in the riparian owner to determine this, there would be no need to apply.

For the reasons set forth, the patent must be declared invalid. It is equitable, however, that the Plaintiff pay the costs of this proceeding.

/s/ JAMES MACGILL,

Judge.

DECREE

This case coming on for hearing, and being submitted, testimony was taken in open Court, Counsel were heard, and the proceedings read and considered.

It is, thereupon, this twenty-seventh day of October, 1955, by the Circuit Court for Anne Arundel County, sitting in Equity, ADJUDGED, ORDERED, DECREED and DECLARED:

(1) That the patent mentioned in these proceedings, namely, that patent issued by the Land Office of Maryland on September 10, 1909, to John P. Bruns for 33 and 3/4ths acres of land, to be held by the name of "Reed Bird Island", be, and the same is hereby, set aside, annulled and declared void and invalid, and it is further declared that, at that time (September 10, 1909), title to said land was vested in the State of Maryland subject to whatever rights the Mayor and City Council of Baltimore has acquired therein.

(2) That the Complainant pay the cost of this proceeding.

/s/ JAMES MACGILL,

Judge.

FILED APR 4 1956

IN THE
Court of Appeals of Maryland

OCTOBER TERM, 1955

No. 195

H. MILTON WAGNER, JR., ET AL.,
Appellants,

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Appellee.

APPEAL FROM THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
(JAMES MACGILL, Judge)

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This is an action filed by the Mayor and City Council of Baltimore against Appellants to remove a cloud on its alleged title to certain property called "Reed Bird Island." The Appellants claim title to the Island through a patent issued by the State of Maryland. The City, Appellee here, claims that the patent is invalid. The suit was originally filed in 1916, when Reed Bird Island was located in Anne Arundel County. Although the property was subsequently

annexed to Baltimore City, the Circuit Court for Anne Arundel County properly retained jurisdiction under the provisions of Section 18 of Chapter 82 of the Acts of 1918 (Annexation Act). After some delay, the case came on for trial, testimony was taken, arguments presented, and in due course the Court (James Macgill, J.) filed his opinion and entered a decree declaring the Appellants' patent to Reed Bird Island invalid. From that decree, this appeal was taken.

QUESTIONS PRESENTED

I.

Was the patent for Reed Bird Island issued in violation of the statutory injunction prohibiting patents for land covered by navigable waters?

The Appellants submit that this question should be answered in the negative and in support of their position submit the following propositions:

(1) The proper test of whether land is covered by navigable water within the meaning of the statutory prohibition against patenting such land is whether the land is covered by water navigable in fact, and not whether it is flowed by the tide.

(2) There is no evidence in this case to support a finding that Reed Bird Island was entirely covered by water navigable in fact at the time of the issuance of the patent thereto.

It is therefore submitted that the court erred in holding the patent invalid solely on the basis of a finding that Reed Bird Island was covered by some water at high tide.

II.

Did the issue of a patent to Reed Bird Island interfere with any riparian rights of the Appellee as owner of nearby land on the Brooklyn shore?

The Appellants submit that this question should be answered in the negative, and in support of their position submit the following proposition:

(1) The existence of a navigable channel between Reed Bird Island and the Appellee's property on the Brooklyn shore precludes any valid claim by Appellee that its right to make improvements or its right to accretions has been impaired by the granting of Appellant's patent.

It is therefore submitted that the Appellants' patent was not invalid as having been issued in violation of these rights.

III.

Can the Appellee claim a title to Reed Bird Island by virtue of statutory grants concerning harbors and the Light Street Bridge?

The Appellants submit that this question should be answered in the negative, and in support of their position state that neither the grant of control over Baltimore harbor by the Legislature, nor the grant to the Appellee of the Light Street Bridge, conveyed title to the Appellee to the area constituting Reed Bird Island.

IV.

Is the patent upon which Appellants rely invalid because of certain alleged defects?

The Appellants submit that this question should be answered in the negative, and in support of their position state that the aforesaid title has no defects other than an incidental inadvertent error.

STATEMENT OF FACTS

Reed Bird Island is located at about the point where the main branch of the Patapsco River empties into Baltimore Harbor, that is, at the point where Hanover Street crosses the Patapsco River from Brooklyn to the point on which the Maryland Yacht Club is located. The plats filed as evidence (E. 13, 29, 101; Agreed Ex. 2, 9) will more exactly describe the Island.

In 1856 one Richard Owens Crisp was authorized by the Laws of Maryland (Chapter 215, Laws of Maryland of 1856) to build a bridge over the Patapsco River from Ferry Bar, on the north Side, to some point in Anne Arundel County on the south side of the River. In 1858 Crisp, together with one Richard Cromwell, Jr., purchased from Patapsco Company a tract of land in Anne Arundel County as a bridgehead for this bridge. This bridgehead tract is located near Reed Bird Island, being on the Brooklyn shore of the River. The River bridge was subsequently built and became known as the Light Street or Long Bridge. By Chapter 159 of the Laws of Maryland of 1878 the City of Baltimore and the County Commissioners of Anne Arundel County were authorized to purchase the Light Street Bridge and bridgeheads. In 1880 this purchase from Crisp and Cromwell was effected.

In 1918, by the Annexation Act, cited above, Baltimore City acquired all roads, streets, avenues and alleys lying within the annexed territory, any bridges existing in any of the highways being considered parts thereof. On April 15, 1926, South Baltimore Harbor and Improvement Company of Anne Arundel County conveyed to the City of Baltimore certain property along the southern shore of the Patapsco River adjacent to the bridgehead property previously described, and across from Reed Bird Island. It is

on its riparian rights as owner of these properties that the City bases its claim to Reed Bird Island.

On September 15, 1908, a survey of Reed Bird Island was made by L. H. Green, County Surveyor of Anne Arundel County, on a warrant issued from the Land Office of the State of Maryland. Subsequently, on September 10, 1909, a patent was issued out of the Land Office for Reed Bird Island to John P. Bruns. The Light Street Bridge above referred to crosses Reed Bird Island, as indicated in the Green Survey. On September 23, 1910, Bruns conveyed Reed Bird Island to Harry M. Wagner, predecessor in title to the respondents in this case. It is through this patent that the respondents claim title to the Island.

Under authorization of the Legislature in 1914, the State Roads Commission of Maryland began about 1915 to construct the Hanover Street Bridge across the Patapsco River as a substitute for the old Light Street Bridge. The portion of this Bridge running from the Baltimore County point to the Anne Arundel County shore of Brooklyn consisted of a large span across the main branch of the Patapsco, a causeway elevated about 6 feet across Reed Bird Island and a shorter bridge, about 110 feet long from Reed Bird Island to the Brooklyn shore. In this connection, Wagner conveyed to the State Roads Commission a right-of-way to cross Reed Bird Island for Hanover Street, reserving to himself certain rights of access. The new bridges were completed in 1917 and at that time the old Light Street Bridge was destroyed. In the meantime, Wagner had been paying taxes on the property to Anne Arundel County, beginning in 1912, as well as collecting rents for certain billboards located on Reed Bird Island, the rents being collected from January 1, 1917. The rent collections and tax payments continued until 1928, at which time the City ordered abate-

ment of taxes and ordered the billboard owners to pay rent to the City.

In due course, Race Street was extended across the very southern end of Reed Bird Island to connect with Hanover Street and in connection with this extension, an agreement was reached between the Wagner interests and the City whereby a deed was given to the City for the property included in Race Street and the City agreed that the present proceedings would be prosecuted in order to determine title to Reed Bird Island.

There were two issues of fact raised at the trial. The first of these pertained to the existence of a navigable channel between Reed Bird Island and the Brooklyn shore. Evidence was presented by various witnesses tending to show the use made of this channel at the time the patent to Bruns was granted and for some years thereafter. On this question, the court's findings are expressed as follows in the opinion filed (E. 114):

“Respondents contend that, since the evidence clearly shows the presence of a navigable channel or ‘gut’ between the Island and the South Shore, about 100 feet wide, and, since the patent did not interfere with the Plaintiff’s access to that, its rights under Section 46 were not interfered with. The evidence does indicate the existence of such a channel at the time in question, and that it was navigable by small craft, such as rowboats and sailboats. . . .”

Witnesses for both Appellee and Appellants testified to the existence of this channel and its regular use for commercial as well as general travel purposes (E. 43, 44, 46, 52, 53, 77, 80, 90-91). In view of the trial court’s finding of the existence of a navigable channel between Reed Bird Island and the shore — a finding favorable to the Appellants — that fact is not in issue on this appeal.

The second issue of fact raised is the question of the extent to which Reed Bird Island was covered by water in 1909, at the time the patent thereto was granted to Appellants' predecessor in title. The survey upon which the patent was granted was made by L. H. Green, County Surveyor of Anne Arundel County. This survey contains the express statement that, "The above described land is not covered by navigable water" (E. 10).

A number of witnesses testified, and their testimony ran the gamut from the statement that at all tides, including low tide, the Island had some water over it (E. 57, 91-92), to the statement that even at high tide some parts of the Island protruded above the water (E. 77, 95). Most of the witnesses, including some of the Appellee's witnesses, agreed that reeds and marsh grass protruded above the level of the water at all times (E. 49, 54, 58, 60, 80, 83). The photographs taken shortly after suit was filed show clearly that all of the area known as Reed Bird Island was exposed at low tide, and a substantial mass of reeds and apparently some ground was exposed at high tide (Def. Ex. 3). The court may be better able to evaluate these pictures by comparing the time and date taken (as noted on each) with observed tides, recorded by the U. S. Coast and Geodetic Survey, of which the Court can take judicial notice. On April 20, 1916, at 3:42 P.M. a low tide of -0.1 foot, on May 3, 1916, at 7:42 A.M. a high tide of 1.7 feet, and on June 3, 1916, at 8:42 A.M. a high tide of 2.9 feet, were recorded, all figures relative to mean low water, at Fort McHenry.

The only testimony as to boats passing over Reed Bird Island was to the effect that the State Roads Commission ran boats over the Island in connection with construction of the Hanover Street causeway (E. 39), that some rowboats and shallow draft sailboats were seen going over it (E. 52), and that hunters pushed their boats through the reeds

while hunting (E. 60). Mr. Johnson testified that he and some friends speared carp fish on the island, but it appears this was done on foot (E. 48-49), and there is no testimony of commercial or general travel use of this area for navigation. On the contrary, the testimony of most witnesses, including Appellee's witnesses, was generally to the effect that boats went around Reed Bird Island, either by the channel between Reed Bird and the Brooklyn shore, or by the channel between Reed Bird and the island adjacent to it on the west (E. 43, 44, 46, 52, 53, 77, 80, 90-91).

The court below, in its opinion, said (E. 113):

"The preponderance of the evidence, in the opinion of this Court, indicates that 'Reed Bird Island' was, in its entirety, covered by navigable water, as defined in the technical, common law sense, at the time the survey was made and at the time the patent was issued, whether or not the water was navigable in the civil law definition."

The opinion makes clear that the court below understood the common law test of navigability to be met wherever water flowed over the land at high tide (E. 113).

Thus, the finding of the court goes no further than to say that Red Bird Island was flowed by the tide, at least at high tide. Granting that there is some evidence to support this finding, the court did not find that the tide water that flowed the island was navigable in fact; on the contrary, the language used indicates that the court believed that the Island was not covered by water navigable under the civil law definition, and the evidence seems to support this conclusion overwhelmingly.

On the basis of the findings of fact above referred to, the court found as a matter of law that the patent on Reed Bird Island issued to Appellants' predecessor in title was invalid, and that, at the time of issuance of the patent, title to the

land known as Reed Bird Island was vested in the State, subject to whatever rights the Appellee had acquired therein (E. 117). The court decreed that the Appellee pay the cost of the proceedings. From this decree Appellants have appealed.

STATUTE INVOLVED

Chapter 129 of the Acts of 1862 provides as follows:

"WHEREAS, Doubts are entertained in regard to the extent of the rights or proprietors of land abounding on navigable waters, to accretions to said land, and to extend improvements into said waters; for the purpose of solving such doubts, therefore,

"SECTION 1. *Be it enacted by the General Assembly of Maryland*, That article fifty-four of the Code of Public General Laws, be amended by adding thereto the following sections, to wit:

"Thirty-seven. The proprietor of land bounding on any of the navigable waters of this State, is hereby declared to be entitled to all accretions to said land by the recession of said water, whether heretofore or hereafter formed or made by natural causes or otherwise, in like manner and to like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable.

"Thirty-eight. The proprietor of land bounding on any of the navigable waters of this State, is hereby declared to be entitled to the exclusive right of making improvements into the waters in front of his said land; such improvements, and other accretions as above provided for, shall pass to the successive owners of the land to which they are attached, as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made.

"Thirty-nine. No patent hereafter issued out of the Land Office shall impair or affect the rights of riparian

proprietors, as explained and declared in the two sections next preceding this section, and no patent shall hereafter issue for land covered by navigable waters."

(This Act is now codified as Sections 45, 46 and 48 of Article 54, Annotated Code of Maryland (1951).)

ARGUMENT

I.

THE PATENT FOR REED BIRD ISLAND WAS NOT ISSUED IN VIOLATION OF THE STATUTORY INJUNCTION PROHIBITING PATENTS FOR LAND COVERED BY NAVIGABLE WATERS.

A. The proper test of whether water is "navigable" within the meaning of the Act of 1862 is whether the water is navigable in fact, and not whether it is flowed by the tide.

The court below, in its opinion, considered the above rule, and specifically rejected it, as applied to this case. The court stated that the evidence "indicates that Reed Bird Island was, in its entirety, covered by navigable water, as defined in the technical common law sense, at the time the survey was made and at the time the patent was issued, whether or not the water was navigable in the civil law definition" (E. 113). As stated above, the opinion of the court makes it clear that by "technical common law sense" the court meant simply that the land was covered at high tide, even though, as a practical matter, the water was not in fact navigable. It is submitted that the court should have applied the more general test of navigability, and considered whether the water was navigable in fact.

It has often been generally stated that there are two "conflicting" rules with regard to determining navigability: the civil law rule, to the effect that the water must be navigable in fact, and the common law rule to the effect that the ebb and flow of tide determines "navigability." *Mayor and City Council of Havre de Grace v. Harlow*, 129 Md. 265,

272; 5 Md. L. Rev. 314, 316. Generally, there is no conflict between these definitions in particular cases, because tide waters are generally navigable in fact for purposes of issues raised in the case. As the rules are stated above the two possible areas of conflict are (1) waters above the level of the tide that may in fact be navigable, and (2) tide waters that are not in fact navigable. The civilians point to these areas of conflict and contend that the common law rule is wrong and should be rejected. They contend that it was founded on the geographical circumstances existing in England where, as a general rule, the only navigable waters were tide water, and virtually all tide water was navigable. 5 Md. L. Rev. 316n.

It is submitted that the correct and Maryland rule is that whether water is navigable in fact is the ultimate test of whether it is navigable in law, and that this test is applicable in construing the Act of 1862 above referred to. Under the common law doctrine, certainly some weight must be given to the fact that particular water is tide water, in determining its navigability. In the absence of evidence that water is not navigable, the showing of the ebb and flow of the tide may be determinative. The question of whether particular water is subject to navigation for general commercial uses is not, however, irrelevant, and if it appears that the water is not subject to such use, it is not navigable even under the proper common law doctrine and the doctrine now recognized in Maryland.

The latest case discussing the Maryland law with regard to the meaning of "navigable" under the Act of 1862 is *Gray v. Gray*, 178 Md. 566, 16 A. 2d 166 (1940). That case came to this court on an appeal from a ruling on a caveat filed to the issuance of a warrant to resurvey certain marsh land located on the Eastern Shore. It appeared that the area sought to be resurveyed included a large marsh area

with a tide water stream running through it. There was no question about the tide ebbing and flowing in the stream. Nevertheless, the court discussed at great length the testimony appearing in the record concerning the use made of the stream in connection with navigation. It concluded that the land under the stream was not patentable, there having been testimony concerning the use of the stream for purposes of conveying boats for commercial purposes. It was determined, however, that the balance of the property covered by the survey was patentable.

In discussing the proper test of navigability, the court said, p. 574:

“At common law, such waters as are navigable in the popular sense of the word, regardless of whether the tide ebbs and flows in them, are public highways. And in 27 R. C. L. p. 1303, it said: ‘The rule by which to determine whether waters are navigable is variously stated, but clearly enough defined. The test of navigability of a river as stated by the Supreme Court of the United States is that these rivers are navigable in law when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.’”

Thus, the court clearly recognized that navigability in fact is the ultimate determining factor as to whether particular water is navigable in law. Aside from the adoption by the Court of the above definition, there would have been no point in discussing at length the testimony presented concerning the use made of the stream in question by various boats had the court concluded that the ebb and flow of the tide was the sole determining factor. It is interesting to note that in one of the earliest Maryland cases on this question, the court recognized the possibility that

water can be navigable above the level of tide water. In *Binney's case*, 2 Bland 99, 123-4 (1829), the court concluded that the Potomac river above tide water, for purposes of that case, was not navigable in view of the torrent of water and the precipitous manner in which it fell from level to level. The court recognized, however, that rivers could be navigable above tide water and even mentioned that both the Thames and Severn in England had been held to be navigable above tide water.

The position adopted by the court in the *Gray* case is in accord with the well recognized common law in England as to the ultimate test of navigability. It has been clearly stated that the tide itself is not the sole determining factor but that actual navigability is an essential element of navigability in law. In summarizing the English law, COULSON AND FORBES, *WATERS AND LAND DRAINAGE* (1952, 6th ed.) 100-101 state:

"A public navigable river is a river which is actually navigable, and in which the tide ebbs and flows . . . Though the flux and reflux of the tide is *prima facie* evidence that a river is navigable, it does not necessarily follow, that because the tide flows and reflows in any particular place, it is therefore a public navigation, although of sufficient size. The strength of the evidence arising from the flux and the reflux of the tide, must depend on the situation and nature of the channel. If it is a broad and deep channel, calculated to serve for the purpose of commerce, it will be natural to conclude that it has been a public navigation; but if it is a petty stream navigable only at certain states of the tide, and then only for a short time, and by very small boats, it is difficult to suppose that it has ever been a public navigable channel. Not every ditch or cutting which is reached by the tide forms part of the public navigable river, even though it be large enough to admit of the passage of a boat."

The above doctrine is well supported by the English cases. *Mayor of Lynn v. Turner*, 1 Cowp. 36 (1774); *Rex v. Montague*, 4 B. & C. 598 (1825); *Ilchester v. Rashleigh*, 61 L. T. 477, 5 T. L. R. 739 (1889); *Sim E. Bak v. Ang Yong Huat* [1923] A. C. 429, 129 L. T. 72. In the *Turner* case it is stated that the flowing of the tide does not make a river navigable, for there are many places into which the tide flows that are not navigable rivers. In the *Sim E. Bak* case, the court, although noting that the existence of tide makes a *prima facie* case of navigability, held the tide water involved to be non-navigable since insufficient general commercial use was established.

This English doctrine is also in accord with the common law generally. In 1 FARNHAM, WATERS AND WATER RIGHTS (1904) 100, it is said:

“A navigable body of water is one which the public has a right to use for the purposes of navigation. The term includes all waters which for a period long enough to be of commercial value are of sufficient capacity to float water crafts for the purposes of commerce, or to float to market the products of the country through which the water extends, so as to be useful to the population along its banks. This is like the rule of the civil, English Common and American law. . . . The stream must be of some value for commercial purposes, so as to be useful to trade, commerce or agriculture. And this excludes waters which are merely capable of floating a skiff for pleasure.”

It does appear that the advocates of the common law, as opposed to the civilians, emphasize the tidal nature of the water involved. However, in all jurisdictions, the ultimate test of navigability is navigability in fact. Even the English authors state that navigability in fact is an essential element of navigability in the legal sense of the term.

In Farnham's treatise, cited above, there is pointed out in detail, at pp. 104-109, the source of the theory that the tidal nature of the water concerned may be determinative of its status as navigable water. Chancellor Kent originated the theory that at common law tidal streams were the only navigable waters, apparently basing his conclusion on *Royal Fishery of the Banne*, Davies Rep. 149 (decided about 1604). After explaining that the *Banne* case purported to determine only what lands belonged to the King when under water, and not what lands were navigable, the author concluded as follows, "Since Chancellor Kent's doctrine was based entirely on the *Banne* case, it is very evident that it is not supported by the authorities cited, and since the doctrine is not that of the common law, the theory must be regarded as unsound."

The court below and the appellee here rely upon some old Maryland decisions, beginning with the case of *Day v. Day*, 22 Md. 530 (1865). That case indicated generally that navigability would be determined by whether or not the tide ebbed and flowed at the place in question. From the language used, it is possible to conclude that the court, for a period, felt that the ebb and flow of the tide was determinative of navigability. See *Patterson v. Gelston*, 23 Md. 432, 445 (1865); *Garitee v. Mayor and City County of Baltimore*, 53 Md. 422, 433 (1880); *Hess v. Muir*, 65 Md. 586, 607, 5 Atl. 540 (1886); *Sollers v. Sollers*, 77 Md. 148, 26 Atl. 188 (1893). In some of these cases, it is clear that the water in question was navigable in fact. Other cases might be explained as consistent with the general common law doctrine described above because of the fact that in each case there was no evidence upon which a court could base the conclusion that the waters were not navigable; therefore, the question of the ebb and flow of the tide was considered determinative. If, however, these cases stand for the flat

proposition that all land in which the tide ebbs and flows is to be considered navigable, whether or not it is navigable in fact, it is submitted that they misconceive the true doctrine of the common law, and in Maryland, they have been repudiated.

The doctrine of these early cases, which, as has been seen, was based on a misunderstanding of the common law, has been overruled in later decisions, beginning with *Havre de Grace v. Harlow*, 129 Md. 265, 98 Atl. 852 (1916). In determining whether the Susquehanna River was navigable at a particular point, in a suit to enjoin erection of a dam, the court noted the English common law, stating that there ebb and flow of the tide was made the test of navigability. The court then explained in full the practical test of navigability of the civil law, quoting the leading federal case, *The Daniel Ball*, 10 Wall. 557 ("Those rivers must be regarded as public, navigable rivers in law which are navigable in fact."), and citing *Ten Eyck v. Warwick*, 75 Hun. 562 (N. Y.) and *Ingraham v. Wilkinson*, 21 Mass. 268, all leading cases based on the civil law test of navigability. The court concluded, at pp. 276-277:

"Any water to be navigable must be susceptible of use for purposes of commerce, or possess the capacity for valuable floatage, in transporting to market the products of the country through which it runs, and it must be of practicable usefulness to the public as a public highway in its own State, and without the aid of artificial means; a theoretical or potential navigability or one that is temporary, precarious and unprofitable is not sufficient."

After examining the navigational use made of the part of the river involved, the court held that erection of the dam would not interfere with navigation.

The recognition in Maryland of the practical test of navigability in construing the Act of 1862 occurred in the next

Court of Appeals case defining navigability, *Linthicum v. Shipley*, 140 Md. 96, 116 Atl. 871 (1922), where a patent for a tidewater non-navigable pond was sought. As to navigability, the Court said, at p. 98:

"It is abundantly established by the testimony of all the witnesses that the water covering the land cannot be used for purposes of commerce or travel; and that is the well established test in most of the states of this country. It does not seem to have been adopted in this state unless the recognition of the general rule in the case of *Havre de Grace v. Harlow*, 129 Md. 265, had the effect of overruling earlier decisions of this Court."

The Court apparently concluded that the *Harlow* case did have this effect, since in holding that the pond was not patentable, principal reliance was placed on the rule of law that non-navigable bodies of water belong to riparian owners, and are not the State's to patent.

The abandonment of prior error was fully recognized in *Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 4 A. 2d 757 (1939) where the court again stated with approval the practical test of navigability, relying upon the American and English authorities recognizing it, and cited above. Finally in *Gray v. Gray*, previously discussed, the court specifically relied upon the practical test of navigability in construing the Act of 1862. It is submitted that the court below, in rejecting this test, and relying solely upon the ebb and flow of the tide as determinative of navigability, was in error.

B. There is no evidence in this case to support a finding that Reed Bird Island was entirely covered by water navigable in fact at the time of the issuance of the patent thereto.

In its findings, the court below declined to make an express finding as to whether the water over Reed Bird Is-

land was navigable in fact (E. 113). It is submitted that the conclusion that it was not is compelled by the evidence in this case, and that, as a matter of law, the Appellants' title based upon the patent issued in 1909, is valid.

This case is a proceeding collateral to the issuance of the patent granted to the Appellants' predecessor in title. In obtaining their patent, the patentees were required to have their property surveyed, and to have this survey considered and passed upon by the Land Office of Maryland. No caveat was filed by the Appellee, or by anyone else, in those proceedings, provision for which was made by law, now codified as Sec. 39 et seq. of Article 54 of the Code. The present suit was begun some seven years later, long after the Appellants' record title to Reed Bird Island had been perfected.

The survey prerequisite to the issue of the patent to Reed Bird Island was made by Mr. L. H. Green, County Surveyor of Anne Arundel County. It was made September 15, 1908, and clearly states, "The above described land is not covered by Navigable Water" (E. 10). This survey is the strongest possible evidence bearing expressly upon the principle issue concerned, that is, whether Reed Bird Island was covered with navigable water at the time of the survey and the issue of the patent herein. It is submitted that this survey, made by an impartial surveyor, and accepted by the Land Office as a basis for the patent granted, establishes that Reed Bird Island was not covered by water navigable in fact, regardless of the ebb and flow of the tide. Unless contradicted by the clearest and most positive evidence showing a use of this water for general and commercial navigation purposes, the finding of the surveyor must be accepted, particularly when challenged in collateral proceedings filed some years after the patent has issued.

It is submitted that, had the court used the proper test of "navigable water", it would have been compelled to conclude that there has been no evidence of use of the water over Reed Bird Island for purposes of navigation sufficient to overcome the presumption of validity of the survey and the Appellants' record title.

There is in this case no evidence of the use of this water for purposes of commercial boating or general travel and transportation purposes. On the contrary, virtually all of the witnesses testified to taking their boats around Reed Bird Island one way or another. Mr. Johnson, who kept a boat in this area, and testified for the Appellee, described taking his boat through the "gut" as he called it, and then out between Reed Bird Island and the next island to the west toward the railroad bridge (E. 43, 44, 46, 52, 53). The other witnesses who described the boating in this area generally confirmed this pattern of travel (E. 77, 90, 91). In any event, there is no affirmative testimony by any witness of general use of this area for any boating activity over the island. The most that can be said for the Appellee's evidence in regard to water over Reed Bird Island, is that row boats and shallow draft sail boats have gone across the island, and boats could be pushed through the reeds at high tide when there was water over the island (E. 52, 60). Although Mr. Johnson testified to carp fishing on Reed Bird Island, it appears that this fishing was done by wading (E. 48-49).

The non-navigability of all of the water over the area known as Reed Bird Island is further emphasized by the documentary evidence presented in the case. The photographs confirm the consistent testimony of witnesses (E. 49, 54, 58, 60, 80, 83) that the entire area was covered by reeds and marsh grasses. The extent of these grasses is

also confirmed by a survey made in 1921 and filed herein as Agreed Exhibit 4 (E. 29). It is perfectly apparent that for ordinary commercial and general travel and transportation purposes, an area thickly grown up in weeds and marsh grasses is not suitable to navigation. In the absence of any clear and explicit testimony as to such a use, the court must conclude that this area was not navigable in fact. Further, the Coast and Geodetic Survey Charts filed in these proceedings show that even as early as the 1890's, when the surveys upon which Plaintiff's Exhibit 1 is based were apparently being made (E. 96), there were some areas exposed above the water at low tide. A comparison of the 1905 Coast and Geodetic Survey Chart, Plaintiff's Exhibit 1 (E. 97), with Agreed Exhibit 4 (E. 29), or with the Agreed Exhibit 2, will show that three of the areas on the 1905 chart shown as exposed at low tide are within the area known as Reed Bird Island. As to Plaintiff's Exhibits 1 and 2, it should be emphasized that the only authorities known for these surveys vary considerably and apparently date from the 1890's. Plaintiff's Exhibit 2 (E. 99) adds nothing since it is identical with the 1905 chart and we know of no other authorities upon which it was based.

Under the Act of 1862, it is clearly established that, even though part of the land covered by the patent is navigable water, and therefore not patentable, the patent will be valid as to the part of the land which is above navigable water. This is the express holding in *Gray v. Gray*, 178 Md. 566, 16 A. 2d 166 (1940), cited above, in which the patent involved was upheld as to the marshland not covered by navigable water, although the patent was declared invalid as to that part which was covered by the stream determined to be navigable. See also *Tyler v. Cedar Island Club*, 143 Md. 214, 122 Atl. 38 (1923). Thus, in the present case, even if the court should determine that only a part of Reed

Bird Island was not covered by water navigable in fact, the patent, at the time of issue, is nevertheless valid as to that portion. The appellants, would, therefore, as owners of that portion of the island be entitled to all accretions thereto. Section 45, Article 54, Annotated Code of Maryland. When Reed Bird Island eventually reached full size, therefore, it all became the property of Appellants or their predecessors in title. In any event, this patent cannot be set aside by the Appellees in this case, unless they can prove that the patent is invalid in its entirety.

Since there is no affirmative evidence from which to establish, contrary to the express finding of the County Surveyor of Anne Arundel County, when he made his survey in 1908, that all of the water over Reed Bird Island at high tide was navigable in fact, that survey must be considered as valid and the patent based upon it properly issued.

II.

THE ISSUE OF A PATENT TO REED BIRD ISLAND DID NOT INTERFERE WITH ANY RIPARIAN RIGHTS OF THE APPELLEE AS OWNER OF NEARBY LAND ON THE BROOKLYN SHORE.

Agreed Exhibit No. 2 shows the various tracts of land acquired by the Appellee on the Brooklyn Shore just South of Reed Bird Island. At the time of the survey upon which the patent to Reed Bird Island was based, and at the time of the issue of the patent, there existed a navigable channel, about 100 feet or more in width (E. 86, Agreed Ex. 9) between these lands and Reed Bird Island. The testimony of a number of witnesses, both Appellee's and Appellants', supports the Appellants' contention, made in the court below, that this channel was navigable in fact. These witnesses recite a number of uses of the channel by various fishermen (E. 53, 77) and by persons selling shrimp to

fishermen (E. 90-91), as well as for general travel and transportation (E. 43, 44, 46, 52, 80). This testimony is uncontradicted. In view of this testimony, the court's express finding that such a channel did exist at the time in question, and that it was navigable by small crafts, such as rowboats and sailboats, was a necessary one.

In spite of the clearly established channel between Reed Bird Island and the Appellee's property, however, the Appellee still contends, and the court below concluded, that the patent to Reed Bird Island could not properly have been issued because of the rights guaranteed to the shore owners under the Act of 1862. That act provided, "no patent hereafter issued out of the Land Office shall impair or affect the rights of riparian proprietors, as explained and declared in the two sections preceding this section." It is true that this statute was intended to increase the rights which riparian owners had previously enjoyed. *Garitee v. Baltimore*, 53 Md. 422 (1880); *Day v. Day*, 22 Md. 530 (1865). The purpose of the statute, as explained in these and other cases, is to preserve the commercial and economic value of property by protecting its access to navigable waters. It is submitted that Appellee's rights are not impaired by the granting of the patent to Bruns in the present case, and that the Appellee cannot deprive Appellants of their property by relying upon this statute.

A. The Appellee's right to make improvements to its property as guaranteed in the Act of 1862 does not defeat the patent to Reed Bird Island.

The Appellee's right as expressed in the Act of 1862 is that of "making improvements into the water in front of his said lands . . . but no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made." The improve-

ments contemplated are clearly defined in *Hess v. Muir*, 65 Md. 586, 598 (1886):

“ . . . such structures as are subservient to the land, and which used in connection with the land, enhance its value or enlarge its commercial or agricultural facilities, or other utility, to an extent the land alone would be incapable of, and in this way ‘improve’ it. They are to be made ‘into’ the water, a term inconsistent with entire separation from the land. Wharves, piers and landings are examples of such improvements. Farming and commercial interests are promoted by the privilege, and to encourage the development of these was the main object of conferring it. When such improvements are made they become incident to the estate, as not inherently identical in nature with land, but from being joined to it, and contributing to its uses and value legally identified with it, as a fixture or a right of way, or other appurtenance that passes with land.”

In *Goodsell v. Lawson*, 42 Md. 348 (1875), in holding that a riparian owner was entitled to an oyster shell improvement made off of his land, between the land and the navigable channel, the Court stated that the right to improve the property afforded by the Act of 1862 is the right to extend improvements out to the point at which the waters are navigable in fact. Since the Act specifically prohibits any interference with navigation of a stream of water into which the improvements are made, it is clear that the improvements cannot be made so far out into the navigable channel as to interfere with its use by others. Thus, the riparian owner in the present case would not be authorized to extend improvements all the way across the 100 foot channel between the shore land and Reed Bird Island in an effort to reach the wider channel beyond, since such an improvement would interfere with navigation in the 100 foot channel between Reed Bird Island and the shore. *Goodsell v. Lawson*, *supra*.

Since the Appellee had available to it, in the 100 foot channel adjacent to the Brooklyn shore, a navigable channel at the time the patent in this case was granted and at the time suit was brought its right to make improvements cannot extend so far as to defeat Appellants' title to Reed Bird Island. Its right to improve into the navigable stream was a right to improve into the 100 foot channel so far as might be required for purposes of piers, wharves, boat houses, etc., but not a right to extend so far into that channel as to interfere with navigation in it and certainly not a right to extend all the way to Reed Bird Island.

B. The Appellee's right to accretions as guaranteed by the Act of 1862 does not defeat Appellants' title to Reed Bird Island.

The presence of a navigable stream between Reed Bird Island and the Brooklyn shore precludes any claim that the Appellee may have that Reed Bird Island is an accretion to the shore land acquired by the Appellee or that the patent issued to Bruns is invalid by virtue of the Appellee's ownership of this shore property. The right conveyed by the statute is that "accretions to said land by the recession of said water" and the presence of a navigable channel between the shore land and the patented land does not bring the patent within the scope of the Act of 1862.

The right to accretions conferred by the statute is the right to hold such accretions "in like manner and in like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable." The owners of land bordering on non-navigable water, by Maryland law, own all of the land to the center of the stream, whether covered by water or not. See *Goodsell v. Lawson*, 42 Md. 348 (1875). Thus, title to the land is determined, regardless of any change that may occur in the course of the

stream or in the channel of the stream. Obviously, it is impossible to reason directly from the law with reference to riparian owners on non-navigable waters because of the necessity of preserving access to available channels. As has been pointed out in *Goodsell v. Lawson*, *supra*, and *Hess v. Muir*, 65 Md. 586 (1886) the statute of 1862 did not give title to the riparian owner on a navigable stream to the center of the stream. The *Goodsell* case also took note of the fact that the center of the stream could not be a determining factor in deciding the extent of a riparian owner's rights because of the fact that the channel might not follow the center of the stream. Thus, for example, in our case, while Reed Bird Island may be on the Brooklyn side of the center of what is now the main channel, the shore owner's rights could not be considered as extending to and including Reed Bird Island because the channel might have developed primarily in the channel adjacent to the Brooklyn shore, with the center channel filling up and becoming non-navigable. Thus, the shore owner on the other side of the Patapsco River might be cut off from the navigable channel by the Appellee's claim to Reed Bird Island. As has been recognized by the above cases, therefore, the right granted by the statute is the right to actual accretions to the land, and not to an island forming on the other side of a navigable channel.

The situation in the present case is not that of *Melvin v. Schlessinger*, 138 Md. 337, 113 Atl. 875 (1921). In that case, a patent which was issued for a mud island in the Patapsco River was declared invalid because of a finding of the Court that the island was actually joined to the shore and that a usable channel did not exist between the so-called island and the shore. Thus, the "island" was, at the time of the patent, in fact an accretion. The case is substantially similar to *Chapman v. Hoskins*, 2 Md. Ch. 485

(1851), in which the Court held, in proceedings to caveat a patent, that the patent should not issue because the land to be patented was not separated from the shore property by a navigable channel and there appeared to be a probability of it becoming joined as an accretion, if it were not already so joined. The *Chapman* case cited and distinguished the earlier case of *Carpenter v. Mandus*, unreported (1845) in which a patent was granted on an island separated from the shore by a navigable channel. The same result as in the *Carpenter* case was reached in *Linthicum v. Coan*, 64 Md. 439 (1885) in which the patentee was held entitled to an island forming in the Patapsco River over the claim of a shore owner.

Although these cases arose on patents issued prior to the statute of 1862, the rule there expressed is nevertheless valid in the present case. The *Chapman* and *Carpenter* cases, arising on caveats to patents, were subject to an equity practice to deny a patent when its issue might reasonably be expected to interfere with a shore owner's common law right to accretions. In caveat cases, therefore, this equity practice gave substantially the same protection to shore owners as the Act of 1862 later gave them for all cases. The *Carpenter* case is thus authority for the Appellants' position here that the existence of a navigable channel between the patented land and Appellee's land precludes any valid contention by the latter that his right to accretions is impaired.

The purpose of the statute of 1862 being to protect the riparian owner on navigable water in his right of access and use of the navigable stream upon which he fronts, the presence of a navigable stream between Reed Bird Island and the Appellee's property affords the Appellee with complete protection in its access to the navigable stream available to it.

Under the wording of the Act of 1862, it is perfectly clear that the Appellee would not be entitled to any formation of land off its shore unless that formation were actually an accretion, joined to its land. To deny validity to the Appellants' patent in this case, simply because the Island involved lies off the shore owned by the Appellee, on the possibility that the land might at some future time become an accretion to the Appellee's property, would mean that the land is unavailable for development by anyone. The economic waste involved in thus removing a valuable piece of real estate from commerce is certainly an unthinkable result. The navigable channel between Reed Bird Island and the shore certainly protects the City's riparian rights and distinguishes the present case from *Melvin v. Schlesinger, supra*, and *Day v. Day*, 22 Md. 530 (1865) where the Court sustained the caveat to a patent suit for land that had been joined to shore property.

Although Reed Bird Island was in 1942 joined to the Brooklyn shore by an artificial fill made by the Appellee, this occurred long after suit was filed in this case, and in any event, being an act of the City itself, it could not convey a title to the City if the patent issued was otherwise and theretofore valid. It is Appellants' understanding that the Appellee does not contend that this fill would make Reed Bird Island an accretion to the Brooklyn shore if it was not so prior to the fill.

Since Reed Bird Island cannot be considered an accretion to the Brooklyn shore for purposes of this case, but rather is separated from it by a navigable channel, the issue of the patent to the Island did not impair Appellee's right to accretions.

III.

THE APPELLEE CANNOT CLAIM TITLE TO REED BIRD ISLAND
BY VIRTUE OF STATUTORY GRANTS CONCERNING
HARBORS AND THE LIGHT STREET BRIDGE.

The Appellee claims that by virtue of its statutory control over the bed of Baltimore Harbor, it has title to Reed Bird Island. In *City of Baltimore v. Canton Co.*, 186 Md. 618, 47 Atl. 2d 775 (1946) it was expressly held by the Court of Appeals, in an exhaustive opinion by Judge Markell, that the City's control over the harbor did not convey to it title to the bed of the harbor. The Court there determined that the City could not charge a minor privilege fee to a riparian owner for building out into the harbor, the City not having title to the bed of the harbor.

Similarly, the grant to Crisp by the Legislature of the right to build a bridge did not convey to him title to the land under it. At most, Crisp, and subsequently the Appellee, merely acquired an easement for highway purposes across the harbor, and not fee simple title. If it could be considered that an easement was granted, the easement was abandoned in 1917 when the Appellee destroyed the bridge.

IV.

THE APPELLEE'S CLAIM THAT THE PATENT UPON WHICH
APPELLANTS RELY IS INVALID BECAUSE OF CERTAIN
ALLEGED DEFECTS IS WITHOUT MERIT.

The Appellee claims that the reference in the survey to "Improvements: None" is a false statement and, therefore, should invalidate the patent, the Appellee pointing to the Light Street Bridge which then crossed Reed Bird Island. Clearly, the Light Street Bridge was not an improvement to Reed Bird Island under the test set forth in *Hess v. Muir*, 65 Md. 586, 598, since the Bridge did not

in any way add to the economic value or usefulness of the property. There was no access from Reed Bird Island to the Bridge and, therefore, it could not be considered an improvement to the Island. In any event, the survey was not misleading, since it showed the bridge crossing Reed Bird Island in the plat attached to the survey.

The Appellee also argues that since the plat only shows 8 courses, whereas 9 are described in the metes and bounds description of the property, the survey is ambiguous and should invalidate the patent. It is perfectly clear that course 7 in the plat is actually two courses, being the 7th and 8th described in the "Table" on the first page. The full 9 courses appear in two separate places and the failure to list them as 9 separate courses on the plat is a harmless inadvertent omission which certainly cannot invalidate the patent.

CONCLUSION

It is respectfully submitted that the decree of the Court below should be reversed, and the Bill of Complaint dismissed, since the Appellee has failed to prove either that it has good title to Reed Bird Island or that the patent upon which Appellants rely is invalid.

Respectfully submitted,

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FILED APR 23 1956

IN THE
Court of Appeals of Maryland

OCTOBER TERM, 1955

No. 195

H. MILTON WAGNER, JR., ET AL.,
Appellants,

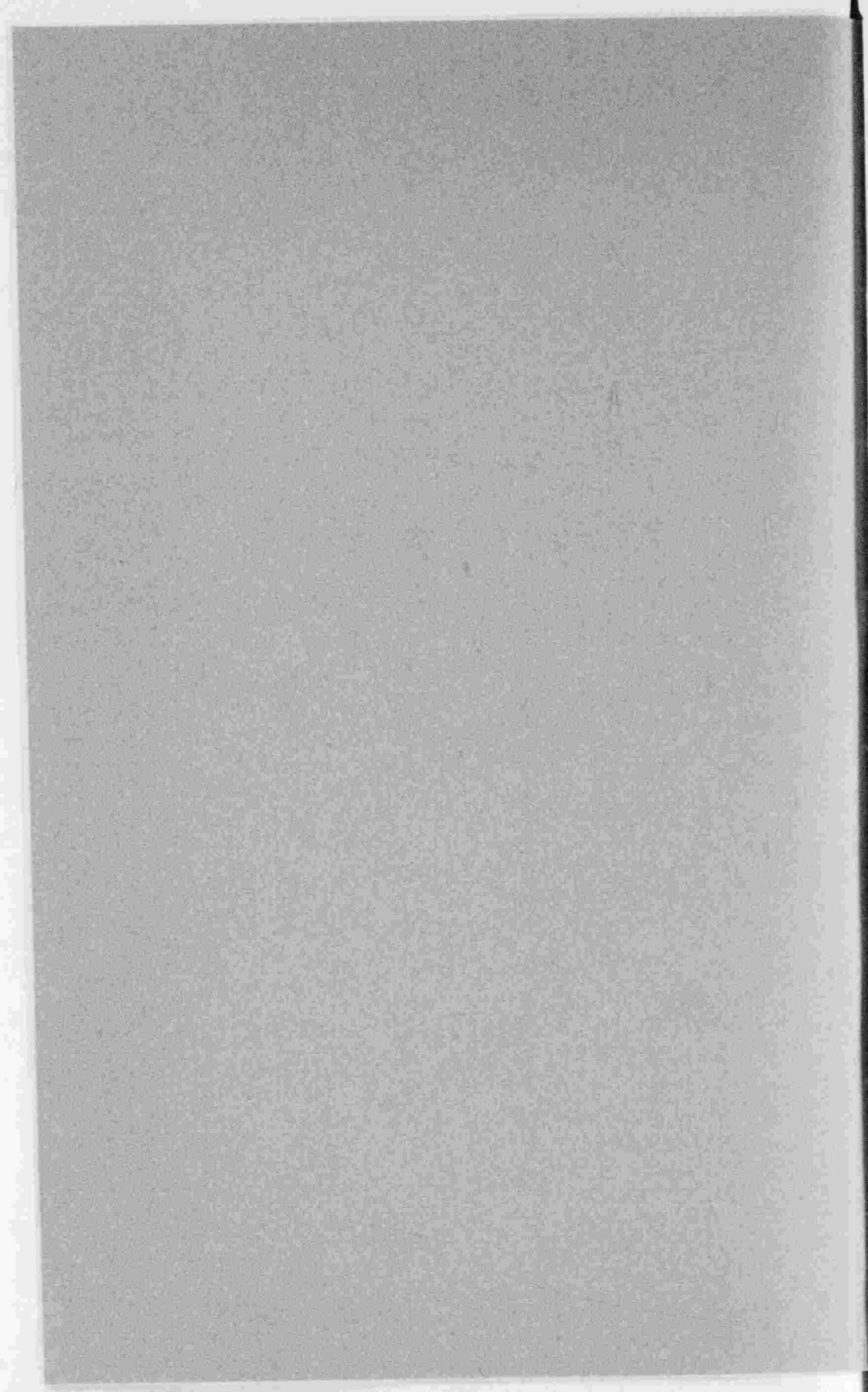
vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Appellee.

APPEAL FROM THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
(JAMES MACGILL, Judge)

BRIEF OF APPELLEE

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IN THE
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H. MILTON WAGNER, JR., ET AL.,
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Appellee.

APPEAL FROM THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
(JAMES MACGILL, Judge)

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee agrees that the Statement of the Case by Appellants in their Brief is substantially correct.

QUESTIONS PRESENTED

I.

Was the Patent for "Reed Bird Island" Issued in Violation of the Statutory Injunction Prohibiting Patents for Land Covered by Navigable Waters?

II.

Did the Issue of a Patent to "Reed Bird Island" Materially Impair and Affect Riparian Rights of the Appellee?

III.

Is the Patent Upon Which Appellants Rely Invalid Because of Defects?

IV.

Did the Issue of a Patent to "Reed Bird Island" Unlawfully Abrogate the Title to Any Land Vested in the Appellee?

STATEMENT OF FACTS

The facts in this case are essentially set out in the Brief of the Appellant. By way of amplification, however, Appellee, the Mayor and City Council of Baltimore, wishes to stress the following facts:

Appellee, Mayor and City Council of Baltimore, and the County Commissioners of Anne Arundel County, in 1880, were granted *all of the interest* of Richard Owens Crisp and wife and Richard Cromwell, Jr. and wife to the Light Street Bridge from Ferry Bar in the City of Baltimore, over the Patapsco River to the foot of First Street (now known as Hanover Street), in the City of Brooklyn, Anne Arundel County, and the necessary land connected therewith, for the sum of \$35,000.00; Crisp and Cromwell having previously entered upon and held the necessary land under said Light Street Bridge in *fee simple* (E. 21); that all of Appellants' witnesses, except one, and all of the Appellee's witnesses testified that as a matter of fact "Reed Bird Island" was covered by water prior to, during and after the grant of the patent to the Appellants in 1909.

See:

Testimony of Appellants' witnesses: James B. Woodward (E. 83), and John P. Helmer (E. 90, 91, 92, 93).

Testimony of Appellee's witnesses: John M. Mackall (E. 37, 39), Joseph N. Johnson (E. 46, 47, 48, 49), George N. Potee (E. 57, 60), and Richard W. Tyler (E. 62, 65, 67).

That prior to 1909, during 1909, and subsequent to 1909, boats navigated the area known as "Reed Bird Island", including boats used in commerce (E. 39, 41, 48); that between "Red Bird Island" and the fast land owned in fee simple by the Mayor and City Council of Baltimore on the Brooklyn shore there was a stream of water referred to as a "gut" in the testimony which was no deeper than the waist or belt line of an eight year old boy in 1909, who as an adult is not above 5 ft. 7 in. tall (E. 57). That the trestles of the Light Street Bridge blocked off passage of said "gut" or "stream" by any boats other than row boats (E. 43, 53); that in contrast, the channel leading from the mouth of the Patapsco River into the Baltimore harbor is now and was prior to and during 1909, to the northwest of the area known as "Reed Bird Island", and which channel was open to navigation prior to, during and subsequent to 1909, by means of a draw bridge opening in the Light Street Bridge at a point north of "Reed Bird Island" (E. 36, 45, 58, 59). That "Reed Bird Island" lies in an area which the State of Maryland and this Appellee propose to develop as the southern end of a park to be known as Patapsco River Valley Park (E. 27).

ARGUMENT

I. THE PATENT FOR "REED BIRD ISLAND" WAS ISSUED IN VIOLATION OF THE STATUTORY INJUNCTION PROHIBITING PATENTS FOR LAND COVERED BY NAVIGABLE WATERS.

The lower Court's finding that "Reed Bird Island" was in its entirety covered by navigable water is overwhelmingly supported by the evidence in this case. Every witness, but one, gave testimony to the fact. In addition, the profile plat prepared in the normal course of business by the State Roads Commission, and under the supervision of witness Mackall is unimpeachable evidence that there was no point across the center of what was patented as "Reed Bird Island" that was above "0.0" elevation or mean low tide. The importance of this document cannot be overstressed as we must all be well aware of the necessity for complete accuracy in such an undertaking, as the construction of a bridge and causeway over water.

Appellants faced with the crushing weight of the testimony of the witnesses in this case, as well as the supporting exhibits in evidence in the case now apparently concede that "Reed Bird Island" was, perhaps, covered by water at the time the survey was made and the patent issued, but weakly say that the water which covered "Reed Bird Island" was not "navigable in fact." This is an interesting argument, but upon a close scrutiny, it is apparent that it is without substance.

Let us analyze Appellants' contention. We shall assume that "Reed Bird Island" was covered by water non-navigable in fact, and hence, according to Appellants, non-navigable under the provision of Chapter 129 of the Acts of 1862.

The preamble to Chapter 129 of the Acts of 1862 (codified as Sections 45, 46, 48 of Article 54 Annotated Code of Maryland, 1951):

“Whereas, Doubts are entertained in regard to the extent of the rights of proprietors of land abounding on navigable waters, to accretions to said land, and to extend improvements into said waters; for the purpose of solving such doubts, therefore, * * *”

can leave no doubt but that the navigable waters to which the Act refers and applies are those waters, the title to the beds of which, were vested in the State and title to which, prior to this Act were patentable by the State through the agency of its Land Office.

Title to the beds of non-navigable waters belong to the abutters and as such were not patentable by the State and there has never been any doubt that the abutter was entitled to accretions to land bounding on non-navigable waters nor of his right to extend improvements into such waters. Or, as this Court said in the case of *Day v. Day*, 22 Md. 530 (1865):

“The Common Law distinction between navigable waters, and rivers or streams not navigable, is founded on the difference of the rights to which they are respectively subject; the entire property of the former being vested in the public, while the latter belong to riparian owners, although in some cases subject to a qualified public use. Rivers or streams within the ebb and flow of tide, to high water mark belong to the public, and in that sense are navigable waters; all the land below high water mark, being as much a part of the *jus publicum*, as the stream itself. The owners of adjacent ground had no exclusive right to such lands, nor could any exclusive right to their use be acquired, otherwise than by an express grant from the State. The Act of 1862 was intended to vest these owners of contiguous lands with the rights and privileges not recognized by the

Common Law, and to that end, the first section declares, — that the proprietor of land bounding on any of the navigable waters of the State, should be entitled to all accretions thereto by the recession of water, whether before or thereafter formed or made, by natural causes or otherwise. The second section goes further, and not only vests such owners with the exclusive privilege of extending improvements from their lands into the waters in front thereof, but declares that these rights and privileges shall pass to the successive owners of such lands, as incident to their respective estates. Looking then to the general purpose disclosed by these affirmative provisions, it is clear that the clause in the third section prohibiting the issue of any patent of land covered by navigable water should be so construed, as to apply to all lands below high water mark, or in terms still more comprehensive, to embrace any lands, to which the rights and privileges conferred by this Act could attach.”

The Supreme Court of the United States in the case of *Shively v. Bowlby*, 152 U. S. 1, 23, 38 L. Ed. 331 (1893) took the opportunity presented thereby to fully review the decisions concerning the subject of public and private rights in lands below high water mark of navigable waters, in the manner following:

“By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King * * * In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage * * * The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the

charters, constitutions, statutes or usages of the several colonies and states or by the Constitution and laws of the United States * * * And upon the American Revolution all of the rights of the Crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the Constitution of the United States * * * In Maryland, the owner of land bounded by tide water is authorized, according to various statutes beginning in 1745, to build wharves or other improvements upon the flats in front of his land and to acquire a right in the land so improved."

The word "navigable" as employed in the Act of 1862 pertained to the ownership of the waters and not to the navigability thereof. In this sense the Legislature could well have substituted "tidal" for "navigable"; whereas "navigable" meaning "navigable in fact" could not have been intended since it would then include those waters and the beds thereof owned by private persons and corporations; and therefor not subject to grant by the State.

The Appellants urge that this Court adopt and apply a "practical test of navigability" in construing the Act of 1862, citing in support thereof 1 Farnham, *Waters and Water Rights* (1904) 100, 104-109:

"Chancellor Kent originated a theory that at common law only tidal streams were navigable. In *Palmer v. Mulligan* (Cai. 307, 2 Am. Dec. 270 citation supplied) which was an action for building upon bed of the Hudson river in such a way as to interrupt the rafting of timber into plaintiff's dam and to change the course of the water, Chancellor Kent said that 'the Hudson at Stillwater is a fresh water river not navigable in the common law sense of the term, because the tide does not ebb and flow at that place. In the Royal Fishery of the Banne, it was resolved that by the rules and authorities of the common law every river where the sea does not ebb and flow was an inland river not nav-

igable, and belonged to the owners of the adjoining soil' * * * Palmer v. Mulligan involved the question of the title to the soil of a navigable river and the right to place structures on its bed, so that the question involved was not whether or not the stream was navigable, but who had the title to it. This question at common law did not depend upon the navigability of the stream but upon the presence or absence of the tide so that the question before the court did not require any ruling upon the question of the navigability of the stream."

The Appellee can add nothing to the Appellants' own authority to demonstrate more clearly why the court below was constrained to reject this "practical test of navigability" in construing the Act of 1862.

Now, carrying, appellants' contention to its natural and logical conclusion, the result is that the lower Court's findings are completely substantiated, because this Court has many times said that no patent could lawfully issue where land did not lay within navigable waters, and that said land belongs to the riparian owners.

Appellants, unintentionally perhaps, in their Brief on page 17, bear this out when they quote *Linthicum v. Shipley*, 140 Md. 96:

"The Court apparently concluded that the Harlow case did not have this effect, since in holding that the pond was not patentable, principal reliance was placed on the rule of law that non-navigable bodies of water belong to riparian owners, and are not the State's to patent."

This Appellee, being the owner of the fast land immediately south of "Reed Bird Island", is then entitled to ownership thereto as riparian owner.

Further analysis of Appellants' contention that "Reed Bird Island" was not covered by navigable water shows that they base this contention upon a claim that the lower Court declined to make an express finding that the navigable water which covered "Reed Bird Island" was navigable in fact. The lower Court, in referring to this question, stated in its opinion (E. 113), that the application of the common law rule and the civil law rule in the State of Maryland is not necessarily inconsistent, and in a very scholarly approach, based on solid legal authority, determined that:

"The preponderance of the evidence, in the opinion of this Court, indicated that Reed Bird Island was, *in its entirety*, covered by navigable water, as defined in the technical, common law sense, at the time the survey was made and at the time the patent was issued, *whether or not the water* was navigable in the civil law definition. * * *" (Emphasis ours.)

Hence, the lower Court did not decline, as the Appellants advocate, to determine that "Reed Bird Island" was not covered by water navigable in the civil law definition. It merely made a finding that the water was navigable in the common law sense, and in its opinion, the applicability of both rules in Maryland not being inconsistent, determined that this one reason was sufficient to invalidate the issuance of the patent. However, Appellee, seriously urges that the lower Court could have found that "Reed Bird Island" was not only covered by water navigable in the common law sense, but that the evidence in the case clearly shows that "Reed Bird Island", and the immediately surrounding waters, was used in commerce by witness Johnson and his friends when they were carp fishing and loading their catch into a half filled row boat prior to sale (E. 48), as well as the selling of shrimp, as testified by Mr. Helmer (E. 90,

91), and the using of boats by the State Roads Commission in its construction of the Hanover Street Bridge and causeway over "Reed Bird Island" (E. 39).

Appellants lay great stress on the decision of *Gray v. Gray*, 178 Md. 566. However, the case is clearly distinguished from the instant case and all previous cases similar to the case at bar by the very words of the opinion in that case. At p. 576, the Court said:

"However, a distinction between the *Sollers* and *Linthicum* cases and the one now before us lies in the fact that, in both of the former cases, the area for which patents were applied for was entirely submerged and that over it the tide ebbed and flowed; while, in the latter, a large area of land, through a part of which a tide water stream flows, is embraced in the certificate of survey returned to the Land Commissioner."

Although the Court, in the *Gray* case, *supra*, did inquire into the question of the stream being used in commerce, this was only natural in view of the distinction above quoted, and to show that the stream in question was navigable in every sense of the word. Further, this Court did not say in the *Gray* case, *supra*, that it would have found the stream involved in the case patentable, if there was no testimony of its being used for commercial purposes. Nor did it abandon the common law rule of determining whether or not waters are navigable (*Maryland Law Review*, Vol. V, p. 314). As a matter of fact, in the opinion of this Court, in *Clark v. Todd*, 192 Md. 487, decided March 9, 1949, some nine years after the *Gray* case, speaking in the person of Judge Delaplaine, upheld the common law rule as previously discussed when it was said on p. 492:

"It has long been recognized that the rivers within the ebb and flow of the tide are public rivers, or arms

of the sea, and the land under these tide waters, under the Charter granted to Lord Baltimore, became vested in the State of Maryland (Citing cases)."

In the instant case, the lower Court has properly determined that the entire area of "Reed Bird Island" was covered by navigable water. There is ample testimony that the water which covered "Reed Bird Island" was used in commerce. Hence, the findings in the *Gray* case can in no sense disturb the decision of the lower Court in this case, but must be considered to give added weight to the lower Court's determination that "Reed Bird Island" was invalidly patented in direct violation of the statutory injunction prohibiting the issuance of patents for land covered by navigable water. Chapter 129 of the Laws of Maryland of 1862, now codified as Secs. 45, 46, 48 of Art. 54, of the Annotated Code of Maryland (1951 Ed.).

**II. THE ISSUANCE OF A PATENT TO "REED BIRD ISLAND"
MATERIALLY IMPAIRED AND AFFECTED RIPARIAN
RIGHTS OF THE APPELLEE.**

The Mayor and City Council of Baltimore, Appellee, as proprietor of land bounding on the navigable water of the Patapsco River, immediately adjacent to "Reed Bird Island", as patented, is entitled to the rights conferred, and the protection afforded, by the Acts of 1862, Chapter 129, Secs. 37, 38 and 39, now codified as Art. 54, Secs. 45, 46 and 48 of the Annotated Code of Maryland (1951 Ed.):

"Section 45. The proprietors of land bounding on any of the navigable waters of this State shall be entitled to all accretions to said land by the recession of said water whether heretofore or hereafter formed or made by natural causes or otherwise, in like manner and to like extent as such right may or can be claimed by the proprietors of land bounding on water not navigable.

"Section 46. The proprietors of land bounding on any of the navigable waters of this State shall be entitled to the exclusive right of making improvements into the waters in front of his said land; such improvements and other accretions as above provided for shall pass to the successive owners of the land to which they are attached, as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made.

"Section 48. No patent hereafter issued out of the land office shall impair or affect the rights of riparian proprietors as explained and declared in Sections 45 and 46, and no patent shall hereafter issue for land covered by navigable waters."

Appellants in order to circumvent the precise, clear and unambiguous language of the sections of the statute above quoted, attempt to say that the "gut" in the testimony in the case, between "Reed Bird Island" and the fast land belonging to the Appellee is a channel. Appellants concede that Appellee is entitled to riparian rights of ownership, but contend that those rights extend only to the said "gut".

The very "gut" involved in this case was also before the Court in the case of *Melvin v. Schlessinger*, 138 Md. 337, which case involved title to land known as Billikin Island, which is one of the mud islands formed to the south of the Baltimore & Ohio Railroad's Curtis Bay Branch Bridge. Billikin Island lay to the north of the fast land on the Brooklyn shore, just as "Reed Bird Island", as patented, did, and about 1200 feet southwest of "Reed Bird Island". In the *Schlessinger* case, this Court of Appeals had the benefit of the intervention of counsel for Harry M. Wagner, one of the Appellants in this case, as *amici curiae*. Counsel for Wagner also included the predecessor firm of present counsel for Appellants. This Honorable Court held in that

case that the patent for Billikin Island should not have been granted. Then, referring to the Acts of 1862 of the Laws of Maryland, this Court in the *Schlessinger* case, *supra*, said on page 343:

“The Act was passed with the intention and for the purpose of enlarging the rights of riparian owners upon navigable waters of this State by giving to them accretions to their lands to which without the statute they would not be entitled; and also by giving to them the exclusive right to make improvements in the waters in front of their lands; and while it has been said that it was not intended by the Act to give to such riparian owners the title to the bed of the stream (*Goodsell v. Lawson*); yet by the language of the Act, we do not think the accretions contemplated by it, to which the riparian owners are thereby entitled are confined to those only that, in their formation, start at the shore and extend outwards to the channel.

“As already stated, the riparian owners had the right to such accretions before the passage of the Act when they were imperceptibly formed, and now to say that their rights enlarged by the statute, go only to the extent of adding thereto accretions which have been more rapidly and suddenly formed, from natural causes or otherwise, extending outwards from the shore, would be giving the statute a very narrow construction and one that, we think, should not be adopted.”

And further, the Court on p. 344, said:

“In our opinion, had the issuance of the patent been contested, it, under the Act and the facts of this case, should not have been granted, as it is established by the facts in the case that the rights of the riparian owners would be impaired and affected by a grant of the accretions to which said riparian owners were then, and are now, entitled; for by a grant of these the riparian owners would not only be excluded from the use of the navigable stream, but as such accretions lie between the shore and the channel of the stream, the

said riparian owners would be prevented thereby from making improvements in the waters in front of their lands. * * *

The decision in the *Schlessinger* case is particularly noteworthy in that it sustained the lower Court's invalidation of the patent, despite the finding of that Court that "Billikin" actually existed as "an island in the stream of the Patapsco River, a navigable water * * * and gradually extended toward the shore, and that at the time the patent was issued it was not at high tide covered by water." Certainly the Court was there presented with a much weaker case than this case, since only an unreasonable and forced construction could assume the existence of "Reed Bird Island", as an actual island in 1909, in face of the overwhelming evidence in this case to the contrary.

Appellants, totally disregarding the physical facts of the *locus in quo* in existence at the time of the survey and the issuance of the patent in 1909, to wit, that the channel existed to the north and west of "Reed Bird Island" and not to the south of "Reed Bird Island", in order to circumvent the law of the *Schlessinger* case, *supra*, now attempt to create a fiction, tenuous at best, that because there was a shallow "gut" of water between the area of "Reed Bird Island", as patented, and the fast land belonging to the Appellee on the south, that to said "gut" would be all that the fast land owner could claim in the way of riparian rights, notwithstanding the fact that this shallow "gut" was blocked by the trestles of the Light Street Bridge, was passable only to row boats weaving under said Bridge, and the fact that the true channel was located to the north of "Reed Bird Island" where there was a draw provided for the passage of vessels through the Light Street Bridge.

Appellants, on p. 6, of their Brief, have quoted fragments of the lower Court's opinion to show that the channel existed between "Reed Bird Island" and the fast land to the south. The lower Court's opinion (E. 114), to be correctly construed, must be read in its entirety on this question, as the more important part follows immediately after the part quoted by Appellants in their Brief. The entire applicable part of the opinion, with the portions left out by the Appellants emphasized, reads:

"Respondents contend that since the evidence clearly shows the presence of a navigable channel or 'gut' between the Island and the South Shore, about 100 feet wide, and, since the patent did not interfere with the Plaintiff's access to that, its rights under Section 46 were not interfered with. The evidence does indicate the existence of such a channel at the time in question, and that it was navigable by small craft, such as row-boats and sail boats, *but, in the Court's opinion, riparian rights, within the meaning of the Statute, are not so restricted. These rights, so provided for, mean not merely that the riparian owner is entitled to access to navigable waters, however shallow, provided only that a skiff is floatable therein, but that he is entitled to access, by way of improvements, to the generally usable part of the navigable water, in other words to the main channel of commerce of the river.*"

The lower Court further, in its opinion, quoted compelling authority in defining the meaning of the word "channel":

"The word 'channel', when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow" (E. 115).

Again, in "Words and Phrases", Vol. 6, pp. 545, 546, we find the word "channel" defined as:

"The channel is that portion of a body of a river or canal which furnishes uninterruptedly, through its course, the deepest water."

The Sarah, 52 F. 233, 235, 3 C. C. A. 56.

"A channel is defined by the Century Dictionary to be the deeper part of the river or bay where the current flows, or which is most convenient for the track of ships."

The Northern Queen, 117 F. 906, 915.

Assuming that "Reed Bird Island" was in fact not covered by water solely for the purpose of this argument, then this case completely and entirely falls within the *Melvin v. Schlessinger* case, *supra*, and land making up from the water toward the fast land owned by the Appellee must of necessity be considered as part of this Appellee's riparian rights.

Further, Appellants' argument that the "gut" is the channel of the Patapsco at this point is against the weight of the evidence, since the Light Street Bridge was in existence prior to the patent involved in this case, and since there was no provision made for boats to pass under that bridge at the point where the so-called "gut" flowed under it. Yet, there was a draw further north on the Light Street Bridge and north of the area known as "Reed Bird Island".

A mere glance at the plats and charts in this case will further indicate the serious impairment of its rights suffered by the Mayor and City Council of Baltimore as riparian owner, should a patentee be permitted to intercept those privileges guaranteed to the riparian owner by the Act of 1862. That the Courts have been very zealous in safeguarding these rights is amply evidenced by the forceful opinion in the case of *Day v. Day*, *supra*.

Then, too, this Appellee acquired the ownership and interest of Crisp and Cromwell in the Light Street Bridge

and the land necessary under the bridge, in fee simple, and that assuming without admitting, for the sake of this argument, and contrary to the overwhelming weight of the evidence in this case, that "Reed Bird Island" was out of water, then the fee simple ownership of this Appellee, as well as the riparian rights which it had to the accretion to said strip was materially impaired, affected and illegally taken by the issuance of the patent, without just compensation having been awarded to this Appellee in violation of its constitutional rights.

If the argument of Appellants that the Appellee has no riparian rights in "Reed Bird Island" as a result of its ownership of the fast land in Brooklyn is correct, and we cannot agree with this, as previously argued, then certainly the fee simple title to the land under the bridge, and the bridge which was then very much in existence, would entitle this Appellee, as owner, to riparian rights, assuming again, contrary to the evidence in this case, that "Reed Bird Island" was out of water.

III. THE PATENT TO "REED BIRD ISLAND" IS INVALID BECAUSE OF THE DEFECTS CONTAINED IN IT, AND IN THE SURVEY UPON WHICH IT WAS BASED.

The following defects existed in the patent issued to the Appellants or their predecessors on September 10, 1909. First, the survey states that the land known as "Reed Bird Island" was not covered by navigable water at the time of the survey. Second, the survey states that the land known as "Reed Bird Island" was unimproved. Third, that only eight courses are contained in the survey plat, whereas nine courses are described in the metes and bounds description of the property; and fourth, that an error of closure exists: north 81°-08' east, 19.25 feet in the perimeter description contained in said survey. See Agreed Exhibit No. 2, which

is contained in the records in the possession of this Court, and as stated in the record extract was not susceptible of being reproduced, but will be presented to the Court on the day of argument of this case.

Land, in order to be patentable in Maryland, must be vacant (Art. 54, sec. 24 of the Annotated Code of Md., 1951 Ed.). This Appellee contends that in order for "Reed Bird Island" to have been considered as vacant and unimproved at the time of the issuance of the patent, that it must have been absolutely free, unclaimed and unoccupied.

Marshall v. Bonaparte, 18 Mo. 84, 87;

Cosmo Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 190 U. S. 301.

The uncontradicted testimony and evidence in this case clearly shows that an improvement existed over "Reed Bird Island" in the form of the Light Street Bridge at the time of the survey and patent. The Mayor and City Council of Baltimore maintained and repaired this bridge, in whole or in part, from 1880 until 1917. The fee simple ownership of the strip of land under the bridge, the bridge itself, and the exercise by the Mayor and City Council of Baltimore of its right of ownership over said bridge by repairing and maintaining it, without question, shows that the land known as "Reed Bird Island" was in fact *not* vacant but was occupied by the Mayor and City Council of Baltimore prior to, during and subsequent to the date of the grant of the patent unto John P. Bruns.

Further, the Mayor and City Council of Baltimore has never relinquished, waived, transferred, assigned, or in any manner deeded away the fee simple right to the strip of land under the old Light Street Bridge even though said Bridge was removed in 1917. It is also submitted for the Court's consideration that the Appellants, at no time, ever

took physical possession of that strip of land over which the Light Street Bridge was constructed, nor did this land escheat unto the State of Maryland subsequent to the time the Mayor and City Council of Baltimore acquired same from Crisp and Cromwell.

The grant of the patent under these circumstances then was not only improper, but it was clearly unlawful since it involved land not properly patentable because it was *not* vacant and because it was improved by the Light Street Bridge.

The cryptic statement of Green in the warrant of survey of "Reed Bird Island" made on September 15, 1908, to the effect that the land in question was not covered by navigable water might, under some circumstances, be persuasive, but in view of the overwhelming testimony in this case, in addition to Agreed Exhibit No. 9, the profile plat of the State Roads Commission, showing that no part of the center of what was patented as "Reed Bird Island" was above mean low tide on or before August 21, 1914, as well as the positive statement of one of Appellants' witnesses that the area was clear water prior to the dumping of the fill for the Hanover Street Bridge (E. 90), and as well as the other mechanical errors herein recited, clearly indicates that if the survey of "Reed Bird Island" was in fact true, that at best the survey must have been made at low tide, and that when the surveyor for the patentee certified that "The above described land is not covered by navigable water", he did not know the *situs in quo*, as it must have existed at high tide. The fact that there was an error in the closure of the metes and bounds of the perimeter description of the patented land might well give credence to the fact that the survey was accomplished by means of a boat.

The error regarding the metes and bounds involved would, in itself, of course, be easily explainable under nor-

mal circumstances, but when you have a series of errors as was compounded in this case, and which errors are material and contain serious misstatements of facts which adversely affect the rights of this Appellee, then no defect can be dismissed by any specious argument on the part of the Appellants to the effect that said defects are without merit.

**IV. THE ISSUE OF A PATENT TO "REED BIRD ISLAND"
UNLAWFULLY ABROGATED THE TITLE TO LAND
VESTED IN THE APPELLEE.**

As hereinbefore stated, the Appellee was the successor in title to all of the interest of Crisp and Cromwell in the Light Street Bridge, and the land under the bridge. Chapter 215 of the Acts of the Laws of the State of Maryland of 1856, authorized them to acquire the fee simple ownership to any land necessary for the construction of the bridge, and any piers and abutments thereof. In paying a consideration, and assuming all of the interest of Crisp and Cromwell, and of the Anne Arundel County Commissioners in this bridge, and the land lying thereunder, this Appellee became vested with the fee simple ownership of said land. This Appellee has never relinquished, waived, transferred, assigned, or in any manner deeded away the fee simple right to the strip of land under the old Light Street Bridge at any time, and certainly not before or during the time that the patent was issued. Accordingly, by the issuance of the patent to the Appellants in this case, Appellee's rights to the bridge and to the land lying thereunder were completely destroyed by an agency of the State, to wit, the Land Office, contrary to an express grant by the Maryland General Assembly and the Governor of the State, in granting the fee simple interest to Crisp, et al. of the land under the Light Street Bridge.

CONCLUSION

Appellee respectfully submits:

- (1) That the grant of the patent for "Reed Bird Island" on September 10, 1909, to John P. Bruns, was issued in direct violation of the statutory injunction prohibiting patents for grants covered by navigable waters. (Acts of 1862, Chapter 129, being Secs. 45, 46 and 48 of Art. 54, of the Code of Public General Laws of Maryland, 1951 Ed.).
- (2) That the grant of the patent to "Reed Bird Island" on September 10, 1909, to John P. Bruns, materially impaired and adversely affected the rights of the Mayor and City Council of Baltimore, riparian owner, Appellee, in violation of the provisions of the Acts of 1862, Chapter 129.
- (3) That there were serious and material errors and misstatements in the survey of "Reed Bird Island" upon the patent of September 10, 1909, which was granted unto John P. Bruns, more than sufficient to cause said patent to be declared unlawfully issued.
- (4) That there was no lawful power and authority existing on September 10, 1909, to grant a patent unto John P. Bruns, of the land lying under the Light Street Bridge, the same having previously been granted in fee simple on March 10, 1856, by the Acts of the General Assembly of Maryland of 1856, Chapter 215, unto Richard O. Crisp.

For all of such reasons, it is earnestly and respectfully submitted that the determination of the Court below in invalidating the patent to "Reed Bird Island" should be affirmed.

Respectfully submitted,

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