

John F. Weyler, Warden of the Mary-  
land Penitentiary,

vs

Frank T. Gibson et al.

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O P I N I O N

By

Burke, J.

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To be reported.

The appellees on this record, as the heirs at law of Thomas King Carroll and wife, are the owners in fee of the land sued for in this case. It comprises the bed of what was formerly Constitution Street in the City of Baltimore. This street was dedicated to public use by Mr. Carroll and his wife in 1831 by certain grants of lots abutting thereon, but by the terms of the conveyances the title to the street itself remained in the grantors, and that title is now vested in the appellees. The State, finding it necessary to enlarge and extend the Maryland Penitentiary, provided by the Act of 1900 Chapter 200, that the directors of the Maryland Penitentiary should have power to contract for, purchase, and hold in fee simple or for a term of years all the several slots of ground and their improvements in Baltimore City lying between Eager Street on the north, Concord Street on the west, Truxton Street on the South and Forrest Street on the east. The land described in the declaration lies within these bounds. In case the said directors could not agree with the owner or owners of any of the land, or of any interest in the same, they were given power to condemn.

In pursuance of the power conferred by the Act, the directors acquired title to all the lots abutting on Constitution Street, but did not acquire from the appellees or either of them title to the bed of that Street.

They secured the passage by the Mayor and City Council in October 1892 of an ordinance providing for the closing of Constitution Street, but nothing further was done, and the Street was never legally closed.

It became necessary in the enlargement of the Penitentiary to occupy the bed of Constitution Street. The Directors, without authority of law, simply took possession of the Street and erected a part of the buildings of the Maryland Penitentiary across it.

What was done is thus described by Mr. Weyler: "The bed of Constitution Street is covered by the west wing of the main building; the Eager Street wing. This was begun after the appropriation of 1896, and as near as I can remember in the year 1896. The buildings were completed and moved into-we occupied them on December 10th, 1899. After the beginning of this wing in 1896, Constitution Street was not at any time open or used as a street. When the construction of this wing began we had to commence with the foundations of the west wing, that involved building across Constitution Street, and after that Constitution Street could not be used for purposes of public travel by the public. As near as I can remember this may have been in 1895, but I am almost positive it was in 1896, because we could not do anything to the property until after we had got the \$500,000 appropriation. The exterior part of the walls of the Eager Street wing are of granite and the interior of brick. It goes right across the bed of Constitution Street. No part of the bed of Constitution Street is open between Eager and Truxton Street. It is not entirely covered by the building, part of it is vacant ground inside of the institution. The outer walls are on Eager Street crossing Constitution Street. The building on this wing is about 50 or 55 feet high, the wing is used for cells for housing the prisoners. These walls at the base are three feet wide, running up to

about two feet. The entire buildings including steel cells, equipment of buildings, cost in the neighborhood of \$913,000, without the ground; that is, the wing on Forrest Street, the Administration Building, the wing on Eager Street, the power house and the long building for the dining room and kitchen. The administration part of the building fronts on Forrest and Eager Streets, and is 86 feet square. The part of the building over the bed of Constitution Street is absolutely essential to the rest of the building. There was paid for property taken for the penitentiary on both sides of Constitution Street less than \$30,000." On the 24th of March 1904, the appellees brought an action of ejectment in the Superior Court of Baltimore City against the Directors of the Maryland Penitentiary and John F. Weyler, its Warden, for the recovery of the bed of Constitution Street described in the Declaration, and on the 26th of March, 1907 an amended narr was filed. The defendants appeared and pleaded they did not commit the wrong alleged, and also two pleas of limitation. An additional plea was subsequently filed in which it was averred that the premises in controversy are covered in part by the Maryland Penitentiary building. The plaintiffs joined issue upon the first plea, and the Court held the rest bad on demurrer. In disposing of the demurrer the Court held that the Directors of the Maryland Penitentiary being a quasi corporation or governmental agency upon which liability to suit had not been imposed by statute, the suit against it could not be maintained. Mr. Weyler, the Warden, then filed four additional pleas,

L. That the land described in the declaration in this case is covered by a portion of the building of the Maryland Penitentiary, a prison of

the State of Maryland; and that this defendant is Warden of the said Penitentiary, with the duties prescribed by law and by the By-Laws of the said Penitentiary; a copy of which By-Laws is herewith filed, marked Exhibit Warden, and prayed to be taken as part of this plea; and this defendant further says that other than performing his duties as Warden of the said Maryland Penitentiary, this defendant has no title to or interest in or connection with the land described in the declaration.

2. And for a second additional plea-leave of Court to file the same having been first had and obtained-the said John F. Weyler says, that the land as described in the declaration is a part of the bed of Constitution Street, one of the public highways of Baltimore City; and that an ordinance was duly and regularly passed by the Mayor and City Council of Baltimore, providing for closing said Constitution Street, but that the proceedings for closing said street had not been completed by the Commissioners for Opening Streets and filed in the office of the City Registrar up to the time of filing this plea.

3. And for a third additional plea to the declaration in said cause, says that he is an employee of the Directors of the Penitentiary, and holds his employment under and at the will of said Directors and subject to the rules and regulations adopted by said Directors.

4. And for a fourth additional plea, he says, that he is an employee of the Directors of the Maryland Penitentiary and hold his employment under and at the will of said Directors and subject to the rules and regulations adopted by them, and that neither by virtue of his said em-

ployment nor of the rules and regulations adopted by said Directors is he in possession or charge of the property mentioned in the declaration in this cause or of the management thereof.

He filed with these pleas, and prayed <sup>that</sup> it <sup>might</sup> be taken as a part thereof, a copy of the By-Laws of the Maryland Penitentiary. This is certainly a most unusual method of pleading in a law case, and we are not to be understood as approving or sanctioning it.

The plaintiffs demurred to the additional pleas, and also amended the declaration by eliminating therefrom, as a party defendant, the Directors of the Maryland Penitentiary, and by changing the words "its Warden" and inserting after the name of the defendant, John F. Weyler, the words "Warden of the Maryland State Penitentiary".

The demurrer to the four additional pleas was sustained, and the case was tried before Judge Niles, without a jury, upon a joinder of issue on the plea of not guilty, and resulted in a verdict and judgment for the plaintiffs for the property described in the declaration, and one cent damages and costs. From this judgment the defendant has prosecuted this appeal.

No question is made as to the ruling upon the pleas of limitation. It is admitted that the defendant was not thereby injured, and that the correctness of the Court's action upon these pleas need not be considered. The case has been ably argued by counsel on both sides, and they have given the Court in their carefully prepared briefs the benefit of a clear statement of their respective contentions, and a full citation of authorities bearing on the questions involved.

Assuming the existence of the public easement in Constitution Street created by Mr. Carroll and wife as herein stated, does the fact of that existing easement prevent the plaintiffs from maintaining this suit?. The adjudged cases are so numerous in support of the right to maintain an action against a wrong doer, who has taken possession of the property and is using it for purposes utterly inconsistent with its use as a Street, that the right of the plaintiffs <sup>to</sup> prosecuting the suit <sup>ought</sup> ~~are~~ not to be seriously questioned. The rule that the owner of the fee in land, subject to the easement of a public highway, street or common, may maintain ejectment against a person who has wrongfully seized and appropriated such land exclusively to his own use is supported by the overwhelming weight of authority.

A great many authorities were cited in the brief of the appellees ~~to~~ establishing this rule, and in the note to the case of Bork & wife vs United New Jersey Railroad and Canal Co. 1 Am. & Eng. Annotated Cases 861 will be found a full collection of cases on the subject.

In this case, upon the assumption we have made as to the existing easement, the property of the street is in the appellees as the owner of the soil, subject to the easement for the benefit of the public, and the mere fact that such an easement may exist is no reason why the suit may not be maintained; but the judgment is necessarily subject to the easement, if any exists.

The owner of the fee in the land, subject to the easement of the highway or street, cannot of course maintain an ejectment against the municipality, or other lawful public authority which is occupying the

street within the limits of the public right. This was the real question decided in the City of Cincinnati vs Lessee of White 6 Peters 431; and Lansburgh vs District of Columbia 8 Appeal Cases 10. In Lansburgh's case supra the suit was against the District of Columbia to recover a portion of the land used as a street, and the Court recognized in its opinion the clear and obvious distinction between a case of that character and one by the owner of the fee to eject a trespasser from property subject to an easement. "This is not" said the Court, "the case of a suit by the owner of land, with a highway upon it, against a trespasser holding adversely to the owner as well as to the public right. In such case, it may be that the owner of the fee could recover possession in ejectment, subject to the public easement, and there is much authority in support of his right to do so".

A separate discussion of the <sup>other</sup> ~~several~~ pleas, which were held bad on demurrer is unnecessary as the two propositions which they assert are; first, that the suit cannot be maintained under any circumstances, because it is in effect a suit against the State to recover the possession of property in the actual use by the State for police and State purposes; and second, because the possession of John F. Weyler as Warden, is not such a possession as would authorize his being made a defendant in the action of ejectment.

Judge Dillon, in his work on the Laws and Jurisprudence of Eng. & Am. 207 said "that all of the original States in their first Constitutions and Charters provided for the security of private property, as well as

life and liberty. This they did either by adopting, in terms, the famous thirty ninth Article of Magna Charta which secures the people from arbitrary imprisonment and arbitrary spoliation, or by claiming for themselves, compendiously, all of the liberties and rights set forth in the great Charter".

Our declaration of rights (Article 19) declares that every man for any injury done to him in his person or his property ought to have remedy by the course of the law of the land, and (Article 23) that no man ought to be deprived of his property; but by the judgment of his peers, or by the law of the land, and Section 40 Article 3 of the Constitution prohibits the passing of any law authorizing private property to be taken for public use, without just compensation as agreed between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation. Nor shall any State deprive any person of his property without due process of law.

Section 1, 14th Amendment of the Constitution of the United States.

Speaking of this amendment Judge Dillon says: "It was of set purpose that its prohibitions were directed to any and every form and mode of State action-whether in the shape of constitutions, statutes, or judicial judgments- that deprived any person, white or black, natural or corporate, of life, liberty, or property, or of the equal protection of the laws. Its value consists in the great fundamental principles of right and justice which it embodies and makes part of the organic law of the nation".

It is conceded that no suit can be brought against the State, without its consent. This immunity of the State from suit rests upon grounds of public policy, and is too firmly fixed in our law to be questioned. But it would be strange indeed, in the face of the solemn constitutional guarantees, which place private property among the fundamental and indestructible rights of the citizen, if this principle could be extended and applied so as to preclude him from prosecuting an action of ejectment against a State Official unjustly and wrongfully withholding property, by the mere fact that he was holding it for the State and for State uses.

It is easy to see the abuses to which a doctrine like that would lead. That such is not the law has been conclusively settled by United States vs Lee, 106 U.S. 106; Tindal vs Wesley 167 U.S.204; Smith vs Reeves 178 U.S. 438; 10 Am. and Eng. Ency. of Law, 528.

The only other question to be considered is this, is the character of the appellant's possession such that he can properly be made a defendant in this suit?. We think it is. The general rule upon this subject is thus stated in 7 Ency. Pl. & Prac. 303: "Where a mere servant or employee of the beneficial occupier of the premises, who claims for himself no interest therein, or no right to their possession, is in temporary possession thereof, he cannot be made a defendant in ejectment, unless he assumes the character of a tenant. And where the employer is in possession of premises through a mere servant and is not himself amenable to process, the rule in such case cannot be applied, and the employee becomes the proper party defendant".

The latter branch of this rule applies directly to the appellant's contention. But we cannot treat Mr. Weyler as a mere servant or employee. He holds his position, it is true, at the pleasure of the Directors; but he is an important State Official, charged with duties and responsibilities of a very grave and serious nature. He is in the actual, personal occupation of the premises. He resides upon them, and in addition to his salary receives an allowance "of subsistence and fuel, and occupancy as a dwelling of such parts of the front building as are not used for prison purposes, also all necessary out buildings, yards and grounds not within the walls of the prison proper".

1 Vol. Code 1904, Section 554.

The judgment will be affirmed, and if the Directors cannot agree with the owners of the land sued for, they may condemn the same under the Act mentioned, or take such other action as they may be advised is proper.

Judgment affirmed with costs above and below.