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# Change of Venue Between Courts in Baltimore City: is the Constitutional Right Protected? - Middleton v. Morgan

## CHANGE OF VENUE BETWEEN COURTS IN BALTIMORE CITY: Is the Constitutional Right Protected?

*Middleton v. Morgan*[1]

Appellants, two doctors, were defendants in a medical malpractice suit in the Superior Court of Baltimore City. They "suggested" to the court that they could not receive a fair and impartial trial in that court and urged that the case be sent beyond the jurisdictional limits of Baltimore City. The court granted the prayer for removal but ordered the case removed to the Court of Common Pleas of Baltimore City.[2] From that removal order the appellants immediately appealed, arguing that such a removal does not achieve the purpose and desired effect of the constitu-

1. 263 Md. 154, 282 A.2d 94 (1971).

2. Three of the courts which constitute the Baltimore Supreme Bench are given concurrent jurisdiction in civil cases, with a few minor exceptions. These are the Superior Court, the Court of Common Pleas and the Baltimore City Court. MD. CONST. art. IV, § 28.

tional provision granting the right of removal.[3] The Maryland Court of Appeals held that the 1882 case of *Weiskettle v. State*[4] was controlling in the matter. The basis for that decision, according to the court, was that ". . . each court in the City was a distinct and separate court within a circuit and since the Constitution does not require a removal to be to a court without the circuit, a removal within the City gratified the constitutional right of removal."[5] The court did not, however, affirm the removal order, but rather dismissed the appeal as being premature on the grounds that the choice of the court to which the case should be removed is discretionary and that the exercise of that discretion is reviewable only after final judgment. This note will critically examine the court's decision in light of the history behind the removal provision and the ends which that provision was intended to achieve.

The underlying purpose behind the right of removal was to allow the parties to an action ". . . to get rid of the influence of local prejudice in the community from which the jury to try the case was to come, and thus, as far as practicable, to secure a fair and impartial trial by jury."[6] Although the right of removal has

3. MD. CONST. art. IV, § 8 provides in part:

[I]n all suits or actions, at law, issues from the Orphans Court, or from any court sitting in equity and in all cases of Presentments or indictments for offenses, which are or may be punishable by death, pending in any of the courts of law in this State having jurisdiction thereof upon suggestion in writing under oath of either of the parties to said proceedings that such party cannot have a fair and impartial trial in the court in which the same may be pending, the court shall order and direct the record or proceedings in such suit . . . to be transmitted to some other court having jurisdiction in such case for trial, but in all other cases of Presentment or indictment, pending in any of the Courts of law in this State having jurisdiction thereof, in addition to the suggestion in writing . . . it shall be necessary for the party making such suggestion to make it satisfactorily appear to the Court that such suggestion is true, or that there is reasonable ground for the same . . . and such right or removal shall exist upon suggestion in such cases where all the judges of said Court may be disqualified under the provisions of this Constitution to sit in any such case and said Court to which the record of proceedings in such suit or action, issue, presentment or indictment may be so transmitted shall hear and determine the same in like manner as if such suit or action, issue, presentment or indictment had been originally instituted therein . . .

4. 58 Md. 155 (1882).

5. 263 Md. at 158, 282 A.2d at 96.

6. Cooke v. Cooke, 41 Md. 362, 372 (1875). *See also* Johnson v. State, 258 Md. 597, 267 A.2d 152 (1970). It is generally agreed that jury prejudice is the primary reason behind change of venue provisions. *See* Austin, *Prejudice and Change of Venue*, 68 DICK. L. REV. 401 (1964); Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAW. 925 (1967).

been a constitutional right since 1805,[7] the procedures used to effectuate this purpose have from time to time been different.[8] The principal issues which have caused these repeated changes are: first, that of whether the right should be absolute, or discretionary and thus granted only upon satisfactory proof to the court that a fair and impartial trial cannot be had in the court where the cause was originally brought, and; second, that of where the case may be sent once removal has been granted.[9]

Before 1864, the right of removal in civil cases was absolute;[10] in the 1864 revision of the constitution, however, removal was made contingent upon proof to the court that a fair trial could not be had in the court where the action was pending.[11] In addition, each revision prior to 1867 placed geographical limitations on the choice of the court to which the action could be removed.[12] In the 1867 constitution the right of removal was again made absolute,[13] and the case was to be sent ". . . to some other court (and of a different circuit, if the party applying shall so elect,) having jurisdiction in such cases. . ."[14] This latter provision was interpreted

7. *See* ch. 55, § 2, [1804] Md. Laws, confirmed, ch. 16, [1805] Md. Laws. It has been asserted by one author that "at common law, the power of the courts to remove a cause to an adjoining county for trial, when justice required it, existed as a part of their ordinary common jurisdiction," but that it was thought wise to make the right of removal one of constitutional stature. A. NILES, MARYLAND CONSTITUTIONAL LAW 242 (1915).

8. The changes made in the seveal revisions of the Constitution are outlined at notes 10-14, 20-21 *infra*. The removal right in criminal cases, which has followed a similar course, is dealt with only tangentially in this note. For a review of the changes in the removal right in criminal cases see Note, *Constitutional Limitation on Change of Venue in Criminal Cases*, 13 MD. L. REV. 344, 346 (1953).

9. The several revisions reflect the effect of these issues. *See* notes 10-12 *infra*. These issues were the focus of the debates on the removal section in the conventions of 1850 and 1864. *See* 3 DEBATES OF CONSTITUTIONAL CONVENTION OF 1864 at 1403-11; PROCEEDINGS: MARYLAND STATE CONVENTION 683-84 (1850).

10. In the 1805 constitutional amendment the right was absolute in civil cases. *See* ch. 55, § 2, [1804] Md. Laws. This provision was unchanged in the 1851 constitution. *See* MD. CONST. art. IV, § 28 (1851).

11. It was provided that in civil as well as criminal cases removal was to be granted only when the party "shall make it satisfactorily appear to the Court" that he could not have a fair and impartial trial. MD. CONST. art. IV, § 9 (1864).

12. The original amendment provided for removal of the proceedings in civil cases to "any county within the district." Ch. 55, § 2, [1804] Md. Laws. The 1851 constitution provided that in civil cases removal was confined to "an adjoining county within the judicial circuit, except as to the city of Baltimore, where the removal may be to an adjoining county . . ." MD. CONST. art. IV, § 28 (1851). In 1864, removals in all cases might be had to "some other court in the same or any adjoining circuit. . ." MD. CONST. art. IV, § 9 (1864). Thus each provision limited the possible sites to which cases might be sent to those in close physical proximity to the jurisdiction from which the case was removed.

13. MD. CONST. art. IV, § 8 (1867).

14. *Id.*

by the court in *Kimball v. Harman*[15] to mean that the selection of the court to which a removed case should be sent was within the discretion of the court to which the suggestion was made, and that that discretion was "general and unlimited" except to the extent the removing party elected to be sent to another circuit.[16] The reasons why the removing court's discretion was thus limited are not known.[17] However, one effect of the provision was to permit litigants in Baltimore City to be removed outside the city if they so desired.[18]

The removal section in the 1867 constitution[19] was rewritten and amended in 1874.[20] In this amendment, which remains the law today, the right to be removed continued to be absolute in civil and capital criminal cases, but in non-capital criminal cases the right to be removed was made dependent upon satisfactory proof to the court that a fair and impartial trial could not be had.[21] In addition, this amendment eliminated the clause permitting the applying party to elect to have the case sent to a different circuit. Because of the lack of legislative history on the matter, it is not known why the "different circuit" clause was omitted.[22] The effect of that omission, however, was one of the principal issues in *Weiskettle v. State*.[23]

In *Weiskettle*, the appellant, who was the defendant in a wrongful death action, made an application to have the case removed from the Baltimore Court of Common Pleas to another court of a different circuit. The court ordered the case removed to the Superior Court of Baltimore City, and the appellant immediately appealed.[24] The issues in the case were whether in light

15. 34 Md. 401 (1871).

16. *Id.* at 406.

17. PEARLMAN, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, which is the only source of the convention debates, contains nothing concerning this matter.

18. Under the 1864 constitution it was possible for a judge to send a case pending in one court in Baltimore City to another court within the City. *See* note 12 *supra*.

19. MD. CONST. art. IV, § 9 (1864).

20. *See* ch. 364, [1874] Md. Laws 530.

21. *Id.* The reason why the grant of removal in non-capital criminal cases was made discretionary was to eliminate abuses of the absolute right whereby trials were delayed and " . . . parties accused of crime were enabled to escape trial and conviction, because of the difficulty of procuring the attendance of witnesses at the courts to which the cases were removed." 2 POE, PLEADING AND PRACTICE AT LAW § 98 (3d ed. 1897).

22. One possible reason is the use of the clause for delaying purposes and other abusive ends. *See* note 21 *supra*.

23. 58 Md. 155 (1882).

24. The question of the appellant's right to take an immediate appeal was not

of the 1874 amendment a party could still elect to have his case sent to another circuit and, if not, whether a removal between courts in Baltimore City was a removal to "some other court." As to the first issue the court held that no such right of election existed, stating that:

> [i]n the amendment, the right of election contained in the original section was omitted, and we cannot doubt, upon either reason or authority, that such an omission operated as a repeal of this right of election, and that now it rests in the discretion of the court, from which the removal is sought, to send the case to some other court having jurisdiction, either within or without the circuit, as it may think best.[25]

As to the second issue, the court held that:

> Baltimore City is a complete Judicial Circuit, (the 8th), and in that circuit there are several distinct courts, each with its distinct organization and jurisdiction defined in the Constitution. . . The Superior Court of Baltimore City has jurisdiction in the case before us, and the removal thereto from the Court of Common Pleas, gratifies the constitutional provision of a removal to some other court having jurisdiction . . . .[26]

Since the courts in Baltimore City are recognized as separate courts, and given concurrent jurisdiction by the Maryland Constitution, this result is supported by a literal reading of the Constitution.[27]

Despite the *Weiskettle* holding, the appellants in *Middleton* argued that the purpose of removal is to enable a party to escape from the prejudice of jurors in a given community, and that a removal between courts in Baltimore City cannot achieve this result. The court, however, could not decide this issue until the action reached a final judgment. Under the Maryland procedure governing appeals from orders of a trial court, actions which af-

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discussed in the opinion. For a discussion of this issue in the context of the *Middleton* case see notes 28-29 *infra* and accompanying text.

25. 58 Md. at 157.

26. *Id.* at 158-59.

27. *See* note 3 *supra*. It might be argued that the phrase "some other court" should be construed in this situation to mean a court not part of the Supreme Bench of Baltimore City; this construction would be more harmonious with the purpose of removal, since it would allow the litigant to escape the prejudice of jurors in the community. *See* note 6 *supra* and accompanying text. However, the deletion of the "other circuit" clause, and the elimination of any language referring to which court may be selected by the removing judge makes it clear that the intent of the draftsmen was to delete this right.

fect an absolute constitutional right are immediately reviewable, while other orders are reviewable only after final judgment.[28] Since the appellants attacked the lower court's discretionary selection of a court to hear the case, which was not a decision affecting a constitutional right, the *Middleton* court followed precedent in dismissing the appeal as premature.[29]

Although the court's selection of a court to hear the removed case is not immediately reviewable, the selection may be reviewed after final judgment as an abuse of discretion. This was made clear by the Court of Appeals in *Lee v. State*.[30] In that case, the appellant was indicted for murder in Worcester County. Because of several attempts made on his life while he was in custody, the appellant requested that the case be removed from the circuit court of that county. Since the right of removal is absolute in capital cases, the court had to grant the request; however, it ordered the case removed to the Circuit Court of Dorchester County, which is within the same judicial circuit. The appellant immediately appealed from that order, alleging that he could not receive a fair trial in that court either. The court cited strong evidence which established the truth of this allegation,[31] but nevertheless held that:

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28. The rule allowing an immediate appeal from orders affecting an absolute constitutional right is based upon the generally accepted rule that there can be no appeal except from a final judgment. For an illustration of this rule see City of Baltimore v. Moore, 209 Md. 516, 121 A.2d 857 (1956). The Maryland Court of Appeals has reasoned that the refusal to grant removal where the right is made absolute by the Maryland Constitution is in the nature of a final order and is therefore immediately reviewable. *See* Tidewater Portland Cement Co. v. State, 122 Md. 96, 89 A. 327 (1913); Griffin v. Leslie, 20 Md. 15 (1863). However, the selection of the court to which a removed case may be sent is within the discretion of the trial court, and hence not final within the meaning of this rule. *See, e.g.*, Marzullo v. Kovens Furniture Co., 253 Md. 274, 252 A.2d 822 (1969). For a review of these rules in a context other than that of removal see Pearlman v. State, 226 Md. 67, 172 A.2d 395 (1961).

29. The reason why discretionary orders are not "final" has never been fully explained by the court, other than its statement that they are in the nature of interlocutory decrees. *See* Tidewater Portland Cement Co. v. State, 122 Md. 96, 89 A.327 (1913). Presumably the basis for the distinction lies in considerations of judicial economy.

30. 161 Md. 430, 157 A. 723 (1931).

31. The court referred to

> . . . a plan which appears to have been suggested by the state's attorney of Dorchester County . . . that the accused be brought to Cambridge by boat strongly guarded, and that during the period of trial he should be housed on one of the boats, anchored in the stream at night . . . . And the Attorney General of the state . . . announced his conviction that a fair trial could not be had in Dorchester County, and strongly urged that trial there should not be attempted.

161 Md. at 438, 157 A. at 726.

> [t]he accused has been allowed his constitutional right of removal from the court of origin, and therefore has no complaint of a denial of that right, which has been held immediately reviewable; and he seeks a review only of the subsequent discretionary selection of a new court for the case, and on that selection no appeal or proceeding . . . now lies.[32]

Although the *Lee* court dismissed the appeal, it did discuss the merits in a very significant dictum. It stated that the purpose of the right of removal is to secure a fair and impartial trial by jury, and that the sole problem facing a removing judge is that of selecting a new court which is likely to achieve that purpose.[33] Thus the court concluded that:

> . . . the conditions evidenced by the occurrences recited would leave no latitude for discretion, but would demonstrate that the securing of a fair and unprejudiced jury from the county selected . . . is unlikely, and that to attain the object of the Constitution and statutes the cause must be removed for trial to some other portion of the state . . . where it appears . . . more likely that the local prejudice may be avoided.[34]

This dictum was later corroborated in the case of *Jones v. State*,[35] where on similar facts, except that the case came up after final judgment, the court held that the trial court had abused its discretion by sending the case to a court in which it appeared that the appellant could not be tried by an unprejudiced jury. The *Jones* and *Lee* cases are somewhat different from *Middleton* in that both of the former involved threats of bodily harm to the defendants.[36] However, in those cases the principle was clearly enunciated that a removal to a court where it appears that the removing party cannot receive a fair trial is an abuse of discretion.

It is clear, then, that a removal from one Baltimore court to another, although initially permissible as a removal from one court to another having jurisdiction, may be an abuse of discretion if the removed party could not be tried by an unprejudiced jury. Indeed, the *Middleton* court stated in dicta that "the dis-

32. 161 Md. at 434, 157 A. at 724.
33. 161 Md. at 441, 157 A. at 727.
34. 161 Md. at 442, 157 A. at 727.
35. 185 Md. 481, 45 A.2d 350 (1946).
36. That fact seemingly makes the existence of prejudice much more immediate and disruptive.

missal of the appeal on the ground that it was taken prematurely will not affect the right of the doctors, if they appeal after final judgment, to bring before us for review their claim (as yet unarticulated) of the actual prejudice they suffered by reason of the trial being held in Baltimore."[37]

It is important to note that on such an appeal the appellants would be required to show what actual prejudice they suffered before the court's selection would be overturned as an abuse of discretion. Such an approach undercuts the absolute right to removal granted to litigants by the Maryland Constitution. It was to obviate the necessity of such a showing that the right to removal was made absolute; the draftsmen of the various constitutions realized that prejudice which is not susceptible of proof may exist in a given community.[38] The technique adopted to resolve the problem was to allow the parties to determine the existence of such prejudice. It is inconsistent with the rationale behind the grant of an absolute right of removal to allow a judge rather than the parties to determine the existence *vel non* of prejudice.

In *Middleton*, the appellants decided that they could not be tried by an unprejudiced jury in the Superior Court. It is axiomatic that the conditions upon which they based their decision exist also in the Court of Common Pleas, since the jurors of both courts are selected from the same source.[39] One manner in which this situation could be rectified would be to adopt a rule that such a removal is a *per se* abuse of discretion. Based on the rationale of the dictum in *Lee*, an appellate court might decide that a trial judge had not discharged his function of selecting an unbiased court by sending the case to a court within the same locale. Since under the Constitution the litigant has decided by his "suggestion" that prejudice exists within the community, the judge is in effect sending the case to a court which has already been determined to be prejudiced; thus he has abused his discretion within the *Lee* case. Such a solution would eliminate the situation

37. 263 Md. at 159, 282 A.2d at 97.

38. 3 DEBATES OF CONSTITUTIONAL CONVENTION OF 1864 at 1403-11.

39. *See* MD. ANN. CODE art. 51, §§ 1, 5 (1972). That nothing substantive is accomplished by a removal between courts in Baltimore seems clear. *Cf.* Kastern Constr. Co. v. Evans, 260 Md. 536, 273 A.2d 90 (1971). There, in response to a removal from the Superior Court to the Baltimore City Court, Judge McWilliams said, "[w]hy this was thought to be a less hostile climate we fain would say, if we knew." 260 Md. at 539, 273 A.2d at 91. *See also* BYRD, THE JUDICIAL PROCESS IN MARYLAND 51 (1961).

whereby a judge substitutes his opinion for the absolute prerogative of the appellants to determine the existence of prejudice.[40]

The *Middleton* decision treats litigants in Baltimore city in an unfair manner as compared to that in which litigants in other parts of the state are treated.[41] In requiring them to show actual prejudice, they are denied the absolute right to removal given litigants in other courts within Maryland. It is difficult to see how the result may be squared with the purpose and intendment of the constitutional right. The literal reading of the Constitution given by the *Middleton* court severely undercuts the removal right.

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40. The absolute removal right may foster some abuse, which the practice of requiring a showing of prejudice may prevent. In *Middleton*, the appellants never made any showing of prejudice whatsoever. 263 Md. at 156, 282 A.2d at 95. However, whatever abuse exists does not change the fact that the practice of removal within Baltimore is being used to deny an absolute constitutional right of the litigant to determine the existence of prejudice.

41. A possibility of attack under the equal protection clause might exist since the effect of the *Middleton* decision is to create a classification which denies to Baltimore City litigants the same right as that enjoyed by litigants elsewhere in the state, that is, the right to be removed from the jurisdiction wherein the cause is originally brought. However, the Supreme Court has consistently upheld classifications based on geographic subdivisions as presumedly reasonable. *See, e.g.*, Salsberg v. Maryland, 346 U.S. 544 (1954); Mallett v. North Carolina, 181 U.S. 1015 (1901); Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co., 172 U.S. 474 (1898); Missouri v. Lewis, 101 U.S. 22 (1879).

One case which might provide some support for such an attack is that of Long v. Robinson, 316 F. Supp. 22 (D. Md. 1970), *aff'd*, 436 F.2d 1116 (4th Cir. 1971). There a Maryland statute which set the juvenile age limit for crimes at sixteen in Baltimore City and at eighteen throughout the rest of the state was held to violate equal protection. However, that holding was based upon overwhelming evidence that the classification could have no reasonable basis. *See* 316 F. Supp. at 27-28. Therefore, it would be weak support for any such attack in the *Middleton* situation.