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.

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 nonsuable, 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 ejectment 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 ejectment 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,
Almingo 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 mandamus 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 dicta*. 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 ejectment 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 ejectment 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 *ejectment* 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 wrong-doer 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 ejectment 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 ejectment*, 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 ejectment 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 ejectment 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 ejectment 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 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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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. Gantt, 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 palmiest 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.

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