

Title

Shreve v. Baltimore: A Municipal Misstep leads to a City Forever Beautiful

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Abstract

This paper explores municipal decision making in condemnation proceedings and whether or not the public use requirement protects individual property owners from poor municipal decision-making. When condemners are allowed to take in fee simple absolute, their decisions have lasting effects on property. The decisions of the Baltimore City government in its creation of a water system illustrate why some may be queasy about this. However, this may actually be desirable because it allows for municipalities, in particular, to both achieve the public purpose necessary at the time of condemnation and to improve in the future rather than go through the hassle of returning land a century later.

Disciplines

e.g. Law, Baltimore City History, Environmental Law, Public Utilities

I. INTRODUCTION

Lake Roland Park, a bucolic green space surrounding Lake Roland, sits just north of Baltimore City in the midst of suburban housing developments and roads.¹ The wealthy Buchanan family once owned the space until Baltimore City condemned it for a reservoir in 1857². The reservoir remained operational until 1915 when the City transformed its water system for public health reasons.³ The City repurposed the reservoir and surrounding land as a recreation area.⁴ In 1965, more than one hundred years after the condemnation, C. A. Buchanan Shreve and other heirs of the Buchanan estate, brought a suit in ejectment against the Mayor and

¹"Lake Roland - Baltimore County." Lake Roland. Baltimore County Md., 21 Oct. 2015. Web. 30 Nov. 2015.

² *Shreve v. Baltimore*, 243 Md. 613, 616 – 617 (1966).

³ *See infra*, Part III.D.

⁴ *See infra*, Part III.D.

City Council of Baltimore requesting return of the property and one and half million dollars in damages.⁵ The heirs claimed that the Enabling Act under which the City had condemned the Buchanan land only allowed the City to take what was necessary for its water system.⁶ So, if the City ceased to use property taken under the Enabling Act as part of the water system, it would revert to the original owner or his successor in interest.⁷ The Maryland Court of Appeals threw the suit out on summary judgment.⁸ This paper explores both the historical and legal aspects of this eminent domain dispute.

First, this paper will embark on an historical overview of how the Buchanan property came to be condemned⁹ and why it eventually became a park.¹⁰ Both these choices were largely the product of contemporary politics.¹¹ Buchanan's land was condemned as a result of the City's 1854 decision to expand the Jones Falls rather than utilizing the more voluminous Gunpowder Falls.¹² Historians attribute this decision to contemporary fiscal conservatism.¹³ The early Twentieth Century decision to cease using the Jones Falls as a water source and convert the reservoir area to a park was equally rooted in contemporary movements – Progressivism and the City Beautiful Movement.¹⁴ The use as a reservoir was discontinued as a matter of public health necessity.¹⁵ This decision was in line with other progressive improvements at the time.¹⁶ The

⁵ See *infra*, Part V.A.

⁶ See *infra*, Part V.D.1.

⁷ See *infra*, Part V.D.1.

⁸ See *infra*, Part V.D.2.

⁹ See *infra*, Part II.

¹⁰ See *infra*, Part III.

¹¹ See *infra*, Part II, III.

¹² See *infra*, Part II.C.

¹³ See *infra*, Part II.C.

¹⁴ See *infra*, Part III.

¹⁵ See *infra*, Part III.A.

choice to convert the land to a park was in line with the City Beautiful movement, which emphasized green space.¹⁷

Second, the paper will explore the correctness of the decision in Shreve's case in light of the history.¹⁸ The arguments presented in briefs represent two fundamental tensions.¹⁹ First, when confronted with statutory interpretation how far from the four corners of the document should the court go?²⁰ Second, how much protection from the state eminent domain power should the property owners be afforded?²¹ Or, conversely, how much discretion should a municipality have?²²

II. AN ACT FOR SUPPLYING BALTIMORE CITY WITH DRINKING WATER

A. *Baltimore City and its water system at the turn of 1850's*

In the late 1840's and early 1850's, Baltimore was booming.²³ The construction of the B & O Railroad brought wealth and opportunity to the City.²⁴ The population swelled²⁵ as waves of immigrants fleeing agricultural crisis in Europe chose to settle there.²⁶ From 1840 to 1850, the

¹⁶ *See infra*, Part III.

¹⁷ *See infra*, Part III.

¹⁸ *See infra*, Part VI.

¹⁹ *See infra*, Part VI.

²⁰ *See infra*, Part VI.1.

²¹ *See infra*, Part VI.2.

²² *See infra*, Part VI.2.

²³ Redner, Sidney. "Population History of Baltimore from 1790 - 1990." Baltimore Population History. Boston University, 24 Nov. 1998. Web. 30 Nov. 2015.(*hereinafter* Population).

²⁴ Olsen, Sherry. BALTIMORE: THE BUILDING OF AN AMERICAN CITY. Baltimore: Johns Hopkins UP, 1980. Print.

²⁵ *Id.* at 102 – 103.

²⁶ *See, id.* (explaining that agricultural depression in Ireland and Germany brought surges of immigrants in 1847 and 1854 respectively). Public works projects including the B&O Railroad also pulled these immigrants to the United States from Europe. *Id.* at 103.

population grew from 102,313 to 169,054 – a sixty-nine increase in just a decade.²⁷ This growth taxed the city's public works, especially the underdeveloped water and sewage systems.²⁸

At the turn of the 1850's, Baltimore's water system was privately owned and wholly inadequate.²⁹ One company exercised monopoly power over the system.³⁰ As a result, only half the city had water main service and only a quarter of residents purchased their water from the company.³¹ Poorer residents were unable to afford the service.³² While the wealthy had water pumped into their townhomes via pipes, poorer residents had to walk blocks to retrieve water from shallow polluted wells around the city.³³ The pollution was attributable to two things.³⁴ First, Wealthy residents, contrary to the law, would drain their privies into the Jones Falls.³⁵ Second, the sewer system in place was defective.³⁶ Human waste in the water supply led to the spread of disease especially during the summer months.³⁷ Each year many died from intestinal diseases such as cholera.³⁸ Realizing that the city government would soon take over the water business, the water company began improving and expanding service.³⁹ It constructed a reservoir

²⁷ Population, *supra* note 23.

²⁸ *See Infra*, notes 29 – 38, and accompanying text.

²⁹ Hendrickson, Martha A. "Montebello Water Filtration Plant I: Clean Water for City & Suburb Alike." Ed. Youssi J. Adam. HISTORY TRIALS OF BALTIMORE COUNTY 43.Summer (2012): 1-20. Print.

³⁰ *Id.* at 5.

³¹ OLSEN, *supra* note 24, at 132.

³² Hendrickson, *supra* note 29, at 5.

³³ *Id.*

³⁴ *See infra*, notes 35 – 36 and accompanying text.

³⁵ OLSEN, *supra* note 24, at 132.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* In 1849, in one almshouse alone, eighty-six out of seven hundred and fifty residents died for cholera. *Id.* at 134.

³⁹ *Id.* at 132.

where the Belvedere Hotel presently stands and bought properties along the Jones Falls to protect its property rights from the municipality.⁴⁰ However, it was not enough.⁴¹

In 1852, John Smith Hollins took office as mayor.⁴² During his tenure as mayor, Hollins took on a many public projects to address the growing city's needs.⁴³ New schools and markets were constructed.⁴⁴ The development of a sewer system got underway.⁴⁵ Most significantly, he laid the groundwork for the conveying pure, clean water to the City.⁴⁶ Under Hollins, the City took over the water system from the private company and obtained condemnation powers from the Maryland General Assembly to expand the water system.⁴⁷

B. The Maryland State Legislature Authorizes Eminent Domain to Bring Clean Water to the Growing City.

In 1853, Baltimore City, as a municipal corporation created by the General Assembly, did not have general eminent domain powers.⁴⁸ Each time the City wanted to embark on a new civic project, City officials had to request the power of condemnation from the Maryland General

⁴⁰ OLSEN, *supra* note 24, at 132.

⁴¹ *See Infra*, Part II.B, II.C.

⁴² "John Smith Hollins." Archives of Maryland: Biographical Series. Maryland State Archives, 20 May 2002. Web. 30 Nov. 2015.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See Infra*, Part II.B.

⁴⁷ *See Infra*, Part II.B.

⁴⁸ 1898 Md. Laws 123.

Assembly.⁴⁹ In 1853, the Maryland General Assembly granted the City the power to condemn lands for the purpose of “conveying water” for fire protection, security and health.⁵⁰

The first section purported to empower the City to purchase a variety of interests in land and water for the completion of its project.⁵¹ In relevant part, this section gives the City the following powers:

Contract for, purchase, lease and hold *to them and their successors, in fee simple*, or for a *term of years* any land, real estate, brook, water and water course, and also *the right to use and occupy forever or for a term of years*, any land, real estate, brook, water and water course which they may conceive expedient and necessary for the purpose of conveying water into the said city.⁵²

To parse this language a little, it appears that the city could purchase any number of estates in the property it sought to acquire. The words “to them and their successors, in fee simple” seem to imply a fee simple absolute estate. The words “for a term of years” seem to connote a lesser interest.⁵³ Finally, “[T]he right to use and occupy” seems to connote a right of way.⁵⁴ The discretion the General Assembly afforded the City is likely attributable to the varied property interests the City would need to acquire in completing a water system.⁵⁵ A reservoir, for example, would entail a greater interest, maybe even fee simple absolute, because the City would

⁴⁹ *Cf.* 1853 Md. Laws 545.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 1853 Md. Laws 545, § 1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See infra*, notes 56 – 57 and accompanying text.

need to flood the property to create it.⁵⁶ However, for laying pipes to transport water from the reservoir to homes and businesses, the City would only need to acquire an easement.⁵⁷

The second section detailed the procedure for condemning the property if the City and the property owner could not agree.⁵⁸ First, the City would issue a warrant to the sheriff of the county in which the property was located commanding him to summon a jury of twenty uninterested freeholders to value the property.⁵⁹ The Mayor and City Council were also to give twenty days notice to the property owner.⁶⁰ On the specified day, the jury would convene on the property.⁶¹ The City and the landowner would each strike four jurors leaving twelve jurors to assess the amount necessary for the City to “purchase and hold or use” the property.⁶² The jurors would then swear to “justly and impartially value the damages which the owner would sustain by the use and occupation” by the City.⁶³ Next the jurors would return the value of the land and the quality of title the city was to have.⁶⁴ Once the jurors performed their inquisition and reduced it to writing, a court could then either confirm or deny the condemnation.⁶⁵

The third section gave the Mayor and City Council the ability to defray its costs by issuing certificates of debt “to be denominated on the face ‘Baltimore Water Stock’” in lieu of

⁵⁶ See, *Choctaw & Chickasaw Nations v. City of Akota*, 207 F. 2d 763, 767 (10th Cir. 1953) (explaining that a reservoir would most likely require a fee simple takeing).

⁵⁷ Cf. *Johnson v. State Roads Comm.* 222 Md. 493 (1960) (explaining that in the case of rail roads, the tracks are most frequently taken as easements).

⁵⁸ 1853 Md. Laws 545, § 2.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 1853 Md. Laws 545, § 2.

⁶⁵ *Id.*

cash purchases.⁶⁶ These certificates would accrue interest of six cents per year.⁶⁷ The fourth section gave the city power to purchase property of other companies conveying water to the city – thus disbanding the private water works.⁶⁸

The fifth and final section forbade the City to build a dam at Raven’s Rocks that would submerge land more than eighty feet “from the present banks of the Gun Powder River”.⁶⁹ While the Gunpowder would eventually become the City’s water source, the Jones Falls was the first source tapped under this act.⁷⁰ Based on this section, it seems that the original intent of the City, under Mayor Hollins, was to utilize the Gunpowder River.⁷¹ However, Hollins left office before getting to shape the course of the water system.⁷²

C. The City Chooses the Jones Falls

Once the City acquired the private water company in 1853 for one million three hundred and fifty dollars, it remained to be seen how the City would develop the water system.⁷³ The City had two options: the Gunpowder Falls or the Jones Falls.⁷⁴ The Jones Falls flows from northwestern Baltimore County through Baltimore City and out into the Patapsco River.⁷⁵ The Gunpowder Falls flows from farther north of the City and east of the City into the Chesapeake

⁶⁶ 1853 Md. Laws 545, § 3.

⁶⁷ *Id.*

⁶⁸ 1853 Md. Laws 545, § 4.

⁶⁹ 1853 Md. Laws 545, § 5.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *See infra*, Part II.C.

⁷³ OLSEN, *supra* note 24, at 136.

⁷⁴ *Id.* at 137.

⁷⁵ *See Appendix A.*

Bay.⁷⁶ The private water company had already begun developing the Jones Falls making it the cheaper option.⁷⁷ Additionally, developing the Gunpowder Falls would require more complex and costly engineering feats, as it does not flow through the City.⁷⁸ However, the Gunpowder Falls was a better water source due to its “volume and cleanliness.”⁷⁹ Virtually all engineering experts consulted were of the opinion that the Gunpowder, despite greater construction costs, would be a superior water source.⁸⁰

When the time came to choose between the Jones Falls and Gunpowder Falls, the City leadership and economic conditions had changed.⁸¹ After 1852, the completion of railroad projects led to unemployment and a downward economic turn.⁸² This economic climate along with the recent Irish Catholic immigration and the impending abolition of slavery brought about the rise of Know-Nothing or American party.⁸³ The American Party was both anti-immigrant and pro-slavery.⁸⁴ Nationally, their main priorities were electing “native” American politicians and placing a twenty-five year residency requirement on citizenship.⁸⁵ In Maryland, they were associated with the temperance movement.⁸⁶

⁷⁶ *See Appendix A.*

⁷⁷ *Id.*

⁷⁸ *Id.* One engineer, T. E. Sickels, proposed a seven-mile tunnel between the Gunpowder River and the city running through solid rock. *Id.*

⁷⁹ OLSEN, *supra* note 24, at 137.

⁸⁰ *Id.*

⁸¹ *See infra*, at note 82 – 86 and accompanying text.

⁸² *Id.* at 108.

⁸³ "The Know Nothings." Teaching American History in Maryland. Maryland State Archives, 2005. Web. 30 Nov. 2015.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

American Party Mayor, Samuel Hinks, took office in 1854.⁸⁷ Another American Party mayor, Thomas Swann, succeeded him in 1856.⁸⁸ Both Hinks and Swann believed that taking the cheaper route of expanding the Jones Falls water system to sources beyond the city limits would best serve the City.⁸⁹ In reference to the decision to develop the Jones Falls over the Gunpowder Falls, Mayor Hicks explained that the greater volume of the Gunpowder Falls need not be a factor because the population would not grow to “six-hundred thousand souls” until well after the “the youngest male child of the present day would be an old man.”⁹⁰ Hinks, himself, attributed this to a desire to not incur debt for the city.⁹¹ This seemed like a reasonable assessment given that economic growth had halted when the B&O Railroad project had ended.⁹² However, it did not account for the influxes of European Catholic immigrants, which continued to increase Baltimore’s population.⁹³ It also did not account for the engineers’ assessment that the Gunpowder would provide cleaner water.⁹⁴ Given the extent to which the Jones Falls was polluted, this was more than a mere oversight.⁹⁵ This rash decision-making would later prove to be the impetus of a public health crisis.⁹⁶

D. *The Buchanan property is condemned and transformed into Swann Lake*

⁸⁷ OLSEN, *supra* note 24, at 137. Hinks was a businessman from Ellicott City. “Samuel Hinks.” *Maryland State Archives: Biographical Series*. Maryland State Archives, 20 May 2002. Web. He and his brother had been in the grain and flour commission business together. *Id.* As mayor, authorized the construction of the city jail at Madison and Van Buren, and instituted a new market house for the world famous Lexington Market. *Id.*

⁸⁸ OLSEN, *supra* note 24, at 137.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 108.

⁹³ *See supra*, note 26.

⁹⁴ *See supra*, notes 79 – 80 and accompanying text.

⁹⁵ *See supra*, notes 37 – 38 and accompanying text.

⁹⁶ *See infra*, Part III.A.

A major part of the Jones Falls project was the construction of a dam on the Jones Falls north of the city limits.⁹⁷ Mr. Charles A. Buchanan owned the site.⁹⁸ The City and Mr. Buchanan were unable to agree upon the value of the land.⁹⁹ An inquisition followed as per section two of the Enabling Act.¹⁰⁰ The Water Board President, Mr. Columbus O'Donnell, sent a letter to the Baltimore County Justice of the Peace, Mr. George W. Ritter, asking him to assemble a jury for the inquisition.¹⁰¹ Mr. Ritter, in turn, issued a warrant to the County Sherriff, Mr. William Pole Esq., requesting him to assemble a jury on the 10th of September.¹⁰² Mr. O'Donnell also notified Mr. Buchanan of the inquisition.¹⁰³

The inquisition concluded on October 6th, 1857.¹⁰⁴ The jury assessed the property at thirteen thousand dollars.¹⁰⁵ Mr. Pole had instructed the jury to assess both the damages to Mr. Buchanan for the city's use and occupation of his land as well as the "fee simple estate therein."¹⁰⁶ The jury, in returning its verdict, used the same language stating that is was not only assessing damages from condemnation, but also the "fee simple thereof".¹⁰⁷ The jury left to Mr. Buchanan and his heirs a private road leading to a rail station on his property¹⁰⁸. The Circuit

⁹⁷ Hendrickson, *supra* note 29, at 6.

⁹⁸ *See*, Appendix B.

⁹⁹ Joint Record Extract, *Shreve v. Baltimore*, 243 Md. 613, E 15 (1966) (No. 370) (*Hereinafter* Joint Record Extract).

¹⁰⁰ *Compare id.* at E. 15 – 22 with 1854 Md. Laws 545 §2.

¹⁰¹ Joint Record Extract, *supra* note 99, at 15 – 22.

¹⁰² *Id.* at E. 15.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at E. 17.

¹⁰⁵ *Id.* at E. 21.

¹⁰⁶ *Id.* at E. 17.

¹⁰⁷ Joint Record Extract, *supra* note 99, at E. 18.

¹⁰⁸ *Id.* at E. 21.

Court for Baltimore County confirmed the condemnation and Mr. Buchanan sent notice that the condemnation had been satisfied.¹⁰⁹

A dam was constructed on the Jones Falls and a reservoir formed.¹¹⁰ The city christened the new body of water Swann Lake.¹¹¹ It would later come to be called Lake Roland.¹¹²

E. *The owners of condemned property fight back*

While the city's condemnation Mr. Buchanan's land was only met with only resistance as to the value,¹¹³ other landowners challenged the validity of the takings.¹¹⁴ Three such cases went to the Maryland Court of Appeals.¹¹⁵

In *Graff*, the Court held that after a jury valued the property as per the Enabling Act, the City was not obligated to pay for the land.¹¹⁶ A jury entered on Graff's property at Stony Brook Run and completed an inquisition.¹¹⁷ After a court confirmed the condemnation, the city decided not to purchase Graff's property, as it no longer fit in the plan.¹¹⁸ Graff took the City to court to

¹⁰⁹ *Id.* at E. 22.

¹¹⁰ "History of the Park - Lake Roland Nature Council." *Lake Roland Nature Council*. Lake Roland Nature Council, 2015. Web. 30 Nov. 2015. <<http://lakeroland.org/committee/history-of-the-park/>>.

¹¹¹ *Hendrickson, supra* at note 29, at 6.

¹¹² *Id.*

¹¹³ *See supra*, Part II.E.

¹¹⁴ *Graff v. Baltimore*, 10 Md. 544 (1857); *Kane v. Baltimore*, 15 Md. 240 (1860); *Taylor v. Baltimore*, 45 Md. 576 (1877).

¹¹⁵ *Graff v. Baltimore*, 10 Md. 544 (1857); *Kane v. Baltimore*, 15 Md. 240 (1860); *Taylor v. Baltimore*, 45 Md. 576 (1877).

¹¹⁶ *Graff*, 10 Md. at 544.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

force it to pay for the condemnation.¹¹⁹ The Maryland Court of Appeals explained that the entry of the jury on Graff's land was not a taking because it "does not divest the owner's title." Title would have only divested if the city had actually tendered compensation.¹²⁰ The Court held that the City was not obligated to purchase the land, which it did not deem necessary for conveying water.¹²¹ To hold otherwise, it said, would be a great burden on the citizens of Baltimore, as the City would be forced to purchase unnecessary property with taxpayer dollars.¹²²

In *Kane*, the City had condemned land from a Mr. Tonge.¹²³ After the inquisition, but before the City paid Tonge, other individuals asserted interests in the land.¹²⁴ The City interpleaded and a court declared that it owned the property in fee simple.¹²⁵ Later, Tonge became insolvent, and Kane¹²⁶ purchased his property at an auction.¹²⁷ Kane then filed suit to enjoin the City from interfering with his use of the property as a mill.¹²⁸ He claimed that the City could not stop him from operating the mill because its operation did not interfere with the City conveying water.¹²⁹ The City contended that it had purchased a fee simple absolute estate and

¹¹⁹ *Id.*

¹²⁰ *Graff*, 10 Md. at 551.

¹²¹ *Id.*

¹²² *Id.* at 552.

¹²³ *Kane*, 15 Md. at 247.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ "Marshall Kane's Land Speculation?" *Maryland State Archives Special Collections*. Maryland State Archives, n.d. Web.

<http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000230/000000/000004/restricted/kane_land.html>. Kane purportedly was speculating on land surrounding the Jones Falls around the time that the City was beginning the water system project. *Id.*

¹²⁷ *Kane*, 15 Md. at 247. The city had attempted to destroy the dam on Kane's land. *Id.*

¹²⁸ *Id.* at 247 – 248.

¹²⁹ *Id.* at 248. Kane explained that the dam merely made the water pass over a water wheel rather than flowing directly into the Jones' Falls. *Id.*

thus, could use the water flowing over the dam in any way it saw fit.¹³⁰ The Court of Appeals agreed with Kane.¹³¹ It explained that, under the Maryland Constitution, the General Assembly could only grant power to condemn for a public purpose.¹³² Here, the public purpose was a water system and the City could condemn no more than was necessary to achieve that purpose.¹³³ Thus, they could only require Kane to stop using the mill if it interfered with the conveyance of water.¹³⁴ It did not.¹³⁵ Kane could keep his mill.¹³⁶

In *Taylor*, the City sought to construct a subterranean aqueduct seventy-nine to one hundred and twenty feet below the surface of Taylor's property.¹³⁷ There was some evidence that the jury had valued the Taylor property solely based on its subterranean value.¹³⁸ Taylor claimed that the City should have to pay for the surface rights as well.¹³⁹ The Court found the language in the Enabling Act granted the City broad discretion to condemn any interest in land up to a fee simple.¹⁴⁰ The Court again explained, as it had in *Kane*, that "the city could only acquire under a condemnation *such use and occupation* as was necessary for the purpose mentioned in the Act, under which the condemnation was had."¹⁴¹ Thus, the jury need only assess damages for what

¹³⁰ *Id.* at 249.

¹³¹ *Kane*, 15 Md. at 250.

¹³² *Id.* at 249.

¹³³ *Id.* at 249 – 250.

¹³⁴ *Id.* at 250.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Taylor v. Baltimore*, 45 Md. 576, 578 (1877).

¹³⁸ *Id.* at 579.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 579 – 580.

¹⁴¹ *Id.* at 580 – 581 (citing *Kane*, 45 Md. 240 (1887)).

the City needed – a right of way to construct a subterranean tunnel.¹⁴² The City did not need to pay for the surface rights.¹⁴³

These three cases purport to both protect the landowner's property rights and the City's discretion.¹⁴⁴ The City had discretion to determine exactly what property interest was necessary for its water project.¹⁴⁵ It could not be required to purchase more.¹⁴⁶ The City also could not get greedy and interfere with property interests that did not inhibit its conveyance of water.¹⁴⁷ What remained unclear was the durability of the interests the City acquired.¹⁴⁸

F. *A new and improved, yet imperfect water system*

When it was completed in 1862, the City's new water system looked as follows.¹⁴⁹ The dam constructed on Buchanan's land created a lake, Lake Roland.¹⁵⁰ Water flowed in a five by six conduit four miles to a reservoir in the Hampden neighborhood and to two other reservoirs – the Mt. Royal Reservoir and the Lake Chapman Reservoir.¹⁵¹ The Baltimore Sun proudly

¹⁴² *Id.* at 580.

¹⁴³ *Taylor*, 45 Md. at 580.

¹⁴⁴ *Compare, Graff*, 10 Md. at 552 (explaining that giving the City discretion in condemnation even after the inquisition was necessary to protecting the taxpayers), and *Taylor*, 45 Md. at 579 – 580 (explaining the Enabling Act purports to give the City broad powers to condemn interest in land including a fee), *with Kane*, 15 Md. at 249 – 250 (explaining that the City could not condemn an interest unnecessary to achieve the public use specified by the legislature).

¹⁴⁵ *See, Graff*, 10 Md. at 552 (explaining that the city not the property owner determines what is necessary to achieve the public use).

¹⁴⁶ *See, Taylor*, 45 Md. at 580 (explaining that the jury only needed to return damages for the property the city found necessary).

¹⁴⁷ *See, Kane*, 15 Md. at 250 (explaining that Kane's dam did not interfere with the flow of water, and so, the city could not take his property and prevent him from using the dam).

¹⁴⁸ *See Generally, Shreve*, 243 Md. 613 (1965).

¹⁴⁹ *See Infra*, notes 144 – 150 and accompanying text.

¹⁵⁰ OLSEN, *supra* note 21, at 137.

¹⁵¹ Hendrickson, *supra* note 26, at 6.

announced the system's completion and stated that its thirty million gallon capacity promised to serve Baltimore for many generations to come.¹⁵² It also explained that the new water system was far less expensive than those in other major cities.¹⁵³ The Baltimore system conveyed water using only gravity whereas other cities had to utilize pumps.¹⁵⁴ As a result, the construction had been much cheaper.¹⁵⁵ In 1862, another reservoir was planned where Druid Lake Park is today.¹⁵⁶ The new system allowed for greater access to water for city residents – an exciting innovation for many, who had previously needed to walk blocks to retrieve water from wells.¹⁵⁷ However, the system was not without its problems.¹⁵⁸

Mayor Hinks' prediction of the city's population growth potential proved wrong.¹⁵⁹ By 1870, the population had already grown to 276,354.¹⁶⁰ In 1874, the City decided to augment the existing Jones Falls system and tap the Gunpowder Falls acknowledging that it would provide the city with a "cleaner, more prolific source of water".¹⁶¹ The new project was completed in 1881 with a dam at Loch Raven.¹⁶² From there, a conduit ran seven and a half miles to the new Montebello Reservoir.¹⁶³ Another reservoir was added at Lake Clifton in 1888 to accommodate

¹⁵² "Completion of Water Works – Official Visit of City Council." *The Baltimore Sun* [Baltimore] 15 May 1862: 1. Proquest. Web. 28 Nov. 2015.

¹⁵³ *Id.*

¹⁵⁴ Hendrickson, *supra* note 29, at 6.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *See infra*, notes 152 – 174 and accompanying text.

¹⁵⁹ *See supra*, note 85 and accompanying text.

¹⁶⁰ Population, *supra* note 23.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

further population growth.¹⁶⁴ These innovations led to improved water clarity; however, they did not rid the water of bacteria.¹⁶⁵ And the city's population continued to swell.¹⁶⁶ Between 1870 and 1900, it grew from 276,354 to 558,485¹⁶⁷ in part due to annexation.¹⁶⁸

III. BALTIMORE'S WATER SUPPLY TRANSITIONS AND A PARK IS DEVELOPED AT THE OLD RESERVOIR SITE

A. *Dirt and Disease flow from Baltimore City's Taps*

At the turn of the Twentieth Century, disease, a growing population, and advances in germ theory pushed the City to make significant leaps in sanitation.¹⁶⁹ The City's population stood at a half a million and growing.¹⁷⁰ With respect to the water supply, city officials found themselves back at square one.¹⁷¹ The Jones Falls was an open sewer flowing into the harbor.¹⁷²¹⁷³When it did not rain, the water supply was inadequate for the growing population.¹⁷⁴ When it did rain, city residents found muddy, murky water flowing from their taps.¹⁷⁵ The water tasted so poor that some residents continued to get their water from the shallow wells that had caused

¹⁶⁴ Hendrickson, *supra* note 29, at 6.

¹⁶⁵ *Id.*

¹⁶⁶ Population, *supra* note 23.

¹⁶⁷ *Id.*

¹⁶⁸ OLSEN, *supra* note 24, at 217.

¹⁶⁹ *See Generally*, Hendrickson, *supra* note 29 (explaining the various factors that pushed Baltimore to improve its water supply).

¹⁷⁰ Population, *supra* note 23.

¹⁷¹ Hendrickson, *supra* note 29, at 6.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

disease in the mid-19th century.¹⁷⁶ Not only was the tap water muddy and poor tasting, but it also carried disease.¹⁷⁷ The City was not yet employing chemical sanitation, and sewage and bacteria contaminated groundwater due to the lack of a proper sewage system.¹⁷⁸ Due to the continued presence of waste in the water system, typhoid, a waterborne pathogen, ran rampant through the City.¹⁷⁹ There were thirty-five typhoid deaths per one hundred thousand residents in Baltimore in the first decade of the Twentieth Century.¹⁸⁰

Citizens urged for improvements to the water system.¹⁸¹ The great fire of 1904 presented the first opportunity to rebuild and introduce sanitary systems.¹⁸² However, due to political disagreements, private money ended up rebuilding the area; so, the City lost its opportunity to shape the development.¹⁸³ Finally, under Mayor Mahool in 1908, the City passed a five million dollar water loan to improve the water supply.¹⁸⁴

When the City began addressing the water issue this time, the municipal government's priorities had changed.¹⁸⁵ At the time, the City Beautiful movement and the progressive movement were in full swing.¹⁸⁶ The Municipal Arts Society led the push for an underground

¹⁷⁶ *Id.*

¹⁷⁷ Hendrickson, *supra* note 26, at 7.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Ellms, Joseph W. *Water Purification*. New York: McGraw-Hill Book, 1917. Print. (p. 407).

¹⁸¹ Wittman, Ezra B. "Our Water System." *Some Things You Should Know about Your City Government: Series of Practical Talks on Baltimore*. Baltimore: Press of Thomas & Evans Print., 1913. p. 29. Web.

¹⁸² Hendrickson, *supra* note 29, at 7.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See infra*, notes 186 – 191 and accompanying text.

¹⁸⁶ Hendrickson, *supra* note 29, at 6.

sewage system in conjunction with more parks.¹⁸⁷ Meanwhile the progressive movement pushed for “child saving” or lowering the infant mortality rate.¹⁸⁸ This included various measures including improvements to the water system and milk pasteurization.¹⁸⁹ Both of these movements shaped the improvements made to the water system.¹⁹⁰ This was no longer a city government looking to put a mere Band-Aids on a gaping wound, but a government looking to truly reshape the face of the City.¹⁹¹

Given how long it had taken to respond to this issue, the City found itself with many questions to answer.¹⁹² In 1913, the city’s water engineer, Ezra B. Wittman, delivered a talk addressing concerns and explaining the city’s progress in water sanitation and purification to the Baltimore Women’s Civic League.¹⁹³ This talk is preserved in a pamphlet entitled *Some Things You Should Know About Your City Government*.¹⁹⁴ Wittman first acknowledged that the water had been muddy for some time due to agricultural run off.¹⁹⁵ He then explained that the problem was particularly acute in East Baltimore, where there was no sewage system.¹⁹⁶ Next, he went on to list the measures he was taking and would take to amend the issue.¹⁹⁷ First, in 1911, he had

¹⁸⁷ *Id.*

¹⁸⁸ OLSEN, *supra* note 24, at 266.

¹⁸⁹ *Id.*

¹⁹⁰ Hendrickson, *supra* note 29, at 6.

¹⁹¹ *See infra*, notes 192 – 213 and accompanying text.

¹⁹² Hendrickson, *supra* note 26, at 7.

¹⁹³ Wittman, Ezra B. "Our Water System." *Some Things You Should Know about Your City Government: Series of Practical Talks on Baltimore*. Baltimore: Press of Thomas & Evans Print., 1913. p. 29. Web.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 30.

¹⁹⁷ *See infra*, notes 198 – 213 and accompanying text.

started adding calcium hydrochloride to the water supply.¹⁹⁸ Then, at the advice of the District of Columbia's water engineer, he began adding alum.¹⁹⁹ This combination of chemicals reduced the amount of bacteria in the water supply dramatically.²⁰⁰ As a result, typhoid cases in the City reduced by half.²⁰¹ However, the water clarity did not improve because of mud residue left in the pipes.²⁰² The City, at the advice of consultants,²⁰³ decided to take the modernization of the water supply further.²⁰⁴ The consultants recommended constructing a higher dam and a water filtration system.²⁰⁵ The City agreed to both.²⁰⁶ A higher dam would be constructed at Loch Raven and a water filtration plant would be built at Lake Montebello both on the Gunpowder Falls.²⁰⁷ At first, there was some debate as to whether the filtration plant would use a sand or mechanical filtration method.²⁰⁸ The City preferred the sand method, but, in experiments, the sand method proved to only remove about ten percent of the mud from the water.²⁰⁹ The consultant, John R. Freeman, took Wittman to see mechanical filtration plants.²¹⁰ Wittman noted that the water was very

¹⁹⁸ Wittman, *supra* note 193, at 30.

¹⁹⁹ *Id.* at 31.

²⁰⁰ *Id.* at 31 – 32.

²⁰¹ *Id.*

²⁰² *Id.* at 32.

²⁰³ *Id.* The city brought in two outside consultants from an engineering consulting firm, Stearns and Freeman. Hendrickson, *supra* note 29, at 7.

²⁰⁴ Wittman, *supra* note 193, at 32.

²⁰⁵ *Id.* 32, 34 – 35.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Hendrickson, *supra* note 29, at 37.

²⁰⁹ *Id.*

²¹⁰ *Id.*

pure.²¹¹ He also learned that mechanical filtration plants had dramatically reduced cases of typhoid in major cities worldwide.²¹² So, the city settled on a mechanical filtration plant.²¹³

C. The Montebello water filtration plant opens to great fanfare and success.

The Montebello Water Filtration plant opened in 1915 to great fanfare and has remained in operation to this day.²¹⁴ The City celebrated 100 years of operation in 2015.²¹⁵ In accord with the City Beautiful Movement, the filtration plant is not only functional, but also beautiful.²¹⁶ The site of the plant was chosen for its aesthetic appeal and²¹⁷ the buildings have been noted for their architectural appeal.²¹⁸ The buildings were constructed in a mixture of Beaux Arts, Spanish Mission, and Italianate styles and the surrounding area was impeccably landscaped.²¹⁹ In addition to being an aesthetic marvel, the plant was celebrated by local newspapers as one of the finest filtration plants in the world.²²⁰ It was featured in professional journals and newspapers, and water engineers from all over the country visited it.²²¹ Most importantly, however, the plant finally brought clear, pure, good-tasting water to Baltimore.²²²

D. Lake Roland becomes a park for the community

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Braken, Matt. "Building Lake Montebello's Water System." *The Darkroom Exploring Visual Journalism from the Baltimore Sun RSS*. 18 Sept. 2015. Web. 30 Nov. 2015. <<http://darkroom.baltimoresun.com/2015/09/building-lake-montebellos-water-system/#1>>.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Hendrickson, *supra* note 29, at 11.

²¹⁸ *Id.* at 15.

²¹⁹ *Id.* at 16.

²²⁰ *Id.* at 15.

²²¹ *Id.*

²²² *Id.*

In 1915, as per Freeman's suggestions, the City discontinued use of the Jones Falls as a water source.²²³ While some parts of the water source blended into the city, the reservoirs took up large areas of land in both the City and County.²²⁴ The Lake Roland reservoir was left as green space.²²⁵ The reason behind the city not putting the lake to another use was most likely the City Beautiful Movement, which had been the backdrop for the decision to build at the Montebello site.²²⁶ As illustrated by the Montebello Plant, City Beautiful emphasized parks and recreation as well as beauty in municipal architecture.²²⁷ The decision to leave green space was likely in the same vein.²²⁸ This makes it less surprising that that in spite of the potential value of the land as real estate, the City would choose to convert it to a park.²²⁹ From 1915 until 1965, no one complained about this decision.²³⁰

The land was officially made a park in the 1940's.²³¹ It was originally called Robert E. Lee Memorial Park, but in the recent efforts to remove the names of confederate leadership from parks and monuments, it became Lake Roland Park.²³² The park was in a state of disarray until a few years ago.²³³ The buildings, which were once associated with the water system, were

²²³ Hendrickson, *supra* note 29, at 7.

²²⁴ *See Appendix, A.*

²²⁵ "History of the Park - Lake Roland Nature Council." *Lake Roland Nature Council*. Lake Roland Nature Council, 2015. Web. 30 Nov. 2015. <<http://lakeroland.org/committee/history-of-the-park/>>.

²²⁶ *See supra*, Part III.C.

²²⁷ *See supra*, Part III.C.

²²⁸ *Cf.* Braken, *supra* note 214.

²²⁹ *Cf.* Braken, *supra* note 214.

²³⁰ *Cf.* *Shreve*, 243 Md. 613. *Shreve* filed his suite in 1965. *Id.*

²³¹ "History of the Park - Lake Roland Nature Council." *Lake Roland Nature Council*. Lake Roland Nature Council, 2015. Web. 30 Nov. 2015. <<http://lakeroland.org/committee/history-of-the-park/>>.

²³² *Id.*

²³³ *Id.*

deteriorating and the park grounds were not well maintained.²³⁴ Baltimore City simply did not have the assets to maintain it as a first class park.²³⁵ So, it leased the park to Baltimore County, which was able to invest and improve the park dramatically.²³⁶ Today, the park spans over five hundred acres and includes trails, a dog park, many pavilions, and, of course, the historic Lake Roland Dam.²³⁷ Visitors can enjoy a plethora of activities from hiking to canoeing to spending a beautiful day with their canine companions.²³⁸ In the midst of urban and suburban sprawl, the park plays an important role in the community.²³⁹

V. SHREVE BRINGS HIS CASE

A. C. A. Buchanan Shreve

The City operated its park at Lake Roland in peace until 1965, when C. A. Buchanan Shreve, one Mr. Charles A Buchanan's heirs, entered the picture.²⁴⁰ While much of Mr. Shreve's biographical history has been lost in the waste bin of time, his worldview has been preserved in the archives of *The Baltimore Sun*.²⁴¹ Mr. Shreve had a penchant for writing letters to the editor.²⁴² A review of these letters reveals a common theme:²⁴³ Government, even when it acts

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ "Lake Roland - Baltimore County." *Lake Roland*. Baltimore County, Md., Web. 30 Nov. 2015.

<<http://www.baltimorecountymd.gov/Agencies/recreation/programdivision/naturearea/lakeroland/>>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *See infra*, Part V.B.

²⁴¹ *See infra*, notes 245 – 253 and accompanying text.

²⁴² *See infra*, notes 245 – 253 and accompanying text.

²⁴³ *See infra*, notes 245 – 253 and accompanying text.

with the best of intentions, should not be trusted with development.²⁴⁴ In one letter, he expressed his doubts as to whether a bridge to Assateague Island was an efficient use of taxpayer dollars because it was impossible to construct buildings there.²⁴⁵ Today, of course, Assateague is a popular camping area.²⁴⁶ In another letter, he railed against a park being built on the Jones Falls near the Hampden neighborhood in Baltimore City.²⁴⁷ He explained that the land had traditionally been used as mill sites.²⁴⁸ Many parks exist in the Hampden area today and are enjoyed by City dwellers.²⁴⁹ In a third letter, he expressed that the City had no business getting into the business of urban renewal explaining that the city planners were too “visionary” and “impractical”.²⁵⁰ Two things are clear from Mr. Shreve’s writings.²⁵¹ First, he believed the government, though acting on good intentions, was incompetent in determining the course of development in Baltimore and beyond.²⁵² Second, he believed that land was only useful insofar as people could develop it for economic gain.²⁵³

²⁴⁴ See *infra*, notes 245 – 253 and accompanying text.

²⁴⁵ Buchanan Shreve, C.A. "Assateague." *The Baltimore Sun* [Baltimore] 29 Mar. 1963: 16. *Proquest*. Web. 29 Nov. 2015.

²⁴⁶ "Assateague Island National Seashore Visitor Services." *Assateague Island National Seashore Visitor Services*. Assateagueisland.com, 01 Jan. 2000. Web. 09 Jan. 2016. <<http://www.assateagueisland.com/>>.

²⁴⁷ Buchanan Shreve, C.A. "The Jones Falls Valley." *The Baltimore Sun* [Baltimore] 20 Apr. 1966: 12. *Proquest*. Web. 29 Nov. 2015. He believed the money would be better spent to protect the existing Druid Hill Park. *Id.* He also explained that the Jones Falls Expressway took away any aesthetic value the area would have as a park. *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Buchanan Shreve, C.A. "Waste of Money." *The Baltimore Sun* [Baltimore] 13 Jun. 1964: 10. *Proquest*. Web. 29 Nov. 2015.

²⁵¹ See *infra*, notes 252 – 253 and accompanying text.

²⁵² See *eg.*, Buchanan Shreve, *supra* note 245, at 10 (explaining that despite their good intentions the city planners were wasting money on urban renewal).

²⁵³ See *eg.*, Buchanan Shreve, *supra* at note 247, at 12 (explaining that the Hampden area was better suited for industry than a park).

B. Mr. SHREVE'S CLAIM

Shreve and other Buchanan heirs retained the counsel of Arthur Machen Jr. of Venable, Baetjer, and Howard.²⁵⁴ On January 28th 1965, they filed a suit in ejectment in the Baltimore County Circuit Court.²⁵⁵ The claim laid out the facts as follows.²⁵⁶ The Mayor and City Council had taken the Buchanan land for use as part of the City's water works in 1857.²⁵⁷ However, the City had ceased that use and begun using the land as park and recreational area.²⁵⁸ This was impermissible under the Enabling Act because the City could only acquire land to convey water. So, when it ceased using the property at Lake Roland for reservoir purposes, title reverted to Buchanan's successors in interest.²⁵⁹ The complaint went on explain how Mr. Shreve and each of the other plaintiffs were successors in interest to Mr. Buchanan.²⁶⁰ Finally, it stated that the plaintiffs not only sought ejectment of the City, but also one and a half million dollars.²⁶¹

Including Mr. Shreve there were seven plaintiffs named in the complaint.²⁶² On February 11th, 1965, two more members of the Buchanan family claiming fractional interests in the property successfully filed a motion to intervene bringing the grand total of plaintiffs to nine.²⁶³

²⁵⁴ Joint Record Extract at E. 7, *Shreve v. Baltimore*, 243 Md. 613 (1966) (No. 370).

²⁵⁵ *Id.*

²⁵⁶ *See infra*, notes 257 – 261 and accompanying text.

²⁵⁷ Joint Record Extract, *supra* note 254, at E. 8.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at E. 8 – E. 9.

²⁶⁰ *Id.* at E. 9.

²⁶¹ *Id.*

²⁶² *Id.* at E. 7.

²⁶³ Joint Record Extract, *supra* note 99, at E. 10. They claimed one eighteenth and one ninth of an interest each. *Id.*

Given that the complaint was filed one hundred and seven year after the original 1857 inquisition, this large number of heirs claiming fractional interests was unsurprising.²⁶⁴

C. TRIAL COURT PROCEEDINGS

On February 16, 1965, the City Solicitor's office filed a request for production of documents demanding: 1) the inquisition proceedings; 2) the written instrument from which the legal description of the property was taken; 3) Ordinance No. 173; and 4) the instruments proving the plaintiffs were Mr. Buchanan's successors in interest.²⁶⁵ Once, it received these documents, the City demurred.²⁶⁶ *The Baltimore Sun* reported on the arguments made in the lower court proceeding.²⁶⁷ Machen, for Shreve, argued that when the Water Board transferred the property to the Department of Parks and Recreation in 1945, the underlying conditions of the taking no longer existed.²⁶⁸ Ambrose T. Hartman²⁶⁹, for the City, argued that the original condemnation proceeding showed on its face that the City had taken the property in fee simple absolute.²⁷⁰

Judge Proctor of the Baltimore County Circuit Court sustained the demurrer.²⁷¹ He looked at precedent cases and the plain language of the condemnation.²⁷² First, he found that

²⁶⁴ *Id.* at E. 7, E. 13.

²⁶⁵ *Id.* at E. 11-12.

²⁶⁶ *Id.* at E. 23.

²⁶⁷ "County Court Makes Ruling on Who Owns Lake Roland." *The Baltimore Sun* [Baltimore] 6 Aug. 1965: 21. *Proquest*. Web. 28 Nov. 2015.

²⁶⁸ *Id.*

²⁶⁹ *See Appendix C.*

²⁷⁰ "County Court Makes Ruling on Who Owns Lake Roland." *The Baltimore Sun* [Baltimore] 6 Aug. 1965: 21. *Proquest*. Web. 28 Nov. 2015.

²⁷¹ Joint Record Extract, *supra* note 99, at E. 35.

²⁷² *Id.* at 27 – 34.

Graff, provided no guidance, as the Maryland Court of Appeals had not considered the quality of the City’s title.²⁷³ Second, Proctor explained that the *Kane* decision did not rest on the language of the statute but on the Maryland Constitution.²⁷⁴ The *Kane* Court had held that under the Maryland Constitution, the General Assembly could only confer the power to take for public uses, and so, the City could only condemn what it needed for the specified public use.²⁷⁵ This was the way the Maryland Court of Appeals had interpreted *Kane* in *Taylor*.²⁷⁶ However, the Proctor wrote, it was necessary to look at further dicta in *Taylor*, which said that the Enabling Act gave the City the power to purchase *in fee*.²⁷⁷ Proctor further explained that “purchase” in the first section of the Enabling Act applied both when the City negotiated the sale of property and when it condemned.²⁷⁸ Thus, all that remained was to determine what interest the City had acquired in Buchanan’s land.²⁷⁹ Looking at the plain language of the condemnation, he saw that the jury had been instructed to value and did value the fee simple estate.²⁸⁰ Thus, the land would not revert to Shreve and his co-plaintiffs.²⁸¹ Machen filed a timely appeal.²⁸²

D. IN THE MARYLAND COURT OF APPEALS

1. *The Arguments*

²⁷³ *Id.* at E 28.

²⁷⁴ *Id.* at E 30.

²⁷⁵ *Id.* at E 30 – E 31.

²⁷⁶ *Id.* at E 30.

²⁷⁷ Joint Record Extract, *supra* note 99, at E. 30.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 34.

²⁸⁰ *Id.*

²⁸¹ *Id.* at E 35.

²⁸² Joint Record Extract, *supra* note 99, at E. 35.

Hartman and Machen took drastically different approaches to the questions presented.²⁸³ The first issue was whether or not the Enabling Act gave the City power to take in fee simple absolute.²⁸⁴ Machen, writing for Shreve, took a historical, contextual approach.²⁸⁵ Meanwhile Hartman, writing for the City, stuck to the text of the statute and case law.²⁸⁶ The second issue was whether or not the City had in fact taken the Buchanan property in fee simple absolute.²⁸⁷ Again Hartman's argument was more heavily textual.²⁸⁸

Machen looked at the statute within the broader context of Maryland's eminent domain history.²⁸⁹ He first explained that in the United States, unlike in feudal England, eminent domain principles are based in balancing the power of the sovereign to take property with the individual's property rights.²⁹⁰ He further explained that in 1857 Baltimore City, as a "creature of the legislature," only had the eminent domain powers that the General Assembly granted it.²⁹¹ The General Assembly had explicitly given Baltimore power to take in fee simple for other municipal purposes and had not been so explicit in the Enabling Act.²⁹² Further, the City did not have a general eminent domain power until 1898 and did not have a power of eminent domain

²⁸³ See *infra*, notes 284 – 288 and accompanying text.

²⁸⁴ *Shreve*, 243 Md. at 615.

²⁸⁵ See *infra*, notes 289 – 316 and accompanying text.

²⁸⁶ See *infra*, notes 317 – 336 and accompanying text.

²⁸⁷ *Shreve*, 243 Md. at 615.

²⁸⁸ See *infra*, notes 317 – 336 and accompanying text.

²⁸⁹ Brief of the Appellants, *Shreve v. Baltimore*, 243 Md. 613, 6 – 12 (1965) (No. 370).

²⁹⁰ *Id.* at 7 – 9.

²⁹¹ *Id.* at 9 – 10.

²⁹² *Id.*

without possibility of reverter until 1908.²⁹³ Thus, Machen claimed the City could not have condemned Buchanan's property in fee simple.²⁹⁴

Machen furthered his argument by analyzing at the prior cases in which the Maryland Court of Appeals had interpreted the Enabling Act.²⁹⁵ *Graff* he claimed showed how indecisive the City was when it set out to condemn property for its water system.²⁹⁶ Machen claimed the General Assembly had been worried about such indecision and did not grant the Mayor and City Council fee simple condemnation powers as a result.²⁹⁷ *Kane*, for Machen, was decisive of the question at bar.²⁹⁸ *Kane* clarified that the City could only take property *necessary* to convey water.²⁹⁹ After the City shut down the Jones Falls, the Buchanan property was no longer necessary to convey water.³⁰⁰ Finally, he explained that the dicta in *Taylor* mentioning the City's ability to condemn in fee under the Enabling Act should be disregarded.³⁰¹ Whether the City could condemn in fee was not before the Court and the Court was merely speculating.³⁰² In so speculating, the Court had disregarded the lack of a reference to fee simple in section two of the Enabling Act.³⁰³ Machen explained that he interpreted the Enabling Act in two parts.³⁰⁴ Section

²⁹³ *Id.* at 10.

²⁹⁴ *Id.*

²⁹⁵ Brief of the Appellants, *supra* note 289, at 14 – 20.

²⁹⁶ *Id.* at 14 – 15.

²⁹⁷ *Id.* at 14 – 15.

²⁹⁸ *Id.* at 17.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Brief of the Appellants, *supra* note 289, at 17. With respect to *Kane*, Machen also included in his brief the explanations of various lawyers. *Id.* at 18 – 19. It should be noted that though each explanation cites *Kane* as standing for the proposition that the condemner can only take what is necessary to achieve a particular public use, they do not mention anything about a reversionary interest. *Id.*

³⁰² *Id.* at 22 – 23.

³⁰³ *Id.* at 23.

one gave the City power to purchase *by agreement* and mentioned fee simple.³⁰⁵ Conversely, section two gave the City the power *to condemn* and failed to mention fee simple.³⁰⁶ So, it only gave the City the power to purchase a “use in fee” or fees simple determinable.³⁰⁷ So, condemned property like Buchanan’s would revert when the use changed.³⁰⁸

Turning to the condemnation proceeding itself, Machen argued that despite the references to the jury valuing both the damages to Buchanan attributable to the condemnation and the fee simple thereof, the City had nonetheless only acquired a “use in fee” or fee simple determinable.³⁰⁹ The same language had been used in the *Kane* inquisition, which had only conferred the City with a right of way.³¹⁰ As such, Machen argued the cases should be interpreted consistently and the City could only have attained a right of way or at most a fee simple determinable.³¹¹

Finally, Machen also took on two equitable considerations.³¹² First, he explained, the plaintiffs were not trying to have their cake and eat it too as Judge Proctor had suggested.³¹³ They were merely asking if the City had taken the whole cake in the first place.³¹⁴ Second, he argued that that the Court need not worry about a parade of plaintiffs coming in to assert

³⁰⁴ *Id.*

³⁰⁵ Brief of the Appellants, *supra* note 289, at 23.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 26.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 28 – 30.

³¹⁰ *Id.* at 30.

³¹¹ Brief of the Appellants, *supra* note 289, at 30.

³¹² *Id.* at 31 – 32.

³¹³ *Id.* at 31.

³¹⁴ *Id.* at 31 – 32.

reversionary interests.³¹⁵ The City had only been able to condemn land without the possibility of reverter since 1908, and only a few acts pre-1908 had not conferred the power to condemn in fee simple absolute on the city.³¹⁶

Hartman, writing for the City, based his arguments in the text of the condemnation and Enabling Act using case law as a gloss.³¹⁷ First, Hartman took Machen to task on his statutory interpretation.³¹⁸ Because statutes must be interpreted consistently though all their parts, if section one gave the power to purchase property in fee simple by agreement, then section two should allow it to condemn the same property in fee simple as well.³¹⁹ Hartman suggested that some language in section two gave rise to this inference.³²⁰ It used the words “to purchase and hold *or* use” and also said that the jury should state the interest the City was acquiring in the condemnation documents.³²¹

Next, Hartman turned to case law.³²² He explained that in a recently decided case, *Johnson v. State Roads Commission*, the Court has interpreted an 1826 act with less broad language than the Enabling Act as allowing the city to acquire land in fee simple.³²³ He further explained that *Johnson* had been about tracks for a railroad, which are sometimes thought of as merely requiring an easement.³²⁴ Meanwhile, this case was about a reservoir, which courts had

³¹⁵ *Id.* at 32.

³¹⁶ *Id.*

³¹⁷ Brief of the Appellee, *Shreve v. Baltimore*, 243 Md. 163 (1965) (No. 370).

³¹⁸ *Id.*

³¹⁹ *Id.* at 8 – 9.

³²⁰ *Id.* at 11.

³²¹ *Id.*

³²² *See infra*, notes 305 – 312 and accompanying text.

³²³ Brief of the Appellee, *supra* note 317, at 16 – 17.

³²⁴ *Id.* at 17.

thought of as requiring a fee simple title.³²⁵ Then, he took on the *Kane* case, which he explained did not rule out the City condemning land in fee simple, but rather limited it to necessity.³²⁶ Furthermore, the Enabling Act did not limit the City to fee simple determinable takings merely because it had a named public use.³²⁷ The same was true in *Johnson*.³²⁸ The railroad had been limited to taking what was necessary for its purposes.³²⁹ And yet, Court had not interpreted that act preventing the corporation from acquiring in fee simple.³³⁰

The only question that remained was whether the City had actually condemned the Buchanan land in fee simple.³³¹ Hartman found that the words “use and occupation,” which Machen had relied on in proving that the City had acquired a fee simple determinable, were boilerplate language from section two of the Enabling Act.³³² He also explained that the words “fee simple” in the condemnation proceeding must mean what they say.³³³ In *Johnson*, words other than fee simple – absolute estate in perpetuity – were said to convey a fee simple absolute

³²⁵ *Id.* (citing *Taylor v. Baltimore*, 45 Md. 576, 579 (1877); *Choctaw & Chickasaw Nations v. City of Akota*, 207 F. 2d. 763, 767 (10th Cir. 1953); *In Re Amsterdam Water Comrs.*, 96 NY 351 (1881); *Springfield v. City of Perry*, (citation omitted); *Town of Morganton v. Hutton and Burbonnais Co.* (Citation omitted); *City of Fort Worth v. Morgan*, 168 S.W. 976 (Tex. Civ. App. 1914); *Torrence v. City of Charlotte*, 163 NC 562 (1913).

³²⁶ *Id.* at 18.

³²⁷ *Id.* at 22 – 23.

³²⁸ *Id.*

³²⁹ Brief of the Appellee, *supra* note 317, at 22 – 23.

³³⁰ *Id.*

³³¹ *Id.* at 27.

³³² *Id.*

³³³ *Id.* at 32. The lack of the words in perpetuity was not dispositive. *Id.* Other courts dealing with non-specific language had looked to at the purpose for which the land was conveyed. In the case of a reservoir many had said fee simple was the appropriate interest. Brief of the Apellee, *supra* note 317, at 33 – 34 (citing *Choctaw & Chickasaw Nations*, 207 F. 2d at 767).

estate.³³⁴ Further, he explained that the dollar amount –thirteen thousand dollars for fifty-five acres – was certainly a fair price.³³⁵ Thus, the City had obtained Buchanan’s land in fee simple.³³⁶

2. *The Decision*

The Court of Appeals noted that Machen’s historical arguments were an interesting read, but decided for the City.³³⁷ The Court identified two key issues: 1) whether the City had the power to take property in fee simple under the Act; 2) whether it had accomplished a fee simple taking of Mr. Buchanan’s land.

Considering the first issue, the Court found that the Act enabled the City to acquire property in fee simple absolute rather merely enabling it to acquire easements or fee simple determinable estates.³³⁸ The Court explicitly declined Machen’s invitation to delve into the history of eminent domain and stuck to case law and statutory text.³³⁹ It started by quoting two relevant parts of the Enabling Act: a) the City could take property “*forever* or for a term of years;” and b) the jury could assess the amount the City should pay to “hold or use” the property, and that the inquisitions should “describe the property to be taken *** and the quantity or duration of the interest in the same *** and the payment or tender of the damages assessed ‘shall entitle the City to use, estate and interest in the same as fully as if it had been conveyed by the

³³⁴ *Id.* at 33. The Court decided this in spite of the fact that many commentators had written that rail tracks were usually taken as easements. *Id.* (citing *Johnson*, 222 Md. at 501 – 502).

³³⁵ *Id.* at 23.

³³⁶ *Id.* at 34.

³³⁷ *Shreve v. Baltimore*, 243 Md. 613 (1966).

³³⁸ *Id.* at 622.

³³⁹ *Id.* at 618 – 619.

owners’’.³⁴⁰ The Court declined to use Machen’s section-by-section approach and chose to look at the Enabling Act as whole.³⁴¹ Turning to whether takings under the Enabling Act were limited to mere easements, the Court explained that if the act had only empowered the City to acquire easements, it would have been more particular in its language.³⁴² Further, even in 1877 in *Taylor*, the Enabling Act had been interpreted as allowing the city to acquire a fee.³⁴³ The Court then turned to whether under the Enabling Act the City could take the property in fee simple absolute or just fee simple determinable.³⁴⁴ Shreve insisted that the General Assembly had only given the power to condemn property as part of its waterworks and that once the use changed; it had to revert to the prior owners.³⁴⁵ In assessing the merits of Shreve’s argument, the Court relied heavily the *Johnson* case.³⁴⁶ It found that that the language in the Enabling Act both mirrored the 1826 statute that had been interpreted in *Johnson* and was broader than it.³⁴⁷ As such, the Enabling Act necessarily empowered the city to take in fee simple.³⁴⁸ The Court also rejected the argument that the property had to revert if the City ceased using it as part of the waterworks.³⁴⁹ It explained that while the City could not have initially condemned the property for another use, it could, in good faith, condemn for the permitted use then transition to another use when circumstances changed.³⁵⁰

³⁴⁰ *Id.* at 621 (quoting 1853 Md. Laws 545).

³⁴¹ *Id.* at 619 (citing *Pumphrey v. County Com’rs of Anne Arundel County*, 212 Md. 536).

³⁴² *Id.* at 620 (citing *Taylor v. Baltimore*, 45 Md. 576 (1877)).

³⁴³ *Shreve*, 243 Md at 620 (quoting *Taylor v. Baltimore*, 45 Md. 576, 579 (1877)).

³⁴⁴ *Id.* at 621.

³⁴⁵ *Id.* at 620.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Shreve*, 243 Md. at 620.

³⁴⁹ *Id.* at 622.

³⁵⁰ *Id.*

After finding that the Enabling Act allowed fee simple condemnations, it remained only to decide whether the inquisition jury had condemned the property in fee simple absolute.³⁵¹ The Court found that it had.³⁵² The jury instructions and verdict both included the words “fee simple”.³⁵³ Again, this case was clearer than *Johnson* in which the jury had used the words “absolute estate in perpetuity” to mean fee simple.³⁵⁴ The order also stated that Buchanan and his heirs were to have continued access to a private road across the property.³⁵⁵ The Court rhetorically asked why Buchanan would have to retain a right of way for the road if the city had obtained a mere easement.³⁵⁶

Despite the language in the condemnation proceeding, the Court also had to overcome the *Kane*, which held that the City could not condemn more than it needed to convey water.³⁵⁷ The Court noted that *Kane* was “unusual” and that the records had unfortunately disappeared.³⁵⁸ It went on to explain the facts and holding in *Kane*.³⁵⁹ In particular, it focused on a portion of the opinion that stated:

In our opinion, the decree did not alter or enlarge the rights of the city, acquired under the condemnation. That [the condemnation] conferred upon the city, in perpetuity, the use

³⁵¹ *Id.* at 623.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Shreve*, 243 Md. at 623.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 623 – 625.

and occupation of the stream, for *the purpose mentioned in the Act*, but left Tonge, “all such use of it as did not injuriously interfere there with”.³⁶⁰

The Court decided that words in quotation marks were from the original condemnation proceeding.³⁶¹ So, later when the City interplead and was declared fee simple owner, it still could not own more than it had purchased in the condemnation proceeding.³⁶² Alternately, the Court explained that even if the words were not from the condemnation proceeding, *Kane* would not control.³⁶³ If the City condemned more than it needed to convey water, there was no public purpose.³⁶⁴ In the case of Buchanan’s land, the City had condemned and used the Buchanan property in good faith for use as a reservoir.³⁶⁵ Thus, *Johnson* was more analogous than *Kane*.³⁶⁶

The Court also added that if it decided the City could not condemn in fee simple, here, it could never do so.³⁶⁷ At some point, any public use may become obsolete.³⁶⁸ So, under Shreve’s interpretation, every condemnation would be a fee simple determinable and the possibility of reverter would forever lurk.³⁶⁹ The Court found this untenable.³⁷⁰ The City held the land in fee simple.³⁷¹

VI. THE CORRECTNESS OF THE SHREVE DECISION

³⁶⁰ *Id.* at 625.

³⁶¹ *Shreve*, 243 Md. at 625.

³⁶² *Id.*

³⁶³ *Id.* at 626.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Shreve*, 243 Md. at 626.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

a. *The fundamental tensions in the case*

The Court in the *Shreve* decision dealt with two fundamental tensions.³⁷² The first was one of statutory interpretation.³⁷³ To what extent should the Court let in information outside the statutory text and the case law in order to determine the meaning of a statute?³⁷⁴ The second one tension was a matter of the public use requirement.³⁷⁵ Exactly how much does “public use” protect property owners from the caprice of the condemner?³⁷⁶

1. *How far from the four corners of the document and case law should the court go?*

The Court made the explicit decision not to look at the history Machen presented in his briefs.³⁷⁷ It reasoned that it has to be consistent with *Johnson* decision.³⁷⁸ *Johnson* was temptingly dispositive of *Shreve*’s claims³⁷⁹ and Machen’s historical arguments were somewhat attenuated.³⁸⁰

A. *Following Johnson disposed of many of the questions in Shreve’s case*

The *Johnson* Court was faced with an analogous situation to the one in *Shreve*’s case.³⁸¹ As in *Shreve*, land had been taken for one public use and because that use became untenable, it

³⁷² See *infra*, notes 373 – 376 and accompanying text.

³⁷³ See *infra*, Part VI.a.1.

³⁷⁴ See *infra*, Part VI.a.1.

³⁷⁵ See *infra*, Part VI.a.2.

³⁷⁶ See *infra*, Part VI.a.2.

³⁷⁷ *Shreve*, 243 Md. at 618 – 619.

³⁷⁸ *Id.* at 619.

³⁷⁹ See *infra*, Part VI.1.a.2.A.

³⁸⁰ See *infra*, Part VI.1.a.2.B.

³⁸¹ See *infra*, notes 381 – 403 and accompanying text (explaining the similarities between the *Shreve* and *Johnson* cases).

was converted to another public use.³⁸² The plaintiffs in *Johnson* sought a decree regarding the ownership interests in a parcel in Anne Arundel County.³⁸³ They had purchased the land in 1944.³⁸⁴ However, Annapolis and Elkridge Railroad Company had condemned the land in 1838³⁸⁵. Subsequently, the railroad became defunct and sold the property to the State Highway Commission³⁸⁶. The question presented, as in *Shreve*, was whether property had been condemned in fee simple or as a mere easement.³⁸⁷ Johnson claimed that if it had only condemned an easement, it would revert to him after the company had ceased to use it in 1935.³⁸⁸

The *Johnson* statute also laid out much the same procedure as the Enabling Act.³⁸⁹ The act at issue allowed the railroad to acquire everything from land to timber to materials to make tunnels, warehouses, tracks and stations.³⁹⁰ Thus, it would need fee simple condemnation power.³⁹¹ Additionally, the act instructed the jury to state the interest that the company would acquire.³⁹² In the case of the land at issue, the jury had followed that procedure and condemned

³⁸² Compare, *Johnson* 222 Md. at 495 (explain that the plaintiffs had appealed from a trial court order stating the road company had title to previously condemned land), with *Shreve*, 243 Md. at 615 (explaining that the issues was whether or not the city had acquired fee simple title to property at Lake Roland).

³⁸³ *Johnson*, 222 Md. at 495.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ Compare, *id.* (explaining that there were two questions presented: whether the company had acquired an easement or a fee simple title and if the company had obtained an easement whether it would revert), with *Shreve*, 243 Md. at 616 (explaining that the only question at bar as whether the city had obtained a fee simple interest in the Buchanan property or some lesser interest).

³⁸⁸ *Id.* at 496.

³⁸⁹ Compare, 1836 Md. Laws 298, with 1853 Md. Laws 454.

³⁹⁰ *Johnson*, 222 Md. at 496.

³⁹¹ *Id.*

³⁹² *Id.* at 497.

the land at one hundred and twenty dollars per acre as an “absolute estate in perpetuity.”³⁹³ The Court found that the words “could only be construed to describe a ‘fee simple’ or as it was some times called, ‘a fee simple absolute’”.³⁹⁴ The Court noted that many commentaries define a “fee simple” as an absolute estate or an estate in perpetuity.³⁹⁵ The Court said while the words “in perpetuity alone could connote a lesser interest,” but with absolute estate they certainly connoted fee simple.³⁹⁶ This exercise was unnecessary for the Court in *Shreve* because the jury had actually used the words fee simple.³⁹⁷

Maryland Courts have distinguished *Johnson* twice since it was decided.³⁹⁸ Of the two only one, *DC Transit Systems Inc. v. State Roads Commission*, deals with the interpretation of a condemnation proceeding.³⁹⁹ It explicitly distinguishes *Johnson* because the condemnation proceeding stated that the interest acquired was “right of way for rail road purposes,” which the Court found was an easement.⁴⁰⁰ When simply looking at the text of the condemnation proceeding and the purpose of the land, *Shreve* is actually much clearer than both these cases.⁴⁰¹

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 497 – 498.

³⁹⁶ *Johnson*, 222 Md. at 498.

³⁹⁷ *See Shreve*, 243 Md. at 623 (explaining that the court in *Johnson* had interpreted a condemnation proceeding not even using the words fee simple as conferring the company with a fee simple interest and that the condemnation proceeding at issue had included those words).

³⁹⁸ *See, DC Transit Systems Inc. v. State Roads Comm.*, 259 Md. 675, 687 (1970); *see also, Dean v. Director of Finance*, 96 Md. App. 80, 92 (1993).

³⁹⁹ 259 Md. at 687.

⁴⁰⁰ *Id.* at 686 – 689. The court also considered how thin the tract of land was and how it had been used *Id.* at 688.

⁴⁰¹ *Compare Shreve*, 243 Md. at 623 (explaining that the words fee simple had been used in the condemnation proceeding), *with Johnson*, 222 Md. at 497 – 498 (explaining that the words absolute estate in perpetuity connotes a fee simple absolute estate), *and DC Transit Systems, Inc.* 259 Md. at 686 – 698 (explaining that “right-of-way for rail road purposes is an easement).

The condemnation proceeding uses the words “fee simple”⁴⁰² and the purpose for the land was reservoir, which put the majority of the condemned land underwater.⁴⁰³

B. *Fact Checking Machen’s history*

After looking at *Johnson*, the Enabling Act, and the condemnation proceeding, the Maryland Court of Appeals dismissed both Machen’s broad strokes of eminent domain history as well as his attempts to connect the dots between acts and cases relating to the creation of the water system.⁴⁰⁴ These arguments are flawed, but deserve a closer look.

First, Machen is likely inaccurate in his assessment that the General Assembly was reluctant to give the City power to condemn in fee simple because it showed signs of indecision.⁴⁰⁵ He argued that in what happened in *Graff* – the City having a jury value land then not purchasing it – showed the indecision the General Assembly feared.⁴⁰⁶ First of all, hindsight is 20/20.⁴⁰⁷ The General Assembly could not have known the City would take indecisive actions.⁴⁰⁸ In fact, the Enabling Act shows evidence that the City had been decisive when the General Assembly put pen to paper.⁴⁰⁹ Section five of the Enabling Act mentions a dam at Raven’s Rock showing the City came forward with plans to develop the Gunpowder Falls.⁴¹⁰ The ongoing assessments of both potential water sources by engineering experts could be argued

⁴⁰² *Shreve*, 243 Md. at 623.

⁴⁰³ Brief of the Appellee, *supra* note 317, at 32.

⁴⁰⁴ *Shreve*, 243 Md. at 618 – 619.

⁴⁰⁵ Brief of the Appellant, *supra* note 289, at 14 – 15.

⁴⁰⁶ *Id.*

⁴⁰⁷ *See infra*, notes 409 – 413 and accompanying text.

⁴⁰⁸ *See infra*, notes 409 – 413 and accompanying text.

⁴⁰⁹ *See* 1853 Md. Laws 454 § 5

⁴¹⁰ *Id.*

to show indecision.⁴¹¹ However, they could also be said to show a desire to make an educated municipal decision.⁴¹² Before the Enabling Act was approved, there is little evidence that the City was going to be indecisive.⁴¹³

Second, Machen's interpretation Act of 1908 has flaws as well.⁴¹⁴ Machen claimed that a 1908 Act, which stated that property the City condemned would not revert, was an attempt to overrule *Kane* and allow the City to acquire land in Fee Simple for reservoirs.⁴¹⁵ Hartman did a good job of debunking its relation to *Kane* in his brief.⁴¹⁶ Hartman pointed out that that act was put in place more than thirty years after *Kane* was decided and thus, not likely a direct reaction to the case.⁴¹⁷ Hartman's explanation is satisfactory. It is worth adding that at the time it was enacted, the City was focused on developing its water system and perhaps that is why the portion about reservoirs was specifically included.⁴¹⁸ However, the question remains as to why in that same 1908 act the city had to add in the non-possibility of reverter for all property.⁴¹⁹ It was likely just tying up loose ends from the 1898 act that had granted the city general eminent domain powers, but failed to be specific about possibility of reverter.⁴²⁰

3. *The Public Use Question*

⁴¹¹ See *supra*, Part II.

⁴¹² See *supra*, Part II.

⁴¹³ See *supra*, Part II. Only after when the Know Nothing mayors came to power did the City start making what appeared to be unsound decisions. See *supra*, Part II.

⁴¹⁴ Brief of the Appellant, *supra* note 289, at 11 – 12.

⁴¹⁵ Brief of the Appellant, *supra* note 289, at 11 – 12.

⁴¹⁶ Brief of the Appellee, *supra* note 317, at 24.

⁴¹⁷ Brief of the Appellee, *supra* note 317, at 24.

⁴¹⁸ See *supra*, Part III.

⁴¹⁹ 1908 Md. Laws 214.

⁴²⁰ 1898 Md. Laws 54.

The question in *Shreve* really comes down to how much the public use prong of Eminent Domain articles should protect landowners.⁴²¹ The Court flatly rejected the proposal that land taken for a public use can only be used for *that* public use forever or it will revert explaining that if it had so held in this case, every property taken would have the possibility of reverter.⁴²² It is not alone in so holding.⁴²³ The highest courts of other states when confronted with similar problems have similarly held.⁴²⁴

However, there is an argument to be made that property owners should have greater protections.⁴²⁵ Municipal decision-making is imperfect and often a product of the political climate rather than sound judgment.⁴²⁶ The Know-Nothing mayors' decision to develop the Jones Falls over the Gunpowder Falls is illustrative of this point.⁴²⁷ Engineering experts had told them the Gunpowder was a cleaner and more profound water source and they were faced with a growing population.⁴²⁸ However, they chose the cheaper option.⁴²⁹ A decision like this speaks

⁴²¹ See *infra*, notes 422 – 424 and accompanying text.

⁴²² See generally, *Shreve*, 243 Md. 613.

⁴²³ Brief of the Appellee, *supra* note 317, at 17 (citing *Taylor v. Baltimore*, 45 Md. 576, 579 (1877); *Choctaw & Chickasaw Nations v. City of Akota*, 207 F. 2d. 763, 767 (10th Cir. 1953); *In Re Amsterdam Water Comrs.*, 96 NY 351 (1881); *Springfield v. City of Perry*, (citation omitted); *Town of Morganton v. Hutton and Burbonnais Co.* (Citation omitted); *City of Fort Worth v. Morgan*, 168 S.W. 976 (Tex. Civ. App. 1914); *Torrence v. City of Charlotte*, 163 NC 562 (1913).

⁴²⁴ See, 3-9 Nichols on Eminent Domain § 9.04 (explaining that that it is generally accepted that when fee simple title is acquired in an condemnation action, it will not revert to the owner even if the use changes).

⁴²⁵ See *infra*, note 426 – 431 and accompanying text.

⁴²⁶ See *supra*, Part II.

⁴²⁷ See *supra*, Part II.

⁴²⁸ See *supra*, Part II.

⁴²⁹ See *supra*, Part II.

for itself as to why cities might not be trusted with the power to condemn in fee simple absolute.⁴³⁰ Their poor condemnation decisions are lasting ones.⁴³¹

On the other hand, the stability of allowing a city to take in fee simple certainly has appeal as well.⁴³² The possibility of reverter, especially with use restrictions, may create disincentive making adequate improvements to failing public works.⁴³³ Sometimes, condemners take and use land for a public use, but the use become obsolete like the railroad in *Johnson*.⁴³⁴ Or as happened in *Shreve*, the use had to be discontinued for the health and safety of the public.⁴³⁵ When the condemner holds that land in fee simple, it may see this as an opportunity for modernization and improvement.⁴³⁶ However, where there is a possibility of reverter, the City will have less incentive to improve because of the potential for suits like *Shreve*'s.⁴³⁷ Further reverter is an exception to the rule against perpetuities; so, successors in interest to the original owner could come forward centuries later.⁴³⁸ Condemners have successfully dealt this in two ways.⁴³⁹ First, as in *Shreve*, they have won in court.⁴⁴⁰ Second, some condemners have modified

⁴³⁰ See *supra*, Part II, III.

⁴³¹ See *supra*, Part III. (explaining that even after the Jones Falls water system was defunct, the city kept it as green space).

⁴³² Cf. *Shreve*, 243 Md. at 626 – 627.

⁴³³ Cf. Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 480 (2001) (explaining that local governments have had to find workarounds for the possibility of reverter with the creation of rail trails because holding the land in fee simple is much more convenient).

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Johnson, 222 Md. at 495.

⁴³⁵ See *supra*, Part III.

⁴³⁶ Cf. Wright, *supra* note 433, at 480 (2001) (explaining that despite the disputes over the public use requirement, rail trails have come to serve communities' needs for green space).

⁴³⁷ Cf., *Shreve*, 213 Md. 613.

⁴³⁸ Cf. Wright, *supra* note 433, at 480.

⁴³⁹ See *infra*, notes 440 – 441 and accompanying text.

the rule against perpetuities to keep hold of land that would otherwise revert in order to avoid the complexity of finding successor in interest and better serve communities.⁴⁴¹ The results have been beneficial for communities.⁴⁴² The railroad in *Johnson*, for example, became a highway.⁴⁴³ Many other defunct railroads have become bike trails.⁴⁴⁴ And, of course, many enjoy Lake Roland Park.⁴⁴⁵ The unpalatable capriciousness in one case is no reason to punish condemners.⁴⁴⁶

VII. CONCLUSION

Discretion in condemnation proceedings has often led to imperfect results.⁴⁴⁷ The ebbs and flows of politics have a great deal of influence on the process.⁴⁴⁸ What starts out as a sound decision making process can become capricious merely because a different party has taken the mayoral seat.⁴⁴⁹ That is what happened in the case of Baltimore's water system.⁴⁵⁰ The City started out consulting multiple engineers on the best water source, but then the power balance

⁴⁴⁰ *Shreve*, 213 Md. 613.

⁴⁴¹ *See*, Wright, *supra* note 433, at 459. Generally, the rule against perpetuities does not apply to the possibility of reverter *Id.* at 460.

⁴⁴² *See infra*, notes 444 – 445 and accompanying text.

⁴⁴³ *See Johnson*, 222 Md. at 495 (explaining that the railroad sold the property to the State Highway commission).

⁴⁴⁴ *See e.g.*, "Gunpowder Falls State Park: Torrey C. Brown Rail Trail." Gunpowder Falls State Park: Torrey C. Brown Rail Trail. Maryland.gov, Web. 30 Nov. 2015.
<<http://dnr2.maryland.gov/publiclands/Pages/central/tcb.aspx>>

⁴⁴⁵ "Lake Roland - Baltimore County." Lake Roland. Baltimore County Md., 21 Oct. 2015. Web. 30 Nov. 2015.

<<http://www.baltimorecountymd.gov/Agencies/recreation/programdivision/naturearea/lakeroland/>>

⁴⁴⁶ *See supra*, Part II.C.

⁴⁴⁷ *See supra*, Part II.

⁴⁴⁸ *See supra*, Part II.

⁴⁴⁹ *See supra*, Part II.C.

⁴⁵⁰ *See supra*, Part II.C.

changed.⁴⁵¹ The final decision hinged on the financial situation of the moment rather than on what would be the most lasting and effective water source for the City.⁴⁵² This decision had lasting effects on Baltimore.⁴⁵³ In the immediate future, it led to a public health crisis and greater cost to the City, which ended up paying to renovate the water system.⁴⁵⁴ In the far future, it led to many wonderful parks along the Jones Falls, including Lake Roland Park.⁴⁵⁵ Many city and county residents have enjoyed this unintended consequence.⁴⁵⁶

Shreve's case brought the questionable aspects of the 1850's decision into court.⁴⁵⁷ While the appellate opinion is sanitized of any history, it does bring forward the question of whether failed municipal decision-making should be able to have a lasting mark on a City's landscape.⁴⁵⁸ It is important to remember that the possibility of reverter is also lasting as an exception to the rule against perpetuities.⁴⁵⁹ Where this possibility lurks, there may be less incentive to improve.⁴⁶⁰ Finding or identifying successors in interest to bargain with or return the property to may be impossible centuries later.⁴⁶¹ Where it does not lurk, municipalities have the flexibility to create new public goods for their citizens and evade the inconvenience of negotiating with

⁴⁵¹ *See supra*, Part II.C.

⁴⁵² *See supra*, Part II.C.

⁴⁵³ *See supra*, Part II.C.

⁴⁵⁴ *See supra*, Part III.A.

⁴⁵⁵ *See supra*, Part III.D.

⁴⁵⁶ *See supra*, Part III.D.

⁴⁵⁷ *See supra*, Part V.B.

⁴⁵⁸ *See supra*, Part V.D.2.

⁴⁵⁹ *See supra*, Part VI.B.

⁴⁶⁰ *See supra*, Part VI.B.

⁴⁶¹ *But see*, Shreve, 243 Md. at 615. The heirs came forward on their own over a century later. *Id.*

successors in interest.⁴⁶² In many cases where former 18th Century innovations once stood, there are now urban oases such as parks and trials.⁴⁶³

⁴⁶² *See supra*, Part VI.B.3.

⁴⁶³ *See supra*, Part VI.B.3.

Appendix C:

Ambrose T. Hartman: "Always bridesmaid, never a bride"

Ambrose T. Hartman served twice as Deputy Baltimore City Solicitor and once a Maryland Assistant Attorney General.⁴⁶⁴ Reflecting on his career, he once remarked to Governor Kurt Schmoke that he was "always a bridesmaid, never a bride".⁴⁶⁵ Contrary to what this quote suggests, Mr. Hartman was somewhat of a legal legend in the Baltimore community.⁴⁶⁶ He successfully argued before the United States Supreme Court and had a hand in many prominent cases for Baltimore City and the State of Maryland.⁴⁶⁷

Hartman was born in 1925 in Baltimore County.⁴⁶⁸ He attended Towson Catholic High School in 1943.⁴⁶⁹ He joined the United States Army during World War II and fought in the European Theatre.⁴⁷⁰ He earned the bronze star for his service and a purple heart for being wounded.⁴⁷¹ When he returned from the war, he attended the University of Maryland at College

⁴⁶⁴ Rassumsen, Fredrick N. "Ambrose T. Hartman." *The Baltimore Sun*. N.p., 16 Feb. 2009. Web. 30 Nov. 2015. <http://articles.baltimoresun.com/2009-02-16/news/0902150077_1_hartman-city-solicitor-university-of-maryland>.

⁴⁶⁵ *Id.*

⁴⁶⁶ *See generally*, Zorzi, William F., Jr. "Andy Hartman, Legal Legend, Retires Even Ex-foes Laud City's Longtime Assistant Solicitor." *The Baltimore Sun*. 02 Jan. 1993. Web. 30 Nov. 2015. <http://articles.baltimoresun.com/1993-01-02/news/1993002004_1_andy-hartman-city-solicitor-institutional-memory>.

⁴⁶⁷ Rassmusen, *supra* note 464.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

Park and then the University of Maryland School of Law on the GI Bill⁴⁷². He graduated in 1951.⁴⁷³

Hartman was predominantly a public servant throughout his career. Right out of law school, he worked as an Assistant Attorney General in the Maryland Office of the Attorney General.⁴⁷⁴ In 1952, he served on the team of lawyers who tried the case of G. Edward Grammer.⁴⁷⁵ He successfully argued the Grammar case in the Maryland Court of Appeals and gained esteem and recognition in Maryland's legal community.⁴⁷⁶

He worked at the Office of the Attorney General until 1955 when he join a private law firm, but that only lasted until 1959.⁴⁷⁷ That year, he was asked to join the City Solicitor's Office.⁴⁷⁸ He bounced back into private practice with Miles and Stockbridge in 1961, but returned to the City Solicitor's office when Republicans returned to office in 1967.⁴⁷⁹ He remained there for the rest of his career.⁴⁸⁰

His career included many storied arguments and cases.⁴⁸¹ In 1954, he argued the case of *Salzburg v. Maryland* before the United State Supreme Court and won.⁴⁸² The case was about whether or not a Maryland statute disallowing the use of evidence obtained in illegal searches

⁴⁷² *Id.*

⁴⁷³ Rassmusen, *supra* note 464.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* Grammar had killed his wife. *Id.* After being convicted, he was hanged in the Maryland State Penitentiary. *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ Rassmusen, *supra* note 464.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *See infra*, notes 482 – 485 and accompanying text.

⁴⁸² *Salsburg v. Maryland*, 346 U.S. 545 (1954)

and seizures in all misdemeanors except some gambling misdemeanors in Anne Arundel County violated the Fourteenth Amendment.⁴⁸³ More humorously, as a Deputy City Solicitor, he once argued that “air is free until you sell it” in the Maryland Court of Appeals and won.⁴⁸⁴ The reputation he gained afforded him the opportunity to work on some of the most complex issues the City Solicitor’s Office had to offer.⁴⁸⁵

When he finally retired to South Carolina in 1993, colleagues, rivals and city politicians were quoted in the Baltimore Sun praising him.⁴⁸⁶ Some expressed fear that the city would be in trouble with his “institutional memory” leaving the office.⁴⁸⁷ Mayor Kurt Smoke declared him to be great role model especially for public servants.⁴⁸⁸ Hartman himself simply said that he had gotten a great deal of enjoyment from public service and that he was happy to be retiring while still in good health.⁴⁸⁹

Hartman died in South Carolina in 2009.⁴⁹⁰ Hartman’s life as a City Solicitor had been a noble one.⁴⁹¹ While a career as a city public servant may not have earned him wealth and world fame, many appreciated him.⁴⁹² It was later said that he had given his life to his career and the city was better for his service.⁴⁹³

⁴⁸³ *Id.*

⁴⁸⁴ Zozori, *supra* note 466.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ Rassumsen, *supra* note 464.

⁴⁹¹ *Id.*

⁴⁹² Zozori, *supra* note 466.

⁴⁹³ Rassumsen, *supra* note 464.

