

JOHN F. WEYLER,

Warden, etc.

vs.

FRANK T. GIBSON, ET AL.

IN THE

Court of Appeals

OF MARYLAND.

APRIL TERM, 1909.

GENERAL DOCKET,

No. 35.

Appeal From the Superior Court of Baltimore City.

SUPPLEMENTAL BRIEF FOR THE APPELLANT.

A.

As to the right of the Appellees to maintain an action of ejectment against Warden Weyler for land covered by part of the Penitentiary Building:

In the original Brief for the Appellant it was attempted to show that as this suit is *in reality* a suit against the State of Maryland to recover land used by the State for a public purpose *i. e.* the State prison, the action can not be maintained.

In *U. S. vs. Lee*, 106 U. S., the Supreme Court by a majority of one, held that ejectment could be brought against an

In 1892 by Ordinance No. 111 (Approved October 17th), the Mayor and City Council in the exercise of the power conferred upon it by the General Assembly of Maryland, ordained that Great Constitution Street should be closed. *No proceedings were taken under this ordinance to legally close this Street.* (Record, page 66.)

In 1896 the Directors of the Maryland Penitentiary having previously acquired the abutting property on both sides of Great Constitution Street (Record, page 54) built over the bed of this Street. (Record, page 54.) They evidently acted under the mistaken impression that the mere passage of the Ordinance closed the Street, and that the Street being closed they, as the owners of all the abutting property, had the right to build over the bed of the Street.

The prisoners and officers were moved into the new Penitentiary Buildings on December 10th, 1899, the new buildings having been at that time finished at a cost of \$913,000. (Record, page 54.)

Then on March 22nd, 1904, this suit was instituted by the Appellees, evidently on the theory that when the Penitentiary Building was constructed over the bed of Great Constitution Street the public easement was destroyed, and that the heirs of ex-Governor Carroll, as the owners of the servient fee, were entitled to demand possession of the land.

The Appellees filed an Amended Declaration on March 26th, 1907; to this, the then defendants, the Directors of the Maryland Penitentiary and John F. Weyler, Warden, filed three pleas: first, the general issue, and secondly and thirdly, differing forms of the plea of the Statute of Limitations. The Appellees joined issue on the general issue plea, and demurred to the two pleas of the Statute of Limitations. On November 2nd, 1907, the Defendants, leave of Court to file the same first having been obtained, filed an additional plea.

defense is that he acted under the orders of the government. In these cases he is not sued as, or because he is the officer of the government, but as an individual, and the Court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority is sufficient in law to protect him.' After citing several cases to this point, he added: 'To this class belongs also the recent case of *United States vs. Lee*, 106 U. S. 196, for the act of ejectment in that case is, in its essential character, an action of trespass, with the power in the Court to restore the possession to the plaintiff as part of the judgment. And the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this Court held to be unlawful, and therefore insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession.' *Cunningham vs. Macon and Brunswick Railroad*, 109 U. S. 446, 452."

Now, if it be assumed that the doctrine of the case of *U. S. vs. Lee* is the correct rule of law, we see that even under the ruling in that case this suit is only maintainable against Mr. Weyler on the theory that he is a wrongdoer, and that he is committing a trespass by wrongfully withholding from the appellees their property.

It is therefore essential, even under the ruling in the *Lee Case*, that Weyler should be in actual possession of the property.

As the Statute Law of the State demonstrates that Weyler was *not* in possession of the land sued for, and also shows that it was beyond his power to surrender this land to the appel-

lees, it is most illogical and unreasonable to hold him a wrongdoer for failing to do a thing which it was legally impossible for him to do, *i. e.*, to surrender the land sued for.

B.

To show how inapposite are many of the cases relied on by the Appellees, it is not amiss to call to the Court's attention the case of *Elmore vs. Fields*, 45 Southern Rep., p. 67, cited on page 3 of the Appellees' Supplemental Brief.

It is true as stated by the Appellees that the defendant in that case was the Warden of the State Penitentiary. But there the analogy between the cases ceases. There the suit was not brought against the Warden to recover judgment for the land on which the State had built and was maintaining the Penitentiary; the suit was for damages for having wrongfully cut down timber alleged to belong to the plaintiffs.

C.

It is also proper to call the Court's attention to several errors in the Appellee's original Brief.

(a) It is a mistake to state (as is done with great apparent confidence on pages 9 and 10 of the Appellee's original Brief):

"If, as all the authorities hold, the State cannot prevent suits against its own direct representatives to recover from them property that is wrongfully withheld from the real owners even though by authority and in the name of the State, certainly the State cannot accomplish this by creating a corporation and making it non-suable, and thus enabling that corporation to withhold through its agents property which could not be placed beyond the reach of its true owners by putting it in charge of direct representatives of the State."

“And for a third additional plea to the Declaration in said cause, says that he is an employe 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.

“And for a fourth additional plea, he says that he is an employe of the Directors of the Maryland Penitentiary and holds 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 employment 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.”

With these pleas was filed as an Exhibit a copy of the By-Laws of the Maryland Penitentiary (Record, pages 16-37), which By-Laws prescribe the Warden's duties and powers.

The Plaintiffs and Appellees demurred to all these additional pleas (Record, page 37), and on February 17th, 1909, these demurrers were sustained. (Record, page 39.)

The case was then by consent tried on the general issue plea before the learned Judge below without the intervention of a jury. (Record, page 39.)

At the trial an admission of Counsel that ex-Governor Carroll and his wife were on May 19th, 1831, seized in fee simple of the lands described in the Amended Declaration and of the lands surrounding the same was offered in evidence (Record, pages 41-2). The Plaintiffs then offered in evidence from the original Land Record books of the Superior Court three deeds dated respectively, May 19th, 1831 (Record, pages 43-46); July 13th, 1831 (Record, pages 46-49); and July 13th, 1831 (Record, pages 49-52). These three deeds all show that ex-Governor Carroll and his wife had on the dates named in

was no discussion of the right to bring or maintain ejectment for placing additional burdens on *City Streets*.

It is noteworthy that in delivering the opinion in this case (74 Md. 47), JUDGE McSHERRY said:

“The use to which *streets* in a town or city may be lawfully put are greater and more numerous than in the case of an *ordinary road or highway in the country*. With reference to the latter, as we have just observed, all the public acquires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil, and by virtue of this ownership is entitled, except for the purposes of repair, to the earth, timber and grass growing thereon, and to all minerals, quarries and springs below the surface. But with respect to streets in populous places, the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street, and may make culverts, drains and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam and other things capable of that mode of distribution. 2 *Dillon Mun. Corp.*, Secs. 656a, 688. Subject to these and other like rights of the municipality and the public to the use of a street for *street purposes*, the owner of the fee in the bed of the street possesses the same right to demand compensation for additional servitude placed thereon, that the owner of the bed of a highway in the country is entitled to.”

(c) On page 13 of Appellees' Brief the curious mistake is made of supposing that when a street is closed the owner of the street bed is awarded damages. Of course directly the

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 got the \$500,000 appropriation. The exterior part of the walls of the Eager 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 of 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 3 feet wide, running up to about 2 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."*

Warden Weyler (Record, pages 55-57) gave in further detail evidence that the land in controversy is now within the exclusive possession of the Maryland Penitentiary and *that it is used as part of the public prison.*

On cross-examination Mr. Weyler identified and proved to be correct, the copy of the Penitentiary By-Laws filed with

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and conveyances out of which the cause of action arose took place in 1788, 1789, 1791, 1794, 1795 and 1800.

The case could not therefore have been affected by a statute passed by Ohio in 1831.

D.

The placing of an additional burden on the bed of Great Constitution Street was a matter which authorized the owner of the servient fee to file a Bill in Equity for an injunction to prevent an additional burden being placed on the street bed; but doing this wrong did not relieve the land of the burden of the easement resting upon it.

As was said by the Supreme Court in *Barclay vs. Howell's Lessee*, 6 Peters, 507:

“If this ground had been dedicated for a particular purpose and the City authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a Court of Chancery to compel a specific execution of the trust, by restraining the corporation or causing the removal of the obstructions. But even in such cases the property dedicated would not revert to the original owner. The use would still remain in the public, limited only by the conditions imposed in the grant.”

See also—

Bayard vs. Hargrove, 45 Georgia, 342.

Harrison vs. Augusta Factory, 73 Georgia, 449.

E.

It being settled that a Bill in Equity can be filed by the owner of the fee in the street bed to require the removal of obstructions placed in the street which amount to an addi-

"Q. I have asked you about the By-Laws whether they are not the By-Laws ?

"A. Yes, sir; this was adopted in 1889.

"Mr. Straus: These are the By-Laws ?

"A. Yes; in use today.

"Q. Just to get an understanding of the matter let me ask you this: Suppose the Board of Directors were to have a special meeting tonight under the practice over there, could they tell you to move out at once and quit ?

"A. *They could dismiss me at once at any time.*

"Q. *You do not claim to hold under any tenure except by the will of the board?*

A. *Entirely so."*

He further stated (Record, page 60) that he was the executive officer at the Penitentiary; that John F. Leonard, the Assistant Warden, was in charge on the day of the trial while the Warden was absent in Court. Both the Warden and the Assistant Warden are *subject to the control of the Board—the Board had control of the building and could dismiss the Warden tomorrow and he and his family would have to move out.* (Record, page 61.)

Mr. Weyler also proved (Record, page 74) that at the instance of the Board of Directors of the Penitentiary Mr. John T. Ford, who was at that time a member of the Board of Directors prepared the advertisement giving notice that Ordinance 111 for closing Great Constitution Street would be introduced in the City Council.

The Defendant and Appellant proved by Messrs. Samuel F. Sharretts (Record, pages 61-65) and Frederick W. Story (Record, pages 65-74) the course of proceeding in closing a street.

These proceedings are just the reverse of those pursued in opening a street. After giving the appropriate notices, the

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APPELLEES' BRIEF.

This is defendant's appeal from a judgment in ejectment rendered by the Superior Court of Baltimore City. The land involved comprises what was formerly the bed of Constitution street or "Great Constitution" street. Prior to May 19, 1831, Governor Thomas King Carroll and Juliana Stevenson Carroll, his wife, were the owners of all that land and the surrounding land (Record, page 41). On that date (Record, page 43) and on July 13, 1831 (Record, pages 46, 47), by certain deeds, Governor Carroll and wife conveyed the abutting lots by grants which operated to dedicate Constitution street as a street, but which did not convey to the said grantees of the abutting lots the title to the street itself, the same remaining in the Carrolls subject to the easement thus created in the public.

The appellees (plaintiffs) are the heirs of Governor Carroll and his wife (Record, page 74), and the Maryland Penitentiary Board is the owner by mesne conveyances (Record, page 52) of the lots formerly abutting on Constitution street, conveyed by the aforesaid deeds from the Carrolls in 1831.

In 1890, the Legislature passed an Act (Chapter 200) providing for the extension and enlargement of the Maryland Penitentiary. This Act empowered the directors "to contract for, purchase and hold in fee simple * * * all the several lots of ground and their improvements embraced in the following metes and bounds, that is to say, between Eager street on the north, Concord street on the west, Truxton street on the south and Forrest street on the east, or such portions thereof as they may deem necessary." Various other Acts were passed in the ensuing years, in the furtherance of this plan of extension (Record, page 53), and the directors gradually acquired (Record, page 52) all the lots abutting on this particular part of Constitution street. So far as Constitution street itself is concerned, the directors of the penitentiary had an ordinance introduced (Record, page 74) and passed by the City Council on October 17, 1892 (Record, page 52), providing for the closing of the street. No formal steps whatever were taken to close the street beyond the passage of this ordinance, nor was anything done by the penitentiary board to acquire, either by purchase, condemnation or otherwise, the rights of the Carroll heirs in the bed of Constitution street. They merely, when the work reached a point requiring the occupation of Constitution street, took possession of the street, and in the course of several years (from 1896 to 1899, Record, page 54) they had completely enclosed the street bed within the walls of the new addition to the penitentiary. From the time this work began in 1896, the use of the street absolutely ceased and the public never thereafter used or could use it. The city having passed the ordinance of 1892, providing for the closing of the street,

apparently considered it needless to do anything more, and took no further interest in the street bed, except to claim the cobblestones when they were torn up by the penitentiary board (Record, page 71). The record does not show when the attention of the Carroll heirs was first drawn to the matter, but on March 22, 1904, they filed the original declaration in ejectment to recover the street bed. The suit was originally docketed against "The Directors of the Maryland Penitentiary and John F. Weyler, Warden," and on March 26, 1907, an amended narr. against these two defendants was filed (Record, page 5). To this the two defendants filed pleas (Record, pages 9 and 10), to which the plaintiffs demurred. The demurrer was fully argued before Judge Niles, the main contention of the defendants being that the suit was one against the State and therefore not maintainable. In an able and extended opinion (Record, page 10) the Court held that the suit might be maintained against Mr. Weyler individually, but not against the Penitentiary Board, because not by statute creating it is it permitted to be sued in such actions.

The case came up for final hearing in February, 1909. The plaintiffs dismissed the suit as to the Penitentiary Board, and Mr. Weyler, as remaining defendant, filed various additional pleas, which are set out on page 14 of the record. To these a demurrer was filed and sustained, the case went to trial and evidence was offered on both sides, and the defendant renewed in his prayers all the defenses he has raised in his pleas. All the defendant's prayers required the finding of a verdict for the defendant (Record, page 78) and all were rejected by the Court. The plaintiffs offered three prayers, of which the Court granted the first and refused the other two, for reasons which will be hereafter referred to. No effort was made to recover mesne profits against the defendant and none were included in the verdict, which as has been said was for the plaintiffs, followed by a judgment (Record, page 5).

From an examination of the record it will be seen that the main questions involved in this appeal are these :

A. *Can a suit be maintained against Mr. Weyler to recover the possession of property in actual use for State purposes?*

B. *Has the easement of the public in the street as a street been abandoned or surrendered, so that the plaintiffs' title to the same is unincumbered any longer by said easement?*

C. *Even if the easement to use the street as a street is still technically in existence, does the existence of such easement prevent the plaintiffs from maintaining ejectment against a third party who has taken possession of the property and is using the same for purposes utterly inconsistent with its use as a street, and to the complete exclusion of both the plaintiffs and the public generally?*

The plaintiffs contended and contend, for the affirmative of all these propositions. Judge Niles sustained them as to the first and third. As to the second, which was presented in plaintiffs' second and third prayers (Record, pages 75 and 77) Judge Niles said it was unnecessary to rule on this point at all, and for that reason only, and not because he considered the propositions involved in these prayers erroneous (as to which he said he expressed no opinion) he rejected the second and third prayers of the plaintiffs.

Perhaps it will be convenient to discuss these propositions, without particular regard to the precise forms in which they were raised in the pleadings. Later we shall call attention to any particular question of pleadings involved.

We respectfully submit :

A. THE SUIT IS MAINTAINABLE AGAINST WEYLER, NOTWITHSTANDING THE FACT THAT HE HOLDS THE PROPERTY BY AUTHORITY OF AND FOR THE USE OF THE STATE OR OF A STATE INSTITUTION.

In his opinion (Record, page 10), to which we respectfully refer the Court, Judge Niles ably discusses the limitations

of the old doctrine whereby "the State" as the representative or embodiment of the sovereignty, was immune from suit, no matter for what wrongs. The whole subject was elaborately reargued in connection with the special pleas and the prayers, at the final hearing of the case, resulting in a re-affirmance by Judge Niles of his previous rulings.

As expressed orally by the judge at that time, the situation is this :

Our law recognizes the principle, inherited from the common law, that the State, as the sovereignty, is exempt from suit, unless by its consent. On the other hand, the Constitution, both State (Art. III, Sec. 40) and Federal (14th Amendment) provides that no citizen shall be deprived of his property without due process of law and compensation first paid or tendered.

If the principle of the State's immunity from suit is carried to the point of holding that the State may seize and retain the property of a citizen, without any redress on his part, the provision of the Constitution is practically nullified,—to say nothing of the injustice of such a view. It is one thing to hold that the State cannot be compelled to pay, *out of its own funds*, claims against it, except when and as it thinks best. It is quite another thing to hold that a State agent may take possession, without right or law, of private property, and be absolutely immune from disturbance in his possession of it, no matter how absolutely lacking the State's title may be,—purely because he claims to hold it "for the State." To avoid any such result, and to give effect to the above constitutional provision, the Courts of this country have uniformly held that while *the State as such* is non-suable, even in cases such as this, *the individual in actual possession of plaintiff's property* may be sued for the recovery of that specific property, and that where it can be shown that the State has no title, the actual possessor will not be allowed to set up as a defence, that he is holding for and by

authority of the State. If the State has no right to hold the property, it cannot lawfully *authorize an alleged agent* or representative to hold for it. This may seem, and possibly is, a refined distinction, but it is an absolutely necessary one in order to prevent gross injustice. Otherwise, as Judge Niles suggested, if tomorrow Mr. Weyler should by force take possession of say the Alexander Brown & Son building, and begin to use it as a part of the penitentiary, the owners would be absolutely helpless and without redress, notwithstanding their constitutional rights, simply because he claimed to be doing this for *State* purposes.

The distinction is recognized by all the authorities.

In *Harris vs. Elliott*, 10 Peters, 25 (35 U. S.), a case arose almost precisely similar to the one at bar, in which the heirs of the original dedicator of the street bed brought ejectment against the commandant of the United States navy yard, on the ground that the use of the streets as such having ceased, the easement had ended and the rights of the original owner or his heirs had revived.

Here, while the question of the right to sue to recover property in the possession of the State was not discussed, such a suit was allowed.

In *United States vs. Lee*, 106 U. S. 196, however, the question was expressly raised and flatly decided. The heirs of General Lee brought ejectment to recover possession of "Arlington," then used as a military station or fort. The military officers in charge were made defendants.

The defendants filed a plea similar to that filed by the defendant in the present case (see 106 U. S. 198). The Court considered the whole subject most elaborately, and we have space only to quote from the head lines as follows (page 196):

"1. The doctrine that, except where Congress has provided, the United States cannot be sued, examined and reaffirmed.

“2. That doctrine has no application to officers and agents of the United States who when as such holding for public uses possession of property, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may, by a Court of competent jurisdiction, be the subject-matter of enquiry, and be adjudged accordingly.

“3. The constitutional provisions that no person shall be deprived of life, liberty or property without due process of law, nor private property taken for public use without just compensation, relate to those rights whose protection is peculiarly within the province of judicial branch of the government. Cases examined which show that the Courts extend protection when the rights of property are unlawfully invaded by public officers.”

In *Cunningham vs. Macon, etc. Ry.*, 109 U. S. 446, the doctrine of the Lee case was re-affirmed, the Court distinguishing the class of cases covered by the doctrine of the Lee case (*See especially, page 452 of this case.*)

In *Tindal vs. Wesley*, 167 U. S. 204, the whole subject was again elaborately considered, resulting in the *complete re-affirmance of the doctrine of the Lee case.*

This case is particularly interesting because the defendant set up that he was a *State* official, and the Court holds that “whether a particular suit is one against the State within the meaning of the Constitution depends upon the same principles which determine whether a particular suit is one against the United States.”

Note. This case (167) is so full, in almost every line, of reasoning directly pertinent to the question now under consideration, that it is inadvisable to try to quote any one particular part of it. The *whole decision* is a brief for the

appellees on this question, and we respectfully refer the Court to it as concluding the whole subject.

In *Smith vs. Reeves*, 178 U. S. 438, *Tindal vs. Wesley* is in turn affirmed, and we quote page 439 of 178 U. S. as illustrating the distinction which is made between suits to recover *specific property* and suits merely to enforce a general money claim :

“The case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of *specific property*, although the latter claimed that he was in possession as an officer of the State and not otherwise. In such a case the settled doctrine of this Court is that the question of possession does not cease to be a judicial question—as between the parties actually before the Court—because the defendant asserts or suggests that the right of possession is in the State, of which he is an officer or agent (*Tindal vs. Wesley*, 167 U. S. 204, 221, and authorities there cited). In the present case the action is not to recover specific moneys in the hands of the State Treasurer. It is to enforce the liability of the State to pay a certain amount of money, etc.”

See also—*O'Reilly vs. Brooke*, 135 Fed., page 388, holding that actions of *ejectment, replevin, etc.*, may be maintained against State officers.

While, never as far as we know, directly presented before in this Court, the principle was apparently recognized, many years ago, in the case of

Reddall vs. Bryan, 14 Md. 444,

where a bill was allowed to lie against certain *commissioners* appointed by the U. S. Government to secure a water supply for the city of Washington, to restrain them from taking certain property of the complainants without due process of

law. In the plaintiffs' brief (Record, page 449) they state that "We have proceeded against the defendants as if they were private individuals, because acting as individuals merely, without authority, or acting under a false authority, they are personally responsible. They assume, or rather we assume for them, that they acted as the agents of the United States. Whether lawfully or unlawfully, is the question."

Many cases, Federal and others, were cited below by appellant, such as

Steamer *Siren* vs. U. S., 7 Wall. 152,

in which it was held that a man-of-war could not be libelled, etc. But it will be found that in every case in which the "immunity of the sovereign" was sustained as a defence, the thing attacked or sought to be recovered, was not the *plaintiff's property*, but admittedly *the State's*. An action of ejectment or replevin, in which the *specific property* of the plaintiff is demanded, is one thing. A suit merely to enforce against the State a *money claim* of the plaintiff, either by general suit or by a specific proceeding against some particular property of the defendant, is quite a different thing. *Smith vs. Reeves*, 178 U. S. 439. In the former case a constitutional right of the plaintiff (that his property shall not be taken without compensation) is involved and must be protected. In the latter case, no such constitutional right is in issue.

Defendant's counsel however suggest that inasmuch as the *Penitentiary Board itself* is non-suable, under the Statute creating it, therefore, Mr. Weyler, its warden, is necessarily as immune from suit as is the board, and that "a thing cannot be done indirectly which cannot be done directly." This very principle which they invoke however, shows, when properly applied, the fallacy of their argument. If, as all the authorities hold, the State itself cannot prevent suits against its own direct representatives to recover from them property that is wrongfully withheld from the real owners,

All the cases cited involved efforts, by the plaintiff, not to recover his own specific property (where a constitutional right would be involved as we have already shown) but to make the defendant respond in damages, out of funds *admittedly belonging to the defendant and to which the plaintiff had no specific claim* whatever—in fact which had been dedicated to a purpose totally at variance with that to which the plaintiff's suit sought to divert them.

B. THE EASEMENT OF THE PUBLIC IN CONSTITUTION STREET AS A STREET HAS BEEN ABANDONED AND LOST AND THE CITY HAS NO LONGER ANY RIGHTS THEREIN.

As we have said, this proposition is presented in plaintiffs' second and third prayers (Record, pages 75 and 77), which the lower Court rejected purely because it considered it unnecessary for the purposes of the plaintiffs' case to make any ruling on this point. If Judge Niles was right in this, and if the plaintiffs can maintain ejection against a *wrongful occupier* irrespective of the existence of the easement as a street (as we respectfully insist is the case), then it is unnecessary for this Court to pass on this question. On the other hand, if Judge Niles was wrong in holding that ejection can be maintained as long as the easement of the street exists, then it will be important for the plaintiffs to show that *no such easement in fact does exist*, or did when the suit was filed in 1904. (This question is, of course, open for discussion in this appeal, because while the prayers were rejected as involving a point not necessary, in Judge Niles' opinion, to be decided, no prayers were granted or rulings made *against* the theory of these prayers.)

The prayers in question set out the *undisputed facts* as to the conditions surrounding the discontinuance of the use of Constitution street as a street (pages 75 and 78). It is not conceivable that under these circumstances the City could still assert its former right to use Constitution street *as a*

even though by authority, and in the name of, the State, certainly the State cannot accomplish this by creating a *corporation*, and making it non-suable, and thus enabling *that corporation* to withhold through *its* agents, property which could not be so placed beyond the reach of its true owners by putting it in charge of direct representatives of the State. It could hardly be claimed for instance that in the Lee case, although the direct representative of the United States Government was suable in ejectment, the government might have defeated the suit by incorporating a company to hold the Arlington Estate and operate it as a fort, making that company non-suable, and letting such company make the commandant of the fort *its* agent and not the direct representative of the "State." Certainly that would be "doing indirectly what can not be done directly." Nor is there force in the contention that a *penitentiary* is such a vital part of the machinery of government that "*ex necessitate*" no suit of any kind will be permitted which may in any way disturb its operation. If a fort or a navy yard, designed to protect and preserve the very integrity of the nation, are not by reason of their character excepted from the rule above indicated, a penitentiary can hardly be. No case has been and we confidently assert can be, cited which makes any such distinction in favor of jails or penitentiaries. Of course, there are many cases, such as—

Moody vs. State Prison, 128 N. C. 12,

Clodfeter vs. State, 86 N. C. 51,

O'Hare vs. Jones, 161 Mass. 391,

Almigo vs. Supervisors, 25 Hun. 551,

which hold that a State penal institution or its officials can not be sued unless such suits are expressly allowed by the State; but these are merely in line with the doctrine, well established in this State as elsewhere, on which rest such decisions as—

Weddle vs. School Commissioners, 94 Md. 334.

Perry vs. House of Refuge, 63 Md. 27.

street. That it is no longer physically or actually used as a street is of course manifest. The sole question is, does the *right to resume* the use of it as a street still exist?

Appellees respectfully submit that the facts of this case come directly within the principles laid down in
Baldwin vs. Trimble, 85 Md. 403.

The City is *estopped* to deny that it has abandoned the use of the street. It is not necessary that the estoppel should exist in favor of any particular individual. The fact that it exists is sufficient. And unquestionably the City is estopped by its conduct towards and dealings with the penitentiary board, to demand that the board shall now tear down its buildings and allow Constitution street to be re-opened. The obstructions which the City allowed to be placed in the street were of the most permanent character possible, and *not temporary ones*, such as in—

Canton Co. vs. Baltimore City, 104 Md. at page 588.

In further support of the foregoing contention we respectfully refer the Court to the following additional authorities :

M. & C. C. vs. Frick, 82 Md., page 87.

Clendenin vs. Md. Construction Co., 86 Md., page 85.

Canton Co. vs. Baltimore City, 106 Md. 69.

Moale vs. Balto., 5 Md. 314.

Gephard vs. Reeves, 75 Ill. 301.

B. & O. vs. Gould, 67 Md. 60.

Angell on "Highways," Secs. 314, 326.

Harris vs. Elliott, 35 U. S. 25.

Barclay vs. Howell's Lessee, 6 Peters, 513.

The defendant offered evidence to show that the provisions of the ordinance calling for the closing of Constitution street have never yet been consummated. According to the

evidence, the city having no further interest in the matter, which involved merely an adjustment of damages and benefits, has not concerned itself further with the subject. Nothing in this however conflicts in any way whatever with the doctrine announced in the Baldwin case, in 85 Md. The city has declared its intention to give up the street. It has permitted it to be actually closed. Certainly that much is an accomplished fact. Moreover, it is a remarkable defence for the defendant to advance, that because the plaintiffs have never been awarded or tendered damages for the taking of their property, they are therefore helpless and must sit by indefinitely and see it occupied and built upon by other parties without having the right or power to prevent it in any way whatsoever. Realizing the inevitable result of their contention, defendants suggest that plaintiffs might bring mandamns to compel the formal closing of the street. But what standing would the plaintiffs have to maintain such an action, in the first place, and in the second place, might not the city simply meet this by repealing the ordinance? On what ground could such repeal be resisted by the plaintiffs unless it is in fact too late for the city to undo what it has done, that is to say, unless the city is estopped now to reclaim the right to use the street!

Moreover, if the argument of the appellant is sound, the right of the city to demand the re-opening of the street never will be lost, unless it sees fit to have a formal condemnation to adjust damages and benefits. Fifty years may go by and the situation will be unchanged (for the question rests on *estoppel* and not on *prescription*, which does not operate against the public).

C. THE PLAINTIFFS ARE ENTITLED TO MAINTAIN EJECTMENT AGAINST THE DEFENDANT EVEN IF TECHNICALLY THE EASEMENT OF THE PUBLIC IN THE STREET STILL EXISTS.

As we have said, if the point just discussed is well taken, then this point becomes immaterial, and *vice versa*.

We respectfully submit, however, that the right of the owners of the street bed to maintain ejectment against a wrongful occupier, *whether the easement of the street still exists or not*, is thoroughly well settled in this State.

The defendant argues that to sustain ejectment the plaintiff must show both title and right of possession, and he claims that *the right of possession does not exist as long as the street is in law a street*.

That the plaintiff must show right of possession is of course unquestionable, but that the owner of the street bed has such right within the meaning of the ejectment law, notwithstanding the easement of the public is, we submit, equally clear. Certainly the *Maryland* rule is clear, whatever may be the doctrine of some other jurisdictions, where the nature of the estate of the public in the street bed is viewed differently.

In the case of

Thomas vs. Ford, 63 Md., page 346,

this Court, at page 355, uses this language :

“The existence of an ordinary highway over the land of an owner, whether it had its origin by condemnation, dedication or prescription, does not divest him of the property in the soil. In such case he has full dominion and control over the land, subject to the easement of the public, and he may recover it in ejectment or bring an action for trespass against any person who deposits wood, stones or rubbish upon the soil, or otherwise infringes upon the ordinary proprietary rights of the owner of the soil, in a manner not in the use of the easement as a highway.”

Defendant seeks to escape the force of this case by arguing that that was a *country road*, and that the same principle does not apply to a city street. We respectfully submit that there is no soundness in such attempted distinction, and

neither authority nor warrant for it. On what principle does it rest? Exactly when does a "public highway" in course of development assume the legal characteristics of a city street in such a way as to strip the owner of the technical *right of possession* which at *one time* at least, as said in 63 Md., he possessed; in other words, at what stage of the development of the "road" into a "street" does the *legal character of the estate of the owner change*? Certainly this Court has never recognized any such illogical and impossible distinction. In the cases of

Canton Co. vs. B. & O., 79 Md., at page 432,

and

C. & P. Tel. Co. vs. Mackenzie, 74 Md., at page 47,

this Court, in citing the 63 Md. case, distinctly and expressly applies the principle of that case *to a city street*.

The difference is purely one of *degree* and not of *principle*. The owner of a bed of a country road has possibly a little more actual advantages accompanying this technical "right of possession subject to the easement," but in principle his right and the right of the owner of the bed of a city street are identical, and the *legal character of their estate* is the same. Moreover, there are roads and roads. Will appellant contend that as to *some* roads this "right of possession exists" and as to others it does not, the nature of the legal estate thus depending solely on the extent of the physical development of the highway?

Again, what becomes of this "right of possession" when, according to appellant, the owner of the roadbed loses it on the road reaching the dignity of a city "street"? Where does the right of possession go? Who acquires it? The *right to maintain ejectment* must reside somewhere. If the *owner* has lost it, necessarily the *City* must have fallen heir to it. But this Court has distinctly held that such is not the case, that the *City's estate* is not such as to entitle it to maintain

ejectment, inasmuch as the City has, even as to City streets, a mere easement, a mere *incorporeal hereditament*.

See—Canton Co. vs. Baltimore City, 106 Md. 69.

Nicolai vs. Baltimore, 100 Md. 579.

The defendant here practically relies on an outstanding title *in the city*; but this reliance fails him, because “an outstanding title in another means such a title as the stranger could recover on in *ejectment* against either of the contending parties.”

Waltemeyer vs. Baughman, 63 Md. 200.

George’s Creek Co. vs. Ditmold, 1 Md. 225.

In the Canton Company case in 106 Md. the City’s counsel pressed upon the Court (see Record, page 82) authorities of other jurisdictions holding a different doctrine as to the nature of the City’s estate and rights in such cases, but this Court refused to follow them. In other words, some jurisdictions have adopted the view that the *title* is in the owner of the street bed and a mere easement in the City. This view has uniformly prevailed in Maryland.

Others hold that under special Statutes, as in the States of Ohio and Illinois, the public receives a *base or qualified fee*, while the *dedicator* retains merely the *possibility of reverter*. This reverses the position of the highway at common law, and in Maryland, where the easement in the public is but an incorporeal hereditament (106 Md. 569, 100 Md. 579) and the estate of the dedicator in the street bed is an *ordinary fee, subject to an easement*.

B. & O. vs. Gould, 67 Md. at page 63.

Phipps vs. W. M. R. R. 66 Md. 319 (for Maryland view).

Cullen vs. Columbus, 58 L. R. A. 785.

Morgan vs. Chicago, etc. Ry., 96 U. S. 716.

15 Am. & Eng. Ency. (2d Ed.) page 415 (for other view).

It is important to bear in mind this difference in viewpoint, because most if not all of the few cases cited by appellant in support of his contention against the right of the dedicator of a street bed to maintain ejectment, will be found to be based on the doctrine, *nearly always the result of a local statute*, that the *fee* in the street bed vests in the public as long as the use of the street continues.

For instance, their main case of

City of Cincinnati vs. White, 6 Peters 431,

went up from Ohio where as we have shown, the estate of the public has been held to be a *base fee*, and consequently more than a mere easement, as it is held to be in this State.

Similar considerations apply to the other cases cited by appellant on this point.

It is true that *incidentally* the decision in Cincinnati vs. White discusses and throws doubt upon the right of the owner of the bed of *any* highway to recover in *ejectment* the "possession" of his estate; but this is so utterly in conflict with the practically universal view both *before and since* that decision, that *all* the authorities not only *refuse to follow it*, but treat it as merely *obiter dictu*. This is thoroughly presented in the criticism of the case of Cincinnati vs. White, contained in

Sedgwick & Wait on "Trial of Title to Land,"

where, in section 131, under the heading "City of Cincinnati vs. White discussed," the authors go into a critical analysis of that decision, of its facts, reasoning, and the authorities on which it was supposed to be based, and reach the conclusion that the ruling that ejectment would not lie in such a case is merely *obiter*. That (Record, page 57) "the cases on which it proceeds are in conflict with the universal current of modern authority, the easement being now regarded as a mere liberty, privilege or advantage existing distinct from the ownership of the soil."

How thoroughly this accords with the expressions of this very Court, may be readily seen by turning to the late case of

Canton Co. vs. M. & C. C., 106 Md. 94,

to say nothing of the case of

Thomas vs. Ford, 63 Md. 346.

See also the following sections of the same authority :

Secs. 130, 132, 141, 158, 526, 571,

Holding that the judgment will be for the recovering of the land, *subject to the easement*.

We may also add, in reference to several of the decisions urged upon the lower Court by the defendant, that

Becker vs. Lebanon etc. Ry. Co., 195 Pa. St. 503,

Redfield vs. Utica, 15 Barb. 58,

where *country roads* were involved, are directly in conflict not only with the general doctrine on this subject but with the express ruling of

Thomas vs. Ford, 63 Md. 346.

Lansburgh, etc. vs. Dist. of Col., 8 Ap. Cas. 10,

was an action of ejectment *against the District*. On page 16 the Court says :

“This is not 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.”

This is directly the situation here presented. Naturally a District of Columbia Court could not directly *reject* 6 Peters 431.

In other words, the settled doctrine of the *Maryland* Courts and of *the great majority of other jurisdictions*, whatever may be the rule prevailing in *some* forums, is that the dedication of any highway, for use as a highway, whether it be called a highway, road, turnpike or street, creates merely an *easement* in the land so dedicated in favor of the public, and like any other easement, does not disable the owner of the servient estate from maintaining ejectment against some one who unlawfully deprives him of that estate, by appropriating the land to a use other than the servitude. He may sue and recover possession *subject to the easement*, whether it be a public easement or a private easement.

15 *Cyc.*, page 25.

See also entirely in accord with the *Maryland* doctrine as expressed in the *Ford* case in 63 Md., the following authorities :

15 *Cyc.*, "*Ejectment*," page 25.

"So the owner of the fee subject to a public easement may under certain circumstances cover the land subject to the public easement. Thus he may maintain ejectment against an intruder who takes possession of and uses the land for other purposes, or who claims exclusive possession thereof, or against a permanent encumbrancer who occupies the land for a purpose inconsistent with the use for which it was dedicated."

Citing many cases in Arkansas, California, Georgia, Indiana, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, Wisconsin and England. Among them

Westlake vs. Koch, 134 N. Y. 58, to effect that—

"To maintain ejectment for any part of a public highway to which plaintiff has title, subject to the public easement, defendants must have taken exclusive possession of it or have imposed upon it some burden inconsistent with the public easement."

And in note 18 to page 26 of 15 *Cyc.* it is said :

“This rule also includes those claiming under the original owner.”

Elliott “Roads and Streets” (2d Ed.) page 718,
Sec. 669.

“And ejectment or trespass will lie against one who wrongfully places an obstruction of a permanent character upon that part of a highway in which the complainant owns the fee.”

Newell on “Ejectment,” page 32, Sec. 22.

“The owner of the land can sustain ejectment against a party who has exclusively appropriated a portion of a highway to his own use, or appropriates it to any other use than this servitude.”

(*Note*:—This is said under the heading, “Highways, Public Roads, Streets, etc.”)

II Wood on “Insurances” (3d Ed.) page 904, Section 697 :

“The owner of the fee may maintain ejectment against one who appropriates any part of the street, or trespass against any one who exercises his right of transit over the same in an unreasonable manner.”

Angell on “Highways” (3d Ed.) page 427, Sec. 319 :

“It is now perfectly well settled that the owner of the fee is entitled to protect his right in the soil by every species of action which would be open to him if his land were disencumbered of the way. In *Goodtitle vs. Alker*, which was ejectment for land subject to a highway, it was urged by the defendant that in a case at the Summer Assizes at Exeter, it had been held by Lord

Hardwicke 'that no possession could be delivered of the soil of the highway and therefore no ejection would be for it, and if it was a nuisance the defendant might be indicted.' But Lord Mansfield, putting this case out of the way entirely, as being so loosely remembered and imperfectly reported as to deserve no recognition, said 'There is no reason why the plaintiff should not have a right to all the remedies for the freehold; subject still indeed to the servitude of easement. An assize would lie if he should be disseised of it; an ——— action of trespass would lie for an injury done to it * * * I see no ground why the owner of the soil may not bring ejection as well as trespass. * * * It is true indeed that he must recover the land subject to the way, but surely he ought to have a specific remedy to recover the land itself, notwithstanding its being subject to an easement upon it.' The point thus decided has been repeatedly re-affirmed in subsequent decisions."

The author then goes on to say that the principle thus announced by Lord Mansfield has been questioned in the Supreme Court, *Cincinnati vs. White*, 6th Peters, but after critically analyzing the Supreme Court decision, he says that it must be regarded "as the *extra-judicial dicta of an individual*" (page 429), and based upon "a very imperfect review of the authorities, if not upon some misapprehension of principle."

10 Am. & Eng. Cyc., page 473 :

"Thus, highways, streets and the like are public easements, and the owner of the land subject to the easement may maintain ejection against an intruder who has seized and appropriated the land exclusively to his own use, or has used the same for a purpose not authorized by the easement." Citing cases from many states, and adding in foot note 2, "compare *Cincinnati vs. White*, 6 Peters 431."

17 American Digest, page 1978, Section 26 :

"The owner of the fee of land subject to an easement of a public highway may maintain ejectment against an intruder who takes possession of it and uses it for other purposes." Citing cases from Ark., California, Conn., Ga., Ky., Mass., Me., Mich., Miss., Mo., N. J., N. Y., Pa., Vt., Wis. (to which should be added Maryland, 63 Md).

It will be seen that not one of these authorities, nor any authority as far as we have found, makes any distinction as to the *character* of the *legal estate* between a street and any other public highway.

See also—*Jackson vs. Hathaway*, 15 Johns, 447.

Phipps vs. W. M. R. R., 66 Md. 323.

Rieman vs. Bell Line, 81 Md. 75.

On the contrary, there are many decisions in which the "highway" in question was distinctly a "city street." We quote only a few of them.

Thomas vs. Hunt, 134 Mo. 392 :

This is a flat decision in favor of the right of the owner of the bed of a city street to maintain ejectment against a wrongful occupier who places a permanent obstruction on it.

Moreover, precisely the same arguments were advanced in that case as are urged in the case at bar, quoting from page 398 :

"An action of ejectment is a possessory action, and a judgment thereon for the plaintiff entitles him to the possession of the premises recovered. It is insisted therefore, that the execution of such a judgment would as to the public be the mere substitution of one wrongdoer for another. The leading authority, in support of this position is *Cincinnati vs. White*, 6 Peters, in which the right to a remedy by ejectment was denied on the

ground that the plaintiff, by invoking that remedy, seeks to be put in actual possession of the land, and this would subject him to an indictment for a nuisance, the private right of possession being in direct hostility with the easement or use to which the public are entitled, and taking possession subject to the easement being utterly impracticable."

The Court then goes on to review the authorities and reaches the conclusion (page 400) that

"No good reason can be seen why ejectment should not lie, and that it does lie has been affirmed generally by the text writers and Courts."

See this case especially as directly in point.

Warwick, etc. vs. Mayo, 15 Grattan (56 Va.) at page 546 :

"A doubt has been cast upon the right of the owner of the soil of a highway or public square to recover in ejectment against one who takes extensive possession of the ground by the cases of *Cincinnati vs. White*, 6 Peters, 431, and *Barclay vs. Howell*, Id. 498; cases much relied on in the argument here. The cases are reviewed in the note of *Wallace & Hare*, and it is shown that the remarks of the learned judge were the extra-judicial *dicta* of an individual; for it was obviously well understood that the cases were carried to the Supreme Court for the settlement of the right of the public to the easement; and as the plaintiff claimed exclusive possession, the Court, in deciding against that claim probably did not feel called upon to decide on the right to recover subject to the easement, for which the plaintiff cared nothing. Whatever may be the law of that *forum*, in Virginia the rule has been established by an authoritative decision of the very point in accordance with the settled doctrine of the English Courts and the Courts

of the country so far as we have been referred to them except the Supreme Court."

Note:—In the case above cited, the Virginia Court of Appeals was dealing with a *city street*.

See especially page 548, where the Court says that for the purpose of suit in ejectment by the owner of the soil subject to the easement, *seizin is identical with the possession*.

Taylor vs. Armstrong, 24 Ark., page 105 :

"In Goodtitle vs. Alker, 1 Burr, 133, it was held by Lord Mansfield that the owner of the fee may maintain ejectment against one who obstructs a highway and recover the land subject to the public easement. Though the correctness of this decision was questioned by Mr. Justice Thompson in the case of City of Cincinnati vs. Lessee of White, 6 Peters (U. S.) 431, yet it has been followed and approved by the American Courts and and text-writers generally. (Citing many cases).

"And this rule applies to streets in towns and cities as well as to highways."

Adams vs. Saratoga, etc., R. R. Co. 11 Barb. 414, page 415 :

"Ejectment will not lie for a street, unless the occupation thereof by the public is wholly inconsistent with the public easement."

See also—Robert vs. Sadler, 104 N. Y. 229, holding that the City's easement in a City street "justifies only the taking of earth and soil which the process of construction or repair requires, and necessarily compels to be removed."

See also page 234 :

"The cases which hold that the fee in a highway devoted to the perpetual easement of the public is only

of nominal value, need not be considered. If such value is in any case a question of law which the Court may determine, the smallness of its value does not justify a seizure of the fee without due and lawful authority, or its destruction by indirect rulings."

See especially to the same effect,

Viliski vs. Minneapolis, 40 Minn. 308,

holding that the mere fact that the owner of the street bed has no authority without permission to enter the street, and quarry stone, does not justify the City, *which has control over the street*, in taking the stone, *in disregard of his property rights*.

Rich vs. Minneapolis, 37 Minn. 423, at page 424 :

"The public acquires in a street only a right of way with the powers and privileges incident thereto. Subject to this right, the soil and mineral in a street belong to the owner of the fee, the same as if no street had been laid out. When the surface of the land is above grade line, so that in order to grade and improve the street it is necessary to remove superincumbent materials, this may be done and probably such material may be used if necessary, in improving other parts of the street but the public easement justifies only the taking of material which the process of the construction or repair of the street requires."

The questions we have discussed cover practically all the questions really controverted in this appeal. We will now briefly refer to certain minor questions, of pleading, etc., that arose in the course of the case.

Taking them up chronologically :

(1) PLEAS OF LIMITATIONS.

These are set out on Record, page 9. The plaintiff demurred to each plea, and the Court sustained the demur-

rer. As to the second plea, which relates only to the claim for "mesne profits" the Court's opinion (Record, pages 13-14) indicates fully the grounds on which it sustained the demurrer to the plea. But it is needless to discuss this question, because the plaintiffs subsequently *abandoned their claim for mesne profits*. Hence the sustaining of this demurrer did not prejudice the defendant, whether it was correct or incorrect.

As to the third plea, that the "alleged cause of action" (an ejectment suit) did not accrue within three years, it is of course needless to discuss this. See, however,

Johnson vs. Hanson, 62 Md. 25.

(2) ADDITIONAL PLEA (filed November 2, 1907, page 10).

The demurrer to this plea also was sustained. As the defendant the Penitentiary Board was later stricken out, the question is whether Weyler could file such a plea. We have already discussed the reasons why the facts alleged in the plea constitute no defence. We shall also show later that the *form* of the plea is not permitted by our practice.

(3) "ADDITIONAL PLEAS OF WEYLER" (Filed February 15, 1909, page 14).

These were also demurred to, and the demurrer sustained. As all the facts alleged in these pleas were later proven under the general issue, and all proper defences could be made under that plea, no harm was done the defendant in any event, by sustaining the demurrers.

Wallis vs. Wilkinson, 73 Md. 128.

In so far as the substance of these pleas is concerned, the law bearing on the questions which they raise has already been fully discussed. Not one of them in fact constitutes a good defence, even if such facts could be pleaded in this way.

But apart from this, the pleas are totally improper.

The *first plea* (page 15) in substance admits that defendant is in physical possession of the property, but disclaims title or claim of title thereto.

The Code distinctly provides what pleas the defendant may file and what shall be their effect,

Code, Art. 75, Sec. 71,

and under these provisions the plea of "not guilty" (*which was filed in this case*) amounts to "a confession of the possession and ejection and only puts in issue the title to the premises and right of possession and the amount of damages, etc."

The plaintiff must recover on the strength of his *own* title, and title in another may be proven, but under our practice this should be done under the plea of "not guilty." The defendant either does or does not resist plaintiffs' claim. If he does resist it, that is an "ouster" by the defendant and our Code provides that the plea shall be "not guilty," which has that effect. If defendant does not resist it, he can disclaim any interest, as the Code also provides. But he must do one or the other. He cannot both refuse to give up possession and yet disclaim any interest. Nor, of course, can he rely upon the fact that he holds merely as employee, and at the will, of some one else, and that he is governed by a "set of rules" of his employer (Exhibit, Record, page 16), if in fact that employer has no right to keep him in possession. Only "outstanding title in another" will protect him.

Defendant's *second* plea (Record, page 15) clearly pleads a defence which is provable under the general issue plea, if at all, and is besides manifestly insufficient.

The *third* plea also manifestly is improper. In the first place, every plea must by itself constitute a good defence. Taking this plea alone and apart from the others, what does it amount to? A defendant *in ejection*, replies that "he is a penitentiary employee." Nothing whatever is shown in *this plea*, to connect the penitentiary with the suit, in any

way whatever. The same technical objections under our Code provisions apply to this as to the other pleas. We have already discussed the subject of the suability of an agent of the State in cases such as this.

The *fourth* plea (Record, page 15) admits in substance *physical* possession or occupancy of the property but denies that he is in *legal* possession. The very purpose of an ejection suit is to recover from one who is in actual possession and restore the property to the plaintiff, who is entitled to the legal possession.

The same reply might be made by any defendant, in any ejection suit. The Code, as we have said, provides, however, that a defendant must either disclaim any interest in the *controversy or dispute the plaintiff's claim*. He cannot resist the claim and at the same time assert that he is doing it only for some one else, and that he, the defendant, is in no way personally responsible or liable. Moreover, *all these pleas are inconsistent with the plea of "not guilty" which admits the possession of the plaintiffs and their ejection by the defendant.*"

Brooke vs. Gregg, 89 Md. 237.

Unquestionably they cannot be filed *with a plea having that effect*. In any event the allowance of *special* pleas where the matter can be raised under the general issue plea *which was filed in this case*, is in the discretion of the trial Court and is not the subject of an appeal.

Wallis vs. Wilkinson, 73 Md. 132.

But as we have said, all these attempted defences were later raised in the evidence and prayers, so no harm whatsoever was done the defendant, by not permitting them to be specially pleaded. Hence, the question of pleading is a more interesting than practical one in this case.

Wallis vs. Wilkinson, 73 Md. 132.

(4) PLAINTIFFS' FIRST PRAYER.

This is merely a statement of the provisions of the Code in such cases.

Code, Art. 75, Sec. 71.

The same ruling has in substance been passed upon and approved by this Court.

See—Brooke vs. Gregg, 89 Md. 237.

Wallis vs. Wilkinson, 73 Md. 131.

Tome vs. Davis, 87 Md. 595.

(5) The deeds whereby the street bed was dedicated in 1831, did not convey the title in the street bed to the abutting lot owners, but retained it in the grantors, the plaintiffs' ancestors.

While we understand this is not disputed, we merely refer to—

Peabody Heights vs. Sadtler, 63 Md. 33.

B. & O. vs. Gould, 67 Md. 63.

Rieman vs. B. & O., 81 Md. 68.

(6) As to *Plats*. One was filed with the declaration and used in evidence. By agreement, to save expense, these were not incorporated in the *printed* record (Record, page 40).

In conclusion we respectfully suggest that if it be true, as it must be, that the plaintiffs, like any other owners of similar estates, are entitled to have their property back again, as soon as the public ceases to need or to use it for the only purpose to which it was dedicated by plaintiffs' ancestors, there is little equity in seeking to deprive them of this right on the purely technical grounds,—

(a) That the defendant, however wrongful his retention of their property, cannot be sued for its recovery ;

(b) That the City has itself neglected to take any steps at least to award the plaintiffs their proper damages for the taking of their property, or

(c) That for technical reasons, no action at law such as ejectment or trespass can be maintained, no matter how widely defendant may have diverted the property from the only use for which it was dedicated to the city.

If the defendant is right in his contention, the plaintiffs have no remedy whatever, the estate which they admittedly own in the street bed has neither actual nor *legal* value, and it is unnecessary either in this case or in any other similar case to pay any attention to the rights of the street bed owner before diverting his property to any use whatever, no matter of what kind.

In the Court below much was said by appellant as to the alleged want of merit in plaintiffs' claim, and it was suggested without any evidence to support it, and evidently because of ignorance of facts which have since been made known to the appellant's counsel, that plaintiffs had deliberately stood by and permitted valuable improvements to be made on land to which they had a concealed claim. We will not discuss this question further, as it can have no bearing on the issue whatever, and no evidence showing the real history of the matter is in the record. In this Court the sole question is, have the plaintiffs made out such a case as to entitle them to a judgment by the Court that they are the owners of and entitled to the possession of the land for which they sue. It is not for the Court at this stage to consider how inconvenient the enforcement of such a judgment might be to the State authorities, or how the Court could enforce such a judgment should the authorities decline to acquiesce in it. As the decisions previously cited say, it is not to be presumed that when this Court has declared

what the rights of a litigant are, the State will refuse to accord him those rights or to respect the Court's decision. And if there are in fact other grounds on which the enforcement of the plaintiffs' claim should be restricted or prohibited, the defendant has ample opportunity and right to bring these to the Court's attention.

Respectfully submitted,

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Attorneys for Appellees.

JOHN F. WEYLER,

Warden of the
Maryland Penitentiary,

vs.

FRANK T. GIBSON ET AL.

IN THE

Court of Appeals

OF MARYLAND.

APRIL TERM, 1909.

GENERAL DOCKET,
No. 35.

SUPPLEMENTAL BRIEF FOR APPELLEES.

ADDITIONAL AUTHORITIES ON RIGHT TO SUE WEYLER.

26 Am. & Eng. Encyc, 2d Ed., at page 491.

“ A suit against individuals to recover the possession of property of which they have actual possession and control is not to be considered a suit against the State merely because those individuals claim to be in rightful possession as agents of the State and assert title and right of possession in the State ; but the Court will enquire whether the plaintiff is in law entitled to the possession, and whether the individual defendants have any right in law to withhold possession, and if it be found that the plaintiff is entitled to possession and that the claim of right of possession and title in the

State is without legal foundation, will adjudge that the plaintiff recover possession."

Cooley, "Constitutional Limitations," 7th Ed., pages 23 and 24, note 2;

Citing 106 U. S. and following cases, as the recognized law on the subject.

Board of Public Works vs. Ganti, 76 Va. 455.

"Suits against agents and officers of a government in possession of *specific property* under a void title, may be maintained by the true owner, and it is no answer for them to say that the State has an interest in or claim to the property, but no decision has gone to the extent of affirming that such suit can be maintained for the recovery of *money or property belonging to the State*, because it happens to be found in the possession of its ministerial officers or agents."

See page 464 of this decision, citing 106 U. S., and speaking of it as follows:

"It is a discussion worthy of that high tribunal in its palmyest days."

Whalley vs. Patten, 10 Texas Civ. Ap. 77.

"One in the actual possession of land may be sued therefor in trespass to try title, although he hold such possession only as an officer and agent of the State, and the suit is not one against the State."

Citing 106 U. S.

Sanders vs. Saxton, 182 N. Y. 477, at page 479:

"In *U. S. vs. Lee*, 106 U. S. 196, it was held that while the United States could not be sued without its consent, still an action might be brought in ejectment to recover lands in the possession of officers and agents of the United States. These cases and others *fully sup-*

port the doctrine that the officers and agents of the United States and of the States may be sued for their illegal acts or to recover property illegally possessed by them, despite the immunity of their principal, etc."

Salem Flouring Mills vs. Lord, 59 Pac. Rep. at page 1036 (Supreme Ct. of Oregon). Reviews and approves *Lee Case*, 106 U. S.

Elmore vs. Fields (Supreme Ct. of Ala.), 45 So. Rep. at page 67 :

"It must stand to reason that no person can commit a wrong upon the property or person of another and escape liability, upon the theory that he was acting for and in the name of the Government, which is immune from suit at the instance of one of its subject."

Citing, among others :

U. S. vs. Lee, 106 U. S.

Tindal vs. Wesley, 167 U. S.

Note: This case is interesting because the defendant was *Warden of the State Penitentiary*, and he sought to escape on a plea that this was in effect a *suit against the State*."

Bonnett vs. Vallier, 116 N. W. 885 (Supr. Ct. of Wisconsin.)

"An action against State officials to enjoin them from enforcing an unconstitutional law is not an action against the State, and the law, so called, affords them no protection.

"They are judicially regarded as acting in their personal capacity."

Citing—*Ex parte Young*, 209 U. S. 123,

which in turn reaffirms (p. 151) *U. S. vs. Lee*, and *Tindal vs. Wesley*, 167 U. S. Even the dissenting opinion does this (p. 191).

ADDITIONAL AUTHORITIES ON RIGHT TO SUE IN EJECTMENT A
WRONGFUL OCCUPIER OF STREET BED.

Gurnsey vs. Northern Calif. Ry. Co., 94 Pac.
Rep. 863 (Calif.)

Dusenbury vs. Mutual Tel. Co., 11 Abbott N. C.
(N. Y.) 440.

Lewis, "Eminent Domain," Section 647.

7 Ency. of Pl. & Pr., pages 269 and 270.

FREDERICK H. FLETCHER,
RANDOLPH BARTON, JR.,

Attorneys for Appellees.

TRANSCRIPT OF RECORD

FROM THE

SUPERIOR COURT OF BALTIMORE CITY, 3

IN THE CASE OF

JOHN F. WEYLER, WARDEN OF THE MARYLAND PENITENTIARY,

VS.

FRANK T. GIBSON, JULIA EASTER, CHARLES C. CARROLL, VICTOR C. CARROLL, VIVIAN CARROLL, MARGARET H. CARROLL, JULIA S. CARROLL, NELLIE C. CARROLL, ADA C. BOWDLE, SALLY CARROLL CRADDOCK.

TO THE

COURT OF APPEALS OF MARYLAND.

APPEAL TO APRIL TERM, 1909.

ISAAC LOBE STRAUS, Attorney General,
WM. S. BRYAN, JR.,
For Appellant.

BARTON, WILMER, AMBLER & STEWART,
COLDSBOROUGH & FLETCHER,
For Appellee.

In the Court of Appeals of Maryland:

APPEAL FROM SUPERIOR COURT OF BALTIMORE CITY.

Action in Ejectment commenced on the 24th day of March, 1904.

DOCKET ENTRIES.

(Inserted by Agreement of Counsel.)

22nd March, 1904.—Ejectment Mem. Nar, notice & election for a jury trial filed. Writ issued. 2 copies nar, & notice under seal with 2 copies of writ of summons sent. (Great Constitution & Eager Sts.) “Summoned the Directors of the Maryland Penitentiary a body corporate, by service on Francis E. Waters, President, and a copy of the declaration with a copy of the writ of summons served on the defendant on the 6th April, 1904. Also summoned John F. Weyler, Warden, and a copy of the declaration with a copy of the writ of summons served on the defendant on 31st March 1904.”

11th April, 1904.—App. for defendants rule plea.

26 April, 1904.—Pleas 1, 2, 3 filed, service admitted rule rep.

20 May, 1904.—Joinder of issue to 1st plea & demurrer to 2 & 3 pleas filed. Issues joined short.

26 March, 1907.—Amended Nar filed service admitted rule plea.

21 May, 1907.—Pleas 1, 2 & 3 to amended Nar filed (no service).

28 Oct., 1907.—Joinder of issue to 1 plea & demurrer to 2 & 3 pleas filed. Service admitted & issues joined short on dem.

2 November, 1907.—Addt'l 4 plea filed, rule rep.

11 Jan., 1908.—Dem. to 2 & 3 pleas sustained. Opinion filed.

13 Jan., 1908.—General issue plea of Directors of Md. Penitentiary withdrawn by leave of Court. Same day Demurrer to Nar short on behalf of Directors of Md. Penitentiary & issue joined short. Same day, Dem. sustained & leave granted to Pltff. to amend the Nar within 15 days. Same day, General issue plea of John F. Weyler, Warden, withdrawn by leave of Court. Same day, Dem. to Nar, short on behalf of John F. Weyler, & issue joined short on Demurrer. Same day, Dem. overruled. Same day, plea not guilty short on behalf of John F. Weyler, Warden, and issue joined short.

30 Jan., 1908.—Time for amending Nar extended to April 15, 1908, order of Court filed.

10 March, 1908.—Admissions of facts filed.

15 Feb., 1909.—Leave asked by Defendant the Directors of the Md. Penitentiary to withdraw general issue plea & file demurrer to said declaration. Same day leave granted & plea withdrawn Order of Court filed 15 Feb., 1909, Demurrer short to Narr and issue joined.

15 Feb., 1909.—Leave asked in open Court to file additional pleas on behalf of Defendant, John F. Weyler, Warden, same day, leave granted, pleas filed.

16 Feb., 1909.—Demurrer short to additional pleas & issue.

16 Feb., 1909.—Case dismissed as to defendant Directors of Md. Penitentiary. Order filed.

16 Feb., 1909.—Plaintiff asked leave to amend Nar by interlineation. Same day, leave granted. Same day, amendment made, petition & order of Court filed.

17 Feb., 1909.—Demurrer to 1, 2, 3, 4 additional pleas sustained.

17 Feb., 1909.—Waiver of Jury trial. Order of Plaintiffs and Defendants attorneys filed.

19 Feb., 1909.—Case tried before Hon. Alfred S. Niles without the aid of a jury.

19 Feb., 1909.—Verdict in favor of the Plaintiffs for property described in Declaration with one cent damages & costs.

19 Feb., 1909.—Judgment on Verdict Nisi.

23 Feb., 1909.—Judgment on verdict absolute in favor of the Plaintiff for the property described in the Declaration with one cent damages & costs of suit.

23 Feb., 1909.—Defendants' order of appeal filed.

8 March, 1909.—Time for signing & filing Bills of Exception in this case extended for 30 days from March 9, 1909.

17 March, 1909.—Agreement filed.

17 March, 1909.—Bills of Exceptions.

AMENDED DECLARATION.

(Filed March 26, 1907.)

Frank T. Gibson, Julia Easter, Charles C. Carroll, Victor C. Carroll, Vivian Carroll, Margaret H. Carroll, Julia S. Carroll, Nellie C. Carroll, Ada C. Bowdle and Sally Carroll Craddock, by Goldsborough & Fletcher and Barton, Wilmer, Ambler & Stewart, their attorneys, sue The Directors of the Maryland Penitentiary, a body corporate, duly incorporated under the laws of the State of Maryland, by Section 400 of Article 27 of the Code of Public General Laws, and John F. Weyler, its warden:

For that the plaintiffs, being the owners thereof, were in possession of the following described property in the city of Baltimore and State of Maryland, to-wit:

Lot No. 1. All that part of a certain parcel of land designated as Lot "55", (on a plat marked No. 142, now on file in the Record Office of the Superior Court of said Baltimore City) that lies to the south of the south side of East Eager Street, and to the east of the west side of Great Constitution Street as the said street formerly existed before that part of said Great Constitution Street to the south of said East Eager Street was abandoned as a street. (The plat above referred to is a plat of the lands of Dr. Henry Stevenson, passing on his death to Cosmo G. Stevenson and Juliana (Stevenson) Carroll, wife of Thomas K. Carroll, his residuary devisees, which plat was made under the direction and authority of the said residuary devisees, and by which they made partition of the said lands, which lands, passing unto them as residuary devisees as aforesaid, are a part of the tract of land called "Salisbury Plains" and a part of that part of "Salisbury

Plains" that was conveyed unto the said Doctor Henry Stevenson by Thomas Rutter and wife, by deed dated the 14th day of March, 1770, and now recorded among the Land Records of Baltimore City aforesaid, in Liber A. L. No. B, folio 444; the said plat is also the same plat referred to in the two following deeds, to-wit: (1) Deed to Wm. W. Donald and others, Directors of the Maryland Penitentiary from the said Thomas K. Carroll and Juliana (Stevenson) Carroll, his wife, dated the 26th day of May, 1828, and now recorded among the aforesaid Land Records in Liber W. G. No. 193, folio 512, etc. (2) Deed to the said "The Directors of the Maryland Penitentiary" from Josias Pennington, Trustee, and Harriet G. Stevenson, dated the 7th day of November, 1828, and now recorded among the aforesaid Land Records in Liber W. G. No. 195, folio 539. The lands above described as lot "55" are a part of the same lands described in a conveyance dated the 7th day of June, 1825, unto the said Thomas K. Carroll and Juliana (Stevenson) Carroll, his wife, from the said Cosmo G. Stevenson and wife, and now recorded among the Land Records aforesaid in Liber W. G. No. 176, folio 239, etc.

Lot No. 2. All that part of certain parcels of land designated as lots "56", "57", "44", "30", "29", "45" and "46" on the aforesaid plat marked No. 142, that lies to the south of the south side of East Eager Street and to the north of a line joining the end of the fifth course, (of the second parcel of the lands conveyed by a deed dated the 18th day of May, 1850, to one John Eager Howard from Josias Pennington and James Mason Campbell, Trustee, etc., et al., and now recorded among the aforesaid Land Records in Liber A. W. B. No. 438, folio 105), and the end of the first course of of the second parcel of the lands conveyed by a deed dated the 19th day of May, 1831, to one Robert J. Henry from the said Thomas K. Carroll and Juliana (Stevenson) Carroll, his wife, and now recorded among the aforesaid Land Records in Liber W. G. No. 212, folio 52, and to the west of the east side of said Great Constitution Street, and to the east of the west side of Great Constitution Street, as the same formerly existed before that part of said Great Constitution Street to the south of said East Eager Street was abandoned as a street. The lands above particularly described as Lots "56", "57", "44", "30", "29", "45" and "46", are a part of the same lands described in a conveyance dated the 7th day of June, 1825, from the said Thomas K. Carroll and Juliana (Stevenson) Carroll, his wife, unto the said Cosmo G. Stevenson, and now of record among the Land Records aforesaid

in Liber W. G. No. 176, folio 241, and are also a part of the same lands that were conveyed unto the said Robert J. Henry by Josias Pennington, Trustee, by deed dated the 29th day of December 1830, and now of record among the aforesaid Land Records in Liber W. G. No. 212, folio 48, and also a part of the same lands conveyed unto the said Thomas K. Carroll by the said Robert J. Henry by deed dated the 19th day of May, 1831, and now recorded among the aforesaid Land Records in Liber W. G. No. 212, folio 51.

Lot No. 3. All that part of certain parcels of land designated as "Parnassus Hill Street" and "Alley", (said alley binding on the east of a lot marked "A" on said plat), on the aforesaid plat marked No. 142, that lies to the north of a line joining the end of the fifth course, (of the second parcel of the lands conveyed by the aforesaid deed dated the 18th day of May, 1850, to John Eager Howard from Josias Pennington and James Mason Campbell, Trustees, etc., et al., and now recorded among the aforesaid land records in Liber A. W. B. No. 438, folio 106) and the end of the first course of the second parcel of the lands conveyed by a deed dated the 19th day of May, 1831, to the said Robert J. Henry from the said Thomas K. Carroll and Juliana (Stevenson) Carroll, his wife, and now recorded among the aforesaid Land Records in Liber W. G. No. 212, folio 52, and to the east of the west side of Great Constitution Street, and to the west of the east side of said street, as the same formerly existed before that part of said Great Constitution Street to the south of East Eager Street was abandoned as a street. The lands above particularly described as "Parnassus Hill Street" and "Alley" are a part of the same lands, described in a deed dated the 19th day of May, 1831, from the said Robert J. Henry unto the said Thomas K. Carroll, and now recorded among the Land Records aforesaid in Liber W. G. No. 212, folio 50, and thereby conveyed.

The lands above described as Lots Nos. 1, 2 and 3 are as a whole thus described. Beginning at the point of beginning of the second parcel of the lands conveyed by the aforesaid deed unto the said John Eager Howard from Josias Pennington and James Mason Campbell, Trustees, etc., et al., and now recorded as aforesaid, and thence running southerly 239 feet with the west side of said Great Constitution Street (as the same formerly existed, as aforesaid) and with the last course reversed of said second parcel in said deed to the beginning of said last course, thence easterly, in a straight line, to the end of the first course of the second parcel of the lands

conveyed by the aforesaid deed unto the said Robert J. Henry, dated the 19th day of May, 1831, and now of record as aforesaid, thence northerly, with the aforesaid first course reversed, 229 feet, with the east side of said Great Constitution Street, (as the same formerly existed as aforesaid) to the beginning of said first course, and thence westerly in a straight line to the place of beginning.

A plat of the lands shown on said plat No. 142 is herewith filed as part hereof, marked "Plaintiffs' Exhibit 1" showing the lands passing unto the said Cosmo G. Stevenson and Juliana (Stevenson) Carroll, as the residuary devisees of Dr. Henry Stevenson as aforesaid, and showing the same divisions into streets, alleys and lots as shown on the aforesaid plat No. 142, (the lots being indicated in red figures, by the same numbers, as on the aforesaid plat No. 142) and also showing the position of Great Constitution Street, (before the closing of a part of the same as aforesaid), and of East Eager Street.

And the defendants did wrongfully enter said parcels of land, Lots Nos. 1, 2 and 3, and eject them, the said Plaintiffs therefrom, and the said Defendants ever since have retained and still retain possession of the said lots or parcels of land, and other wrongs to the said plaintiffs then and there did to their great damage.

And the Plaintiffs claims the recovery of the said parcels of land, and for their damages, \$40,000.00.

BARTON, WILMER, AMBLER & STEWART,
GOLDSBOROUGH & FLETCHER,

Attorneys for Plaintiffs.

Rule Plea.

PLEAS TO AMENDED NAR.

(Filed May 21, 1907.)

The Defendants, by George M. Upshur, Llyod L. Jackson, and William S. Bryan, Jr., their attorneys, by way of a first plea to the amended Nar in this case, say that they did not commit the wrongs alleged.

And for a second plea to the amended Declaration, the defendants say that so far as the plaintiff's claim relates to pecuniary damages the alleged cause of action did not accrue within three years before this suit.

And for a third plea the defendants say that the alleged cause of action did not accrue within three years before this suit.

GEO. M. UPSHUR,

LLOYD L. JACKSON,

WILLIAM S. BRYAN, JR.,

Defendant's Attorneys.

Rule Rep.

REPLICATION AND DEMURRER.

(Filed October 28, 1907.)

And the said Plaintiffs herein, by Goldsborough and Fletcher, and Barton, Wilmer, Ambler and Stewart, their attorneys, as to the defendant's pleas to the amended Narr herein, say:

1. As to the first plea the Plaintiffs join issue.
2. As to the second plea so pleaded, the Plaintiffs demur thereto, and for ground of demurrer say that the said plea is not sufficient in law, and is bad in substance.
3. And as to the third plea so pleaded, the Plaintiffs demur thereto, and for ground of demurrer say that the said plea is not sufficient in law and is bad in substance.

GOLDSBOROUGH & FLETCHER,

BARTON, WILMER, AMBLER & STEWART,

Attorneys for Plaintiffs.

Issue joined short.

ADDITIONAL PLEA.

(Filed November 2, 1907.)

And the Defendants, leave of Court first being had and obtained, to the filing of this plea, for an additional plea, say that the premises in controversy are covered by a part of the Maryland Penetentiary Building.

W. S. BRYAN, JR.,

Attorney General.

Rule Replication.

COURT'S OPINION.

(Filed January 11, 1908.)

The main defense to this action of Ejectment which is raised by the pleas demurred to is that the land sought to be recovered is actually occupied by the State of Maryland for State purpose, to-wit: a penitentiary; that, should there be a recovery, it could only be made effective by dispossessing the State itself of one of the buildings actually used in the necessary work of carrying on its government; and consequently the action is really a suit against the State in its Sovereign capacity.

In the sense that the State has an interest which is directly affected and that the defendants have no personal interest but are only holding the land as officials of the State the defendants' contention is palpably and unquestionably true; and it is also true that neither in this country nor England can the State be sued without its consent, and that the State of Maryland has not given such consent.

But it is also true that in Maryland, in other States of the Union, and in the Federal government, the people have by Constitutional enactment forbidden either State or Nation to take the land of a citizen for public purposes without compensation, and that in Maryland this compensation must be paid or tendered previously to the taking.

Now it is obvious that if the State's agents could once get possession of the lands of a private individual, set up a penitentiary thereon, or use it for any other governmental purpose and then defend themselves against the rightful owner

by saying, "This land is occupied for governmental purposes, and any suit that you may bring to recover it, is practically a suit against the State", the Constitutional protection would be a vain and delusive thing.

Upon the solemn declaration of the people that the State must not confiscate private property, there would be engrafted the exception that should the agents of the State once succeed in unlawfully getting possession of private land and putting it to a public use, the rightful owner would have no redress, except by grace of the very power that would be reaping advantage of the wrong.

It is certainly true that there are serious inconveniences when Courts are allowed to interfere with, restrain, or punish public officers, acting without malice, in good faith, in the discharge of their official duties and in strict obedience to the orders of their superiors.

These inconveniences have been so apparent that there has grown up in certain countries,—France, for instance—a body of what is there called, "Droit Administratif", that applies to an official of the government, acting as such, a different rule and a different measure of protection from what is applicable to non-official persons, and avowedly carries out the principle that administrative bodies must never be troubled in the exercise of their functions by any act whatever of the Judicial power.

But it has been one of the features of the Common Law, in which English and American publicists have taken most pride, that it is no respecter of persons, and will punish an officer of State for a Tort committed by him, although in good faith and without malice, and in strict obedience to orders, exactly as it would punish the same tort committed by a private person.

It is true that in England an action of Ejectment, for premises in the actual occupation of the Crown, stands on a different footing from other actions of Tort in this respect, and cannot be maintained without consent of the Sovereign; although this consent seems to be given as a mere matter of course.

In this country, however, the Supreme Court of the United States, has flatly and repeatedly decided that Ejectment is to be treated in this regard like any action of Trespass, and will lie against the persons actually in the wrongful possession of a plaintiff's lands, even though they hold these lands

merely as officers of the government for the essential purposes of government, and in strict obedience to the orders of their superiors; as for instance, the Commandant of a navy yard or a fort.

Although the question as to the liability of our State officers to Ejectment, suits in the State Courts is not one arising under the Federal Constitution, still, on such a subject, the opinion of the Supreme Court should be of the highest authority in the absence of a contrary holding by our own Court of Appeals.

There has certainly been no such direct holding in Maryland; nor do the rulings that the State as such cannot be liable for costs, and that in a suit by the State, set off cannot be pleaded against it appear to this Court, even indirectly to indicate a different point of view on this question from that occupied by the Federal tribunals.

Furthermore, to this Court, the reason of the rule announced by the Supreme Court seems too plain for question.

Indeed were the matter an open one this Court would go further and question whether there is any real necessity for the fundamental rule which protects the State itself from suit.

Whatever some of our ancestors may have thought of the peculiar and sacred character of Kings and Magistrates, we, here and now, recognize that when we actually come into contact with "The State", we generally find it, in the concrete, to be, (in the expressive phrase sometimes used), "an ordinary clerk with a pen behind his ear"; while our abstract and theoretical conception is that "The State" is merely the body of those agents of the public who are carrying out the commands of the people as expressed in their Constitutional enactments.

If this body of men, or any one or more of them, instead of carrying out the command of the people as so expressed, fail in his or their duty and violate the instructions of his or their principal it would seem to this Court, upon the whole, that the better reasoning would require that he or they should be liable to Judicial process in every case, quite as much as the agent of a private person who fails to carry out his duty to his principal.

Various States have, in various degrees, allowed themselves to be sued in their Courts, and nothing of dignity or Sovereignty, or ability to carry on the proper work of government, seems to have been lost thereby.

But of course, the rule of exemption of the State is now a part of our Law, and it matters little what might be the opinion of any Court, and particularly a Court of first instance, upon its merits as an abstract question.

Nevertheless, as the rule is fixed, so seem to this Court to be its limitations and exceptions. Among them is the limitation that if the agents of the State deprive one unlawfully of his real property he may bring an action against them for its recovery, no matter whether or in what manner the State reaps an advantage from their tort. Justice is attained in such a case by the application of some such legal fiction as this, viz: It is impossible for that impeccable entity—the State—to wrongfully occupy land, and therefore, if land of which the plaintiff is the rightful owner is wrongfully withheld from him, this cannot be the act of the State or its authorized agents, but must be the act of individual wrongdoers, even though they do it for the State's benefit.

Of course, as a consequence of this principle that such defendants cannot in law be its agents to commit a Tort, the State is not estopped by any judgment against them, but may file a bill in its own name to quiet title, or take such other action as may be fitting.

These being what the Court considers the true principles of decision, the demurrer to the defendants 4th plea will be sustained.

The Court is of opinion, however, that "The Directors of the Maryland Penitentiary", is a *quasi* corporation or governmental agency upon which liability to suit is not imposed by any statute, and if the point were raised, would sustain a demurrer to the declaration as to it. The demurrer now interposed is however to the pleas; and, although mounting up to the declaration, cannot be sustained as to the whole declaration when one of the two alleged tort feasons is held to be liable to the action.

There is also a demurrer to the 2nd and 3rd pleas, being pleas of limitations.

As the Court understands the changes made in the old law by our State legislation, the Action of Trespass for Mesne Profits, is not made the main action into which the action of Ejectment is merged; nor is it—so to speak—merely federated with the action of Ejectment, so that both are now carried on concurrently in one suit. As the Court understands

it, the old action of Trespass for Mesne Profits is completely merged and *and* lost; and, to cover the need for which it was used, the old action of Ejectment is simply enlarged so as to include substantial as well as nominal damages. If this be so, nominal damages at least are recoverable with every successful Ejectment suit, and no plea can be good as against all pecuniary damages whatever unless it be good as against the whole action.

If the law as above stated be correct, it is evident that neither a plea that "the alleged cause of action", nor that the alleged cause of action, "so far as it relates to pecuniary damages", "did not accrue within three years" would be a good plea.

The demurrer, therefore, as to the 2nd and 3rd pleas will be sustained.

It is not necessary to consider in this opinion whether under the Code, any plea is allowed in Ejectment except the general issue plea of "Not Guilty" or pleas "on equitable grounds" as counsel are understood to desire that the main question, as to whether Ejectment could be brought for ground covered by the State Penitentiary, should be decided by this Court.

It would be very ungracious not to acknowledge the indebtedness to the counsel on both sides which the Court feels for their able arguments and for their full citations of authorities, all of which have been carefully examined by the Court and have led to the above conclusions.

ALFRED S. NILES.

DOCKET ENTRY:

15 Jan., 1908.—Plea not guilty short on behalf of John F. Weyler, & issue.

ADDITIONAL PLEAS OF JOHN F. WEYLER.

(Filed Feb. 15, 1909.)

And John F. Weyler, Warden, &c., one of the defendants herein, by Isaac Lobe Strans, Attorney General, and William

S. Bryan, Jr., his attorneys, for a first additional plea—leave of Court to file the same having been first had and obtained—says:

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.

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 has 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.

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.

And for a fourth additional plea, he says that he is an employee of the Directors of the Maryland Penitentiary and holds 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 employment 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.

ISAAC LOBE STRAUS,

Attorney General.

WILLIAM S. BRYAN, JR.,

For Defendant, John F. Weyler, Warden, &c

EXHIBIT WEYLER.
(Filed February 15, 1909.)

RULES AND REGULATIONS
FOR THE GOVERNMENT
OF THE
MARYLAND PENITENTIARY.

REVISED.

Adopted March 26th, 1889.

BOARD OF DIRECTORS.

1899.

Wilbur F. Jackson, President.

John T. Ford.

Henry Seim.

Lloyd L. Jackson.

Thomas W. Morse.

Francis E. Waters, Secretary.

JOHN F. WEYLER,

Warden.

DIRECTORS.

The Directors shall hold a regular meeting on the first Wednesday of each month, to be known as the monthly meet-

ing, or by adjournment from time to time, and shall also meet when occasion may require; the Warden or two Directors giving notice thereof. They shall keep minutes of their proceedings, and a majority shall be a quorum for the transaction of business.

It shall be their duty to direct the management of the concerns of the prison, and to see that the laws and regulations, in relation thereto, are obeyed and observed by all connected with the Institution.

They shall have the general management of the commercial, financial, and manufacturing affairs of the Institution.

The Directors shall appoint a Monthly Committee and such other committees as may be required by the interests of the Institution.

THE MONTHLY COMMITTEE.

There shall be appointed by the Board of Directors, from among their members, a Monthly Committee, to consist of three Directors who shall have immediate charge of the prison. To examine into the conduct of the officers and inspect the management of the Institution, and to whom reference shall be made, by the Warden and other officers, for advice or aid in cases of emergency. The monthly committee must represent the Board at all times when not in session.

They must report monthly to the Board of Directors, in writing, concerning the condition and police of the prison.

They shall have the superintendence, under the authority of the Board, of the financial and manufacturing operations of the Institution.

They shall monthly examine the cash and credit transaction of the house, and if found correct, so state in the minutes of their monthly meeting.

They shall also report to the monthly ——— of the Board of Directors any inaccuracy or apparent misconduct, in reference to its commercial, financial, contracting or manufacturing affairs or with regard to all its rules and regulations.

DUTIES OF THE CLERK.

The Clerk shall attend daily, and remain in the Institution from 9 until 3 P. M., unless excused or otherwise directed by the Monthly Committee.

It shall be his duty to keep the books of accounts of the Institution.

He shall present at the monthly meeting of the Board a summary account of the transactions of the preceding month, which shall be examined by the Monthly Committee before being submitted to the Board.

He shall not interfere with the police of the prison or prisoners.

In the receipts and disbursements of the Institution, the Clerk shall observe the following directions, viz: Each note to be endorsed by the Clerk, and also by the Warden in countersign, before the same may be negotiated. The Warden, at the time of such endorsement, to see that each note is properly entered in the bill book, and then to note in a column prepared for the purpose, or otherwise, the act of endorsement.

The Clerk must pay all debts done by the Institution as follows:

Bank checks to be filled up in the handwriting of the Clerk, and signed by him; to be countersigned by the Warden; and further, the Warden, when making the countersign, to affix his signatuer to the margin of the check book, corresponding with the check countersigned.

Notes payable to be countersigned in the same manner, and so also, as to the margin of the note book. Drafts from the creditors of the Institution, to be drawn upon the Maryland Penitentiary and accepted by the Clerk and Warden. Notes and drafts to be entered in the bill book, under the same regulations as that above suggested for the entry of notes receivable.

He shall cause the bank book to be balanced monthly.

He shall execute such writing and perform such other duties as may be required of him by the Board of Directors, Monthly Committee, or Warden from time to time.

He may pay bills not exceeding \$10.00 in cash against the Institution when audited and countersigned by the Monthly Committee or President. All other bills shall be paid by check.

RULES AND REGULATIONS.

DUTIES OF THE WARDEN.

The Warden shall see that the laws of the State and the Rules and Regulations for the enforcement of order and discipline are strictly observed, and in case of emergency, he shall report to the Monthly Committee or convene the Board of Directors.

It shall be his duty, upon the admission of convicts to have them searched for any improper articles upon their person; cause their height, name, age, complexion, eyes, hair, place of birth and conviction, nature of crime, and term of confinement to be noted, and also to inquire into his or her former life, trade and occupation, and learn the leading causes of their present conviction, which shall be faithfully recorded in a book to be kept by the Clerk.

He shall read or have read to the convicts on their admission, the laws relating to escapes and rebellious or disorderly conduct, and make them understand that obedience is required, and will be obtained.

He shall take proper measures for the health and cleanliness of the prison, and see that the convicts pay proper attention to their persons.

He shall not permit any kind of gaming, or profane or indecorous language to be used by the convicts, or any of the officers. He shall employ his time in the prison, and when not necessarily engaged in superintending the general affairs of the prison and overlooking the other officers in the discharge of their duties, it is made his duty to remain during working hours, in the Warden's office or lodge, so that he may be conveniently accessible to those having business with him, and readily found in case of emergency.

He is expected, as far as may be practicable, and not interfere with his general supervision of affairs, to make himself acquainted with the different kinds of business carried on, so as to form a proper estimate of the faithfulness with which the work may be done.

He shall before retiring at night, pass through the prison, and satisfy himself that all is safe, and that the guard for the night is set and properly discharging their duty.

He shall designate the employment of the prisoners, reference being had to their age, sex and health, and the profits of labor.

He shall inspect the moral conduct of the prisoners, and attend divine service whenever it may be held in the chapel of the prison, or cause the Assistant Warden to attend such services in his stead, at which all the male prisoners shall attend, unless prevented by sickness.

He shall be answerable for the police and discipline of the Institution, and shall report monthly, or oftener, to the Board upon the conduct of the officers under his direction.

He must not permit any prisoners to be together at any time, without proper supervision by an officer.

He must keep his family entirely isolated from the prison.

He must discourage espionage or tale-bearing among the convicts.

He must govern the Institution by the weight of its authorities, and the prisoners must be made to understand that the officers are entirely cognizant of all their movements and prepared to counteract or prevent any improper effort on their part.

He may punish convicts to the extent of thirteen lashes and ten days confinement on bread and water, and forfeiture of commutation, and in special cases with ball and chain, of which the convict may be relieved at the discretion of the Monthly Committee, for improper conduct.

He must present a record of punishment and offences to the monthly meetings of the Board, and he must particularly observe that however proper and necessary it may be to enforce a desirable discipline, by a prompt and impartial application of corporal punishment, that no abuse of his authority be indulged in, and that whenever solitary confinement on bread and water can be advantageously substituted, that it be adopted.

In the absence of the Assistant Warden, it shall be the duty of the Warden to designate one of the deputies or some other officer to fill said Assistant Warden's place during said absence.

He shall see that convicts on their discharge have returned to them such clothing and other articles of use or value as they may have brought into the prison, which may not have been otherwise disposed of for the benefit of such convicts.

DUTIES OF ASSISTANT WARDEN.

This officer must attend daily at the prison, from the hour of unlocking in the morning until after the prisoners shall have been locked up at night.

In the absence of the Warden from the prison, night or day, or during his illness, the Assistant Warden must be present and take general charge of the prison as Warden.

In the absence of the Warden from the city, he must take the place of that officer, with his powers and authority.

He shall aid the Warden in carrying out the laws of the State, and the rules and regulations of the prison.

He must receive and promptly execute the Warden's orders.

He shall have particular charge of the victualing department, receive and give out the provisions, and have all which may be received accurately weighed or measured, and make an immediate return thereof to the Clerk. He shall also take an account of all fuel received and return the same to the Clerk.

He shall have charge of the manures and ashes which accumulate in the Institution, so also of the bones and empty barrels and casks, and make a return thereof to the Clerk monthly.

He shall be present and preside at the meals of the prisoners, unless his place be taken by the Warden; and also at the religious meetings held in the chapel of the prison.

He shall give a general and faithful supervision over the male department of the prison.

He shall be present in the prison at the hour for letting the prisoners out to work and of locking up, and shall receive the report of the officers charged with locking up, ascertain whether all have been secured, and make report thereof to the Warden that "all is safe".

He shall have a general charge of the provision cellars, store room, refectory, bake house and male hospital, and see that each of these departments are kept clean and in the best order.

He shall weekly examine the dormitories — to their cleanliness, the cells and sleeping accommodations, and report their condition to the Warden immediately after each examination.

DUTIES OF DEPUTY KEEPERS GENERALLY.

These officers shall be the agents of the Warden in enforcing the police and discipline of the prison, and in carrying into effect the laws for the government thereof.

Section 1. It shall be the duty of the officers to attend at the prison at the opening thereof, and not absent themselves therefrom, on any pretext or excuse, during prison hours, except by permission of the Warden, or for longer than a day without the consent of the Board of Directors.

Section 2. They shall supply themselves with uniforms, such as shall be prescribed by the Warden, with the approval of the Board of Directors, which shall be constantly worn while on duty; they shall constantly observe the utmost cleanliness in dress, person and habits compatible with their duties.

Section 3. While within the prison, the officers shall refrain from whistling, scuffling, immoderate laughter, boisterous conversations, discussion of politics, religion or like subjects, avoiding witticisms or sarcasms, and all other acts calculated to disturb the harmony, quiet and good order of the prison.

Section 4. In their intercourse among themselves the officers of the prison are at all times to treat each other with that mutual courtesy and respect that becomes gentlemen and friends, and are required to avoid all discussion, jealousies, separate and party views and interests among themselves, and are strictly forbidden to treat each other with disrespect, or to use any ungentlemanly epithets, or to borrow or loan money one to the other.

Section 5. Neither shall they be engaged, while on duty, in reading or writing, other than making necessary entries, or in any other employment calculated to interfere with constant care and vigilance.

They are expressly forbidden from holding conversation with the convicts, except in relation to their business and health, and even then it must be conducted in a low tone, and with the utmost brevity, and shall not, at any time, permit any freedom or familiarity whatsoever.

They shall not, upon any pretence whatsoever receive from or bestow upon a convict any article or gift, nor suffer to be conveyed by visitors any material for eating, private manufacture, or writing letter, or anything whatever without the permission of the Warden.

They must be vigilant in watching the movements of the prisoners, compel them to perform their labor, and in no case show partiality, or extend favoritism to any of them.

They must never give way to passion, but always remain self-possessed, and calmly but resolutely and undeviatingly enforce the discipline of the prison.

They must never allow the rule of silence to be broken by the convicts unnecessarily.

Section 6. An opprobrious epithet applied to a prisoner or a profane denunciation of him, will be deemed a sufficient reason for instantaneous removal from office.

The prisoners are required to yield a prompt obedience to command, and in the exercise of authority over them the rules of the Institution protects all against insult, insolence and disrespect.

Section 7. A Deputy Keeper must not leave the particular post assigned him, except when relieved or by order of the Warden (who then is answerable for the change). He must not sleep, read, write, nor converse, nor relax his watch neither by night nor by day, when on duty.

Section 8. The Deputy Keepers must report to the Warden's office when anything is found out of order, or if the convicts misbehave.

On the detection of disorder or conversation among any of the prisoners, or any infraction of the rules of the prison by them, the officer in charge must forthwith report the offending convict or convicts to the Warden's office for punishment.

Each Deputy Keeper shall enforce the performance of tasks in the shop of which he has charge, to the extent of the ability of the convict, he shall keep an account of the time made by the prisoners and report it to the Clerk weekly, and an account of the overwork, monthly.

Section 9. They shall not permit them to hold any conversation with each other, or with any person whatever, except those allowed by law, or to communicate with each other by signs or signals, except as hereinafter provided.

Section 10. They shall require the greatest possible cleanliness in the prisoners, their persons and clothing, and in their working and sleeping apartments.

Section 11. They shall instruct the prisoners in all the rules of the prison necessary for their government, and admonish them on the least appearance of insubordination.

Section 12. They shall not punish a prisoner, nor strike him except in self-defence, or to quell an insurrection; nor shall they use any profane or indecorous language to them, or in their presence, but shall uniformly treat them in a kind yet firm and decided manner.

Section 13. They shall not allow any prisoner under their charge to leave their work without permission, nor shall they allow them to speak to or gaze at visitors.

Section 14. They shall not receive from or deliver to a prisoner any article or thing whatsoever without the knowledge or consent of the Warden or his Assistant.

Section 15. The officers shall be men of good moral character and temperate habits, and any consorting with lewd or vicious company, or indulging in gambling for money, shall be a cause for discharge.

Section 16. The officers shall, while on duty in the shops, halls, hospital, or on the walls, be *generally on their feet*; never use a footstool when sitting, or occupy a seat in a reclining or lazy position; nor shall they, in any case, speak of what is transacted at the prison outside the prison walls.

Section 17. The officers must aid in conducting the prisoners to and from their cells and meals, and enforce order and non-intercourse.

Section 18. They must aid in examining the prison cells to guard against measures for escape, and to look to the state and condition of the bedding; and it is made their particular duty to lock and otherwise secure the cells when the convicts are shut in; to satisfy themselves, by subsequent examination, that this duty has been properly done, and that each prisoner is in his place. When this has been performed, they must report to the Assistant Warden. *Escapes must be prevented at all hazards.*

Section 19. No Deputy Keeper or Assistant Warden shall hold any office under the Government, State or city authorities, while in the employment of this Institution or conduct any business outside.

DUTIES OF THE GUARD.

Three of the guards are to patrol the prison walls during work hours, and three must attend to the front and back and yard gates, unless assigned in special cases to other necessary duties by the Warden; and the others must attend about the central yard, kitchen and cellar, or wherever the Warden or Assistant Warden may assign.

The wall guards to be relieved every day at noon, and the change to be noted on the "roster".

The wall guards must be armed, and keep a constant lookout, so as to prevent anyone passing over the wall. If necessary, they must shoot any convict or convicts making such attempts.

The wall guards must only resort to the sentry-box when absolutely necessary, and to be constantly observant of the movements of the inmates and others within the prison walls.

They are forbidden from holding conversation with any person outside or inside the wall, except in relation to their immediate duty, nor can they be allowed to see persons on private business whilst on duty.

They can only leave their post when duly relieved, or upon a signal.

The guards on duty at the gates must, under no circumstances, permit a convict to pass through, except by direction of the Warden; and they are required not to allow a gate, at any time, to remain unlocked longer than may be absolutely necessary to pass the person or wagons entitled to ingress or egress. Any violation of this rule must be followed by immediate suspension and consequent dismissal by the Board of Directors.

DUTIES OF THE HOSPITAL GUARD.

He shall give constant attendance in the Male Hospital, except when relieved, or excused by the Warden.

He shall patrol the Hospital, and enforce silence and discipline among the prisoners.

He shall search the prisoners on their admission into the Hospital for improper articles, and report all infractions of discipline to the Warden for punishment.

He shall examine the clothing of the prisoners and enforce cleanliness among them.

He shall constantly cause cleanliness to be preserved in every department of the Hospital.

DUTIES OF DORMITORY GUARDS.

The Dormitory Guards shall give constant attendance in the dormitories from the hour of letting out to that of locking up the prisoners.

They shall faithfully attend to the cleanliness and ventilation of their departments.

They shall enforce silence among convicts in the dormitories.

They shall daily examine the locks, wire, gratings, bars and everything else about the premises calculated to secure the safe custody of the convicts.

They shall have the general care of the clothing in the dormitories, and make reports from time to time of its condition to the Warden.

DUTIES OF THE NIGHT WATCHMEN.

The watchman in the yard shall be punctual in attendance at the prison at the time for the ringing of the first bell for supper, and shall immediately thereafter make a search of the shops to see that all is safe, and remain on duty until the convicts are liberated from the cells in the morning.

They shall patrol the prison yard and workshops during the night, and see that the fires used in the several workshops have been carefully extinguished, start such as shall be required to be in readiness early in the morning, and look vigilantly to the general safety of the buildings.

He must ring the electric signal every thirty minutes commencing at nine o'clock.

The watchman in the front building shall be punctual in his attendance at the prison at the time for ringing the first bell for supper, he shall patrol his department, and see that all is safe, and that the gates at the entrance to the prison and wagon yards are locked at 9 o'clock P. M.

He shall admit no one to the prison after the hour of 10 o'clock P. M., unless by permission from the Warden or a

Director; and he must ring up the electrical signal every thirty minutes, and remain on duty until relieved in the morning.

The watchmen in the dormitories shall be punctual in their attendance at the prison at the time for ringing the first bell for supper. It shall be their duty after lock up to patrol their department, and see that all is safe, and ring the electric signal every half hour, commencing at 9.05 or 9.10 o'clock P. M.

They shall be vigilant in their duties, and ascertain if any measures are in progress for escape, by the convicts, and report all attempts or suspicion of attempts coming under their observation, to the Warden at once.

They shall promptly obey all orders they may receive from the Warden, and shall ring the Warden's bell in any emergency that may demand his attention.

It shall be the duty of the officers having charge of the dormitories during the night to be moving around the cells, wearing noiseless shoes or slippers, in a silent manner, that they may be able to detect any unnecessary noise; and it is strictly enjoined upon them not to hold the least conversation with the prisoners, or to suffer, the prisoners to speak to them, except to make known their immediate wants, using their utmost exertions to suppress noise of any kind; and report to the Warden any violation of the rules and regulations of the Penitentiary by the prisoners while in their cells.

They shall see that the lights in the cells are promptly extinguished at 9 o'clock.

GENERAL OFFICER.

It shall be the duty of the General Officer to conduct all visitors through the prison and see that no conversation be had with the convicts, unless permission be given by a Director or the Warden; and he shall see that all visitors register their names and residences in the Register in the Warden's lodge.

He shall patrol the yard and building, and report to the Warden all that may come under his observation; and perform all other duties appertaining to the business of the prison or as may be directed by the Warden.

DUTIES OF THE PHYSICIAN.

The Physician shall visit the prison at least once in each day, at 8 o'clock A. M. in the summer, and at 9 o'clock A. M. in the winter, and at such other time as his attendance may be required by the Warden.

He must keep a Hospital Journal, in which shall be entered the names of the convicts reported sick, whether they be exempted or not; he shall note their diseases, treatment and results, and in case of death their age, place of birth, and everything he may deem necessary. This record shall remain at the prison, and be open to the inspection of the authorities thereof.

When absent, the Physician shall procure some one to attend in his place, who shall be approved by the Monthly Committee or Directors.

The Physician shall have such aid as he may require, on application to the Warden, but no one shall interfere with the treatment of the sick or the conduct of the Hospital, except so far as may be necessary to enforce discipline.

The Physician shall examine convicts at their admission into the prison, and note their bodily defects for the direction of the Warden in assigning their tasks.

Whenever anything may be necessary for the Hospital, the Physician must make a written requisition on the Warden, and keep an account thereof, to be noted in his monthly report to the Board of Directors.

He must make a report to the Board, monthly, of the health of the prison, including post-mortem examinations. He must furnish the Warden, daily, with a list of those exempted from labor or reported sick.

It shall be his duty to inquire each day, of the Warden, or Assistant Warden, if any prisoners are confined in their cells or in their rooms, and if so to visit them daily.

DUTIES OF CONTRACTORS.

Contractors, their agents and foremen, shall hold no intercourse with any prisoner other than those employed or superintended by them, nor upon any subject whatever other than the business carried on by them.

They are to confine themselves strictly to their business, and are not to leave the shop, where business is carried on to visit any other part of the prison.

Their intercourse with the officers of the prison shall be such only as is necessarily connected with the prosecution of the business under their charge.

They are not, under any circumstances, to inflict any punishment, or to enforce discipline in any manner upon any prisoner whatever, or to make any comment as to the policy of the prison in the hearing of convicts.

They are to report to the officers having charge of the prisoners in their department all violations of the rules and regulations of the prison.

No foreman shall be employed by contractors, within the prison, without first obtaining the consent of the Warden; and no persons, other than necessary foremen, shall be employed with the prisoners, or in any other manner in the prison.

They shall not apply any harsh or opprobrious epithets to the prisoners, nor use any profane language in their presence.

The teamsters and other persons in the employ of the contractors, who may occasionally visit the prison, shall not be permitted to speak to a prisoner without the permission of an officer.

Every contractor shall keep in each shop twelve buckets of water, of not less than three gallons each, in a convenient place for use in case of fire.

Contractors will not be permitted to have more supplies than practicable of raw or unmanufactured material within the yard, and such supplies to be stacked or piled on ground designated by the Warden.

Temporary wooden buildings will not be allowed within the walls.

All scraps, shavings, chips, sticks, and other combustible waste, must be disposed of each day, either for fuel or by removal from the yard.

Old trash and other material, not necessary to carry on the business of the contracts, must not be permitted to accumulate within the yard or shop.

Each and every convict will be required to do his work so as to bear favorable inspection, if inferior through want of proper care he must do it over again in addition to his as-

signed work. This rule must not be construed, however, to require a convict to duplicate inferior work in addition to his task when the fault is clearly not attributable to him.

The contractor must supply proper material, perfect machinery and tools, otherwise the State cannot be held responsible for the amount or kind of work done; and work once passed as good by the foreman of the shop will relieve the State from responsibility for its condition.

All officers and guards are expressly charged with the execution of the above orders, and are directed to report any neglect or violation of the same to the Warden.

All contractors, overseers, drivers and employees, other than prisoners, shall take the oath as required by the rules of the Institution.

THE FEMALE DEPARTMENT.

The department shall be under the general superintendence of the Warden, and shall be regarded as a distinct and separate branch of the Penitentiary.

No person shall be allowed to enter it except the Directors, the Warden, official visitors as provided by law, Sunday-school teachers, preachers, or parties accompanied by one or more of the Directors.

DUTIES OF THE MATRON.

She shall, under the supervision of the Warden, have charge of the female department of this Institution; of the prisoners and prison property therein contained. She shall conform — the general rules and regulations governing the prison.

The immediate charge of the female department shall be under the care of the Matron, who shall reside in the prison and attend at all times during working hours, except when excused by the Board of Directors, or in an emergency by the Warden. She shall attend the Physician in his visits to the sick in the female hospital, see to the administration of the prescriptions, and give a general superintendence over the sick and the nurses.

She shall be present, preserve a decorum and enforce silence among the prisoners at their meals, which shall be the same as those of the males.

She shall report all violations of the discipline of the prison, by the convicts, to the Warden for punishment.

She shall have charge of the clothing of the convicts, and see that none of said convicts have in use at any one time more articles of dress than may be required by the exigencies of the season, except when the same may be ordered by the Physician.

She shall superintend and see that the female convicts perform such work as the Warden may direct.

She shall enforce cleanliness among the female convicts.

She shall make monthly returns of the work done in her department to the Clerk.

GENERAL RULES.

No Director, Warden, Assistant Warden, or any other officer or person having any official relation with the prison, shall purchase any article from, or sell anything to the prison, either directly or indirectly, nor shall they receive any reward, gift or promise, from any convict, or from any one in their behalf, under the penalties of the thirteenth section of the Act of 1837.

The officers appointed by the Board shall receive regular and stated salaries, to be fixed at the time of the appointment, and shall be paid in money; their salaries shall not be increased or diminished during the time for which they were appointed; and none of them shall be allowed any perquisites; but the Warden may keep a horse and cow for his own use, to be fed at his own expense, and may be allowed, in the discretion of the Board of Directors, the use in his family of two of the female convicts, and others may be detailed for service upon the Board or official visitors.

Singing, whistling or smoking will not be permitted within the walls of the prison.

Whenever business may require a communication to be made by one officer to another, such communication must be brief, in a low tone of voice, and apart from the convicts, so as not to be heard by them, it being hereby enjoined as an indispensable duty, that no conversation shall be held by any of the officers in the presence or within the hearing of said convicts.

The officers are required, to preserve harmony and kind feelings among themselves, to the end that a desirable official intercourse may obtain. They must, therefore, be respectful in their intercourse and communications with each other, and indulge in no undue liberties.

The Deputy Keepers must yield that ready obedience to their superior officers, so necessary to secure the beneficial results of effective co-operation and good government.

Whenever a Deputy Keeper may be absent from sickness or other necessary cause, the Warden shall designate one of the approved substitutes to take his place, at such Deputy Keeper's expense.

On each Sunday, half of the Deputy Keepers will, in rotation, have leave of absence for the day; and the balance must remain on duty at the prison.

Officers "on leave of absence" must report themselves at the prison punctually at the time at which their leave expires, as the executive management of a prison must be precise, rigid and undeviating, subject to no confusion or irregularity, and hence official agents should be punctual in their attendance and faithful in the discharge of their assigned duties.

Any officer becoming intoxicated, in or out of the Institution, shall, on being reported to the Board, be subject to dismissal.

The officers of the Institution shall feel themselves bound to report to the Monthly Committee any breach of the rules or official neglect of duty by any of the officers.

A roster of the officers shall be kept in a suitable place in the hall of the front building, and they are required to indicate thereby their presence or absence, and when present their particular post respectively.

For the purpose of eating, the officers of the Institution must provide for their meals to be sent to them when necessary to eat within the prison.

The slops and offal of the prison shall be sold.

The walls and buildings shall be whitewashed, or otherwise colored, as may be considered desirable, at least twice a year.

When a convict is discharged, he must be dressed in citizen's clothing, and the Warden must see that he does not convey from the prison any letter or any property of the Institution, and pay to him the amount that may be due for overwork, or such sum as may be designated by the Monthly Committee.

The discipline of the prison must be rigidly enforced in the hospital departments by the proper officer.

The patients in the hospital may be nursed and attended to by convicts, but none but the regularly appointed infirmarian shall have charge of, or access to, the medicines at any time; these shall at all times be under the direction and general care of the Assistant Warden or Guard in this department.

Convicts shall not be discharged while laboring under disease, except at their own request.

The bodies of deceased convicts may be claimed by their friends, or else properly buried, at the expense of the Institution, in Potter's Field.

The officers of this Institution, appointed by the Board shall be liable to dismissal at any time.

Any officer making a false and malicious charge against another, shall be suspended, and subject to such penalty as the Board, in its discretion, may impose.

Every officer must discountenance all tale-bearing among the prisoners, and on no account whatsoever circulate any report prejudicial to the standing of an officer upon the authority of a convict.

No dog, except those belonging to the Institution, shall be permitted to enter inside the prison walls.

The Warden shall permit the relatives and friends of prisoners to visit them once in each month; visits to be limited according to law and existing regulations. The maximum time at each visit to be fifteen minutes.

The Warden shall have every permit for entrance into the prison by visitors endorsed with the amount received, and that the Clerk is to file these permits for examination by the Finance Committee. Also, that every permit is to be recorded in the Warden's lodge and the amount received therefor; and in the event of any fee of admission having been presented then the Warden or his Deputy shall make a ticket embracing the names of those admitted and the amount received, and this ticket be also filed by the Clerk.

In addition to the regular night watch, at least three officers shall stay at the prison each night; they shall do fire watch or patrol duty, and remain at the prison during the night. The outer doors of the prison shall be closed at 10 P. M.

No ardent spirits, wines, strong beer or ale, are upon any occasion to be used by an officer, contractor or foreman in or about the prison; neither are they to suffer any other person to bring the same within the prison walls, except for the Hospital, to be used for medicine, under the direction of the Warden or Physician.

Profanity is positively prohibited by any officer, guard, contractor or foreman, or any person connected with the prison, and will not be tolerated under any circumstances. They are called upon to practice that, by way of example, which they are required by precept to enforce.

The prisoners shall have, at all times, the liberty of speaking to any of the Directors.

Daily papers are absolutely prohibited within the prison either by officers, contractors, employees or teamsters.

It shall be the duty of the Warden to assign or re-assign officers to service at any time when in his judgment will enhance the discipline of the Institution.

CONVICTS.

The convicts shall be cleansed on their admission and furnished with suitable and comfortable clothing of uniform pattern and description, to be changed as often as the Warden may designate.

They shall be put to hard labor every day in the year except Sunday, Christmas, Fourth of July and Thanksgiving Day, and their time so employed as to be most advantageous.

In no case shall offences against order and discipline be overlooked, but shall be promptly punished.

They shall be allowed the means of communicating, in writing, to the Board; such writing to be done in the presence of the Assistant Warden, or some other officer of the prison, which, when completed, shall be handed to the Warden, who shall deliver the same to the Directors, who shall inquire into complaints and give proper attention to the subject of all such communications.

Good conduct and industry shall be encouraged by favorable reports to the Board; but in no case shall any hope of pardon or favor be held out of them.

After their tasks they may do overwork (if the contractors desire it) in their particular branch of business to which they have been assigned, and for which an allowance will be made

to them, which they shall receive on their *discharge from prison*; but they shall not be permitted to engage in any other kind of work.

They shall not be permitted to leave their stations, to move about the shops with any other inmate, or to go into the yard without permission.

In passing to and from the cells, to and from the shops, and to and from their meals, the convicts must move in close single file with lock-step, in silence.

Their working tools and implements must be left in the shops and their knives in the eating-room.

Each convict must wash his hands and face daily, his feet once a week, and he must change his clothes once a week. Every male convict shall have his beard shaved weekly and his hair cut monthly.

They shall have three meals a day, of such plain and wholesome food as may be deemed proper by the Monthly Committee, subject to such suggestions as may be made by the Physician, and by him considered necessary for the health of the convicts.

When a convict shall signify to the officer of the shop to which he belongs that he is ill, such officer shall immediately report to the Warden, who shall have him excused, if necessary, by the Physician.

VISITORS.

No person shall be permitted to visit the Penitentiary except on business, and that shall be transacted in the front building, unless he have a written permission from a Director, or he for a member of the Legislature for the time being, Governor, Secretary of State, Judge of a Court of Record, Attorney-General, or one of his deputies, ex-Directors of this Institution, members of a city corporation in the State, Sheriff or Grant Jurors.

Visitors shall not be admitted on Saturday or Sunday, except in the case of clergymen, Sabbath-school teachers, or that of strangers who may not be able to appropriate another day to the purpose, unless by permission of a Director.

Every person visiting the Penitentiary, except those exempted by law, shall pay an admission fee of twenty-five cents unless where they may be furnished with a free ticket

by a Director, who is hereby authorized, in his discretion, to grant the same, specifying the number to be admitted.

Tickets of admission to visit the Penitentiary shall be granted by the Directors, or any one of them. But the Directors may authorize the Warden to admit visitors.

RESOLUTIONS.

No prisoner shall receive any amount of his overwork until his discharge, except by order of the Warden.

All substitutes while on duty in place of absentees, shall be entitled to the full pay of the regular officers.

The Assistant Warden shall be required to make a correct report of the provisions on hand every Board day.

All contractors, overseers, drivers and employees other than prisoners, shall take the oath as required by the Rules of the Institution.

The Board of Directors will supply all the officers of the Institution with suitable arms, and the officers will be required to give security for the return of their weapons, on their retiring from the prison.

There shall be no change of hands from one shop to another, without the consent of the Board of Directors or the Warden.

Any officer who shall sleep while at his post, or while in the discharge of any duty, or who shall neglect the same, or who shall behave improperly, shall be suspended, and reported to the Board of Directors.

The officers must yield that ready obedience to their superior officers, so necessary to secure the beneficial results of effective co-operation and good government.

They shall not allow any person to go on the walls, or into the prison, without permission from the Warden.

They shall not be permitted to hold any unnecessary conversation in the dormitory, while the Assistant Warden is counting his return, or in the dining-room while the prisoners are at their meals.

No person shall be allowed to be present in the washing-room while prisoners are being washed and changing clothing, except officers of the Penitentiary.

No officer of the prison, or other person, shall buy for him or themselves any provisions, fuel or supplies, or any article in connection with the supplies purchased for the prison; nor shall officers or other persons use for themselves or family, or purchase any provisions, fuel or supplies, or any article whatever bought for the use of the Institution.

No contractor will be allowed to give any officer any reward or present. Any officer receiving such reward or present will be immediately suspended and reported to the Board of Directors for dismissal.

All officers charged with the execution of any special order made by the Board of Directors and entered upon their journal, shall report either verbally or in writing its performance or progress at the meeting of the Directors next subsequent to the passage of such order.

All Deputies in charge of shops, dormitories or State work shall make a written report to the Warden on the first of every month, for the previous month, as to the condition of their respective departments and the work done therein; and if not previously made, shall then make estimates for the coming month and requisitions for any deficiency or want therein; and any suggestions or recommendations deemed by them for the good of the service, pertaining to their department, may then be made, together with a statement of supplies on hand.

Any person violating the foregoing rules shall for the first offense be reprimanded by the President of the Board or the Monthly Committee, and for the second, he shall be dismissed.

Ordered, that the Rules and Regulations for the government of the Maryland Penitentiary be printed, and that a copy be placed in the hands of each of the officers, from whom an undeviating and rigid enforcement of their provisions will be required by the Board of Directors.

DOCKET ENTRY.

16 February, 1909.—Demurrer short to add' pleas & issue joined short on demurrer.

PETITION OF PLAINTIFF FOR LEAVE TO AMEND
& ORDER OF COURT.

(Filed Feb. 16, 1909.)

To the Honorable, the Judge of said Court:

The Plaintiffs respectfully ask leave to amend the declaration in this case by interlineation by striking out the defendant, The Directors of the Maryland Penitentiary as a party defendant herein, and by changing the words, "its Warden" after the name of the defendant, John F. Weyler, to the words, "Warden of the Maryland State Penitentiary."

FREDERICK H. FLETCHER,
RANDOLPH BARTON, JR.,

Attorneys for Plaintiffs.

Leave granted as prayed, this February 16, 1909.

ALFRED S. NILES.

ORDER TO STRIKE OUT, &c.

(Filed Feb. 16, 1909.)

MR. CLERK:

Please strike out the Defendant, The Directors of the Maryland Penitentiary, as one of the parties defendant in this case.

FREDK. H. FLETCHER,
RANDOLPH BARTON, JR.,

Attorneys for Plaintiff.

WAIVER OF JURY TRIAL.

(Filed Feb. 17th, 1909.)

It is agreed that this case shall be tried before his Honor, Judge Niles, without a jury.

F. H. FLETCHER,
 RANDOLPH BARTON, JR.,
 Plffs. Attys.

ISAAC LOBE STRAUS,
 Attorney General.

WILLIAM S. BRYAN, JR.,
 Defdts. Atty.

Feby. 16, 1909.

DOCKET ENTRIES.

17 February, 1909.—Demurrer to 1, 2, 3, 4 additional pleas “Sustained”.

19 February, 1909.—Case tried before the Hon. Alfred S. Niles, without the aid of a jury.

19 February, 1909.—Verdict in favor of the Plaintiff for the property described in declaration, one cent damages & costs.

19 February, 1909.—Judgment on Verdict Nisi.

23 February, 1909.—Judgment on Verdict absolute in favor of the Plaintiff for the property described in the declaration, with one cent damages & costs.

DEFENDANT'S ORDER FOR APPEAL.

(Filed February 23, 1909.)

MR. CLERK:

Enter an appeal from the judgment of the Court here to the Court of Appeals of Maryland.

ISAAC LOBE STRAUS,

Attorney General.

WILLIAM S. BRYAN, JR.,

Attorneys for Plaintiffs.

 AGREEMENT OF COUNSEL.

(Filed March 17, 1909.)

It is agreed that in making up the transcript of the Record for the Court of Appeals, the Clerk shall insert:

1. Docket Entries.
2. Amended Declaration filed March 26th, 1907.

The plat attached to this Amended Declaration shall be omitted from the transcript of the Record, and either party may use such plat in the Court of Appeals.

3. Pleas to Amended Declaration, filed May 21st, 1907.
4. Replication and Demurrer, filed Oct. 28th, 1907.
5. Additional Plea, filed Nov. 2nd, 1907.
6. Court's Opinion, filed January 11th, 1908.
7. Additional pleas on behalf of John F. Weyler, & Exhibit, filed Feb. 15th, 1909.
8. Petition of Plaintiffs for leave to amend, and Order filed Feb. 16th, 1909.
9. Order to strike out Directors of Md. Penitentiary as defendant, filed Feb. 16th, 1909.

It is agreed that the Declaration as thus amended need not be recopied; it is further agreed that the said amendments were made as authorized.

10. Waiver of jury trial.
11. Prayer for Appeal.
12. This agreement.
13. Bill of Exceptions.

WILLIAM S. BRYAN, JR.,

ISAAC LOBE STRAUS,

For John F. Weyler, deft. & appellant.

RANDOLPH BARTON, JR.,

For plaintiffs & appellees.

Mar. 17, 1909.

BILL OF EXCEPTIONS.

(Filed March 17, 1909.)

At the trial of this cause to maintain the issue on their part the plaintiffs read in evidence the following admission of facts heretofore filed in this case:

The parties to the above entitled cause hereby agree to, and admit to be true, that Thomas King Carroll and Juliana (Stevenson) Carroll, his wife, were seized in fee simple of the lands mentioned in the amended declaration (filed in said cause), and the lands surrounding the same on the 19th day of May, 1831, and the parties to said cause also consent that this admission of facts may be used as evidence at the trial or trials of the above entitled cause (subject, however, to any legal objections on the part of any party hereto, on the ground of relevancy), and for any other proper purpose in said case, subject to similar objection.

It is a condition of this admission of facts, however, that no objection is to be made by the plaintiffs, or any of them, to any of the pleas of limitations that are now filed in this

case, on the ground that the said pleas, or any of them, were not filed in the time provided by law, which objection is waived by the parties plaintiff, but this agreement is not to affect the right of the plaintiffs to object to said pleas, or any of said pleas, on any other grounds, nor to affect their right to object, on any ground whatsoever, to any plea or amended plea that may hereafter be filed in this case.

FRANK T. GIBSON, JULIA EASTER,
CHARLES C. CARROLL, VICTOR C.
CARROLL, VIVIAN CARROLL, MARGARET
H. CARROLL, JULIA S. CARROLL,
NELLIE C. CARROLL, ADA C. BOWDLE,
SALLY CARROLL CRADDOCK.

By

GOLDSBOROUGH & FLETCHER,
BARTON, WILMER, AMBLER & STEWART.

their attorneys.

THE DIRECTORS OF THE MARYLAND
PENITENTIARY AND JOHN F. WEYLER,
its Warden,

By

.....
.....
WILLIAM S. BRYAN, JR.,

their attorneys.

The following transactions then took place:

The Plaintiffs offered in evidence the original Land Record of the Superior Court of Baltimore City, Liber W. G. 212,

folio 52, containing the record of the deed from Thomas King Carroll and Juliana Carroll, his wife, to Robert J. Henry, as follows:

This Indenture, Made this 19th day of May, in the year of Our Lord eighteen hundred and thirty-one, between Thomas K. Carroll and Juliana Carroll, his wife, of Somerset County, in the State of Maryland, of one part, and Robert J. Henry of the same County and State, of the other part.

Witnesseth, That the said Thomas J. Carroll and Juliana Carroll, his wife, for and in consideration of the sum of five dollars, to them in hand paid, before the execution hereof, and in order to carry into effect an arrangement heretofore made, between the parties for the division and partition of certain lots of ground lying within the present limits of the City of Baltimore, they, the said Thomas K. Carroll and Juliana Carroll, his wife, have bargained, sold, aliened, released, enfeoffed and confirmed, and by these presents do sell, alien, release, enfeoff and confirm unto the said Robert J. Henry, his heirs and assigns, all that piece or parcel of ground near to the City of Baltimore, and within its presents limits as aforesaid, contained within the following metes and bounds, viz:

Beginning for the same at the northeast corner of East Eager and Great Constitution Streets on the East side of Jones' Falls and running thence North on the East line of Great Constitution Street, one hundred and eighty-five feet, more orless, to the South line of Josias Pennington's property, formerly an apple orchard, thence eastwardly along said Pennington's line, fifty-four feet to the garden wall of the late Doctor Cosmo G. Stevenson, thence south twenty-one and a half degrees East along said wall, one hundred and sixty-five feet to the corner of a fence as now standing, thence eastwardly, with said fence, thirty feet, and thence Southeasterly fifty-five feet to the North line of East Eager Street aforesaid, and thence West along the north line of said street, one hundred and sixty-five feet to the place of beginning.

Also all that lot or parcel of ground, beginning for the same at a stone placed at the southeast corner of Great Constitution and East Eager Streets, aforesaid, and running thence South two hundred and twenty-nine feet on the East side of Great Constitution Street; thence easterly one hundred and thirty-four feet along a line which being extended to Forrest, formerly Nelson Street, would strike the West side of said street at a distance of sixty-four feet nine inches

northwardly from the northwest intersection of Forrest and Truxton Streets as lately established by the Baltimore City Commissioners, thence, northwardly, parallel to and at a distance of one hundred and forty feet from Forrest Street, one hundred and sixty-six feet to the northwest corner of Henry Ewing's lot, thence eastwardly on the North line of said Ewing's lot, one hundred and forty feet to Forrest Street, thence northwardly on the West side of Forrest Street, thirty-three feet and three inches, more or less, to its intersection with East Eagr Street, and thence on the south side of East Eagr Street two hundred and forty-one feet to the place of beginning.

Also all that lot or parcel of ground beginning for the same at the southeast corner of Forrest and East Eagr Streets, and running thence southerly on the East side of Forrest Street, twenty-four feet, more or less, to the south line of a street formerly laid out by the residuary devisees of Doctor Henry Stevenson, called Parnassus Hill Street, it being also the North line of property now, or lately belonging to the estate of Harter, and running thence easterly along said line to the York Road or Avenue and thence northerly on said road or avenue, supposed to be a few inches, to the Southwest corner of East Eagr Street and said road or avenue, thence on the south side of East Eagr Street westwardly, to the beginning. (The said three several parcels of ground being laid down on a plat hereto sub-joined and contained within the yellow shaded lines.)

Together with the appurtenances and advantages to the same belonging or in anywise appertaining, and all the estate, right, title and claim, legal and equitable of the said Thomas K. Carroll and Juliana Carroll, therein and thereto.

To have and to hold the said three several lots or parcels of ground and premises unto him, the said Robert J. Henry, his heirs and assigns forever to and for his and their use and behoof, and for no other intent or use or purpose whatsoever.

And the said Thomas K. Carroll and Juliana for themselves and their heirs, do hereby covenant and agree to and with the said Robert J. Henry, his heirs and assigns, that they, the said Thomas K. Carroll and Juliana Carroll and their heirs, the said several lots or parcels of ground and premises hereby bargained and sold or intended so to be unto the said Robert J. Henry and his heirs and assigns against themselves the said Thomas K. Carroll and Juliana Carroll, and their heirs

and against all and every person or persons claiming or to claim by, from or under them, or either of them, their, or either of their heirs, shall and will warrant, and forever defend.

In Witness Whereof, the said Thomas K. Carroll and Juliana Carroll, his wife, have hereunto set their hands and seals on the day and year first above written.

THOMAS KING CARROLL (Seal)

JULIANA CARROLL (Seal)

Signed, sealed and delivered
in presence of

THOS. ROBERTSON,

WM. H. CURTIS.

STATE OF MARYLAND,

SOMERSET COUNTY, TO-WIT:

On the 19th day of May, in the year of our Lord, one thousand, eight hundred and thirty-one, personally appears Thomas King Carroll of Somerset County, being the grantor named in the above instrument, before us, two Justices of the Peace, and acknowledged the above instrument of writing to be his act and deed, and the lands and premises therein mentioned and thereby bargained and sold, to be the right and estate of the within named Robert J. Henry, party grantee, also therein named, his heirs and assigns forever, according to the purport and true intent and meaning of said instrument of writing and the Acts of Assembly therein made and provided, and at the same time also personally appears Juliana Carroll, wife of the said Thomas King Carroll, before us as aforesaid, and acknowledges the said deed or instrument of writing to be her act and deed, and the lands and premises therein mentioned to be the right and estate of the within named Robert J. Henry, his heirs and assigns forever; and the said Juliana Carroll being by us privately examined apart from and out of the hearing of her husband, acknowledges that she doth make her acknowledgment of the same willingly and freely and without being induced thereto by fear or threats of or ill-usage by her husband, or fear of his

displeasure. Taken and certified the day and year above written.

THOS. ROBERTSON,
WM. H. CURTIS.

MARYLAND,

SOMERSET COUNTY, TO-WIT:

I hereby certify that Thomas Robertson and William H. Curtis, Esquires, before whom the foregoing acknowledgment appears to have been made, were at the time of taking said acknowledgment two of the Justices of the Peace of the said State in and for Somerset County aforesaid, duly commissioned and sworn.

(Seal's Place.) In testimony whereof I hereto set my hand and affix the seal of said county this 20th day of May, Anno Domini 1831.

GEO. HANDY,

Clk. Somt. Coty. Court.

Received to be recorded the 28th day of May, 1901, at a quarter before eleven o'clock A. M.; same day recorded and examined.

Pr. WM. GIBSON;

Clk.

The plaintiffs also offered in evidence from the original Land Records in the office of the Clerk of the Superior Court of Baltimore City, Liber W. G., No. 213, folio 642, in which appears a record of the following deed from Thomas K. Carroll and Juliana Carroll, to James Howard:

This Indenture made this 13th day of July, in the year of Our Lord Eighteen hundred and thirty-one, between Thomas K. Carroll and Juliana Carroll, his wife, of Somerset County in the State of Maryland, of the one part, and James Howard of the City of Baltimore in the State aforesaid, of the other part.

Witnesseth: That the said Thomas K. Carroll and Juliana Carroll for and in consideration of the sum of eighteen hundred dollars, to them in hand paid by the said James at or before the sealing and delivery of these presents, the receipt whereof, they do hereby acknowledge, have bargained, sold, aliened, released, enfeoffed and confirmed, and by these presents do bargain, sell, alien, release, enfeoff and confirm unto the said James Howard, his heirs and assigns, forever, all those several lots or parcels of ground, being part of the real estate of Doctor Henry Stevenson, deceased, being within the present limits of the City of Baltimore on the East side of Jones' Falls, beginning for the whole of said lots on the South side of East Eager Street at a distance of twenty-eight feet from the Southwest corner of East Eager and Great Constitution Streets and running thence West one hundred and thirteen feet, more or less to the West line of said Doctor Henry Stevenson's (deceased) ground, along the South line of East Eager Street, thence, southerly along the said West line of the said Doctor Henry Stevenson's ground, two hundred and eighteen feet, more or less to a stone marked H. S. No. 6, thence southeasterly forty-three feet, more or less, to the North side of Truxton Street, thence Easterly, on the said North side of Truxton Street, twenty-two feet more or less, and thence Easterly to the West side of Great Constitution Street, at a point eleven feet North from the Northwest corner of Truxton Street and Great Constitution Street, thence North along the West side of Great Constitution Street one hundred and thirty-nine feet, thence West, parallel to East Eager Street, twenty-eight feet, and thence North by a straight line, to the beginning, agreeable to a small plat of said lots or parcels of ground hereunto annexed.

Together with all and singular the rights, privileges and appurtenances thereunto belonging, or in anywise appertaining.

To *Hand* and to *Hold* the said several lots and pieces or parcels of ground contained within the aforesaid metes and bounds, with all the rights and appurtenances thereof, unto him, the said James Howard, his heirs and assigns, forever, to and for his and their only use and behoof and for no other intent or purpose whatsoever.

In Testimony Whereof the said Thomas K. Carroll and

Juliana Carroll have hereunto set their hands and seals on the day and year aforesaid.

THOMAS KING CARROLL (Seal)

JULIANA CARROLL (Seal)

Signed, sealed and delivered

in presence of

THOS. ROBERTSON,

THEODORE G. DASHIELL.

STATE OF MARYLAND,

SOMERSET COUNTY, *Set.:*

On this 13th day of July, 1831, personally appeared before us the subscribers, two Justices of the Peace for the County aforesaid, the above named Thomas K. Carroll and acknowledged the foregoing instrument of writing as his act and deed for the purposes therein mentioned, and at the same time also came Juliana Carroll, the other party grantor, wife of the said Thomas K. Carroll, and acknowledged the said instrument of writing to be her act and deed, for the purposes therein mentioned; and the said Juliana Carroll being by us first privately examined, apart from and out of the hearing of her said husband, did declare that she made her said acknowledgment willingly and freely without being induced thereto by fear of threats of ill-usage by her said husband or through fear of his displeasure.

Acknowledged before Thos. Robertson and Theodore G. Dashiell.

MARYLAND,

SOMERSET COUNTY, TO-WIT:

I hereby certify that Thomas Robertson and Theodore G. Dashiell gentlemen before whom the above acknowledgments were made, and whose signatures appear thereto, were at the time of the making and signing the same, Justices of the Peace of the State of Maryland, in and for Somerset County, duly commissioned and sworn.

(Seal's Place.) In testimony whereof I have hereunto set my hand and affixed the seal of the Somerset County Court, this 19th day of July, 1831.

GEO. HANDY,

Clk. Somt. Coty. Court.

Received to be recorded the 30th day of August, 1831, at half past eleven o'clock, A. M. Same day recorded and examined.

Pr. WM. GIBSON.

Clk.

It is agreed that either party may exhibit and use the plat referred to in the above deeds in the Court of Appeals as fully as if the same were incorporated in the record.

Plaintiff offers in evidence from the office of the Clerk of the Superior Court of Baltimore City, original Land Record, Liber W. G. No. 214, folio 95, wherein is recorded Deed of Thomas K. Carroll and Juliana Carroll to Henry S. Coulter.

This Indenture, made this 13th day of July, in the year of Our Lord 1831, between Thomas K. Carroll and Juliana Carroll, his wife, of Somerset County, in the State of Maryland of one part, and Henry S. Coulter of the City of Baltimore in said State, of the other part.

Whereas, Doctor Henry Stevenson, late of Baltimore County, deceased, by his last will and testament, did devise a lot of ground of thirty feet front to the said Henry S. Coulter if he should attain the age twenty-one years, and did direct that the same should be laid off adjoining the lots devised to his said testator's grandsons; and

Whereas, it has been ascertained, that if the directions of this will were strictly and literally pursued, the lot of ground so to be laid off for said Henry S. Coulter would fall within the lines of Great Constitution Street as the same has

been laid off and established by the commissions appointed to lay off the streets, lanes and alleys within the extended limits of the City of Baltimore, and would thus become of little or no value to the said devisee; and

Whereas, it has been agreed that the lot of ground hereinafter conveyed and described should be given and conveyed to the said Henry S. Coulter, and be received and taken by him in lieu of the lot contemplated by the will of the said testator.

No, This Indenture Witnesseth: That the said Thomas K. Carroll and Juliana, his wife, for and in consideration of the premises, and of the sum of five dollars to them in hand paid by the said Henry S. Coulter, the receipt whereof they hereby acknowledge, have bargained, sold, aliened, released, enfeoffed and confirmed and by these presents do bargain, sell, alien, release, enfeoff and confirm unto the said Henry S. Coulter, his heirs and assigns, forever, all that lot or parcel of ground lying within the present limits of the City of Baltimore, on the East side of Jones' Falls and contained within the following metes and bounds, to-wit: Beginning for the same at the southwest corner or intersection of Great Constitution and East Eager Streets, and running thence south on the west side of Great Constitution Street one hundred feet, thence West, parallel to East Eager Street, twenty-eight feet, thence North parallel to Great Constitution Street, one hundred feet, to East Eager Street, and thence east on the south side of said last mentioned street, to the place of beginning.

Together with all the privileges, advantages and appurtenances to the said lot or parcel of ground belonging or in anywise appertaining.

To Have and to Hold the said lot or parcel of ground and premises unto the said Henry S. Coulter, his heirs and assigns forever, to and for his and their sole use and benefit and for no other intent or purpose whatsoever.

In Witness Whereof, the said Thomas K. Carroll and

Juliana Carroll have hereunto set their hands and seals on the day and year first above written.

THOMAS KING CARROLL (Seal)

JULIANA CARROLL (Seal)

Signed, sealed and delivered
in presence of

THOS. ROBERTSON,

THEODORE G. DASHIELL.

STATE OF MARYLAND,

SOMERSET COUNTY, TO-WIT:

On the 13th day of July, 1831, personally appeared before the subscribers, two Justices of the Peace for the County aforesaid, the above named Thomas K. Carroll and acknowledged the foregoing instrument of writing to be his act and deed, for the purposes therein mentioned, and at the same time also came Juliana Carroll, the other party grantor, wife of said Thomas K. Carroll, and acknowledged the said instrument of writing to be her act and deed for the purposes therein mentioned, and the said Juliana Carroll being by us privately examined, apart from and out of the hearing of her said husband, did declare that she made her said acknowledgment willingly and freely without being induced thereto by fear or threats of or ill-usage by her said husband, or through fear of his displeasure.

Acknowledged before Thomas Robertson and Theodore G. Dashiell.

MARYLAND,

SOMERSET COUNTY, TO-WIT:

I hereby certify, that Thomas Robertson and Theodore G. Dashiell, gentlemen before whom the within acknowledgments were made, and whose signatures appear thereto, were at the time of the making and signing the same, Justices of the Peace of the State of Maryland, in and for Somerset County, duly commissioned and sworn.

(Seal's Place.) In Testimony Whereof, I have hereunto set my hand and affixed the seal of Somerset County Court this 19th day of July, 1831.

GEO. HANDY,

Clk. Somt. Coty. Court.

Received to be recorded September 10th, 1831, at fifteen minutes past twelve P. M.

The same day recorded and examined.

Pr. WM. GIBSON,

Clk.

Annexed to the three deeds above mentioned in the aforesaid records are plats which have delineated upon them Great Constitution Street, or what is spoken of in this case as Constitution Street or Clifton Place, and which shows that the second parcel of the lands conveyed by the first of the three aforesaid deeds abuts on the whole of the east side of that part of Great Constitution Street, or Constitution Street or Clifton Place, which is claimed in this case, and which plats also show that the lands conveyed by the second and third of the three aforesaid deeds abuts on the whole of the west side of that part of Great Constitution Street, or Constitution Street or Clifton Place which is claimed in this case, and it is agreed that either party may exhibit and use the aforesaid plats or certified copies thereof, and also all plats filed with the pleadings, in the Court of Appeals as fully as if the same were incorporated in the above deeds and in the record.

It is admitted by the parties hereto that the Directors of the Maryland Penitentiary acquired between the years 1891 and 1896 all the land and rights conveyed by Thomas King Carroll and Juliana Carroll, his wife, by the three deeds just offered in evidence so far as said lands and rights abut on or relate to the lands sought to be recovered in this case.

It is agreed that Ordinance 111 approved October 17, 1892, may be read in evidence from the printed volume, in this Court or in any other Court to which this cause may be taken by appropriate proceedings as fully as if the same were incorporated in the record.

The same agreement shall also apply to the following Acts of the General Assembly of Maryland:

Act of 1890, Chapter 200; Act of 1890, Chapter 202; Act of 1892, Chapter 391; Act of 1896, Chapter 166; Act of 1898, Chapter 219.

Counsel for Plaintiffs offered in evidence Ordinance III, approved Oct. 17, 1892, which was read.

Counsel for Plaintiffs also offered in evidence Act of the General Assembly of Maryland, 1890, Chapter 200, which was read.

Also Act of the General Assembly of Maryland of 1890, Chapter 202, which was read.

Also Act of the General Assembly of Maryland of 1892, Chapter 391, which was read.

Also Act of 1896, Chapter 166, which was read.

Also Act of 1898, Chapter 219, which was read.

The Plaintiffs then proved by JOHN F. WEYLER, the defendant, that he is the Warden of the Maryland Penitentiary, that he was appointed Warden of the Penitentiary on May 9th, 1888, and that he assumed the duties of Warden on June 1st, 1888, and has been Warden ever since. The Penitentiary was very much enlarged about 15 years ago. The first appropriation for this purpose was made in 1890. That witness is familiar with the land of which description has been read in this case constituting what was formerly the bed of Constitution St. and was familiar with it in 1890 and that the old penitentiary did not stand on that ground. In 1890 the old penitentiary was bounded by Forrest Street on the East, Madison Street on the south, Truxton Street on the north and the Baltimore City Jail wall on the west. Constitution Street, now called Clifton Place was then in use as an open public street. The Administration Building of the new work at the penitentiary was commenced in 1894; it was erected out of the first appropriation of \$250,000. This is the large building farthest east, on the corner of Eager & Forrest Streets. This building does not cover what was formerly the bed of Constitution Street. 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 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 3 feet wide, running up to about 2 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.

Q. The Act of 1890, Chapter 200, authorizes the Penitentiary Directors to acquire all the several lots of ground embraced within the following bounds: that is to say between Eager Street on the north, Concord Street on the west, Truxton Street on the south and Forrest Street on the east; to what extent has the Penitentiary bought or acquired lands which were contained within these bounds?

(Objected to; admitted subject to exception.)

A. They have acquired all the lands.

Q. They have acquired all the land?

A. All the lands south of Truxton Street, including the bed of Truxton Street.

Q. Eager Street on the north, Concord Street on the west, Truxton Street on the south and Forrest Street on the east; all that has been acquired by the Penitentiary?

A. Yes.

Q. Is there included within that definition what was formerly the bed of Constitution Street?

A. Yes; between Eager and Truxton.

Q. You knew that these buildings were being put up on the bed of Constitution street?

A. I knew that building was put up across Constitution street.

Q. You were aware the construction was going on?

A. Yes.

Q. Did you make any objection thereto?

A. I haven't anything to do with it.

Q. Did the Directors of the Penitentiary make any protest against building on the bed of Constitution street?

(Objected to.)

A. I cannot testify to that because the directors attended to the purchasing of the property.

(Objection sustained.)

The Court: He can testify whether or not he heard of any?

A. I heard of none.

(Motion to strike out; motion granted.)

(By Mr. Barton:)

Q. Who had charge of the erection of the building on behalf of the penitentiary?

A. How do you mean?

Q. Which official?

A. The directors had charge of it.

Q. That was not within your particular duties?

A. No.

Q. When did you as warden take charge, or when did your

duties include the charge of the part of the building on the Eager street wing which stands on the bed of Constitution street?

(Objected to.)

Q. When was this new wing that covers now the bed of Constitution street put into actual use for prisoners, for administrative purposes?

A. We moved into the building as I stated before on the 10th of December 1899 and have occupied it ever since.

Q. You have occupied it from that time on, you were the occupants of the Administration building from that time on?

A. Yes.

Q. Were the prisoners contained or confined in cells in this new addition from this time on under your charge?

A. Yes, sir; as warden.

Q. What is the nature of the residue of the Penitentiary building; I am not referring to what you have spoken of as the Eager street wing, which covers this specific property, but the balance of the Penitentiary building, what is it built of; what material, a stone building or a frame building?

A. All of the buildings except the dining room, which is not on the new land acquired, but which is on old ground the power house, the Eager street wing, the wing on Forrest street and the Administration building are built, the exterior of walls of granite and the interior part of the wall is brick and the cells which the prisoners occupy are of steel.

Q. Is there a wall around the whole building?

A. The building themselves are the wall on Eager street and Forest street.

Q. How about Truxton street; is that within the interior?

A. That is within the interior of the institution, not built on.

Q. The average height of the building is what?

A. Of those wings are between 50 and 55 feet; the administration building is over 100 feet.

Q. How old is that penitentiary building; I don't mean the new addition, but when was the penitentiary first established on this site?

A. The first prisoners taken into the Maryland Penitentiary, according to the records of the institution was in 1811.

Q. Was it then on this same general location?

A. No, sir; that was on Madison street and part of Forest street.

Q. It was that same locality?

A. South of it.

Q. Is that part which was the original grounds of the penitentiary still owned and used by the penitentiary?

A. Still owned and used.

Q. And this is an addition to the old ground?

A. This is an extension made in accordance with the Act of 1890.

Q. So the penitentiary is nearly 100 years old in that locality on that site?

A. The first ordinance introduced into the legislature was in 1804, but the first appropriation was not made until 1809 and the building completed in 1811.

Q. In order to make sure there is no misunderstanding, let me ask you whether or not the grounds of the Maryland Penitentiary are enclosed by those walls, either of the building itself or in some other way on all sides or is any side open?

A. How do you mean "open"?

Q. Is any side unenclosed?

A. The old grounds are of course closed or enclosed by a wall; on Forest street is a wall, on Madison street side is a wall and there is a wall which divided the city jail and the Maryland Penitentiary grounds and there was a wall of course on Truxton street on the North side; all the old ground was enclosed by a wall.

CROSS-EXAMINATION.

(By Mr. Bryan :)

Q. I hand you an exhibit which has been filed, make Exhibit "Weyler," filed with the defendants plea; look at it and state

if you know what it is? (See Exhibit Weyler filed by defendant with his pleadings.)

(Objected to; admitted subject to exception.)

Q. What is it; are those the rules?

A. The rules and regulations governing the Maryland Penitentiary.

Q. As Warden of the Maryland Penitentiary are you, while you hold your office as such warden, subject to those rules?

A. I am subject to those rules contained therein.

Q. State whether or not those are the rules which define your duties?

A. The rules and regulations define the duties of the warden of the Maryland Penitentiary; yes.

Q. Are there any rules defining your duties except those contained in this exhibit?

A. Only the statute which is practically the same.

Q. I ask you are there any other rules which govern you as warden?

A. No, sir; no other rules.

Q. In answering one of Mr. Barton's questions you said we moved in and occupied the building; state who you meant by "we", yourself alone, or whether you meant the directors?

A. I meant to say that all of us moved from the old prison into the new buildings.

Q. As a matter of fact—I am not speaking about the statutes and the rules—but as a matter of fact who is in control of the Penitentiary building now and who determines what is to be done?

A. The Board of Directors of the Maryland Penitentiary.

(Objected to; admitted subject to exception.)

Q. Explain to the Court how the Board of Directors manages the penitentiary, by that I mean will you state how often any committee comes there, if there be any committee which comes there, and what it does and what you do and to whom you report and all about it; give a short history of what is done in that respect without going into all the details, just what is done.

(Objected to; admitted subject to exception.)

The Board of Directors are in charge of the Maryland Penitentiary and they meet the first Wednesday of each month and receive reports from myself—first of all from the monthly committee who have charge during the interim of the meetings of the board; they are in charge during the month; they are the persons to which I report if anything is out of order and if I want advice from any one, instructions, and so on; they make their report of what has happened during the month to the directors; I simply carry out the rules and regulations and laws of the State in reference to the penitentiary and attend to the discipline of the prisoners.

(This testimony is subject to exception.)

Q. Suppose one of the deputy wardens misbehaved and got drunk or anything of that sort, state whether or not you would punish him or would you report him to the board?

A. It would depend on circumstances; I would suspend him and report him to the board or I would dismiss him subject to the approval of the board and report what the offense was and so on but what I did would always be subject to their approval.

Q. You have spoken of a monthly committee taking charge of the business during the interval between the meetings of the board; please state whether or not the monthly committee which you refer to is the same as the monthly committee which is referred to on page 6 of the by-laws?

A. The monthly committee referred to on page 6 of the by-laws is the same to which I have referred and its duties are defined there.

Q. I have asked you about the by-laws whether they are not the by-laws?

A. Yes, sir; this was adopted in 1889.

Mr. Strauss: These are the by-laws?

A. Yes; in use today.

Q. Just to get an understanding of the matter let me ask you this: Suppose the Board of Directors were to have a special meeting tonight under the practice over there, could they tell you to move out at once and quit?

A. They could dismiss me at once at any time.

Q. You do not claim to hold under any tenure except by the will of the board?

A. Entirely so.

RE-DIRECT EXAMINATION.

(By Mr. Barton :)

Q. You live in the Penitentiary building, do you not?

A. The building adjoins the Administrative building; that is specially built for the warden; the warden is obliged to live on the ground under the statute.

Q. Your office is in the Administration building; is it not?

A. Yes; the office is there.

Q. Your own office is in it?

Q. Yes.

Q. And your dwelling is near there?

A. Adjoins in on Eager street.

Q. Do your duties carry you to your office every day?

A. I am there every day.

Q. Is anybody at the Penitentiary who is higher than you are in authority; I mean who are permanently there?

A. No one there only when the monthly committee visits there.

Q. I mean in the intervals between the meetings of the committee and the board.

A. No, not directly on the ground.

Q. You are the person in highest authority in the penitentiary at all other times?

A. Yes, I am executive officer?

Q. The executive officer?

A. Yes.

 RE-CROSS EXAMINATION.

(By Mr. Bryan :)

Q. When you are here who is in authority?

A. The Assistant Warden John F. Leonard, has charge today while I am absent.

Q. Both you and he are subject to the board?

A. Certainly.

Q. The board has control of the building?

A. Yes.

Q. If the board dismisses you tomorrow, you and your family will have to move out of the house?

A. Yes.

Mr. Barton: The board has not dismissed you up to this time?

A. I have not heard of it.

The defendant was here permitted by consent to call out of order two witnesses, Sherretts & Story.

Then Samuel F. Sherretts and Frederick W. Story called by the defendant being duly sworn testified as follows:

SAMUEL F. SHERRETTS, called by defendants, sworn.

(By Mr. Bryan:)

Q. What is your business?

A. I am in the real estate business; at the present time I am assistant commissioner for opening streets; as their real estate man attending to the technical part of this work.

Q. Have you ever held any public office under the Mayor and City Council of Baltimore?

A. I was Commissioner for Opening Streets for ten years.

Q. Just explain to his Honor what the course of the Commissioners is in closing a street?

(Objected to; subject to exception.)

A. It is just the reverse or opening a street.

Q. For instance an ordinance is passed to close Constitution street we will say?

A. Yes.

Q. When you come to assess benefits and damages where do you put the damages in closing a street?

A. To the abutting property.

Q. Damages for what?

A. For depreciation in being deprived of the use of the street; it is just the reverse of the case of opening a street; there the abutting property is assessed for benefits for the use of the street and where the street is closed damages are allowed for cutting off that use, because they would have no open street.

Q. In the case of opening a street you give the owner of the bed of the street damages for taking his property?

A. Where you open; yes.

Q. When you close a street what do you do so far as the owner of the bed of the street is concerned, that is the owner of the street subject to the servitude of the street?

A. We make him pay the expenses of closing, whatever that may be, and take back the ground.

Q. He gets the ground?

A. Yes.

Q. Freed from the easement of the street?

A. Yes; and from the easement of the abutting property owners, adjoining property owners.

Q. You call that benefits?

A. Yes.

Q. Those benefits are always some sum of money?

A. Yes.

Q. Of course we all understand that it is quite difficult to express an opinion as to what those benefits would be, but can you give his Honor any idea as to how you arrive at those benefits?

(Objected to; admitted subject to exception.)

A. That would be determined first by the amount that would be allowed to the abutting property for damages by the closing in the first place and the expense the city has been put to for advertising, examination of titles and preparation of plats and so on; all that would be put in the bill and the man who got the property would have to pay it; the city never realizes anything from opening a street and never expects to pay anything for closing a street.

Q. The man who gets the street freed from the servitude of the street has to pay whatever sum is necessary to reimburse the city for the expenses incurred in closing the street?

A. That is the universal practice.

Q. And in addition to that he has to pay such a sum as will enable the city to pay damages to the abutting owners for the loss of the use of the street?

A. Yes.

Q. Speaking roughly can you tell whether or not that generally amounts to the full value of the land or not?

A. Sometime it does and sometimes it amounts to more than the original property owner is willing to pay and he allows it to be sold by the city for if the property owner does not pay these expenses the city sells it.

Q. To satisfy the claim and pay for the expenses incurred?

A. Yes.

Q. Take Constitution street as an example; the Penitentiary owns the abutting land on both sides according to the proof and according to the proof so far we will assume the heirs of Mr. Carroll own the fee of the bed of the street; if you close the street in the regular way you would assess to the Penitentiary as to the owner of the abutting land whatever damages may arise from that or how far the market value of it is depreciated by reason of it being deprived of its abutment on a public street; would you not?

A. Yes, sir.

Q. And the damages—

A. I will say in regard to Constitution street I do not know anything about it; I had nothing to do with it; I have never had occasion to value property in that immediate neighborhood and of course I could not tell you anything in regard to damages.

Q. I only want to get at the procedure; you assess the owner of the abutting property whatever damages you think he suffers by reason of being deprived of the use of a street?

A. Yes; that is universal.

Q. And put the benefits on the owner of the street that he gets by having his property relieved of the easement?

A. Yes.

Q. And the general rule is that those benefits equal the total amount of the damages on both sides and the expenses—

A. The expenses, the expense has to be added.

Q. The expenses the city is put to in the proceedings?

A. Yes.

Q. You were Commissioner for Opening Streets for ten years?

A. Yes, sir.

Q. And closing a street is exactly the reverse of opening one?

A. It is just the reverse of opening a street when you close one; in opening a street you assess a man so much benefits to his property abutting on that street or contiguous to it; it is not necessarily the man who has property abutting directly on the street but any property that derives benefits or damages because the Commission can go wherever it thinks property is specially benefitted in order to assess their benefits and wherever property is specially damaged they can give damages.

Q. And as the Commission finds it stands unless reversed on appeal?

A. Yes, sir.

Q. You were one of the Commissioners during the time I was City Solicitor?

A. I was, I went in under Mayor Hodges and remained ten years.

Q. You went in under Hodges and went out under Hooper?

A. Yes, I have been attending to street cases ever since, I have been intimately connected with street openings ever since and I helped the Burnt District Commission to get through with their condemnation proceedings and then I went to the Annex Commission and the Commission for Opening Streets; I see Mr. Story there, he know more about this than I do.

The Court : Do I understand that you assess damages on anybody that you think is damaged?

A. Specially damaged; yes.

Q. You assess benefits on anybody you think specially benefitted?

A. In closing a street?

Q. Yes; the assessment for benefits is charged up against the property?

A. Yes.

Q. Entirely so?

A. Entirely against the property, that is in closing streets.

Q. All you do is to assess the damages?

A. Yes.

Q. And make the man who takes the bed of the closed street pay those damages and expenses?

A. Yes.

Q. If he does not pay the damages and expenses then the bed of the street is sold?

A. It is sold by the City Collector.

Q. You sell the fee simple bed of the street by metes and bounds?

A. Yes.

(Examination concluded.)

FREDERICK STORY, called by defendants, sworn.

(By Mr. Bryan :)

Q. You are a member of the bar?

A. Yes.

Q. You have some connection with the real estate department of the City Solicitor's office?

A. Yes.

Q. What is that connection?

A. Of course I am a republican and I am out of office now, but I work with the city nearly all the time and it is very seldom that I have not 4 or 5 or 6 important matters on hand investigating titles for the Mayor and City Council of Baltimore and so it has been for over 30 years.

Q. You are over 30 years old then?

A. I have been a member of the bar for a generation as we reckon three generations to a century.

Q. Do you know about the Constitution street Ordinance No. 111 for closing that street?

A. At the time this ordinance was passed, it is No. 111 in the year 1892 I think; you will find, and at that time I was as I have been for a good long time what we used to call assistant to the examiner of titles; when it was being carried out I was the Examiner of Titles and the rod was in my hand apparently; at least Mr. Weyler thought so.

Q. You must not tell what Mr. Weyler thought as it might not be admissible?

A. Well then Mr. Weyler said so.

Q. Do you know whether or not the proceedings under that ordinance have been complied with and carried out?

A. They have not been complied with; exactly how far they have proceeded I don't know, but I do not know up to the time the new city charter wholly took effect that is to say nearly a year after it went into effect up to the last moment I ceased to be Examiner of Titles, which was in the Spring of the year 1900, it had not even passed through the stages of receiving so much as the first notice, much less anything more; the street book has not been found, there never has been any return and it has not been complied with; it has never reached the City Register's office and therefore it has never been subject to any appeal to the Baltimore City Court.

Q. Mr. Weyler—excuse me, I mean Mr. Story—

A. Weyler is a good name.

Q. But he is not a lawyer—although he has handled some lawyers?

A. He is taking care of several.

Q. Yes, and he will take care of some more.

A. I suppose so.

Q. Can you from your wide experience as Examiner of Titles for over 30 years and your connection with real estate department of the Baltimore City Law Department—

A. I did not say over 30 years, but I said about 30 years.

Q. Can you tell his honor about the assessment of benefits against the bed of a street when it is closed; can you explain how that is done?

A. It is customary your honor and the Court of Appeals has decided that it is not a bad custom, they flopped a little bit as to the meaning of the words, but having understood what the

words mean in Baltimore city, that is to say : when our Court said "benefits" they meant the opposite and meant "damages" and when they said "damages" they meant the opposite to what was meant in any other place and meant "benefits"--and having that in view the Court agreed with and approved our method here in the city, here for closing streets with that understanding of what the words meant.

Mr. Barton : Give us the cases ?

A. I am not here to pass judgment on the Court of Appeals but I am speaking now as to what we did.

Mr. Barton : What was that custom that was approved of by the Court of Appeals; I want you to give us the case where the Court of Appeals decided that so we can read it for ourselves ?

A. I put it in the other way and say that we so understood the Court to mean that and therefore we kept a book for the closing of streets; we kept a book in exactly the reverse of the other; I am not talking now about the Court of Appeals, but I am telling you what he did.

Mr. Bryan : The Court of Appeals is *res inter alios*.

A. We kept a book for closing exactly the reverse of what it was for opening the streets.

Q. We want to know what you did ?

A. The book in closing a street is kept in exactly the opposite form that it is in the case of opening a street and therefore I only wanted to say that what I say in regard to the closing of a street that exactly the opposite will apply to the opening of a street and vice versa; the book is begun by two or three printed slips in front and they are filled up and first are the oaths of the commissioners to that particular book and the oath of the Clerk of the Commissioners for Opening Streets as their clerk for that particular book; then they have certain preliminary notices which they give that they will meet on such and such a day to perform this function and thereupon they meet and they hear whatever parties or objections of any kind that they please and they are authorized to accept and do accept all surrenders and compositions of all kinds for the part of the ground that is to be in the opening included, in the opening as well as the surrounding parts included therein; of course in closing a street the reverse process would be gone through with; and then they make up what is called a first return; and if my brother wants the case--

Q. Tell us what they do and give us the case afterwards; what do they do with the first return ?

A. The awards are all made—

Mr. Barton : Are these steps which you have just recited provided for by the law ?

A. By the ordinance and they are always 5 x 9.

Q. Are you testifying to what the ordinance require you to do ?

A. I am speaking about the universal practice of every book.

Q. But you do follow the instructions —

A. As a matter of fact there are instructions and they are followed literally in every case.

Mr. Bryan : I do not want to go into the ordinance but I want to let the Court know how it is done; what physical acts have to be done in the closing of streets ?

A. The last case was Gardiner vs. The Mayor & City Council¹ where our conduct and especially Mr. Story's conduct in the matter is passed on and approved.

Mr. Bryan : Just tell us what they do when they come to closing a street; where they put the damages ?

A. The damages are put on the abutting property.

Q. Of the abutting owner ?

A. Where a street is closed the man is damaged who loses his outlet and he receives the money that the return is for; the same return is made—it is presumed that the man who gets the land free from that user is benefited and he must pay his benefits and the other fellow must receive his damages; it is just the reverse of what it is the other way; but all the awards are made to the parties by name, to such and such persons legally entitled to receive the same; you stopped me—

Q. I did not intend to stop you; I wanted you to go ahead, when they come to fixing the amount of benefits assessed against the owner of the servient fee; do you know what I mean ?

A. Yes; but we do not recognize that, we only recognize the fee simple.

Q. In fixing that—

A. A lot of ground, for instance at A—

Q. How do you arrive at what those benefits are?

A. Mr. Sharretts properly stated it; the charges in the case of a street closing to be paid by the lot which is released from what you call the servient estate or condition rather---

Q. Releasing it from the dominant easement---

A. The charges against it are the whole damages that is suffered by the abutting owner or the owner around the corner, the Mayor and City Council of Baltimore, the share of the Mayor and City Council of Baltimore consist almost entirely in closing, so far as I remember, as I remember any expenses that is the Mayor and City Council's share of the damages and expenses they are made of notices, string of per diems, surveyors' costs and costs of examining the titles and also the expenses of the Register's office at the closing; the man around the corner, he may or may not, be damaged according as he is left without any other outlet or the distance is increased to an outlet by the closing of the street; the man who abutts right on the improvement, the character of his land is wholly changed from being land that abutts on the street to land that does not abutt on the street; he is damaged to that extent; and that value is reflected in the difference of the value between the value of the land as fronting on the street and the value of land as not fronting on any street; but it always lot A, B, C or D, and those lots are to whatever the name is X, Y, Z, or such other person or persons as may be legally entitled to receive the same.

Q. One more question and I think I won't trouble you any more; can you give us any idea from your experience whether or not the amount of benefits assessed against the fee-simple bed of the street about equals the fee-simple value of that property; you know what I mean?

A. We never allow a balance to remain over so that the city shall be subjected to any charges; if the owner of what you call the dominant estate and the owner of the lowest estate in the same, we do not trouble ourselves so much about figuring so much exactly in dollars and cents damages, because his benefits help out the damages; where it is necessary to discriminate between the benefits and the damages we figure to the closest degree and notify the parties sometimes and listen to them in regard to any protests.

Q. If there were different owners involved you would have to separate the damages and the benefits?

A. Yes, sir.

Q. If Mr. Strauss owned the abutting land and I owned the bed of the street which was about to be closed he would get such damages as the market value of his property would be hurt by the closing of the street?

A. Yes; he would get such damages as he cried for—

Q. And if I owned the bed of the street to be closed I would have to pay such benefits as the sum of the damages and expenses amounted to—

A. Unless the jury said otherwise.

Q. As the Commissioner of Opening Streets determined upon?

A. They are governed by the amount of noise made before them very largely, if the parties come and cry and say we are willing to do so and so the commissioners very possibly when the parties come and cry and cry, the commissioners recognize their cries and they consider those cries and send those cries to the Register and from there they are sent to the Baltimore City Court.

Q. You remember what is said about an honest man not being shaken by the clamors of citizens?

A. The law says that they shall listen to the clamor of citizens.

CROSS-EXAMINATION.

(By Mr. Barton:)

Q. What is the purpose of the city in closing a street?

A. I don't know as they have any purpose; it has to be done under the ordinance and we carry it out; the Commissioners for Opening Streets and the Examiners of Titles have nothing to do with the purpose; our purpose in this matter was to carry out Ordinance 111 as we were required.

Q. You have been familiar with the methods of the city in closing and opening streets?

A. I understand you now—

Q. What is the purpose for which streets are closed ordinarily?

A. Principally to relieve the office now called the City Engineer's Office from the labor and expense of paving and repaving.

Q. Are there not some other purposes; suppose some one wanted to make an improvement on a piece of ground intersected by a short street?

A. The Mayor & City Council of Baltimore have nothing to do with that; at least they never regarded they were concerned in private matters.

Q. You represented the Penitentiary Board in the acquisition of the property as far as the title was concerned?

A. No; I represented exactly the other side; the Mayor and City Council of Baltimore.

Q. You said Mr. Weyler seemed to think you had a great deal to do with the title; just what was your connection with examining the title and the acquisition of this title?

A. My connection briefly stated is just exactly this; one of our men of the City Commissioners office, as it was then called, was repairing a piece of pavement around the corner, I think on the York Road, and telephoned down that he wanted a wagon load of cobble stones; he was informed—I was standing I think by the phone—he was informed that he could not have them until the next day; he said, what is the use of waiting, there is a pile right around the corner, can I have a couple of loads off of them; he turned to me and said, can he have them; I said, yes; he forthwith proceeded to take them and he was informed by Mr. Weyler that he would be arrested—

(Objected to.)

Q. I did not ask you for that—

A. The cobble stones were claimed by the Examiner; I did claim them.

Q. By, whom?

A. The Examiner; I was the Examiner; I forthwith took possession of them because they were in the bed of the public highway, part of a public highway and were our property; that resulted in an interview with Mr. Weyler; you can ask Mr. Weyler the rest.

Q. When was this?

A. That must have been in the year 1896, was it not?

Q. Was that when the penitentiary was being built?

A. There was no penitentiary on that street when I claimed the cobble stones.

Q. What street are you speaking of?

A. I presume it is Constitution street or Clifton Place as it is called.

Q. It may have been Truxton street for all you know?

A. It might possibly have been Truxton street, but Mr. Weyler can tell you.

Mr. Bryan : He is not on the stand.

A. He was there every day and I was not.

Mr. Barton : You are Examiner of Titles?

A. I was; I did not care where the cobble stones were; they were in the street and that was enough.

Q. You claimed the stones because they were in a public street?

A. I claimed the stones because the Mayor and City Council put them there on its own property; they were on its own property and were ear marked accordingly.

Q. You knew the street was being torn up?

A. I did not; I knew it was torn up when I saw it.

Q. You knew the time when the Penitentiary was being built, that it was being built there?

A. I did not give any attention to it.

Q. Didn't you have an interview with me about it?

A. It was after that.

Q. Were you officially connected with the City Law Department at that time?

A. I was at the time I had the interview with you; you had an interview not with me, but with Examiner of Titles; you had no interview with me.

Q. Did you not have two or three different interviews; you were a sort of Poo Pah—

A. I mean on that subject; we had many interview socially and privately but that interview was with the Examiner of Titles; I think it was three or 4 months before you and I talked it over.

Q. Do you know at whose request this Ordinance for Closing Constitution Street was introduced?

A. It ought to appear, it ought not to be a question of my knowledge or anybody else's, but it ought to appear; those notices had to be given in those days in 1892 and it ought to appear and you ought to be able to find it out for yourself.

Q. What do you mean by that, that the notices had to appear?

A. Somebody had to publish the notices in some papers in the city of Baltimore that application would be made, a thing about that long, three lines; in this case there were four or five streets and I judge it would be an inch, that application would be made for this ordinance for closing the street.

Q. Is that published for the property owner?

A. That had to be published by the person who was interested, the person who started the game had to do it at that time in order to get it started.

Q. Where would that appear; among what records of the city, is there any record in which we could find that; would it be to the City Librarian's office or the Commissioner's for opening streets or not?

A. That would be in committee; the committees keep no records; but the transactions and other proceedings in the First and Second Branch of the City Council for 1892 ought to show that.

Q. Show at whose instance the ordinance was introduced?

A. Who introduced it.

Q. You don't know?

A. I do not; there were hundreds of them; those things made no impression as to their details on my mind; I had so many of them at that time they came in the bucket fulls; those that did not succeed came as often as those that did succeed; but the interested party had to pay the bill.

Q. The advertisement appears over his signature?

A. No, sir.

the City Code in this Court or in any other Court to which the case may go, as fully and to the same effect as if incorporated in the record.

Mr. Bryan : I also want to offer City Code of 1893, Article 48, sections 1 to 27 inclusive, and also the City Code of 1896.

"I will not take the time now to pick out those ordinances, but I will designate hereafter in the City Code of 1906 such ordinances as relate to the opening and closing of streets, the same to be read from the code in this Court or any other Court to which these proceedings may go as fully as if incorporated in the record.

"Also offer Ordinance 216, approved October 14, 1893, which is introduced under the same stipulation as the above codification of the ordinances in the City Code.

"We also refer to the City Charter but it is not necessary to off it."

The plaintiffs then offered the following three prayers.

PLAINTIFFS' FIRST PRAYER.

The Court rules as a matter of law that under the pleadings in this case the plea of "not guilty" admits the possession of the plaintiffs on the lands in issue and their ejection by the defendant, and puts in issue the title and right of possession to the premises and damages sustained by the plaintiffs.

(Granted.)

PLAINTIFFS' SECOND PRAYER.

That by the admission of facts offered in evidence in this case, it is admitted that Thomas King-Carroll and Juliana Stevenson Carroll, his wife, were seized in fee-simple of the lands sought to be recovered and described in the declaration in this case, on the 19th day of May, 1831; that if the Court shall find as matter of fact that said Carroll and wife executed the deeds to Coulter, Henry and Howard respectively offered in evidence herein, and that the "Constitution Street" referred to in said deeds was composed of the lands described in said declara-

Mr. Bryan : Anonymous advertisement ?

A. Yes.

Mr. Barton : What do you mean, that we could find out at whose instance the ordinance was introduced ?

A. I presume so.

Q. This discussion originated in my asking you if you knew why it was introduced and who had it introduced and you said the records will show that.

A. No; if it had not been for the fire we would have been able to prove all these things, but now since the fire it is impossible to do so; I have gone in again and again and found out from the newspapers who paid for it but the fire came in and things are harder now; Baltimore is not a little village any more.

Then JOHN F. WEYLER was recalled for the plaintiffs and testified that at the instance of the Board of Directors of the Penitentiary, Mr. John T. Ford, who was at that time a member of the Board of Directors prepared the advertisement giving notice that Ordinance 111 for closing Constitution street would be introduced in the City Council.

The plaintiffs then proved by Vivian Carroll that the plaintiffs in this cause are the heirs-at-law of the Thomas King Carroll (a former Governor of Maryland) and Juliana (Stevenson) Carroll, his wife, who are mentioned in the admission of facts hereinbefore set out as to the title to said lands in the year 1831, and also as the grantors in the three deeds hereinbefore set out, who were his grand-parents; that his said grand-father married Juliana Stevenson but did not marry but once; that neither Governor Carroll nor his wife nor any of their descendants, or any of the persons at any time interested in the lands sought to be recovered in this case left any will or wills, but that the real of estate of which the said Governor Carroll and Juliana (Stevenson) Carroll, his wife, respectively died seized; passed by descent to the plaintiffs herein, and they also proved by said witness all necessary deaths, births and marriages."

Mr. Bryan : We offer in evidence the City Code of 1879, Article 47.

It is agreed that this Article of the Code can be read from

tion, then the legal effect of said deeds was to dedicate said lands so therein called "Constitution Street" to the use of the public as a public street or highway, but that said deeds did not convey the fee of said "Constitution Street," but merely impose upon said lands an easement as a public highway as aforesaid; and if the Court shall further find as matter of fact that said Constitution street continued to be used as a public street or highway until after the year 1891, and that in the year 1890 the General Assembly of Maryland passed the Act offered in evidence entitled Acts of 1890 chapter 200, providing for the extension of the Maryland State Penitentiary, and that said Constitution street comprising as aforesaid the lands described in the declaration, is embraced within the area prescribed in said Act; that thereafter, to wit, on the 17th day of October, 1892, the Directors of the Maryland Penitentiary procured the passage by the Mayor and City Council of Baltimore, of the ordinance offered in evidence, to wit, Ordinance No. 111 passed 1892, that the General Assembly of the State of Maryland also passed the Acts offered in evidence herein, to wit, Acts of 1890, Chapter 202, Acts of 1896, Chapter 166, and Acts of 1898, Chapter 219; that during the year 1896, the said Directors of the Maryland Penitentiary began the erection upon said lands, so termed herein "Constitution Street," of massive, costly and permanent buildings, as an addition to and an essential part of the Maryland State Penitentiary, and continued the erection of said buildings up to some time in the year 1899, so that said Constitution street was entirely and permanently occupied and enclosed thereby; that said buildings have ever since been maintained upon said lands and used as a part of said State Penitentiary, and that at no time since the commencement of the erection of said buildings have said lands been used or usable as a street or highway or for purposes of passage upon, under or across the same by the public; that at the time of the erection of said buildings the Directors of the Maryland Penitentiary were the owners of the property abutting on said lands and that the erection and maintenance of said buildings on said lands were with the knowledge and acquiescence of the municipal authorities of Baltimore,—then the Court rules as matter of law the aforesaid easement of the public in said lands as a street or highway, was prior to the institution of this suit abandoned, notwithstanding the fact that the Court may find that a formal closing of said street in accordance with the provisions of said Ordinance No. 111 has not been consummated; and under the pleadings admissions and evidence in this case, the title to said lands, at the time of the institution of this suit was un-

incumbered by the easement previously existing as aforesaid in favor of the public or the Mayor and City Council of Baltimore for the use of said lands as a public street or highway.

(Refused.)

PLAINTIFFS' THIRD PRAYER.

That under the pleadings and admissions of facts filed in this case and offered in evidence, it stands admitted that Thomas King Carroll and Juliana Stevenson Carroll, his wife, on the 19th day of May, 1831, were seized in fee-simple of the lands described in the declaration and the lands surrounding the same, and the Court rules as a matter of law that if it finds as matter of fact the deaths of Thomas King Carroll and Juliana Stevenson Carroll, his wife, both of them intestate, in or about the year 1873 and 1849 respectively, and that Henry James Carroll, Dr. Thomas King Carroll, Mary H. Carroll, Anna Ella Carroll, Henrietta Gibson, Ada C. Bowdle (one of the plaintiffs) and Sarah or Salley C. Cradock (one of the plaintiffs) were their own children and issue except another daughter Julia S. Carroll who died without issue unmarried and intestate before her father, that the said Henry James Carroll died unmarried and intestate in or about the year 1878; that the said Anna Ella Carroll and Mary H. Carroll each died intestate, without issue and unmarried in or about the years 1893 and 1898, respectively, that the said Henrietta Gibson died intestate and a widow in or about the year 1898, that the plaintiffs, Frank T. Gibson and Julia Easter were and are the only children and issue of the said Henrietta Gibson, except a son Fayette who died unmarried and without issue about 13 years ago, and intestate that the said Dr. Thomas King Carroll was married to Margaret H. Carroll in 1852 and died intestate in or about the year 1900, and that the plaintiffs Charles C. Carroll, Victor C. Carroll, Vivian Carroll, Margaret H. Carroll, Julia S. Carroll and Nellie C. Carroll were and are their and his only children and issue except a son who died unmarried and without issue in or about 1896 before his said father and that Margaret H. Carroll was his widow and that she died in 1907, then under the pleadings admissions and evidence in the case, the plaintiffs are entitled to recover, even if the Court further finds as matter of fact that the lands sought to be recovered in this case were in the year 1831, by the certain deeds offered in evidence, to Coulter, Henry and Howard respectively, dedicated by said Carroll and Juliana his wife, to the public for use as a public street

or highway under the name of Constitution street, and that said lands were for many years subsequent to 1831, used as a public street of the City of Baltimore; provided the Court shall further find as matter of fact that in the year 1890 the General Assembly of Maryland passed the Act offered in evidence entitled Acts 1890, Chapter 200, providing for the extension of the Maryland State Penitentiary, and that said Constitution street comprising as aforesaid the lands described in the declaration, is embraced within the area prescribed in said Act; that thereafter to wit on the 17th day of October, 1892, the Directors of the Maryland Penitentiary procured the passage by the Mayor and City Council of Baltimore of the Ordinance offered in evidence, to wit, Ordinance No. 111 passed 1892, that the General Assembly of the State of Maryland also passed the Acts offered in evidence herein, to wit, Acts of 1890, Chapter 202, Acts of 1896, Chapter 166 and Acts of 1898, Chapter 219, that during the year 1896, the said Directors of the Maryland Penitentiary began the erection upon said lands, so termed herein "Constitution Street," of massive, costly and permanent buildings, as an addition to and an essential part of the Maryland State Penitentiary and continued the erection of said buildings up to sometime in the year 1899, so that said Constitution street was entirely and permanently occupied and enclosed thereby, that said buildings have ever since been maintained upon said lands and used as a part of said State Penitentiary, and that at no time since the commencement of the erection of said buildings have said lands been used or usable as a street or highway or for purposes of passage upon, under or across the same by the public; that at the time of the erection of said buildings, the Directors of the Maryland Penitentiary were the owners of the property abutting on said lands, and that the erection and maintenance of said buildings on said lands were with the knowledge and acquiescence of the municipal authorities of Baltimore.

(Refused.)

And the defendant offered the following 6 prayers.

DEFENDANT'S FIRST PRAYER.

The defendant prays the Court to rule as a matter of law that there is no legally sufficient evidence in this case to show that the plaintiffs herein are at this time entitled to the possession of the land described in the declaration, and the verdict therefore must be for the defendant.

(Refused.)

DEFENDANT'S SECOND PRAYER.

The defendant prays the Court to rule as a matter of law that there is no legally sufficient evidence in this case to show that the plaintiffs herein were, at the time this suit was instituted, entitled to the possession of the land described in the declaration, and that therefore the verdict must be for the defendant.

(Refused.)

DEFENDANT'S THIRD PRAYER.

The defendant prays the Court to rule as a matter of law that there is no legally sufficient evidence in this case to show that the plaintiff's herein are entitled to the legal title to the land described in the declaration, and the verdict therefore must be for the defendant.

(Refused.)

DEFENDANT'S FOURTH PRAYER.

The defendant prays the Court to rule as a matter of law that there is no legally sufficient evidence in this case to show that the defendant herein is in possession of the land described in the declaration at this time, or that he was in such possession when this suit was instituted, and that therefore the verdict herein must be for the defendant.

(Refused.)

DEFENDANT'S FIFTH PRAYER.

The defendant prays the Court to rule as matter of law, that there is no evidence in the case legally sufficient to entitle the plaintiffs to recover, and that the verdict must be for the defendant.

(Refused.)

DEFENDANT'S SIXTH PRAYER.

The defendant prays the Court to rule as matter of law that the defendant Weyler, Warden of the Directors of the Maryland Penitentiary is not liable to be sued in this cause, and that therefore the verdict must be for the defendant.

(Refused.)

And the Court granted the first prayer of the plaintiffs, and rejected the second and third prayers of the plaintiffs, and rejected all the prayers of the defendant. To which action of the Court in granting the first prayer of the plaintiffs and in rejecting the six prayers of the defendant, and in rejecting each of them, the defendant excepted and prayed the Court to sign this his bill of exceptions, which is accordingly done this 17th day of March 1909.

ALFRED S. NILES.

Appellant's Costs.....	\$59 85
Appellee's "	33 55

STATE OF MARYLAND,

CITY OF BALTIMORE, SCT:

I, STEPHEN C. LITTLE, Clerk of the Superior Court of Baltimore city, do hereby certify that the foregoing is truly taken from the record and proceedings of the said Superior Court in the therein entitled cause.

(Seal's Place.) In testimony whereof I hereunto set my hand and affix the seal of the Superior Court of Baltimore city, this 25th day of March, in the year one thousand nine hundred and nine.

STEPHEN C. LITTLE,
Clerk Superior Court of Baltimore City.