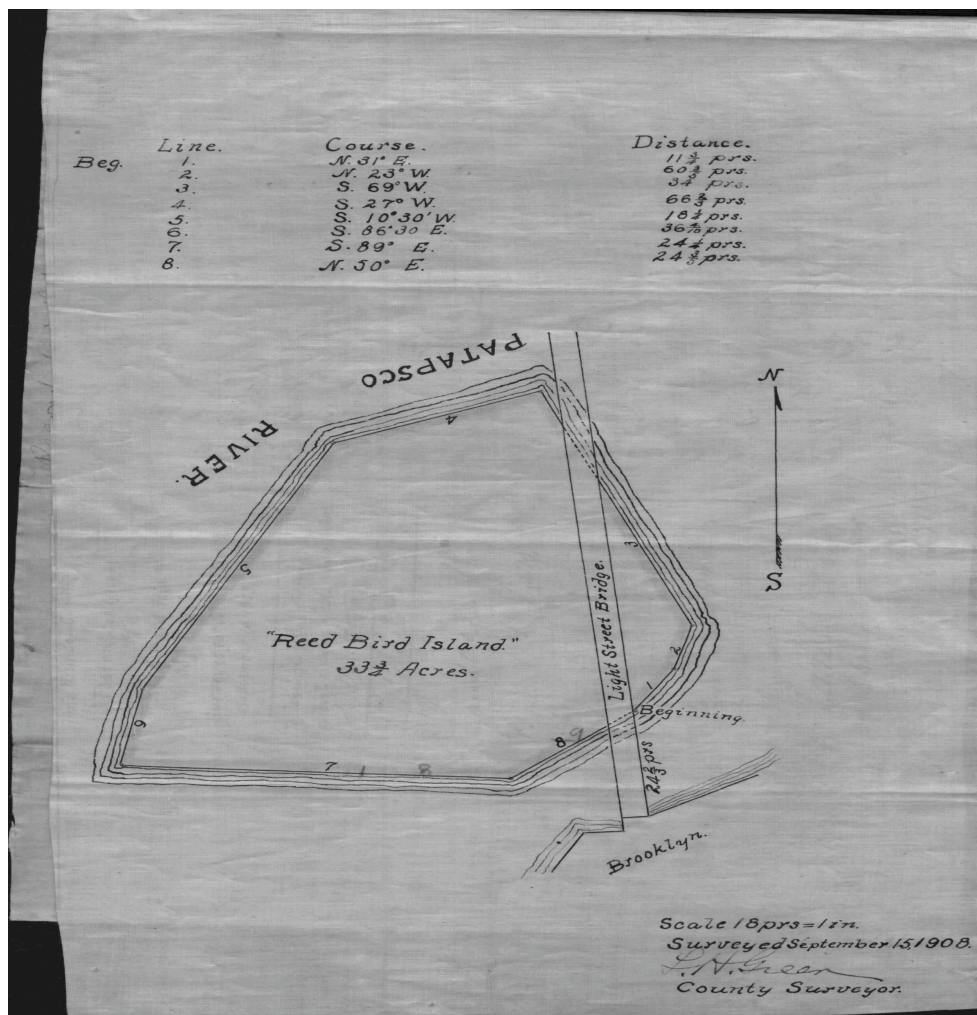


Island Here Today, Gone Tomorrow

Court of Appeals of Maryland.
H. Milton Wagner, Jr., Amelia W. Sutton, Florence C. Mulligan, et al.

v.

Mayor and City Council of Baltimore
July 30, 1956



Original Plat of Reed Bird Island, 1909.

Brandy Reazer, UMBC
Scott Yager, UM Law
December 21, 2009

Introduction

Court of Appeals of Maryland. H. Milton Wagner, Jr., Amelia W. Sutton, Florence C. Mulligan et al. v. City of Baltimore is an appeals case that started in Anne Arundel County, Maryland in 1916 over an island that was at one point in Maryland state history part of Anne Arundel County. A land patent was issued to John P. Bruns in 1909 and later sold to H. Milton Wager, Sr. The island in question, known as Reed Bird Island, was surveyed in 1908 by the County Surveyor of Anne Arundel County. The land was not found to be covered by navigable water and thus a land patent was issued. Since the island was crossed by the Light Street Bridge and thus the state had to pay for right to access, it makes one question what was the motivation behind the law suit. Did the state ultimately want control over the island that so that the issue of riparian rights would no longer be an issue and the state government could do as they saw fit for development of the area. It would appear that control of the island and ultimately the waterway sparked the governmental interest and thus the legal pursuit of control over the area began. The Light Street Bridge burned in 1914 and was subsequently replaced by the present day Hanover Street Bridge. When the case is resolved in 1956 it would appear that the motivation behind governmental control shifted from trade and commerce and was more about protecting the natural habitat and wetlands as the area was later developed into the Patapsco Valley Park.¹

The Legal Challenge

In 1916, the City of Baltimore filed a complaint against John Bruns and Harry M. Wagner, asserting that the land patent issued to Bruns, and the deed sold to Wagner for

¹ Patapsco Valley Commission *The Sun* (1837-1985); May 29, 1946; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. 30. “The major problems of acquisition and development... both as to the status of ownership and as to the difficulty of converting to solid park land.”

Reed Bird Island, were invalid. The City was motivated to acquire this land for use as a dumping ground for the federal government, as it dredged out the channels of the Baltimore harbor.²

Two years after filing the complaint, the land surrounding the contested land patent, which was within Anne Arundel County³, became annexed by the City of Baltimore.⁴ The trial never commenced subsequent to the filing of the bill of complaint, which presumably collected dust on the court docket as it was forgotten for many years. The case finally took to trial four decades later, in 1955. Since Bruns and Wagner were both deceased by this time, Wagner's successors in interest (members of his family to which he willed his interest in Reed Bird Island) were substituted as defendants in the case. The trial was held in the Anne Arundel County Circuit Court where it was originally filed in 1916, even though the surrounding area had been annexed to Baltimore City. Anne Arundel County properly retained jurisdiction under the provisions of Section 18, Chapter 82 of the Laws of Maryland of 1918.⁵

The time lapse between the filing of the complaint and the trial presented a particularly difficult situation for Judge Macgill, the judge sitting on the Anne Arundel County Circuit Court. In order to make his determination on the validity of the land patent and deed, he needed to weigh testimony given by men who were in their septuagenarian years (or older⁶) recalling memories from when they were boys. Questioning senior citizens about memories that are over three decades old may not have resulted in accurate or complete testimony.

² "City to obtain Island by Condemnation Law," *The Baltimore Sun*, Nov 24, 1920.

³ Some of the area was also in Baltimore County.

⁴ Transcript of Record at 24, *Wagner v. Mayor and City Council of Baltimore*, 210 Md. 615 (1956).

⁵ *Id.* at 98.

⁶ James B. Woodward was the oldest of the witnesses, at 91 years old. *Id.* at 81.

To further complicate the issue, the photographic exhibits were taken when the bill of complaint was filed, seven years after the land patent was issued.⁷ This presented a problem because the pictures did not represent the physical state of Reed Bird Island at the pertinent time. The problem of evidence that did not mirror the pertinent time affected other evidence as well, including a U.S. Coast & Geodetic Survey from 1905 (four years before the patent was issued).⁸ Another problem caused by the time lapse was that some key players in the case, namely Bruns and Wagner, had long passed away by the time the case went to trial, thus eliminating key testimonies.

As mentioned above, a hardship in adjudicating this case was caused by the lack of evidence from the year 1909, when the patent was issued. Evidence from that year is important to this case due to the underlying issue of natural land recession and accretion. Recession is the loss of land as a result of erosion, and accretion is the process where coastal sediments build up and form fast land where there was once only water. These ongoing natural processes shape and define the appearance of fast land around waterways, and of particular interest to this case, have the potential to remove or build up small islands. There is little doubt that Reed Bird Island was indeed an island at some point in history. Currently, Reed Bird Island is fast land that is fully connected to the mainland and appears as a peninsula on the tip of Brooklyn, Maryland (see table 1 below). Maps of the area in 1938 show a parcel that more closely resembles an island, as a section of fast land, but with strips of land that connect to the mainland (see table 2 below). What we do not have is conclusive photographic evidence or a map that depict Reed Bird Island in 1909 as a section of fast land, surrounded on all sides by water. Had

⁷ *Id.* at 105.

⁸ *Id.* at 101.

this evidence been available, the controversy of Reed Bird Island would have never reached to the highest court in Maryland.

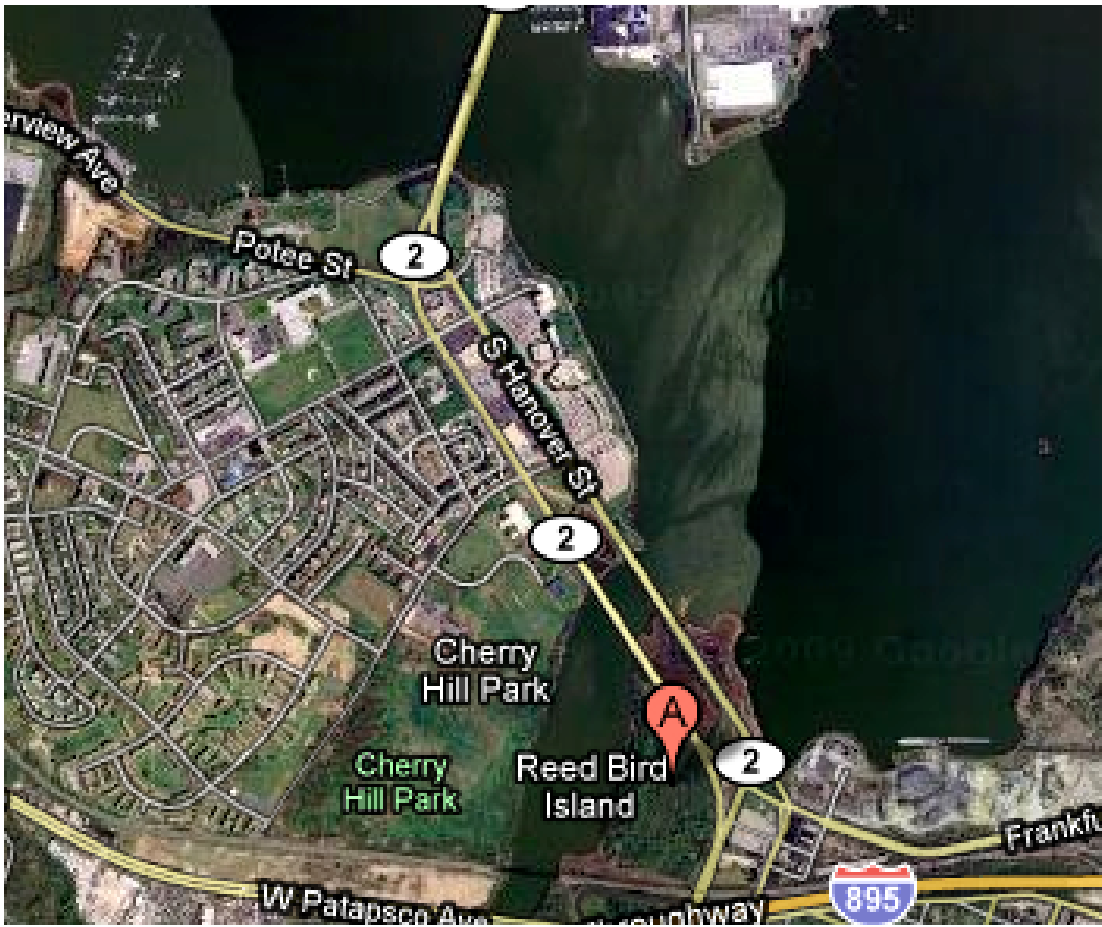


Table 1. Google Maps image of Curtis Bay in 2009. Reed Bird Island is marked by the red pointer marked “A.”

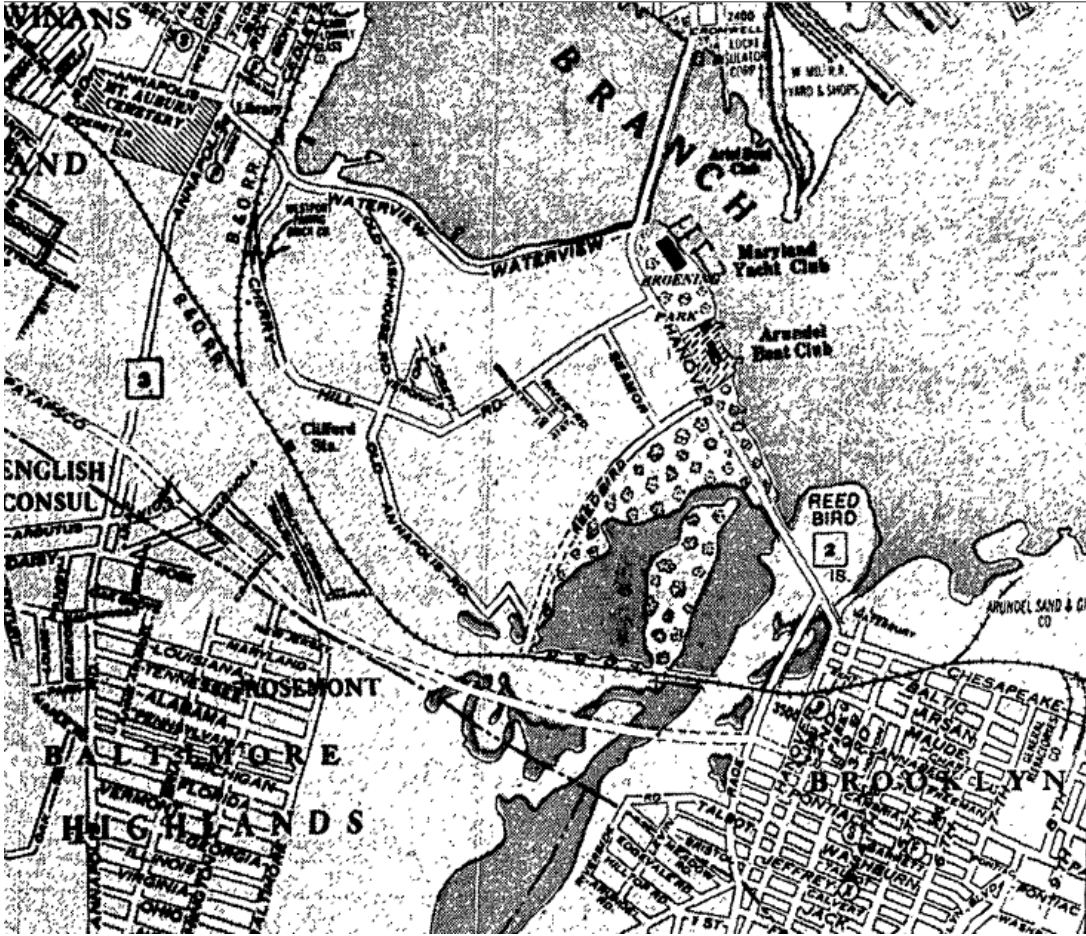


Table 2. Map of Curtis Bay in 1938. The Baltimore Sun.

Since the Hanover Street Bridge crossed over Reed Bird Island the State Roads Commission paid H. M. Wagner, Sr. one dollar for right of way access. Even though Reed Bird Island was documented as being over water in 1908, it was not noted as being above water in 1914 at the time of the new bridge construction. Why would the state pay access to an area that really wasn't? It is apparent that at one point it was not a question if Reed Bird Island was in fact above or below water since access was paid. It is not known how long the right of access was paid by the State Roads Commission to the Wagner's. Regardless of the fact that access rights fees and taxes were paid, the ultimate question was whether or not Reed Bird Island was really above navigable waters at the time the land patent was issued in 1909.

Background

According to a Baltimore Sun article dated July 31, 1956 the circuit court case that started in 1916 was finally decided.⁹ The case of H. Milton Wagner, Jr. v. City of Baltimore initially began as a case against H. Milton Wagner, Sr. as Anne Arundel County disputed that H. Milton Wagner's land patent was not valid. This case that eventually spanned over forty years attempted to determine if Reed Bird Island was indeed above or below water when the land patent was initially issued. The land patent for Reed Bird Island was issued in 1909 to John P. Bruns, an associate and possible business partner of H. Milton Wagner, Sr. Bruns sold the land patent for Reed Bird Island to Wagner for one dollar. Over the decades that followed the issuing of the land patent and exchange of land ownership, the defendant Wagner died bequeathing the land patent for the island and family wholesale grocery business to his children.

In 1956 case assigned for case study was an appeals case from 1916. "The principal question in both cases is whether Reed Island was or was not covered by navigable waters when the patent was issued to Bruns in 1909."¹⁰ Bruns was the initial defendant and then he passed away and by the time of the case came to trial the island was sold to Wagner. This case raises the initial question of why Anne Arundel County was interested in Reed Bird Island, which made up a set of islands called the Mud Islands. The government may have had some real interest in the island whether it be for future development, control of the Patapsco River, or for other financial incentives. One of the Mud Islands, Billiken Island, had its land patent successfully overturned in 1916 as it was found to be invalid. With the successful acquisition of one of the three Mud

⁹ "Court Awards Land to City", The Sun, Baltimore, July 31, 1956.

¹⁰ Westlaw

Islands it would appear that the government was motivated by gain control over the area for financial reasons.

Reed Bird Island

The Wagner's rented space on Reed Bird Island to advertisers as evidence in photographs taken in 1916 by the defense. They collected rents on these billboards for years and also paid property tax on the island. The billboards that advertised local goods and services were visible from the Long Bridge. The Long Bridge gave way to the future Hanover Street Bridge and Light Street Bridge. In an article that reminiscences about the days before the Hanover Street Bridge describe it as "a comfortable accommodating bridge, not confined wholly to uses of transportation."¹¹ It would appear that over time the area changed from a relaxing place for family gatherings and picnics to an area that was bustling with commerce and trade from boats and trucks. Governmental interest in this area appeared to be in expanding the commerce and transportation sector. This may have been one of the motivations behind bringing this case to court in an attempt to invalidate the land patent for Reed Bird Island. The case in 1916 attempts to make the land patent null and void based on the argument that the land patent should have never been issued because Reed Bird Island was covered by navigable waters.

The Plaintiffs

There was no information available in *The Sun* on who John P. Bruns beyond the fact that he sold Reed Bird Island to H. Milton Wagner. Searches for information on the Wagner's required a search through *The Sun* archives using variations of the spelling of the Wagner name. The search was conducted using the following variations: H. M.

¹¹ B. Latrobe Weston, "Long Bridge, a vanished play ground: Forerunner of Hanover Street Span was a Favorite Picnic Site", *The Sun*, Baltimore, July 31, 1932.

Wagner, Harry Wagner, Milton H. Wagner, and H. Milton Wagner and Wagner. This case study may go back in forth using the variations based on the spelling and representations in the articles used. The dates used to conduct the search spanned from January 1, 1837 to January 1, 1956. The purpose of the dates used was to research when the Wagner's began being documented in the local newspaper. There was also interest in researching what the newspapers reported about the case if much was reported at all. Since the case in its entirety covered the span of forty years, there were a number of articles about the Wagner's as they conducted business and attended high-society public events. The Wagner family had an extensive history in the city of Baltimore as business owners and through their religious and social activities in the community.

Through a series mentions in small articles in *The Sun*, the social activities the Wagner's is documented. Harry Wagner, Sr. began making the society pages of *The Sun* by attending numerous dinners and receptions connected to the Methodist Church on February 25, 1893.¹² On February 25, 1897, Mr. Wager attended a banquet for the South Baltimore Business Men's Association.¹³ Mr. Wagner, Sr. appeared to be very active in the church as his attendance is documented in 1905, 1906 and 1907 as he attended banquets and meetings for Social Union of the Methodist Episcopal Church.¹⁴ Mr. Wagner's attendances at these events demonstrate his status in Baltimore societal circles.

¹² Methodist Extension *The Sun (1837-1985)*; Feb 25, 1893; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 8.

¹³ South Baltimoreans *The Sun (1837-1985)*; Feb 25, 1897; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 10.

¹⁴ Article 1 -- No Title *The Sun (1837-1985)*; Oct 27, 1905; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 14; Nation as Peacemaker *The Sun (1837-1985)*; Feb 21, 1906; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 7.; Methodists Have Feast *The Sun (1837-1985)*; Nov 19, 1907; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 9; and Monday Night Class Reunion *The Sun (1837-1985)*; Dec 3, 1907; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 7.

It can be concluded that Wagner, Sr. was a person of high social standing as it can be assumed that he wouldn't be mentioned unless this otherwise be the case. His church membership may have also resulted in business connections for the Wagner family since the Methodist Episcopal church had a very large membership in Baltimore second only to the Catholic church.

Harry Milton Wagner, Sr. was a graduate of Baltimore City College (High School) in 1873. The commencement took place in Ford's Grand Opera House in Baltimore.¹⁵ The owner of the opera house, John T. Ford, also owned the Ford's Theater in Washington, DC which is the location of President Abraham Lincoln's assassination. Harry Milton Wagner, Sr. was the son of German immigrant August Wagner and Susan Wagner. August Wagner died on March 24, 1915.¹⁶ According to August Wagner's death notice in *The Sun*, Harry Wagner, Sr. had four other siblings. His name was the only name mentioned as being a business owner.¹⁷ It may be concluded that the Harry Wagner's wholesale business was well known business in Baltimore as the obituary notice was not comparable in size or detail to one's placed presently as Baltimoreans pass away. Harry M. Wagner, Sr.'s death was noted in an article reporting his death was published by *The Sun* on July 1, 1926.¹⁸ His wife Harriett C. Wagner died on May 24,

¹⁵ Local Matters *The Sun (1837-1985)*; Jul 1, 1873; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. 4.

¹⁶ Died *The Sun (1837-1985)*; Mar 24, 1915; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 6.

¹⁷ LEAVES 27 DESCENDANTS

The Sun (1837-1985); Mar 24, 1915; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 3.

¹⁸ Harry M. Wagner Dies At Home In Roland Park
The Sun (1837-1985); Jul 1, 1926; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 6.

1934 and was laid to rest in Druid Ridge Cemetery.¹⁹ Left as heirs to the Wagner business was two sons, Robert B. Wagner Harry M. Wagner, Jr., and two daughters, Lenore V. S. Wagner and Amelia C. Sutton. The children with the exception of Robert Wager will later be named in the appeals case at the center of this case study.

Wagner, Sr. was very involved the Baltimore business world as he was a member of the Wholesale Grocers Association of Baltimore in 1887.²⁰ The H. M. Wagner & Company, Inc. wholesale supply house is still in operation servicing the Baltimore-Washington metropolitan area. It is not known if H. M. Wagner, Jr. was as involved in the family business as his brother Robert B. Wagner as subsequent articles in *The Sun* highlight H. M. Wagner, Jr.'s involvement in foreign travel and study and later work with Morgan College and the Urban League. Robert Wagner and Wagner, Jr. graduated from Johns Hopkins University. H. Milton Wagner, Jr. in 1911 and later in 1920 became involved in the Young Men's Christian Association as foreign secretary.²¹ Starting in 1937, H. M. Wagner, Jr. is reported as being in attendance of several events given by the Urban League and is re-elected as President of the Urban League and vice chairman of Morgan College (presently Morgan State University) in 1939.²² He served on the Morgan State College board until his resignation in 1950. All of the researched articles make note his activities in improving the social and economic condition of African

¹⁹ Deaths (3) *The Sun (1837-1985)*; May 26, 1934; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. 19.

²⁰ DRAYAGE ON SUGAR Reported for the Baltimore Sun *The Sun (1837-1985)*; Feb 7, 1887; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 6.

²¹ HOMEWOOD THIS SUMMER *The Sun (1837-1985)*; Jun 14, 1911; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 11

²² Says Negro Needs Better J. Educational Facilities *The Sun (1837-1985)*; Feb 20, 1937; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 12.; 4 NEGROES PLACED ON MORGAN BOARD *The Sun (1837-1985)*; Nov 21, 1939; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 13.; EMORY GIVEN COLLEGE POST *The Sun (1837-1985)*; May 26, 1950; ProQuest Historical Newspapers The Baltimore Sun (1837-1985) pg. 15.

Americans in Baltimore as Morgan College is a college for African Americans and the Urban League is a multi-ethnic social service organization. H. M. Wagner, Jr. did not live to see resolution of this case that spanned almost forty years as his death is noted in *The Sun* in 1952.²³

Since Wagner, Sr. was very active in the church and business community, one can speculate if this case may have had politically motivations. These church and business connections may have resulted in increase business for the Wagner's, but there does not appear to be any connection to how or why Reed Bird Island was acquired. There is no evidence connecting the Wagner's to the campaigns of any governmental officials, but many of the social functions associated with the Methodist Church had local elected officials as guest or speakers. The Mayor of Baltimore in 1916 was James H. Preston. It is probably not a coincidence that Mayor Preston is known for the developments of the bridges in question, but no direct connection with the Wagner's. The present Hanover Street Bridge was built by the State Roads Commission, largely through the efforts of Mayor Preston, and the old Light Street Bridge crossing the Patapsco River was removed during his administration.²⁴

Not much is known about the other co-defendants (heirs of H. Milton Wagner, Jr.) of the case short of the social activities and organizations they were involved in and belonged to. Amelia W. Sutton, sister of H. Milton Wagner, Jr., was a vice president of the Urban League and was recording secretary for the Baltimore League for the Hard of

²³ DEATHS *The Sun* (1837-1985); Oct 5, 1952; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. S10.

²⁴ <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/001700/001703/html/1703bio.html>

Hearing.²⁵ Her daughter Sarah Ellen passed away in 1942.²⁶ She was also noted as being a member of the Baltimore Alumnae Chapter of Gamma Phi Beta sorority and attended meetings for the chapter.²⁷ There were no articles in *The Sun* to shed light on who Florence C. V. Mulligan was short of her name mentioned in the father's, Robert B. Wagner (brother of H. Milton Wagner, Jr.), notice of death in *The Sun* in 1943.²⁸ There was information about the other sister of H. Milton Wagner, Jr. who seems to have followed in her brother's footsteps with association and travel with the Methodist Episcopal Church.²⁹ Lenore Wagner also served as a vice-president of the Baltimore League of the Hard of Hearing.³⁰ It would appear from the lack of evidence linking the Wagner heirs to any political groups or governmental agencies that their motivations were merely for maintenance of land ownership.

Counsel

The plaintiff in this case was the Mayor and City Council of Baltimore City. The City was represented by assistant solicitor John R. Cicero. Cicero orchestrated the case-in-chief and conducted many of the witness examinations during trial.

²⁵ HARD OF HEARING ELECT *The Sun (1837-1985)*; Feb 11, 1932; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. 10; Benefit Card Party For Hard Of Hearing *The Sun (1837-1985)*; Jan 23, 1938; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. SC 12.

²⁶ Deaths *The Sun (1837-1985)*; Jun 22, 1942; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. 17.

²⁷ Club Notes *The Sun (1837-1985)*; Feb 7, 1954; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. SS22.

²⁸ R. B. WAGNER DIES AT HOME *The Sun (1837-1985)*; Oct 29, 1943; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. 5.

²⁹ FOUR EVANGELICAL PASTORS CHANGED *The Sun (1837-1985)*; Mar 15, 1924; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. 7. Member of the Baltimore branch, Women's Foreign Missionary Society of the Methodist Episcopal Church. She just returned from a year visit to China.

³⁰ Hard-Of-Hearing To Vie In Lip-Reading Contest *The Sun (1837-1985)*; Mar 20, 1931; ProQuest Historical Newspapers The Baltimore Sun (1837-1985), pg. 4.

William L. Marbury led the defense counsel for Wagner. Marbury was a nationally known trial attorney who handled Supreme Court arguments and other high-profile cases.³¹ He served with distinction as chief counsel of the procurement arm of the United States War Department during World War II, for which he received the Presidential Medal of Merit, the highest civilian honor awarded at that time.³² In 1948, Marbury was elected as a member of the Harvard Corporation and served until 1970.³³ Marbury was appointed as President of the Maryland State Bar Association.³⁴ Lastly, he was one of the founders of DLA Piper, the largest law firm in the United States.³⁵ Marbury had a similar interest in improving the educational condition of African Americans as H. Miton Wagner, Jr.; Marbury was the head of a commission that wanted to establish admission procedures for African Americans.³⁶

Evidence

A set of twenty-five photographs were presented as evidence. These images were taken in 1916 and depicted the land around the Light Street Bridge and the Hanover Street Bridge, which was under construction. The black and white photographs were taken at two different times during the day to show the area during high tide and low tide (see tables 3 and 4 below for examples).

³¹ http://www.harvardsquarelibrary.org/unitarians/clark_grenville.html.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ <http://www.law.com/jsp/article.jsp?id=1202431748925>

³⁶ MARBURY ASKS U. OF M. STUDY FOR NEGROES *The Sun (1837-1985)*; Sep 28, 1950; ProQuest Historical Newspapers *The Baltimore Sun (1837-1985)*, pg. 36.



Table 3. Exhibit 2-L. Low tide, 1916.



Table 4. Exhibit 7-H. High Tide, 1916.

A United States Coast & Geodetic Survey was offered by Cicero as evidence that Reed Bird Island was covered by water. This survey pinpointed the depth of water by various soundings throughout Patapsco River where Reed Bird Island is located. However, Marbury called attention to the fact that the map was based on information

developed between 1844 and 1899, subject to correction and surveys until 1904. He objected to it being used as evidence of the state of Reed Bird Island as it existed in 1909.³⁷

Cicero also offered as evidence a photocopy of a section of Nautical Chart No. 549, issued in the year 1918, by the U.S. Department of Commerce. Marbury called the validity of this map into question as well, because it was issued nine years after the land patent was issued to Bruns.³⁸

Cicero offered the compilation of the tides from September 11, 1908 through September 19, 1908.³⁹ This was the period in which the Anne Arundel county surveyor surveyed Reed Bird Island. Cicero also offered the compilation of the tides from September 6, 1909 to September 14, 1909,⁴⁰ the time in which the land patent was issued to Bruns for Reed Bird Island.

Witness testimonies were a major deciding factor in this case. John Mackall was a key witness. He was a State Roads Commission surveying engineer who was in charge of surveys and plans and acquisitions of rights-of-ways and matters of that nature.⁴¹ He designed and helped construct the Hanover Street Bridge in 1915-1917.⁴² In furtherance of his work, Mackall had physically been in the area of Reed Bird Island during the construction of Hanover Street Bridge. Mackall and others used row-boats during that time to cross through the Reed Bird Island area while surveying and coordinating construction of the bridge.⁴³ Cicero's examination of Mackall focused on having Mackall

³⁷ Transcript of Record at 31, *Wagner v. Mayor and City Council of Baltimore*, 210 Md. 615 (1956).

³⁸ *Id.*

³⁹ *Id.* at 33.

⁴⁰ *Id.* at 33.

⁴¹ *Id.* at 33-34.

⁴² *Id.* at 34.

⁴³ *Id.* at 34.

explain a plan in profile of the Hanover Street Bridge, which showed the elevation of the planned bridge above mean low tide.⁴⁴ Hanover Street Bridge was planned to be built directly over a portion of Reed Bird Island. This drawing showed that at no point did the elevation of Reed Bird Island exceed mean low tide. Mackall corroborated what the map showed by his own personal recollection of Reed Bird Island being covered with water during that time, saying that it was covered with water during normal and high tide.⁴⁵ However, he stated that Reed Bird Island was not covered by water at low tide.⁴⁶ This recollection dated back to 1912 and 1913, several years after the patent was issued. Mackall lastly revealed that the State Roads Commission put in a fill across Reed Bird Island from 1914-1915 that stood ten feet above mean low tide.⁴⁷

Joseph Johnson lived in Brooklyn and worked on the Patapsco River immediately around and over Reed Bird Island during the time the patent was issued.⁴⁸ Johnson's primary job was as a lead burner at the chemical works, but his secondary job was of the most importance to this case. Johnson made a side-job of soft-crabbing and carp-harpooning in the mud flats, as this muddy portion of the river provided great opportunity for such activities.⁴⁹ Johnson traversed the water over Reed Bird Island in his boat from 1905 to 1909, at which point there was not enough water for him to get across the area in his boat without striking bottom so he moved his boat to a different area.⁵⁰ He resumed his activities in the latter part of 1909/1910 through 1911 with soft-crabbing and carp-

⁴⁴ *Id.* at 34-36.

⁴⁵ *Id.* at 36.

⁴⁶ *Id.* at 37.

⁴⁷ *Id.* at 39.

⁴⁸ *Id.* at 39.

⁴⁹ *Id.* at 40.

⁵⁰ *Id.* at 43.

harpooning.⁵¹ Johnson also recalled skating across the frozen water over Reed Bird Island during the winters from 1906-1909.⁵² He recalled breaking through the ice many times and going home wet. According to Johnson, there was twelve inches of water over Reed Bird Island during a medium tide, in 1908 and 1909. Johnson also established that there was a deeper channel (about three feet deep) between the Brooklyn shore and Reed Bird Island that allowed easier row-boat navigation.⁵³ He referred to this channel as the “gut.” Johnson also provided his recollection that the water under the B&O Bridge was filled in 1900.⁵⁴ The B&O Bridge was upstream of what is now referred to as Reed Bird Island. After the fill was put in, the area known as Reed Bird Island began to fill in and reeds began to grow.⁵⁵ His experiences proved to be very valuable in determining that there was water over the island, but for a small period of time in the latter part of 1909.

George Potee lived on Hanover Street since he was born.⁵⁶ He was eleven years old in 1908 when the land was surveyed. During this time, he recalled playing in the water, which was “a little above” his waist during high tide.⁵⁷ He recalled that there was between six to twelve inches of water over Reed Bird Island during low tide.⁵⁸ He stated that there was always water covering Reed Bird Island at all times.⁵⁹ Potee confirmed the presence of reeds in the water and that hunters would wade out to the mud flats wearing hip boots in order to shoot the reed birds.⁶⁰ They would use row-boats to hold their guns

⁵¹ *Id.* at 46.

⁵² *Id.* at 48.

⁵³ *Id.* at 47.

⁵⁴ *Id.* at 47.

⁵⁵ *Id.* at 48.

⁵⁶ *Id.* at 55.

⁵⁷ *Id.* at 55.

⁵⁸ *Id.* at 55.

⁵⁹ *Id.* at 55.

⁶⁰ *Id.* at 57.

and ammunition and push the row-boats through the area because the reeds were so thick. He explained that the reeds themselves were rooted underwater and not on fast land.⁶¹

Richard W. Tyler was the fourth witness to be questioned during the Wagner case. He worked for the City of Baltimore as an associate engineer for the Bureau of Harbors.⁶² He has expertise in construction of municipal docks, piers, wharves, and has been involved in dredging, hydrographic survey work and other engineering work for Baltimore City. Cicero used Tyler's expertise to answer questions about the 1904 U.S. Coast and Geodetic survey that was entered as an exhibit. Tyler had used this chart in the course of his job so he was familiar with it. Tyler's responses regarding water depth presented on the chart came to the conclusion that there was no fast land to the east of the bridge. However, there were two spots that indicated there was "a little bit of land maybe above mean low water" approximately three-hundred feet west of the Light Street Bridge.⁶³ The bits of land were of such a small scale that Tyler wasn't comfortable with marking their locations on the map. He went on to say that the land that was above water was much smaller than 33 acres (the acreage of the land deeded to Wagner) and couldn't have been much over an acre or two.⁶⁴ Tyler, when presented with the soundings from the 1905 map and the 1920, determined that there were no differences in depth between the two maps, and concluded that there had been no major changes in the water depths in those 15 years.⁶⁵ When presented with photographs of the area in 1916, Tyler conceded

⁶¹ *Id.* at 59.

⁶² *Id.* at 60.

⁶³ *Id.* at 62.

⁶⁴ *Id.* at 62.

⁶⁵ *Id.* at 68.

that two spots appeared to be showing fast land, or at least cattails, at low tide, but he also stated that this land would be covered by water at high tide.⁶⁶

Henry C. Burke stated that he worked in Brooklyn starting in 1909 and could see the area now known as Reed Bird Island through his office window.⁶⁷ He stated that he canoed in the general vicinity but not over Reed Bird Island because it was very muddy and full of reeds. He noted, however, that he enjoyed watching people shoot reed birds from their row boats.⁶⁸ It's interesting to note that when Burke was questioned about his age, his numbers did not add up. He stated that he was 63 years old (when he testified), and stated under oath that he was 18 or 20 years old when he moved to Brooklyn in 1909. If he was indeed 63 years old at the time he testified, it would have made him 9 or 10 years old in 1909, not 18 or 20.

James B. Woodward was the eldest of the witnesses, coming in at 91 years old.⁶⁹ Woodward was asked several questions before the court determined that his memory of the specific area during 1909 did not warrant further examination.

John P. Helmer lived in Brooklyn since 1908 where he started a grocery store and was later appointed to the Anne Arundel County police department.⁷⁰ He testified that the fill from B&O bridge (in 1900) began to create fast land in the area directly east of the B&O Bridge in the area known as Birdview Island (determined to be a separate area from Reed Bird Island), in 1909.⁷¹

⁶⁶ *Id.* at 72.

⁶⁷ *Id.* at 75.

⁶⁸ *Id.* at 76.

⁶⁹ *Id.* at 81.

⁷⁰ *Id.* at 83-84.

⁷¹ *Id.* at 85-90.

Henry C. Bourke was the last witness to take the stand in the Wagner case. The court itself presented several questions to Bourke relating to whether or not Reed Bird Island was covered by water. Bourke testified that he could see ground there and “large muskrat places” too. Bourke was not asked the year on which he based his recollection.⁷²

Trial Opinion

Regarding the various witnesses, Judge Macgill commented in his opinion that their testimonies were not accurate after almost fifty years. Macgill believed that Mackall and Johnson’s testimonies were most important due to the fact that they “had reason to have their attention called to the locus in quo within the period which is important to the determination” of this case.”⁷³

Additionally, Macgill felt that the photographs taken of the area in 1916 were frustrating because they did not give a good downward view of the reeds which could shed light onto the question of whether there were only reeds present or if there was fast land.⁷⁴

Macgill determined that the Acts of 1862 contained the key law to apply to the facts in this case. Three sections of this statute laid out water rights for landowners whose land abutted on water. These include exclusive rights to make improvements into those waters, and entitlement to own of any land that forms in that water. The following sections codified these riparian rights. Section 45 stated that “the proprietor of land bounding on any navigable waters of the state is hereby declared to be entitled to all accretions of said land.”⁷⁵ Section 46 stated that “the proprietor of land bounding on any

⁷² *Id.* at 94.

⁷³ *Id.* at 118.

⁷⁴ *Id.* at 105.

⁷⁵ *Id.* at 101.

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...⁷⁶ To protect the aforementioned riparian rights in sections 45 and 46, section 48 stated that “no patent issued hereafter out of the Land Office shall impair or affect the rights of the riparian proprietors...and no patent shall hereafter issue for land covered by navigable waters.”⁷⁷

The common factor among all three sections of the Act is the term, “navigable waters.” Indeed, the definition of this term of art proved to be a major factor in deciding this case. If the court determined that navigable waters covered Reed Bird Island in 1909, then the according to section 48, a patent should never have been issued.

Two tests have been used to determine the presence of navigable waters: the common law test⁷⁸ and the civil law test⁷⁹. The former asks whether the waters covering the land are subject to the ebb and flow of the tide. If the water are subject to the ebb and flow of the tide, the waters are “navigable waters.” The common law test has historically been used in many Maryland cases but has fallen out of favor more recently with the introduction of the civil law test of navigability.

The civil law test determines the presence of navigable waters based on the ability for a vessel to traverse the body of water in question. It has been colloquially dubbed the navigability in fact test; if a vessel can navigate the body of water, then it is “navigable waters.” Like the first test, if this test can be satisfied then a patent should not have been

⁷⁶ *Id.* at 101.

⁷⁷ *Id.* at 101.

⁷⁸ 210 Md. 615, 624.

⁷⁹ *Id.* at 625.

issued to the land. The civil law test has been used in relatively recent cases and was even used at the Supreme Court level.⁸⁰

Judge Macgill pondered the question of which test was appropriate for use in this case and came to the conclusion that use of either test would be sufficient. He decided to make use of the common law test to dispense with the issue of navigable waters. He found that a preponderance of the evidence showed that Reed Bird Island was entirely covered by navigable water at the time the survey was taken and land patent granted.⁸¹ While he did not expound on why the water over Reed Bird Island is subject to the current, it is due the fact that Reed Bird Island is located where the mouth of the Patapsco River meets the Chesapeake Bay. The Chesapeake Bay is subject to the ebb and flow of the Atlantic Ocean and therefore Reed Bird Island influenced by the tide because it is located at the edge of the Chesapeake Bay.

Marbury and the defense counsel argued that use of the common law test was inappropriate for application given that the more modern civil law test was available.⁸² The court did not find Marbury's argument compelling and proceeded with its analysis of navigable water by applying the common law test. Based on the aforementioned facts, the court determined that since there was water over the land, and the water was subject to the ebb and flow of the tide, the common law test for navigability was satisfied. Therefore, Reed Bird Island was covered by navigable waters, making the patent and deed invalid.

Macgill further asserted that had Reed Bird Island been fast land, the patent would be invalid because it interfered with the riparian rights of the adjacent land owners - a

⁸⁰ *Id.* at 626.

⁸¹ *Id.* at 625.

⁸² *Id.* at 625.

direct violation of Section 46.⁸³ Macgill believed that allowing outside ownership of Reed Bird Island prevented the bounding landowners from having access to the deep channel. This was due to the fact that Reed Bird Island was directly in the path of the deep channel so it prevented the bounding landowners from making improvements⁸⁴ that would allow them access to the main channel.

Motions after the Trial

After the conclusion of the trial, Marbury and the defense counsel filed a motion for rehearing of the case based on new evidence that came to light after the trial. This new evidence came in the form of an affidavit from Harry MacCleod. Harry became aware of the case by reading about the court's decision in the newspaper. He then made a phone call to Marbury and told him about his knowledge of Reed Bird Island in 1909. In his affidavit, MacCleod stated that he was the son of John MacLeod, the man who made a joint arrangement with Bruns under which they patented Reed Bird Island. Harry was personally familiar with Reed Bird Island during the time in question and had been bird hunting on Reed Bird Island prior to 1909.⁸⁵ In his hunting expeditions, he would take a boat out to get to the island and then pull the boat onto Reed Bird Island itself to disembark. He got out and walked around on Reed Bird Island while bird hunting.⁸⁶ He wrote that there was dry ground on Reed Bird Island during even high tide.⁸⁷ There were reeds and marsh grasses growing over all the island and the grain that the reed birds fed on grew on the land that remained dry during high tide.⁸⁸ MacCleod also recalled joining

⁸³ Transcript of the Trial Record at 120.

⁸⁴ For example, dredging is a type of improvement that would allow the bounding landowner access to the main channel.

⁸⁵ Transcript of Trial Record at 60.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

his father and John Bruns in their initial excursion out to the island prior to the application for the patent. As they were heading to the island in their rowboat, a group of birds flew up and Bruns asked John what kind of birds they were, to which John responded that they were reed birds. Bruns replied that “we will name it Reed Bird Island.”⁸⁹ While they didn’t get out of the boat on that particular occasion, MacCleod contended in his affidavit that during the same time period he “had been hunting on the island and that it was dry enough so that [he] could walk around and hunt on it without boots.”⁹⁰

After filing the motion for rehearing based on this new evidence, the defense filed a notice of appeal to the Court of Appeals of Maryland for review of the trial decision. In response, Judge Macgill filed an order stating that his court no longer had jurisdiction once the notice of appeal was filed and thereby denied the motion for rehearing.⁹¹

Appellate Review

Chief Judge Brune sat as Chief Judge for the Court of Appeals of Maryland when Wagner’s case was appealed. Frederick W. Brune was born in Baltimore in 1894. After graduating from Harvard Law School and receiving a perfect score on the Maryland Bar Examination, Brune entered private practice in Baltimore, where he worked until 1954, at which point Brune was appointed Chief Judge to the Court of Appeals of Maryland.⁹²

Brune began his review of the case by grounding his analysis on the premise that Reed Bird Island was covered by water in 1909. Given this foundation, Brune needed only to satisfy one of two tests to prove that the waters over Reed Bird Island were

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 67.

⁹² http://www.msa.md.gov/msa/speccol/sc1500/sc1545/e_catalog_2002/murray.html.

navigable waters, thereby invalidating the patent and deed issued for Reed Bird Island based on the Acts of 1862.

Much like his contemporary in the Anne Arundel Circuit Court, Brune chose to apply the common law test of navigability, one that had been used in Maryland for many years, despite the introduction of the more modern civil law test. The common law test made a determination of navigability based upon whether the particular body of water was influenced by the ebb & flow of the ocean current. Using the same reasoning as the lower court, Brune determined that since there was water over the land, and the water was subject to the ebb and flow of the tide, then the common law test for navigability was satisfied. Therefore, Reed Bird Island was covered by navigable waters, making the patent and deed invalid.

Brune also asserted that even though his decision rested on the common law test of navigability, the facts at hand would have satisfied the civil law test as well. The civil law test of navigability had become popular and used in modern cases to determine navigability based on whether a vessel could actually traverse the body of water in question. Brune said that it was not necessary for a stream to be capable of carrying large vessels in order to be navigable in fact. In fact, Brune believed that only a small vessel needed to be capable of traversing the water over Reed Bird Island in order for it to be navigable in fact. Brune opined that ample witness testimony proved that rowboats and other small vessels were capable of, and had in fact, traveled through the waters covering Reed Bird Island during the time period that the land patent and deed were issued. It is interesting to note, however, that he did not address the testimony of Johnson where he said that he removed his boat from the mud flats in 1909 due to the fact that his small

boat struck bottom, presumably because the water receded enough that year to prevent small vessels from traversing the area.⁹³ Regardless, since Brune applied the common law test for navigability and satisfied it, he need not apply the civil test, as it would be redundant.

Brune also looked to case precedent to help make his decision to invalidate the Reed Bird Island land patent. *Melvin v Schlessinger*⁹⁴ is factually analogous to the situation here. It concerned ownership of Billiken Island, a piece of land within the Patapsco River which was southwest of Reed Bird Island, so close that the two islands almost adjoined.⁹⁵ In this case, the Court of Appeals of Maryland determined that sections 45 and 46 of the Acts of 1862 were applicable to Billiken Island and that navigable waters were present. This determination rendered the land patent to Billiken Island invalid. Brune felt that the factual similarities between *Schlessinger* and *Wagner* were many, and thus provided strong precedent to make the same decree.

Brune's affirmation of the circuit court decision sealed the fate of Reed Bird Island. The patent issued in 1909 was deemed invalid due to the determination that navigable waters covered Reed Bird Island in 1909. This invalidation rendered the deed sold to *Wagner* null and void.

Reflections on the Case

It is interesting that this case took over forty years to be resolved. The motives behind the state government wishing to make this area accessible to them were questioned. This case appeared to be about gaining access for control over the waterway where the island was for trade and commerce reasons. The interest in the pursuing

⁹³ Johnson returned the next year to resume his activities of soft crabbing and carp harpooning.

⁹⁴ 138 Md. 337.

⁹⁵ 210 Md. 615, 626.

getting Reed Bird Island's land patent quickly dissipated as the case lie dormant and after several decades and defendants was finally resolved.

A number of public works projects and plans for the area were noted in the local newspaper of Baltimore, *The Sun*. No plans could move forward until the issue of the land patent was resolved. There is no question that Reed Bird Island was at one point acknowledged as land above navigable waters as rents for billboards for advertising was collected and property taxes were paid. The question brought before the court was whether or not the land patent issued in 1909 was valid.

Over time the interest in the area of Reed Bird Island became an environmental issue. Due to changes in the environment, the island was and then wasn't and later was more importantly a place that needed protection from development. The island and area would once again be a place for families to gather and enjoy the outdoors.

Patapsco Valley State Park

Over a decade prior to the commencement of the Wagner trial, the Patapsco River Valley Commission set out to create a public park throughout the lower and upper Patapsco Valley.⁹⁶ A major obstacle to the creation of the park was the ownership dispute over the Mud Islands, consisting of Mud Island, Reed Bird Island, and Bridgeview Island. These parcels of land were privately owned which caused a problem for the Commission who envisioned this land to be part of the 15,089 acre park.⁹⁷ This project was part of a new effort to supply Baltimoreans with recreational park areas. The park was proposed to span the entire Patapsco Valley through a system of connecting parkways, and would provide city residents with opportunities for fishing, boating,

⁹⁶ "Patapsco Valley Commission Urges 15,089 Acres for Park," *The Baltimore Sun*, May 29, 1946.

⁹⁷ Clarence C. Tracy owned the other two islands. See "City to obtain Island by Condemnation Law," *The Baltimore Sun*, Nov 24, 1920.

camping, and picnicking.⁹⁸ The conflicting claims of title to the Mud Flats had existed for more than thirty five years and the City Solicitor's office had advised the Commission that a lawsuit would be necessary to determine the rights of the parties claiming ownership of the islands.⁹⁹

Aside from the conflict of ownership over the Mud Islands, another issue noted by the Patapsco River Valley Commission was that the land itself was problematic due to its muddy nature. This type of land did not allow picnicking or camping, so the Commission had proposed to fill in the area to make it firm. Even with faced with this issue, the Commission proclaimed that leaving the area to the "whims of private owners will not only lose to the public an area which can, with proper treatment, provide...recreational facilities, but will invite the ultimate establishment of an eyesore which would forever haunt the conscience of the city."¹⁰⁰

Conclusion

While this case began in 1916 as a real property dispute over land that the City wanted to use for dumping, when it finally came to trial in 1955 it had evolved into a public rights case that sought to give the people of Baltimore access to land for recreation and enjoyment. Unknowingly, the City of Baltimore endowed protection to an ecosystem that would in several decades become a focal point of environmental conservation - wetlands. While the area was known as a mud flat by residents of Brooklyn, Reed Bird Island perfectly fit the modern description of a wetland.¹⁰¹ The invalidation of the land patent ended the controversy over ownership of Reed Bird Island. Under the Section 45

⁹⁸ "Patapsco Valley Commission Urges 15,089 Acres for Park," *The Baltimore Sun*, May 29, 1946.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ A lowland area, such as a marsh or swamp, that is saturated with moisture, especially when regarded as the natural habitat of wildlife. See, <http://dictionary.reference.com/browse/wetland>.

of the Acts of 1862, the City of Baltimore, as owner of the land bounding the Patapsco River in front of Reed Bird Island, was entitled to Reed Bird Island because it was an accretion of the bounding land.

This case represents a progressive change of thinking in favor of the public use of lands for recreation and enjoyment over private ownership. The sections of the Acts of 1862 which established water rights were used in this case to make a coastal ecosystem into public land. However, these same laws could be asserted by individual land owners to essentially privatize and destroy waterways and wetlands across the Chesapeake Bay. Owners of coastal land had the negative incentive to increase their acreage by filling in wetlands, which would convey ownership to them because the filled area would be considered an accretion “made by natural causes of otherwise.”¹⁰² This was a problem that the Maryland Legislature recognized and addressed. In 1970, the water rights codified in the Acts of 1862 were repealed and replaced with Maryland’s Wetland Act.¹⁰³ This law sought to eliminate the destruction of wetlands by limiting ownership of accretions to only those accretions that were created naturally.¹⁰⁴

¹⁰² 46 Md. L. Rev. 801, 808.

¹⁰³ MD. Nat. Res. Code §§ 9-101 to 9-501.

¹⁰⁴ 46 Md. L. Rev. 801, 808.