

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. Macou 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