

**WALTERS v. BALTIMORE & OHIO RAILROAD
AND BALTIMORE CITY: TAKING
RESPONSIBILITY FOR CONSEQUENTIAL
DAMAGES**

**Sylvia K. Dove
J.D. Candidate, May 2008
University of Maryland School of Law**

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I. Introduction

In the early 1900s, Baltimore City, Maryland was the scene of an increasing number of tragedies occurring at grade crossings. To ensure public safety, the city council passed two ordinances designed to eliminate grade crossings. The bridge prescribed by the second ordinance was constructed by the Baltimore and Ohio Railroad on the south side of Hamburg Street between 1910 and 1911.¹ The bridge damaged many properties, particularly the rowhouses lining the south side of Hamburg Street. These property owners brought claims against both the city and the railroad.²

Henry and Annie Walters were among the injured property owners who proceeded to court, asserting their claim for damages consisting of obstructed light, air, and access to their property.³ While the judge decided the case in favor of the defendants at the first trial,⁴ on appeal the city and the B&O Railroad were held liable for a taking.⁵ The appellate decision expanded the constitutional definition of takings to include damages, such as obstruction of access, light, and air, that were formerly regarded as mere consequential damages for which the government did not have to provide compensation.⁶ In addition to modifying the law of eminent domain, this decision advanced progressive housing reform by imposing the compensation restraint on governments that destroyed healthy living conditions by eliminating light and air.⁷

First, this Essay will address the background that led to the *Walters* case. This section will review grade crossing dangers, the grade crossing ordinances, and the construction of the Hamburg Street bridge before discussing the plaintiffs and the damages to their property.

¹ See *infra* Part II.A.

² See *infra* Part II.B.

³ See *infra* Part II.B–C.

⁴ See *infra* Part III.C.

⁵ See *infra* Part IV.C.

⁶ See *infra* Part VI.A.

⁷ See *infra* Part VI.B.

Second, it will describe the case's progression through the courts, the characters who encounter it during the course of the litigation, and the legal ramifications. Finally, the Essay will conclude by arguing that while events preceding the *Walters* litigation reflected the concerns embodied in Baltimore's housing segregation ordinances, the appellate decision was a product of progressive reform.

II. Background

A. The Grade Crossing

The B&O Railroad had expanded rapidly since its incorporation in 1827, and nowhere was this more evident than in the city of Baltimore itself.⁸ In the early 1900s, Hamburg Street intersected several of the B&O Railroad's tracks on the southern approach to Camden Station.⁹ The Hamburg Street grade crossing was protected by a small, wooden tower.¹⁰ Presumably, the tower housed a railroad watchman who would warn wagon drivers and pedestrians of approaching trains.¹¹

Despite the protection of the Hamburg Street tower, fences, and similar structures guarding grade crossings across the United States, fatal accidents proliferated until grade crossings came to be recognized as "one of the deadliest perils of the age."¹² On December 27, 1902, one of many such accidents occurred at a grade crossing in south Baltimore.¹³ An engine

⁸ JOHN F. STOVER, *HISTORY OF THE BALTIMORE AND OHIO RAILROAD* 17 (Purdue University 1987).

⁹ Baltimore City Court (Court Papers) *Walters v. Mayor & City Council*, et. al., 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 829 (last accessed 18 December 2006).

¹⁰ HERBERT HARWOOD, *IMPOSSIBLE CHALLENGE* 133 (Barnard, Roberts, and Co. 1979).

¹¹ John Sherwood, *The Railroad Crossing Guard*, September 9, 1962, *available in* the Enoch Pratt Free Library Vertical Files under Railroads-Crossings.

¹² *Grade Crossings*, WASH. POST, March 14, 1913, *available at* <http://proquest.umi.com/pqdweb?index=0&did=256102022&SrchMode=1&sid=1&Fmt=10&VInst=PROD&VType=PQD&RQT=309&VName=HNP&TS=1164057887&clientId=10562>.

¹³ *Killed at Grade Crossing*, WASH. POST, December 28, 1902, *available at* <http://proquest.umi.com/pqdweb?index=206&did=258300642&SrchMode=1&sid=4&Fmt=10&VInst=PROD&VType=PQD&RQT=309&VName=HNP&TS=1162851875&clientId=10562>.

operated by the B&O Railroad and a trolley car collided.¹⁴ One man was crushed to death beneath the trolley car and about a dozen more people suffered broken arms and legs and bruises.¹⁵ On June 26, 1905, another trolley car filled with passengers collided with a freight train, overturning the trolley car.¹⁶ The passengers were pinned beneath the car, resulting in the death of two women and the serious injury of ten others.¹⁷ These accidents were the regular stock of newspaper columns that were absorbed by an increasingly alarmed readership.



Hamburg Street grade crossing c. 1910 (Source: Herbert Harwood, *Impossible Challenge*, p. 133)

With the grade crossing casualties rising, citizens across the United States criticized neglectful railroad companies and governments. One enraged journalist in Chicago went so far

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Train Smashes Loaded Car*, N. Y. TIMES, June 27, 1905, available at <http://proquest.umi.com/pqdweb?index=27&did=120277095&SrchMode=1&sid=19&Fmt=10&VInst=PROD&VTy pe=PQD&RQT=309&VName=HNP&TS=1164060253&clientId=10562>.

¹⁷ *Id.*

as to brand the grade crossing deaths as murders.¹⁸ The B&O Railroad was particularly rebuked for failing to protect the public at grade crossings in some dangerous areas.¹⁹ Local governments were not immune from censure, and frequently were denigrated for failing to compel the railroads to construct viaducts over the tracks or to raise the tracks over the street.²⁰ The scattered criticism evolved into organized petitioners demanding increased safety measures and the eventual elimination of railroad grade crossings.²¹

In response to the widespread denouncement of grade crossings, Baltimore, like other municipalities, began to develop plans to address the grade crossing hazard. On March 11, 1905, the city passed Ordinance No. 220.²² First, the ordinance acknowledged that increasing traffic in southern Baltimore was heightening the danger at grade crossings.²³ Second, it authorized Baltimore's mayor to appoint a commission charged with meeting with representatives from the B&O Railroad to discuss the possibility of constructing overhead crossings for the tracks, thereby abating the grade crossing menace.²⁴

In November of 1905, five men were appointed to the Grade Crossing Commission authorized by Ordinance No. 220. James Bond served as the commission's president, and John

¹⁸ *The Latest Grade-Crossing Murders*, CHI. DAILY TRIB., December 30, 1892, available at <http://proquest.umi.com/pqdweb?index=3&did=436349232&SrchMode=1&sid=6&Fmt=10&VInst=PROD&VType=PQD&RQT=309&VName=HNP&TS=1164058149&clientId=10562>.

¹⁹ *Tracks in Statu Quo*, WASH. POST, August 23, 1895, available at <http://proquest.umi.com/pqdweb?index=0&did=196677892&SrchMode=1&sid=3&Fmt=10&VInst=PROD&VType=PQD&RQT=309&VName=HNP&TS=1164057997&clientId=10562>.

²⁰ *The Latest Grade-Crossing Murders*, CHI. DAILY TRIB., December 30, 1892, available at <http://proquest.umi.com/pqdweb?index=3&did=436349232&SrchMode=1&sid=6&Fmt=10&VInst=PROD&VType=PQD&RQT=309&VName=HNP&TS=1164058149&clientId=10562>.

²¹ *E.g. To Lift the Tracks*, CHI. DAILY TRIB., January 21, 1893, available at <http://proquest.umi.com/pqdweb?index=85&did=432338602&SrchMode=1&sid=1&Fmt=10&VInst=PROD&VType=PQD&RQT=309&VName=HNP&TS=1164063808&clientId=10562>.

²² BALTIMORE, MD., ORDINANCE NO. 220 (1905).

²³ *Id.*

²⁴ *Id.*

N. Glenn acted as secretary.²⁵ The remaining positions were filled by John N. Branin, Daniel Rider, and Benjamin T. Fendall, a city engineer.²⁶ The commission operated in conjunction with B&O Railroad representatives for almost two years.²⁷ During that time, numerous conferences were held to discuss plans for eliminating the grade crossings.²⁸ On April 11, 1907, the commission issued its report, summarizing its activities and recommendations. The B&O Railroad had proposed four different plans, but the first two were rejected because they closed too many streets and set streets on unfeasibly steep grades.²⁹ The third plan provided for elevated tracks above the streets, but neither the railroad nor the commission approved.³⁰ The fourth plan, submitted on March 26, 1907, called for tunnels.³¹ The tunnel plan was better received, and the commissioners incorporated aspects of it into their recommendations.³² In their report, the commission recommended that a subway tunnel be constructed at Hamburg Street while other streets were to either conceal a similar tunnel or be covered by elevated tracks.³³

As final construction plans were developing, the Grade Crossing Commission's initial recommendations were not considered in isolation. On September 7, 1908, Jenks B. Jenkins, an assistant engineer at the B&O Railroad, drew up a plan proposing to carry the streets over the railroad tracks, and this plan was submitted for consideration.³⁴ The Board of Estimates

²⁵ "Henry Walters and Annie Walters v. Mayor & City Council of Baltimore et. al. in Baltimore City Court, "Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 37, file no. 13044, electronic version, pdf, p. 184 (last accessed 22 November 2006).

²⁶ *Id.*

²⁷ Baltimore City Court (Court Papers) Walters v. Mayor & City Council, et. al., 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 364 (last accessed 22 November 2006).

²⁸ "Hamburg Street Grade Crossings – General" Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 69, file no. 14852, 5458-51-2379-pdf, p. 230 (last accessed 20 November 2006).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 232.

³⁴ "Henry Walters and Annie Walters v. Mayor & City Council of Baltimore et. al. in Baltimore City Court, "Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 37, file no. 13044, electronic version, pdf, p. 222 (last accessed 21 November 2006).

approved Jenkins's plan, recommending its adoption in a report issued on July 27, 1909.³⁵ In a separate report signed by commission member Fendall and Alfred M. Quick, the Board of Public Improvements recommended that all of the bridges, including the Hamburg Street bridge, be located on the south side of the street, with the exception the Lee Street bridge.³⁶ The Board of Public Works also submitted a minority report signed by a board member named Preston.

Later, Fendall would recall that the decision to build the Hamburg Street bridge on the south side of Hamburg Street instead of on the north side was determined by costs.³⁷ Despite his approval of the south side location, Fendall asserted that from an engineering standpoint, he would have preferred to construct the bridge in the center of the street, but other unspecified considerations superseded his engineering judgment.³⁸

These preliminary reports and plans culminated in the passage of Ordinance No. 387 on August 16, 1909. This lengthy document with its detailed provisions articulated the city's plan to eliminate the grade crossings in southern Baltimore. The ordinance contained three germane provisions. First, the city consented to the B&O Railroad's construction of improvements and new tracks necessitated by the elimination of the grade crossings. Second, the city authorized the B&O Railroad to abolish grade crossings on Lee Street, Cross Street, Stockholm Street, and Hamburg Street by carrying the streets over the track. The ordinance described the contemplated construction in exacting detail. Regarding Hamburg Street, the ordinance instructed the B&O Railroad to build a steel girder bridge at its own expense. The bridge was to extend from Howard Street's east building line to Eutaw Street's west building line. The city mandated that the roadway extend twenty-five feet in width, paralleled by a ten-foot wide sidewalk. The grade

³⁵ *Id.*

³⁶ *Id.* at 184.

³⁷ Baltimore City Court (Court Papers) Walters v. Mayor & City Council, et. al., 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 368 (last accessed 21 November 2006).

³⁸ *Id.* at 372.

elevation was specified at length. Third, the ordinance charged the Baltimore City engineer with the power to approve the B&O Railroad's construction plans for bridges, and all of the work was subject to his supervision and approval.³⁹

Hired by the B&O Railroad, the McLean Contracting Company commenced construction of the Hamburg Street bridge in August of 1910.⁴⁰ City engineer Fendall supervised the project. Fendall had been a civil engineer for almost forty years, and had served as a city engineer since March of 1900.⁴¹ He visited the construction site about once a week,⁴² but assistant city engineer Stanley R. Alexander attended to the daily management of the Hamburg Street project.⁴³ Alexander had been a civil engineer for almost eleven years, and had previously been employed as a surveyor for the B&O Railroad for three years.⁴⁴

On August 12, 1910, the west approach to the bridge was started on Warner Street and on August 30, work on the east approach from Sharp Street began.⁴⁵ The bridge itself was constructed in about a month after the iron work began on February 10, 1911.⁴⁶ The construction continued until August of 1911.⁴⁷ Upon completion, Fendall approved the work shortly before he stepped down as city engineer in October of 1911.⁴⁸ Soon the bridge was bustling from both directions with street cars, wagons, and pedestrians.⁴⁹

³⁹ BALTIMORE, MD., ORDINANCE NO. 387 (1909).

⁴⁰ Baltimore City Court (Court Papers) at 498.

⁴¹ *Id.* at 332.

⁴² *Id.* at 505.

⁴³ *Id.* at 545.

⁴⁴ *Id.* at 403.

⁴⁵ Baltimore City Court (Court Papers) Walters v. Mayor & City Council, et. al., 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 364 (last accessed 22 November 2006).

⁴⁶ "Hamburg Street Grade Crossings – General" Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 69, file no. 14852, 5458-51-2379-pdf, p. 253 (last accessed 21 November 2006). All construction dates are approximate and are according to the recollection of S.R. Alexander, the principle assistant engineer on the project. *Id.* at 255.

⁴⁷ *Id.* at 254.

⁴⁸ Baltimore City Court (Court Papers) at 247.

⁴⁹ *Id.* at 506, 518.

⁵⁰ *Id.* at 360.

B. The Plaintiffs

Not everyone welcomed the construction of the Hamburg Street bridge as wholeheartedly as did city officials and the B&O Railroad. In fact, the affected residents and property owners of Hamburg Street were less than enthusiastic as they foresaw the destruction of their homes and diminished property values. The Hamburg Street neighborhood consisted at least partly of mixed-use rental property. Rowhouses, many built by John Gittings between 1835 and 1845, lined both sides of the street.⁵⁰ The neighborhood was integrated although apparently not all of the residents were social acquaintances. The north side of Hamburg Street was primarily occupied by black families,⁵¹ while two or three black occupants were interspersed between white residents on the south side of the street.⁵²

Despite the neighbors' mutual social aloofness, they seemingly united, along with the non-resident property owners, in their objection to the Hamburg Street bridge. The community's protests were later recalled to be "strenuous and violent."⁵³ Represented by a Reverend Doctor Steffens among others,⁵⁴ the protesters rallied at meetings of the Board of Estimates and the Grade Crossing Commission.⁵⁵

Notwithstanding the protesters' persistent efforts, the city and the B&O Railroad forged ahead with construction preparations. By the end of August 1910, the vehicular traffic could no longer reach the south side of Hamburg Street over the torn up street bed. At first, pedestrian

⁵⁰ PRISCILLA L. MILES, *HISTORIC BALTIMORE: TWELVE WALKING TOURS OF DOWNTOWN, FELS POINT, LOCUS POINT, FEDERAL HILL & MOUNT CLARE* 129 (Priscilla L. Miles 1987).

⁵¹ Baltimore City Court (Court Papers) at 590–91.

⁵² *Id.* at 588.

⁵³ *Id.* at 373–74.

⁵⁴ *Id.* at 388.

⁵⁵ *Id.* at 387.

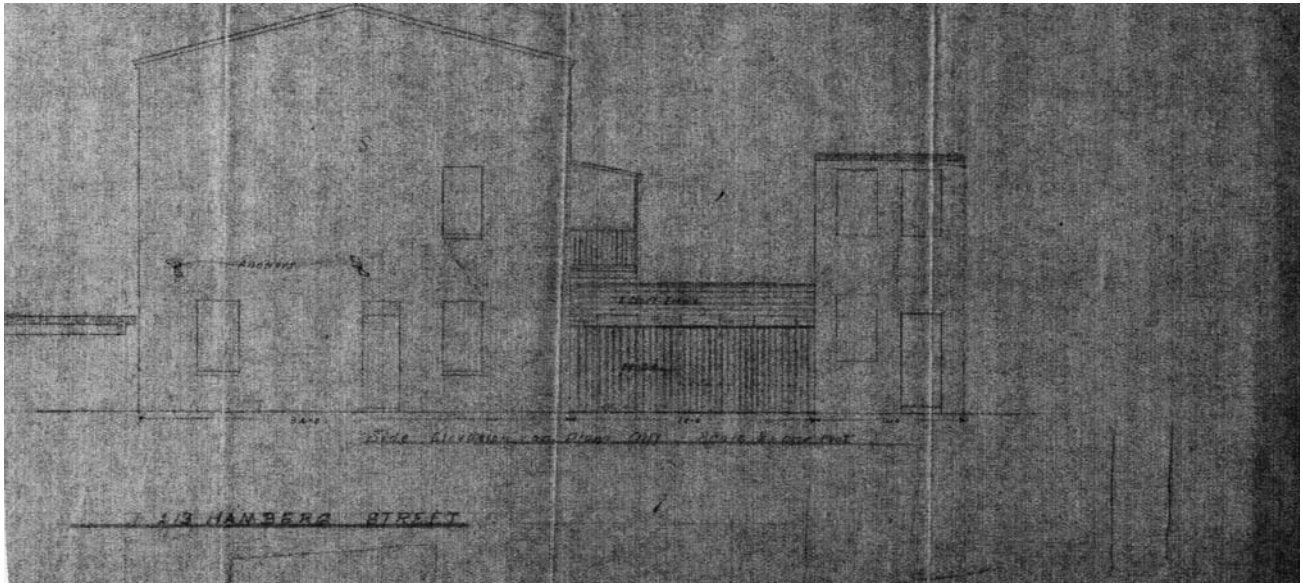
access was only severely restricted, but by the June of 1911, the south side of the street was unreachable by pedestrians as well.⁵⁶



The bridge and the railroad tracks are visible. 213 West Hamburg Street is circled. (Source: Sanborn Map 1914, Sheet 37)

⁵⁶ “Hamburg Street Grade Crossings – General” Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 69, file no. 14852, 5458-51-2379-pdf, p. 252 (last accessed 20 November 2006).

During the course of the construction, Henry F. Walters, one of the affected property owners, received a notice from the city engineer's department instructing him to remove a bow window from the facade of his rowhouse at 213 West Hamburg Street.⁵⁷ Walters and his sister, Annie D, Walters, had obtained the deed to the Hamburg Street property on June 5, 1906 after paying \$1,425 to the previous owner, Louis C. Wenchel.⁵⁸ The property consisted of a two and a half story rowhouse fronting the south side of Hamburg Street as well as a smaller building situated behind it. Located only a few blocks from the Walterses' own residence at 434 West Henrietta Street, Henry Waters directed the numerous improvements to 213 West Hamburg Street himself. Spending about \$243.50, he added a sink, a hydrant, and gas fixtures, repaired and replaced parts of the roof and the flooring, repaved the yard, painted, wainscoted, and enlarged the first story by altering a stairway.⁵⁹



213 West Hamburg Street (Source: Baltimore Archives Box no. 37 at pdf. 338)

⁵⁷ “Henry Walters and Annie Walters v. Mayor & City Council of Baltimore et. al. in Baltimore City Court, “Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 37, file no. 13044, electronic version, pdf, p. 187 (last accessed 22 November 2006).

⁵⁸ Baltimore City Court (Court Papers) at 600; Court of Appeals (Records and Briefs) Walters v. Mayor & City Council, et al., Jan 1913, case no. 74 [MSA S1733-401, 1/65/3/101], electronic version, pdf, p. 176 (last accessed 7 December 2006).

⁵⁹ Court of Appeals (Records and Briefs) at 177–78.

Henry Walters leased his newly acquired property to a series of renters. Most of the renters resided on the rowhouse's second story while exploiting the first story commercially. The double front doors and bow window formed an ideal storefront that served a cigar manufactory and later a grocery business.⁶⁰ The last renter departed on May 9, 1911, only shortly before the bridge's completion.⁶¹

Now the city engineer wanted Walters to remove his bow window from the vacant storefront. At first he ignored the notice. Then in the spring of 1911, assistant city engineer Alexander called on Walters to discuss the window situation in person.⁶² The engineer explained to the property owner that the window extended well over a foot beyond the building line, obstructing the path of the coming east approach to the bridge.⁶³ Walters listened, but declined to remove the window.⁶⁴

The next morning, Alexander supervised the contractors in the removal of the bow window and the overhanging cornice while a neighbor watched.⁶⁵ Whether Henry Walters was present as the workers detached the window is uncertain, but he did arrive in time to unlock the house to allow the contractors to store the dismantled window and cornice inside.⁶⁶ Later he nailed boards over the opening where the window glass had been.⁶⁷

⁶⁰ *Id.* at 177.

⁶¹ Baltimore City Court (Court Papers) at 599.

⁶² *Id.* at 558.

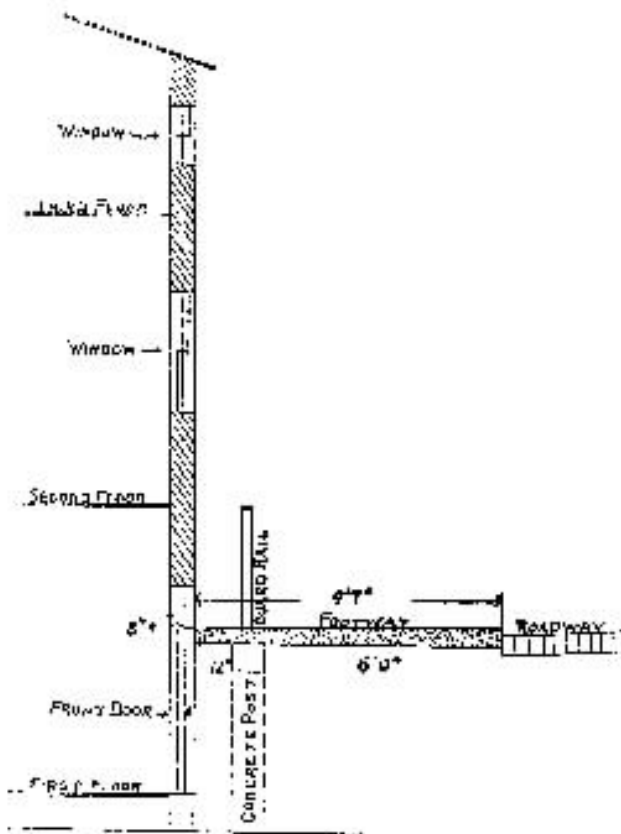
⁶³ *Id.* at 551, 558, 561.

⁶⁴ *Id.* at 560.

⁶⁵ *Id.* at 546, 560.

⁶⁶ *Id.* at 600.

⁶⁷ *Id.*



213 West Hamburg Street after the construction (Source: westlaw.com)

The bow window’s removal was only the beginning of the construction that would transform the first floor of the Walters’ rental property into an uninhabitable, man-made cavern. By the time the bridge was constructed, a three inch gap was all that separated the house from the sidewalk on the east approach to the Hamburg Street bridge. Rainwater from the sidewalk drained into the gap before trickling in through the opening where the bow window had been situated.⁶⁸ With no source of fresh air, the smell of the resulting mold growing on the first story permeated the entire house. The paper peeled away from the walls as the woodwork and flooring started to rot.⁶⁹ As one visitor described the property, “the general feeling when you go

⁶⁸ *Id.* at 598. The boards nailed to cover the opening were apparently ineffective.

⁶⁹ *Id.* at 580.

down there is that it is damp and raw and cold, a disagreeable place to be caught down there at night.”⁷⁰ Even in the unlikely event that a person desired to go inside the house, entry was virtually impossible due to a concrete pillar that almost completely obstructed the double doors that once greeted customers.

In the wake of this destruction, Walters posted “for rent” signs around the property, but to no avail.⁷¹ As one of his neighbors explained, “it is not any ways fit for a person to live in it, the way it looks like now.”⁷²

C. The Declaration

When organized protest and passive resistance failed to stay the bridge’s construction, the defeated property owners, including the Walterses, sought a legal remedy to obtain damages. They retained Edward L. Ward as their lawyer. Ward was a lifelong Marylander with strong ties to the Baltimore region. Born on a farm in Anne Arundel County, Maryland on August 26, 1878, Ward was the youngest of the seven or eight children raised by Joseph S. Ward and Mary Jane Wells.⁷³ When his father died in 1879, his mother moved the family to southern Baltimore.⁷⁴ Ward received his primary education in Baltimore City public schools.⁷⁵

Ward entered the Baltimore University School of Law in 1893, and he graduated with a gold medal for academic achievement in 1895.⁷⁶ Ward worked as a law student in the offices of Joshua W. Bryant, a local attorney before his admission to the bar in 1897.⁷⁷ In his own practice, Ward specialized in liability insurance cases, representing large liability and casualty

⁷⁰ *Id.* at 436.

⁷¹ *Id.* at 599.

⁷² *Id.* at 584.

⁷³ TERCENTENARY HISTORY OF MARYLAND 784 (S.J. Clarke Publishing 1925), REPORT OF THE MARYLAND STATE BAR ASSOCIATION 133 (Maryland State Bar Association 1949).

⁷⁴ REPORT OF THE MARYLAND STATE BAR ASSOCIATION at 133. The area where Mary Jane Ward and her children moved later became Baltimore’s lower business district. *Id.*

⁷⁵ TERCENTENARY HISTORY OF MARYLAND at 784.

⁷⁶ REPORT OF THE MARYLAND STATE BAR ASSOCIATION at 133.

⁷⁷ TERCENTENARY HISTORY OF MARYLAND at 784.

companies.⁷⁸ Despite his talent as a trial lawyer, he cherished a widely-known ambition to become a judge.⁷⁹ His friends and acquaintances called him “Judge” in recognition of his success and in support of his aspiration.⁸⁰



Edward L. Ward (Source: Tercentenary History of Maryland, p. 785)

Ward’s friends also recalled his dedicated preparation for trials, and he almost certainly “burned the midnight oil” planning the offense for the grade crossing cases.⁸¹ Despite the extensive damage to properties abutting the bridge, Ward no doubt realized that these were not simple cases. On the one hand, according to precedent, Baltimore City could be held liable for neither consequential damages such as obstructed access to property or diminished light and air, nor inconveniences including changes in street grade.⁸² The B&O Railroad might evade liability too if it was merely acting as the city’s agent.⁸³ Moreover, the property owners would not

⁷⁸ TERCENTENARY HISTORY OF MARYLAND 784, 787 (S.J. Clarke Publishing 1925).

⁷⁹ REPORT OF THE MARYLAND STATE BAR ASSOCIATION at 133.

⁸⁰ *Id.*

⁸¹ *Id.* at 134.

⁸² *Garrett v. Lake Roland*, 79 Md. 277, 282, 29 A. 830, 832 (1894).

⁸³ *See Green v. City & S. R. Co.*, 78 Md. 294, 305, 28 A. 626, 629 (1894) (stating that a legislative grant protected an electric rail company from punishment).

receive much support from proponents of Baltimore's proposed housing segregation ordinances as the bridge had effectively segregated the block by driving out the white residents who could afford to leave.

On the other hand, compensation was possible if the bridge was negligently located.⁸⁴ The property owners clearly had a valuable right in the abutting street,⁸⁵ and their right to light and air could not be taken for private use.⁸⁶ Additionally, progressive housing reformers would surely sympathize with the property owner's plight, condemning the squalid living conditions created by the bridge.⁸⁷ After considering all of the relevant factors, Henry and Annie Walters's property was selected to be the issue of the test case for the property owners.

On July 24, 1911, Ward filed a declaration on behalf of the Walterses. In this declaration, Ward asserted that the Walterses had been "greatly obstructed and hindered in the use and enjoyment" of their property and the abutting street, significantly decreasing the lot's value.⁸⁸ The Walterses claimed \$5,000 in damages against Baltimore City and the B&O Railroad.⁸⁹ This declaration was succeeded by an amended declaration that Ward filed on March 7, 1912. The amended declaration further accused the city and the railroad of negligently locating and erecting the bridge so as to deprive the Walterses of "the use, enjoyment, and possession of

⁸⁴ See *De Lauder v. Commissioners of Baltimore County*, 94 Md. 1, 9, 50 A. 427, 429 (1901) (reasoning that there are remedies for the negligent location of a public work).

⁸⁵ *Van Witson v. Gutman*, 79 Md. 405, 409, 29 A. 608, 609 (1894).

⁸⁶ *Townsend v. Epstein*, 93 Md. 537, 551, 49 A. 629, 631 (1901).

⁸⁷ Describing the deteriorating living conditions, a nearby property caretaker recalled that a man living in one of the Hamburg Street houses had become sick, but could not be removed from his house because of the bridge construction. After he died in the house, his family had to remove the body through a second story window because the other exits were apparently obstructed. Baltimore City Court (Court Papers) *Walters v. Mayor & City Council*, et. al., 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 741 (last accessed 22 November 2006).

⁸⁸ "Henry Walters and Annie Walters v. Mayor & City Council of Baltimore et. al. in Baltimore City Court, "Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 37, file no. 13044, electronic version, pdf, p. 4-5 (last accessed 10 December 2006).

⁸⁹ *Id.* at 5.

their property” in addition to their use and enjoyment of the street.⁹⁰ Upon service, the joint defendants filed their pleas and prepared for the trial scheduled for later that year.

III. The First Trial

A. The Defense Attorneys

At the trial, Ward confronted some of the ablest attorneys in Maryland. The city was represented by Samuel Summers Field and Benjamin H. McKindless. Field was born in Virginia in 1863, and he grew up in Fauquier County, Virginia.⁹¹ In 1884, he received his law degree from the University of Virginia. Following graduation, he left his home state to launch his legal career in Baltimore.⁹² Field was known as a powerful public speaker and debater.⁹³ In 1911, he was appointed Baltimore City Solicitor.⁹⁴ As city solicitor, he devoted his energies to extending Baltimore’s city limits and defending the city’s new segregation ordinances.⁹⁵ As a private citizen, he devoted himself to his family and the Seventh Baptist Church.⁹⁶

McKindless was born in Pennsylvania on March 15, 1873, but he migrated to Maryland in his early childhood.⁹⁷ In 1895, he graduated from University of Maryland Law School.⁹⁸ After attaining a reputation for being a skillful trial lawyer in Baltimore, he was appointed assistant city solicitor by Field in 1911.⁹⁹ In addition to his work, McKindless dedicated his time to the Knights of Pythias and his wife, Ida Viola Collette, whom he married in 1905.¹⁰⁰

⁹⁰ *Id.* at 17.

⁹¹ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 54 (Maryland State Bar Association 1920).

⁹² *Id.*

⁹³ *Id.* at 55.

⁹⁴ *Id.* at 54.

⁹⁵ *Id.* at 55; S. S. Field, *The Constitutionality of Segregation Ordinances*, 5 VA. L. REV. 81 (1917).

⁹⁶ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 56 (Maryland State Bar Association 1920).

⁹⁷ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 105 (Maryland State Bar Association 1944).

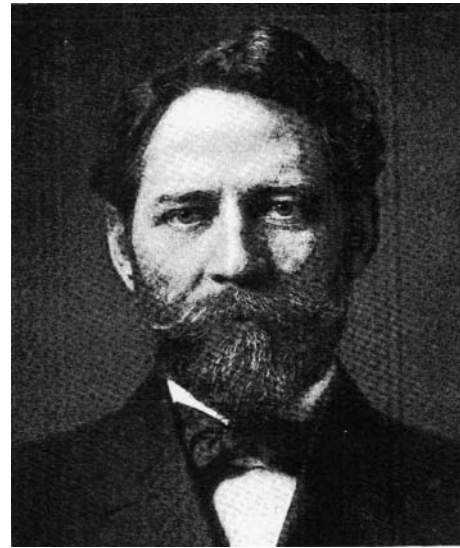
⁹⁸ *Id.* at 106.

⁹⁹ *Id.*

¹⁰⁰ *Id.*



Benjamin McKindless (Source: Enoch Pratt Vertical Files)



S. S. Field (Source: Distinguished Men of Baltimore at 114)

The B&O Railroad was represented by William Irvine Cross and Duncan K. Brent, both longtime employees of the company. Cross was born the son of Reverend A. D. Cross in Oxford, Pennsylvania on February 20, 1852.¹⁰¹ In 1873, he graduated from Princeton before receiving his juris doctor from the University of Maryland Law School in 1876.¹⁰² Cross was admitted to the bar on May 27, 1876.¹⁰³ His long association with the B&O Railroad began in 1875 while he was working at the firm of John K. Cowen and Eben J. D. Cross.¹⁰⁴ After joining the B&O Railroad's legal department, Cross was assigned to the trial of damage cases, a field for which he had no special talent.¹⁰⁵ He was nonetheless successful in the courtroom, due to his careful preparation, his quick wit in trial, and his long experience.¹⁰⁶ Outside the courtroom, Cross hunted, rowed, and rode horseback, but he was particularly noted for his knowledge of all

¹⁰¹ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 38 (Maryland State Bar Association 1933).

¹⁰² JAMES F. SCHNEIDER, A CENTURY OF STRIVING FOR JUSTICE: THE MARYLAND STATE BAR ASSOCIATION 1896-1996 33 (Maryland State Bar Association 1996).

¹⁰³ *Id.*

¹⁰⁴ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 38 (Maryland State Bar Association 1933).

¹⁰⁵ *Id.* at 39.

¹⁰⁶ *Id.*

literature. His friends later recalled that literature was the “chief delight” of this lifelong bachelor.¹⁰⁷

Brent served as Cross’s junior counsel, “a privilege which he greatly relished and appreciated.”¹⁰⁸ Like Cross, Brent was not a Maryland native, but he was a member of an old Maryland family.¹⁰⁹ He was born in New Orleans, Louisiana on October 9, 1877, the son of Confederate Army veteran General Joseph Lancaster Brent and Rosella Kenner.¹¹⁰ Brent grew up in New Orleans, but later immigrated to Baltimore where he completed his secondary education at Marston’s School in Baltimore.¹¹¹ He entered Georgetown University first, but received his bachelor’s degree from Johns Hopkins University in 1898.¹¹² In 1900, Brent graduated from the Law School of the University of Maryland and was admitted to the bar later that year.¹¹³ Paralleling Cross’s career path, Brent entered the offices of Cowen, Cross, and Bond where he began his association with the B&O Railroad, and by 1902 he was a regular employee at the railroad’s legal department.¹¹⁴ Brent was soon involved in all of the railroad’s litigation in Baltimore. While he impressed juries and judges with his skill as a trial lawyer, his friends valued him as a delightful conversationalist with a benign sense of humor.¹¹⁵

¹⁰⁷ *Id.*, SCHNEIDER at 33.

¹⁰⁸ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 52–53 (Maryland State Bar Association 1934).

¹⁰⁹ B&O MAGAZINE, June 1934, *available in* the Enoch Pratt Free Library Biography Files under Duncan K. Brent.

¹¹⁰ REPORT OF THE MARYLAND STATE BAR ASSOCIATION at 52 (1934).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*; B&O MAGAZINE, June 1934, *available in* the Enoch Pratt Free Library Biography Files under Duncan K. Brent.

¹¹⁵ REPORT OF THE MARYLAND STATE BAR ASSOCIATION at 53.

B. The Trial Judge

The preliminary proceedings in the *Walters* case were before Judge Walter I. Dawkins.¹¹⁶ However, Judge Henry D. Harlan would preside over the trial. Of all the accomplished legal minds congregated in the courtroom for the *Walters* trial, Harlan was the most renowned. Harlan was born on a farm in Harford County, Maryland on October 23, 1858, the son of Margret Rebecca and Dr. David Harlan, a naval surgeon.¹¹⁷ He obtained his early education from private tutors and private schools.¹¹⁸ After receiving his degree from St. John's College in 1878, Harlan graduated from the University of Maryland School of Law with an outstanding academic record in 1881.¹¹⁹ Following admission to the bar later that year, he worked in the law offices of James P. Gorter and Henry Arthur Stump.¹²⁰ In the following years, Harlan continued his education, receiving two more degrees from St. John's College.¹²¹

Despite his thriving legal career, Harlan maintained numerous interests outside of the courtroom, two of which were of special significance. One these interests was the University of Maryland, his alma mater, where he served as professor, treasurer, and dean.¹²² The second interest was his family. In 1889, Harlan had celebrated his marriage to Helen Allemus, a union that produced four children.¹²³

¹¹⁶ Baltimore City Court (Court Papers) *Walters v. Mayor & City Council, et. al.*, 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 243 (last accessed 2 December 2006); "Henry Walters and Annie Walters v. Mayor & City Council of Baltimore et. al. in Baltimore City Court, "Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 37, file no. 13044, electronic version, pdf, p. 199 (last accessed 22 November 2006).

¹¹⁷ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 108 (Maryland State Bar Association 1944).

¹¹⁸ EUGENE FAUNTLEROY CORDELL, UNIVERSITY OF MARYLAND 1807-1907: ITS HISTORY, INFLUENCE, EQUIPMENT, and CHARACTERISTICS 371 (Lewis Publishing Co. 1907).

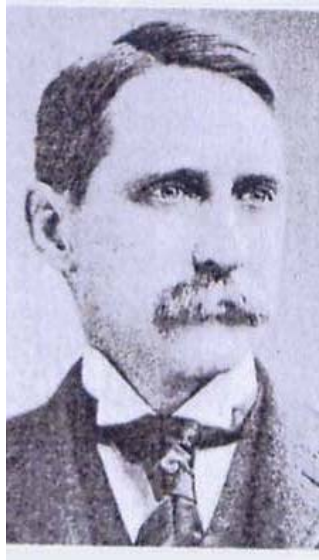
¹¹⁹ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 108 (Maryland State Bar Association 1944).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 110.

¹²³ *Id.* at 108.



Judge Henry D. Harlan (Source: A Century of Striving for Justice at 37)

On October 22, 1888, at the youngest possible age, Harlan became Chief Judge of the Supreme Bench of Baltimore.¹²⁴ As one contemporary noted “[h]e looked the ideal judge.”¹²⁵ Soon, he had also acquired a reputation for his conscientiousness in examining evidence and hearing testimony,¹²⁶ never compromising justice for expediency.¹²⁷

C. The Trial

At trial, the parties confronted not only their legal colleagues, but twelve jurors. The Walterses had elected for a trial by jury on March 7, 1912 in a notice attached to their amended declaration.¹²⁸ Accordingly, three clerks, two machinists, two salesmen, a wagon builder, a fruit grower, a meat wholesaler, a decorator and a retiree assembled in Judge Harlan’s courtroom at

¹²⁴ *Id.*

¹²⁵ *Id.* at 109.

¹²⁶ EUGENE FAUNTLEROY CORDELL, UNIVERSITY OF MARYLAND 1807-1907: ITS HISTORY, INFLUENCE, EQUIPMENT, and CHARACTERISTICS 372 (Lewis Publishing Co. 1907).

¹²⁷ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 111 (Maryland State Bar Association 1944).

¹²⁸ Court of Appeals (Records and Briefs) *Walters v. Mayor & City Council, et al.*, Jan 1913, case no. 74 [MSA S1733-401, 1/65/3/101], electronic version, pdf, p. 143, 145 (last accessed 2 December 2006).

ten o'clock on December 2, 1912.¹²⁹ After some discussion, the lawyers decided to briefly abandon the courtroom routine to allow the jury to visit the Walterses' property.¹³⁰ The jurors were escorted by a bailiff to 213 West Hamburg Street, but the attorneys and judge declined the invitation to participate in the view.¹³¹ This field trip was a brief respite from the first two days of trial during which time the jurors listened to the attorneys' questioning, scrutinized the witnesses' testimonies, studied a plat of the property pinned to a blackboard, and lost count of the myriad objections.

Ten witnesses were introduced over a period of two days. Among them were Henry Walters, a few of his neighbors, city engineer Fendall and his assistant Alexander, real estate brokers, and a builder. McKindless examined all the witnesses on behalf of the city, although Field piped in with a comment on at least two occasions.¹³² The B&O Railroad's representatives divided the task so that generally Cross questioned one witness and Brent the next.

Two recurring themes emerged during the course of the trial. First, a question of semantics illustrated the parties opposing positions. What Ward referred to as a bridge, the defense lawyers characterized as a change in the grade of the street.¹³³ The city solicitors and the railroad attorneys knew that the court, and hopefully the jury, would consider a change of street grade a mere inconvenience, undeserving of compensation.¹³⁴ The defense attorneys resisted

¹²⁹ Baltimore City Court (Court Papers) Walters v. Mayor & City Council, et. al., 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 156, 240 (last accessed 2 December 2006). The jurors were John E. Hogg (foreman), Charles E. Eckenrode, Ferdinand V. Kopp, John A. Begnell, Hamilton E. Showman, Charles A. Lloyd, Frank D. Jennings, Alexander Cohn, James J. Chichester, George H. Houck, Frank H. Barrington, and Edward H. Burns. *Id.* at 156, 241.

¹³⁰ The record is not clear as to the exact date of the view.

¹³¹ Baltimore City Court (Court Papers) Walters v. Mayor & City Council, et. al., 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 494 (last accessed 5 December 2006).

¹³² *Id.* at 294, 309. Other parts of the record indicate that Field was not even present at the trial. *See id.* at 240.

¹³³ *Id.* at 250, 254.

¹³⁴ *See e.g.*, Green v. City & S. R. Co., 78 Md. 294 (1894) (holding that a property owners could not recover for a change in street grade).

Ward's description of the elevation, fearing that jurors would almost certainly view a bridge as more than an inconvenience.

Second, the defense attorneys continually suggested that the Walterses were somehow to blame for the damages. They reminded the jury that the defendants need not have removed the Walterses' bow window had Henry Walters heeded the defendants' request to remove it himself.¹³⁵ They questioned whether Henry Walters had properly sealed the hole where the window had been so as to prevent dampness and mold.¹³⁶ Most interestingly, they charged the Walterses with not adapting to life with a bridge (better known to the defendants as a significant change in street grade). In that vein, they probed witnesses as to the feasibility and the expense of installing a door on the second story and constructing steps to breach the gulf between the sidewalk and the new entrance.¹³⁷ Witnesses patiently explained that this solution was possible, but it was not practical because the steps would have to extend so far onto the sidewalk that a building permit would be unattainable.¹³⁸

The third day of the trial was consumed by prayers, motions, and arguments.¹³⁹ The result was a judgment on verdict nisi in favor of the defendants.¹⁴⁰ Taking the case from the jury, Judge Harlan held that the elevation abutting the Walterses' rowhouse was a change in street grade for which the city was not liable.¹⁴¹ The B&O Railroad was entitled to the same immunity because it was carrying out the physical work authorized by the city. On December 9,

¹³⁵ Baltimore City Court (Court Papers) at 400.

¹³⁶ *Id.* at 301.

¹³⁷ *Id.* at 448.

¹³⁸ *Id.* at 458, 478.

¹³⁹ *Id.* at 486–87.

¹⁴⁰ Court of Appeals (Records and Briefs) *Walters v. Mayor & City Council, et al.*, Jan 1913, case no. 74 [MSA S1733-401, 1/65/3/101], electronic version, pdf, p. 163 (last accessed 5 December 2006).

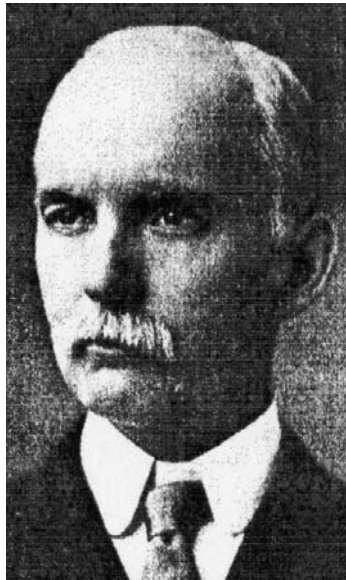
¹⁴¹ *Id.* at 85.

1912, Judge Harlan's decision became final.¹⁴² On January 2, 1913, the Walterses filed an appeal, and the parties braced themselves for the appellate process.¹⁴³

IV. The Appeal

A. The Appellate Judges

In 1913, a distinguished panel of judges served on the Court of Appeals of Maryland. The Walterses' appeal was argued before Chief Judge A. Hunter Boyd, John Parran Briscoe, Nicholas Charles Burke, William H. Thomas, John R. Pattison, Hammond Urner, Albert Constable, and Henry Stockbridge.¹⁴⁴ In addition to their numerous individual accomplishments, many of these appellate judges had been a part of the Maryland delegation present at the founding of the American Law Institute.¹⁴⁵



Judge Henry Stockbridge (Source: A Century of Striving for Justice at 52)

¹⁴² *Id.* at 163.

¹⁴³ *Id.* at 164.

¹⁴⁴ *Walters v. Baltimore and Ohio Railroad and Baltimore City*, 120 Md. 644, 645, 88 A. 47, 47 (1913).

¹⁴⁵ JAMES F. SCHNEIDER, *A CENTURY OF STRIVING FOR JUSTICE: THE MARYLAND STATE BAR ASSOCIATION 1896-1996* 66-67 (Maryland State Bar Association 1996).

Of this illustrious panel Henry Stockbridge was to write the *Walters* opinion. Stockbridge was born in Baltimore on September 18, 1856, the only son of Henry Stockbridge Sr. and Fannie Montague.¹⁴⁶ In 1877, he graduated from Amherst College, but he returned to Baltimore for law school where he received his juris doctor from the University of Maryland in 1878.¹⁴⁷ Instead of practicing law exclusively after commencement, Stockbridge worked in journalism.¹⁴⁸ In 1882, he was appointed an examiner of equity for the Baltimore courts¹⁴⁹ before serving as a United States congressman from 1889 until 1891.¹⁵⁰ In 1896, he was elected to the Supreme Bench of Baltimore City, an office he held until April 13, 1911.¹⁵¹ Stockbridge was elected to the Court of Appeals of Maryland in 1911.¹⁵² Among his numerous activities away from the bench, Stockbridge began teaching law at the University of Maryland in 1899,¹⁵³ and he had actively participated in the Red Cross since he helped to organize its Maryland branch in 1905.¹⁵⁴ In 1913, Judge Stockbridge, along with the other members of the Court of Appeals, reviewed the briefs submitted by the three parties in the *Walters* litigation.

B. The Arguments

Ward did not write the *Walters*' appellate brief alone. He collaborated with Edward M. Hammond to compose the document. Perhaps he accepted Hammond's assistance in a rare fit of self-doubt after realizing the significance of the *Walters* case, but it is more likely that he valued the input of his experienced colleague. The son of a former city solicitor and the

¹⁴⁶ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 61 (Maryland State Bar Association 1924).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ JAMES F. SCHNEIDER, A CENTURY OF STRIVING FOR JUSTICE: THE MARYLAND STATE BAR ASSOCIATION 1896-1996 53 (Maryland State Bar Association 1996).

¹⁵¹ REPORT OF THE MARYLAND STATE BAR ASSOCIATION at 62 (1924).

¹⁵² *Id.*

¹⁵³ EUGENE FAUNTLEROY CORDELL, UNIVERSITY OF MARYLAND 1807-1907: ITS HISTORY, INFLUENCE, EQUIPMENT, and CHARACTERISTICS 376 (Lewis Publishing Co. 1907).

¹⁵⁴ REPORT OF THE MARYLAND STATE BAR ASSOCIATION at 63 (1924).

¹⁵⁴ *Id.*

grandson of a judge, Hammond entered the legal profession himself in 1899 after graduating from the University of Maryland Law School.¹⁵⁵ He was dedicated to public affairs, serving in the House of Delegates and representing Howard County in the State Senate by 1910.¹⁵⁶ As a senator, he was noted for preparing the Workmen's Compensation Law.¹⁵⁷ However, it was his frequent appearances before the Court of Appeals of Maryland and his willingness to assist other attorneys that probably impressed Ward.¹⁵⁸

Ward and Hammond's brief on behalf of the Walterses highlighted four crucial arguments. First, they asserted that governmental agencies are liable for the actual destruction of property, which included the removal of the Walters' cornice and bow window.¹⁵⁹ Second, Ward and Hammond averred that the B&O Railroad was the primary beneficiary of the bridge project because the project would reduce the litigation resulting from grade crossing injuries.¹⁶⁰ Therefore, the railroad should be liable for all actual damage because the project was not undertaken chiefly for the public benefit.¹⁶¹ Third, the attorneys explained that the B&O Railroad was not immune from liability for destroying access to the Walters house because abutting property owners have a right to access the street.¹⁶² Finally, Ward and Hammond claimed that both the city and the railroad were liable for the damages because the bridge was negligently located.¹⁶³

¹⁵⁵ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 54 (Maryland State Bar Association 1928); *see also* the Enoch Pratt Free Library Biography Files under Edward M. Hammond.

¹⁵⁶ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 55 (Maryland State Bar Association 1928).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Court of Appeals (Records and Briefs) *Walters v. Mayor & City Council, et al.*, Jan 1913, case no. 74 [MSA S1733-401, 1/65/3/101], electronic version, pdf, p. 16–17 (last accessed 2 December 2006).

¹⁶⁰ *Id.* at 19.

¹⁶¹ *Id.* at 18.

¹⁶² *Id.* at 26.

¹⁶³ *Id.* at 28.

The city's argument revolved around one central theme, namely that the city was not liable because the conceded damage was entirely the B&O Railroad's doing.¹⁶⁴ Therefore, the B&O Railroad was solely liable, and solicitors McKindless and Field explained the reasons for the railroad's liability in meticulous detail.¹⁶⁵ Chief among these reasons was that the method of abolishing the grade crossings was chosen for the railroad's benefit.¹⁶⁶ The solicitors clarified that the city's only role in the grade crossing elimination project was to pass an ordinance permitting the railroad to build the bridge, and the city could not be liable for its legislative actions.¹⁶⁷

In their brief on behalf of the B&O Railroad, Cross and Brent presented a slightly less accusatory analysis of their co-defendant's actions. They noted the city's power to change street grades and asserted that the grade of Hamburg Street was altered for the public benefit.¹⁶⁸ The B&O Railroad attorneys then denied any negligence in locating or building the bridge.¹⁶⁹ Finally, Cross and Brent insinuated that the city alone was liable by reminding the court that the railroad had been compelled to work under the city's direction while bearing the construction costs.¹⁷⁰ Consequently, the city had the ultimate responsibility and ability to compensate the property owners.¹⁷¹

The appellate judges were left to consider these arguments and decide whether the damages constituted a taking that required compensation, and then if compensation was necessary, whether the city, the railroad, or both should pay.¹⁷²

¹⁶⁴ *Id.* at 85–86.

¹⁶⁵ *Id.* at 106–07.

¹⁶⁶ *Id.* at 86.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 47.

¹⁶⁹ *Id.* at 56.

¹⁷⁰ *Id.* at 70.

¹⁷¹ *Id.* at 76.

¹⁷² *Walters v. Baltimore and Ohio Railroad and Baltimore City*, 120 Md. 644, 653, 88 A. 47, 50 (1913).

C. The Decision

By May 8, 1913, the Court of Appeals had decided *Walters*, and Judge Stockbridge concisely articulated the court's opinion.¹⁷³ After a thorough review of ordinances from 1905 and 1909,¹⁷⁴ Judge Stockbridge quoted the General Assembly's Act of 1910, authorizing Baltimore City to compensate property owners who sustained property damages as a result of the bridge's construction.¹⁷⁵ He proceeded to describe the project's effect on the Walters property at 213 West Hamburg Street, including the obstruction of the doorway, the eradication of all light and air to the first story, and the resulting dampness that rendered the dwelling uninhabitable.¹⁷⁶ Finding words inadequate to explain the damage, Judge Stockbridge referenced a labeled diagram depicting the bridge's footway rammed against a cross-section of the house's façade and a concrete post blockading the entrance.¹⁷⁷

Next, Judge Stockbridge reviewed the case's procedural history before reviewing the pertinent precedents.¹⁷⁸ First he reviewed property owners' rights in the abutting street.¹⁷⁹ Relying on *Van Witzzen v. Gutman*, he concluded that an abutting property owner's right to a public street required compensation.¹⁸⁰ The judge recognized that property owners likewise had a right to light and air.¹⁸¹ Second, Judge Stockbridge highlighted cases distinguishing injuries that rendered the exercise of private rights inconvenient or expensive from injuries that completely destroyed the ability to exercise the right.¹⁸² In each case, whether from Maryland or

¹⁷³ *Id.* at 646, 88 A. at 48.

¹⁷⁴ *Id.* at 646–48, 88 A. at 48–49.

¹⁷⁵ *Id.* at 649–50, 88 A. at 49.

¹⁷⁶ *Id.* at 648–52, 88 A. at 49–50.

¹⁷⁷ *Id.* at 651, 88 A. at 50. This diagram is reproduced on p. 13 of this Essay.

¹⁷⁸ *Id.* at 652–53, 88 A. at 50.

¹⁷⁹ *Id.* at 654, 88 A. at 51.

¹⁸⁰ *Id.* at 655, 88 A. at 51.

¹⁸¹ *Id.* (citing *Townsend, Grace, and Co. v. Epstein*, 93 Md. 537, 49 A. 629 (1901)).

¹⁸² *Id.* at 655–57, 88 A. 51–52.

another jurisdiction, an injury that obstructed the only means of access to the property constituted a taking requiring compensation.¹⁸³

The precedent led Judge Stockbridge to hold that the obstruction of access, light, and air to 213 West Hamburg Street constituted a taking.¹⁸⁴ Rejecting each defendants' contentions that its co-defendant was to blame, the judge concluded that the city and the B&O Railroad were both tortfeasors, jointly and severally liable.¹⁸⁵ In conclusion, Judge Stockbridge reversed the trial court's decision and remanded the case for a new trial.¹⁸⁶

V. The Second Trial

The Court of Appeals remanded the case back to the same court where the same lawyers appeared before the same judge in a trial that lasted four days, starting on June 16, 1913.

Paralleling the first trial, the first day opened with a discussion of the jury's visit to the Walters property. Once again the attorneys all declined to participate in the view. Ward, perhaps remembering the damp, moldy interior, spoke for all the attorneys when he announced, "I have no desire to go."¹⁸⁷ Then referring to the unsuspecting jury, he quickly added, "we want them to go inside."¹⁸⁸

Many of the neighbors, engineers, and real estate experts from the first trial reprised their testimony, while several new faces, including B&O engineer Jenks B. Jenkins, made their witness stand debut. In their questioning, the defense lawyers revived their proposal to convert a second story window into a door, but mostly encountered the same skepticism.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 657, 88 A. at 52.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 658, 88 A. at 52.

¹⁸⁷ Baltimore City Court (Court Papers) Walters v. Mayor & City Council, et. al., 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 493 (last accessed 10 December 2006).

¹⁸⁸ *Id.* at 494. There is no record explaining how the jurors entered the house, but this Author hopes they had the opportunity to climb a ladder and go in through the second story window.

Then, expanding on the first trial's just compensation inquiry, the attorneys induced the witnesses to describe the transformation of the Hamburg Street neighborhood in the wake of the bridge. After the construction, the Walters' house, among others, remained unrepaired and vacant. One witness explained that "[y]ou could not get nobody to move in[to] that neighborhood," but this was not entirely accurate.¹⁸⁹ Many of the white residents had departed, but their deserted abodes were soon inexpensively leased to poor black renters.¹⁹⁰

After the fourth day of testimony, the jury retired to determine the damages to be awarded. They returned a verdict of \$1,186.67 for the Walters, an amount that was less than the \$1,425 the property owners had paid to purchase the rowhouse and much less than the \$5,000 they had claimed in their declaration.¹⁹¹ After declining to appeal the verdict, the city and the B&O Railroad were left alone to squabble over their respective liabilities resulting from any agreement they might have had between them.¹⁹²

VI. Aftermath

While the jury had rendered the final verdict in the *Walters* case, the other grade crossing cases that had been waiting for the test case decision were only beginning. A few these cases were possibly further delayed by assistant city solicitor McKindless who received the court's permission to postpone trial dates while he recovered from an eye infection.¹⁹³ When the remaining grade crossing cases were finally heard in the court, the appellate holding in the *Walters* case frequently determined the outcome, whether positive or negative. Generally, the

¹⁸⁹ *Id.* at 740.

¹⁹⁰ *Id.* at 741.

¹⁹¹ *City and B. and O. Liable*, BALTIMORE SUN, June 21, 1913, at 5.

¹⁹² *Walters*, 120 Md. 644, 658, 88 A. 47, 52.

¹⁹³ "Hamburg Street Grade Crossings – General" Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 69, file no. 14852, 5458-51-2379-pdf, p. 12 (last accessed 11 December 2006).

property owners were eligible for damages when, like the Walterses' rowhouse, their buildings were completely inaccessible or entirely devoid of light and air.

When the court found that the high standard established in *Walters* was not realized, the property owners could not recover. As the court clarified in *Baltimore v. Bregenzer*, “[t]he constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but only indirectly or consequentially injured,” and therefore “*mere* inconvenience of access resulting from acts done, or *mere* diminution of light and air” did not constitute a taking of private property.”¹⁹⁴ As a result of this narrow interpretation, many of the grade crossing cases failed to produce damage awards for the property owners. For example, the court declined to find a taking in *Baltimore & O. R. Co. v. Kahl* because the property owner from the north side of Hamburg Street was not at all hindered by the bridge across the street on the south side.¹⁹⁵ Once again, in *German Evangelical Lutheran St. Lucas Congregation v. Baltimore*, the court held that the city was not required to pay damages when the most direct street to a church building was closed, but it could still be reached by an different route.¹⁹⁶

In other grade crossing cases, property owners could at least recover under particular circumstances. For instance, in *Baltimore & O. R. Co. v. Kane*, the court found no interference with light and air, but the plaintiffs were permitted to recover damages for an alley that had been blocked solely for the railroad's own benefit.¹⁹⁷ Additionally, the court confirmed that the B&O

¹⁹⁴ *Baltimore v. Bregenzer*, 125 Md. 78, 85, 87, 93 A. 425, 427, 428 (1915).

¹⁹⁵ *Baltimore & O. R. Co. v. Kahl*, 124 Md. 299, 301, 92 A. 770, 770 (1914).

¹⁹⁶ *German Evangelical Lutheran St. Lucas Congregation v. Baltimore*, 123 Md. 142, 145, 160, 90 A. 983, 984, 989 (1914).

¹⁹⁷ *Baltimore & O. R. Co. v. Kane*, 124 Md. 231, 240, 92 A. 532, 535 (1914).

Railroad remained liable for consequential damages.¹⁹⁸ With the resolution of these last cases, the grade crossing litigation was winding down at last by the mid-1910s.

While many of the participants in *Walters* witnessed the other grade crossing cases' progression through the court system, only a few played active roles in the new litigation. Among the passive participants was Judge Harlan who retired from the bench on December 31, 1913 to devote his time to the Fidelity Trust Company in which he served as director and general counsel before becoming a vice president.¹⁹⁹ Unlike Judge Harlan, Judge Stockbridge had a prime bench view of the parade of grade crossing cases on appeal before his retirement from the Court of Appeals in 1922.²⁰⁰

After years of confronting one another in courtroom combat in *Walters* and its progeny, Field, McKindless, Cross, Brent, and Ward eventually withdrew from the Hamburg Street neighborhood to engage in battles elsewhere. Field served as city solicitor until about 1918 or 1919 during which time he vigorously, but unsuccessfully, defended Baltimore's residential segregation ordinances.²⁰¹ McKindless deserted the city solicitor's office in late 1919 to pursue his private practice, and in 1930, he was elected state senator.²⁰² Cross retreated from the trial of damage cases, but continued to serve in the B&O Railroad's legal department for the rest of his life.²⁰³ Likewise, Brent remained a lifelong employee of the B&O Railroad after being promoted to General Attorney in 1920.²⁰⁴ Ward's reputation as a trial lawyer in Baltimore continued to grow, but this success did not satisfy his judicial aspirations. In 1938, Ward reluctantly

¹⁹⁸ *Baltimore & O. R. Co. v. Hammond*, 128 Md. 237, 239–40, 97 A. 532, 533 (1916).

¹⁹⁹ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 108 (Maryland State Bar Association 1944).

²⁰⁰ JAMES F. SCHNEIDER, A CENTURY OF STRIVING FOR JUSTICE: THE MARYLAND STATE BAR ASSOCIATION 1896-1996 53 (Maryland State Bar Association 1996).

²⁰¹ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 54 (Maryland State Bar Association 1920); S. S. Field, *The Constitutionality of Segregation Ordinances*, 5 VA. L. REV. 81 (1917).

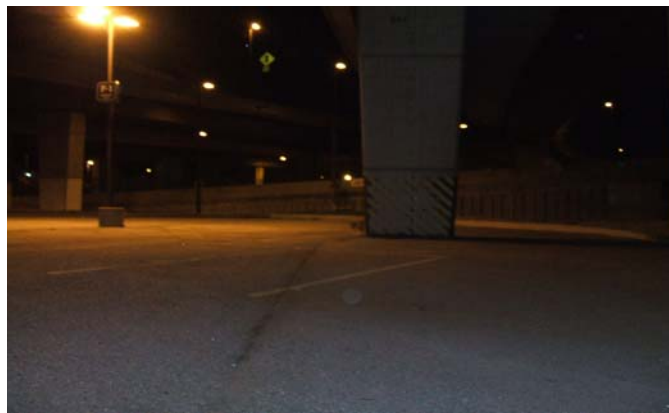
²⁰² REPORT OF THE MARYLAND STATE BAR ASSOCIATION 106 (Maryland State Bar Association 1944).

²⁰³ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 38–39 (Maryland State Bar Association 1933).

²⁰⁴ REPORT OF THE MARYLAND STATE BAR ASSOCIATION 52 (Maryland State Bar Association 1934).

abandoned his judicial hopes after a skirmish over his age cost him the support he needed to win an election to the Supreme Bench.²⁰⁵ Ward never realized his ambition to become a judge.

While newspaper articles mercilessly detailed Ward's defeat, no known document indicates the eventual fate of Ward's clients, Henry and Annie Walters. It is clear that they had a second case against the city and the B&O Railroad to recover damages for the smaller building on the 213 West Hamburg Street property, but the outcome of this case is uncertain.²⁰⁶ A few years after the first case's verdict was announced, their rowhouse was torn down. The Walterses vanish from the record long before their vacant lot was recently paved and divided into parking spaces reserved for fans attending football games at the adjacent M&T Bank Stadium.



M&T Bank Stadium parking lot

VII. Conclusion

A. The Legal Significance of *Walters*

The Walterses are no doubt long departed, but the legal significance of their case survives within the boundaries clarified by the subsequent grade crossing cases. In his appellate decision,

²⁰⁵ *Ward Minimizes Dispute Over Age*, BALT. SUN, June 23, 1938, available in the Enoch Pratt Free Library Vertical Files under Edward L. Ward. The dispute arose from Ward's uncertainty as to the year of his birth. This dispute led to controversy as to his ability to serve as a judge in light of the mandatory judicial retirement age, his "reckless" inconsistency in stating his age, and his underage admission to the Bar. *Mr. Ward's Ages*, BALT. SUN, June 24, 1938, available in the Enoch Pratt Free Library Vertical Files under Edward L. Ward.

²⁰⁶ Baltimore City Court (Court Papers) *Walters v. Mayor & City Council, et. al.*, 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 631 (last accessed 22 November 2006).

Judge Stockbridge expanded the constitutional definition of takings to include damages for the complete obstruction of reasonable access, light, and air.²⁰⁷ Traditionally, these injuries were labeled consequential damages for which a government did not have to compensate.²⁰⁸ After *Walters*, Maryland law acknowledged that the government’s power to deny compensation for consequential damages was not unlimited.

Attorneys still cite *Walters* as good law in their briefs, but the court infrequently, if ever, applies the case to require the government to pay compensation for damages. The court usually responds to a claimant relying on *Walters* by simply distinguishing *Walters*.²⁰⁹ As McKindless accurately predicted before the first trial, *Walters* would “determine the rights and liabilities of other cases,” but as the courts have confirmed, these cases must be “of a similar class.”²¹⁰

B. The Historical Significance of *Walters*

The litigation that led to this modification of Maryland law neither arose spontaneously nor was resolved in isolation. Instead the *Walters* case reflected broader historical movements that were struggling between resisting change and promoting societal reform.

The damage to the Walters’ property was caused by the decision to eliminate the Hamburg Street grade crossing by locating a bridge on the south side of the street as opposed to the north side or down the center of the street. According to engineer Fendall, this decision was influenced by many considerations, one of which was probably the residents’ race. In the early 1900s, race was an implicit factor in planning decisions as the Baltimore City council contemplated housing segregation to address racial tensions, contain health risks, and preserve

²⁰⁷ *Walters v. Baltimore and Ohio Railroad and Baltimore City*, 120 Md. 644, 657, 88 A. 47, 52 (1913).

²⁰⁸ See Emerson G. Spies & John C. McCoid, II, *Recovery of Consequential Damages in Eminent Domain*, 48 VA L. REV. 437, 441 (1962) (describing traditional categories of consequential damages).

²⁰⁹ *Irvine v. Montgomery County*, 239 Md. 113 (1965) (distinguished from *Walters* because this was a private nuisance claim); *Maryland Port Admin. v. QC Corp.*, 310 Md. 379 (1987) (distinguishing *Walters* because there was no significant loss of business).

²¹⁰ “Hamburg Street Grade Crossings – General” Baltimore City Law Department, City Solicitor Casefiles, RG 13-2, box no. 69, file no. 14852, 5458-51-2379-pdf, p. 25 (last accessed 20 November 2006).

property values.²¹¹ The decision-makers directing the bridge project knew that the north side of Hamburg Street was already predominantly occupied by black residents. Building the bridge on the south side of the street created dismal living conditions that drove out white inhabitants who were replaced by poorer black renters.²¹² Consequently, the bridge not only solved the grade crossing dilemma, but it effectively segregated Hamburg Street, converting it from an integrated neighborhood into a black ghetto.

Even if the establishment of a black ghetto on Hamburg Street was inadvertent, its creation was consistent with the rationale underlying the first Baltimore housing segregation ordinance implemented in 1910. The ordinance's stated purpose "for preserving order, securing property values and promoting the great interests and insuring the good government of Baltimore city," presumably encompassed interests such as improved health conditions and sanitation.²¹³ The ordinance purported to achieve these goals by prohibiting blacks from moving into blocks where the residents were more than half white while conversely forbidding whites from moving onto blocks occupied by more than half black residents.²¹⁴

However, the Hamburg Street bridge project achieved the ordinance's stated purpose more efficiently than the ordinance's own provisions because while the bridge had forced almost immediate segregation, the ordinance did not interfere with the status quo.²¹⁵ Accordingly, the Hamburg Street bridge had an acceptable, if not desirable, effect from the local white perspective. As Baltimore residents acting under their own biases as well as the pressure of the local community, the city engineers and trial Judge Harlan would not have been inclined to view

²¹¹ See Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 299 (1983) (discussing the passage of the first housing segregation ordinance).

²¹² Baltimore City Court (Court Papers) *Walters v. Mayor & City Council, et. al.*, 1911, box no. 101, drawer no. 2 [MSA T545-719, 3/32/2/11], electronic version, 5458-51-2410-pdf, p. 741 (last accessed 10 December 2006).

²¹³ BALTIMORE, MD., ORDINANCE NO. 610 (1910).

²¹⁴ *Id.*

²¹⁵ *Id.*

the bridge's location as negligent or be too concerned about the resulting poor housing conditions for blacks.

While the local actors labored under abiding pressure from the surrounding community to address racial issues, Judge Stockbridge endured no similar restraint when he penned the *Walters* decision. Secluded from local racial tensions, Stockbridge was free to incorporate the purest of progressive doctrine into his decision. An active Red Cross organizer, he would have been familiar with the health crisis plaguing overcrowded urban neighborhoods. He also was probably aware of progressive reformers' asserted nexus between poor health and bad housing. As one reformer observed, "[a] child living its early years in dark rooms, without sunlight or fresh air, does not grow up to be a healthy person."²¹⁶

This reformer could have been describing the living conditions on the first story of 213 West Hamburg Street. The *Walters* case presented Stockbridge with the opportunity to effect reform not only on Hamburg Street, but across Maryland. Whereas formerly the government could avoid responsibility for consequential damages, including blocked light and air, Stockbridge's decision imposed the just compensation requirement as a restraint on the government's power to inflict unsanitary housing conditions on residents without restitution. While Stockbridge's decision in *Walters* did not introduce sweeping housing reform, it at least ensured that the government itself was not freely creating unhealthy living conditions.

²¹⁶ LAWRENCE VEILLER, *Housing Evils and Their Significance*, in THE URBAN COMMUNITY: HOUSING AND PLANNING IN THE PROGRESSIVE ERA 56, 57 (Lorman Ratner ed., Greenwood Press 1967).