

## Constitutional Limitation on Change of Venue in Criminal Cases - *Heslop v. State*

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Criminal Procedure Commons](#)

---

### Recommended Citation

*Constitutional Limitation on Change of Venue in Criminal Cases - Heslop v. State*, 13 Md. L. Rev. 344 (1953)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol13/iss4/10>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

## CONSTITUTIONAL LIMITATION ON CHANGE OF VENUE IN CRIMINAL CASES

### *Heslop v. State*<sup>1</sup>

The appellant was convicted in the Circuit Court for Prince George's County of assault with intent to rob and assault and battery. The indictment also charged three other offenses for which he was acquitted. None of the five offenses<sup>2</sup> charged carried a possible capital sentence, but at least the former one<sup>3</sup> of the two for which he was convicted carried a possible sentence to the State Penitentiary. Prior to being tried he filed a request for removal of his trial to another county, relying on the statute of 1952,<sup>4</sup> which had amended the relevant Code Section<sup>5</sup>

---

<sup>1</sup> 95 A. 2d 880 (Md., 1953).

<sup>2</sup> Robbery, assault with intent to rob, assault and battery, larceny and receiving stolen goods. *Ibid*, 880.

<sup>3</sup> Assault with intent to rob.

<sup>4</sup> Md. Laws 1952, Ch. 69.

<sup>5</sup> Md. Code (1951), Art. 75, Sec. 109.

(passed in pursuance of the applicable State Constitutional provision).<sup>6</sup>

This statute, if constitutional, entitled him to an absolute right of removal, in any case involving a possible penitentiary sentence. Prior to the 1952 amendment, a defendant was entitled to an absolute right of removal only in capital cases, and was required to show cause, which in this case he did not attempt to do, in order to obtain a removal in other criminal cases. He claimed advantage of the 1952 amendment and the right to a removal without showing cause.

The trial court denied his request for removal and ruled that the 1952 statute was unconstitutional, because it was beyond the power of the Legislature to extend the absolute right of removal to other than capital cases, which this was not.

Defendant then indicated that he wished to take an immediate appeal from that ruling, but the court advised him that he could not appeal at that point, whereupon the case went to trial and, after conviction on two of the counts, the appeal was taken, assigning as error the trial court's refusal to grant the motion for removal, and its holding that the 1952 law was unconstitutional. The Court of Appeals affirmed.

Two things are incidentally related to the court's ruling. In a companion case, the Criminal Court of Baltimore City, in *State v. Scarlett*,<sup>7</sup> also held the 1952 statute unconstitutional, so that, regardless of appeal, its ruling was ratified by the appellate opinion in the *Heslop* case. Also, the 1953 Legislature, by a law<sup>8</sup> passed just ahead of the ruling in the *Heslop* case, further amended the 1952 statute, to clarify its meaning by providing that the court should grant the absolute right of removal only for those crimes where a penitentiary sentence was provided in the particular penal statute concerning the very offence, rather than under a general statute permitting alternative sentences to different penal institutions for any and all crimes. Of course, this amendment is no more constitutional than the 1952 statute that was amended and intended to be clarified.

The Court's ruling as to the unconstitutionality of the 1952 statute is easily explained, in the light of the Constitutional history in the matter. But for that, it might be

---

<sup>6</sup> Md. Const. (1867), Art. 4, Sec. 8.

<sup>7</sup> Baltimore Daily Record, Dec. 12, 1952.

<sup>8</sup> Md. Laws 1953, Ch. 503.

criticised on the ground that the latest Constitutional provision merely meant to give Constitutional sanction to the absolute right of removal as far as expressed, i.e., in capital cases, and to permit the Legislature to go farther in the matter if they chose, as they tried to do in 1952.

While apparently there was no mention of change of venue in the original State Constitution of 1776, yet soon the need for dealing with it became apparent, for, by an amendment<sup>9</sup> to that Constitution taking effect in 1806, it was provided that the trial court should have a discretionary right to remove all criminal cases, upon suggestion in writing to the court that the trial in the initial county could not be had on a fair and impartial basis. Then, the next State Constitution of 1851<sup>10</sup> changed this by eliminating the court's discretionary power, and by giving an absolute power of removal in *every* criminal case upon mere request to the court, as ultimately came to be the present rule and practice in capital cases only.

By the time of the Convention of 1864 it was felt that the absolute or unlimited right of removal had been grossly abused so as to delay justice, and, accordingly, the Constitution of 1864<sup>11</sup> returned the power of removal to the court's discretion, providing the same rule for all cases, as under the amendment of 1806.<sup>12</sup> Shortly afterwards, the now current constitution of 1867<sup>13</sup> restored the absolute right of removal in all cases.

Soon after that it again became apparent that the absolute right of removal in all cases was being abused, and then, by a proposed Constitutional amendment<sup>14</sup> which was approved and took effect in 1875, the present Constitutional provision was put in force, whereby a compromise was adopted. This was that there should still be the absolute right of removal, without showing cause, in civil and capital cases, but that it should be necessary to make a showing of cause, i.e., the inability to obtain a fair and impartial trial, in other (non-capital) criminal cases.

Apparently, in 1952,<sup>15</sup> the Legislature thought that it had become unfair not to grant an absolute right of removal in the more serious, though non-capital criminal cases, and

---

<sup>9</sup> Md. Laws 1804, Ch. 55, confirmed, Md. Laws 1805, Ch. 16.

<sup>10</sup> Md. Const. (1851), Art. 4, Sec. 28.

<sup>11</sup> Md. Const. (1864), Art. 4, Sec. 9.

<sup>12</sup> *Supra*, n. 9.

<sup>13</sup> *Supra*, n. 6 (before amendment, n. 14, *infra*).

<sup>14</sup> Md. Laws 1874, Ch. 364.

<sup>15</sup> *Supra*, n. 4.

it attempted to change the law in terms of the difference between penitentiary offenses and those carrying less than a penitentiary sentence. The Legislature thus ignored the traditional distinction between felony and misdemeanor, no doubt recognizing that the Maryland technique of distinguishing felonies from misdemeanors is a very un-intelligent one.<sup>16</sup> As had been done for other purposes,<sup>17</sup> that distinction was disregarded in favor of the more realistic one of penitentiary-type offenses and lesser ones.

No doubt the Legislature also had in mind the paradox of the Maryland procedure as it then stood, that there was no absolute right of removal, but only one granted upon a showing of cause, in very serious though non-capital *criminal* cases, whereas the law and practice was and still is that in all *civil* cases<sup>18</sup> at law there is an absolute right of removal without showing any cause. Thus it was and now is under the Court's ruling, the law that a man may be tried for a most serious criminal offense, carrying a heavy, long sentence to the penitentiary, and will not obtain a change of venue unless he can make a showing of cause, but if he be sued on a grocery bill for a few hundred dollars in a court of record he may obtain a change of venue as of right. This has long been one of the many paradoxes of Maryland procedure, and will continue to be unless and until a constitutional amendment may make possible the absolute right of change of venue in serious crimes, as the 1952 Legislature tried to accomplish. The effect of the Court's ruling is to require a Constitutional amendment to do so.

Historically speaking, the power of a court to grant a change of venue to get rid of local prejudices has been recognized since the common law of England. In our country the courts of other states have held this right so

---

<sup>16</sup> Whereas in many other States the test for distinguishing a felony from a misdemeanor is the relative amount of possible penalty for the offense, e.g., more or less than one year's imprisonment, or imprisonment in the State Penitentiary as against other lesser institutions, this is not so in Maryland. The local rule is that a crime is a misdemeanor unless it was a felony at common law, or carries a mandatory death penalty (no crimes do so), or has been explicitly made a felony by the Legislature; *Dutton v. State*, 123 Md. 373, 91 A. 417 (1914). As a result, many serious crimes may be only misdemeanors, as in the *Dutton* case, under which, until the statute was recently amended, attempted rape was only a misdemeanor despite the fact that it carried an (optional) death penalty; Md. Code (1951), Art. 27, Sec. 14.

<sup>17</sup> E.g., for the concurrent criminal jurisdiction of justices of the peace under Md. Code (1951), Art. 52, Sec. 13, and for the general one year statute of limitations on criminal prosecutions under Md. Code (1951), Art. 57, Sec. 11.

<sup>18</sup> Md. Const. (1867), Art. 4, Sec. 8.

fundamental that they have applied it without reliance upon constitutional or statutory authority.<sup>19</sup>

The object of these provisions for the removal of causes from one venue to another is to secure a fair and impartial trial and promote the ends of justice by eliminating the influence of some local prejudice which might operate detrimentally upon the interests or rights of one or the other of the parties to a suit.<sup>20</sup> The purpose is not to avoid a judge, and filing a motion on such grounds has been held in contempt of court.<sup>21</sup> Thus, in non-jury cases such as those in equity,<sup>22</sup> mandamus proceedings at law,<sup>23</sup> and condemnation proceedings,<sup>24</sup> the right of removal is not recognized.

Beyond the paradox of having an absolute right of removal in all civil cases at law, mentioned above, there are other interesting phases of the Maryland procedure on change of venue. First is that, in Maryland, the State has a right to remove a criminal case,<sup>25</sup> co-equal with that of the defendant, and under exactly the same circumstances, i. e., as of right in capital cases, or upon the showing of cause in non-capital ones. No doubt the State would have had the similar right in penitentiary sentence cases under the 1952 law had it not been held unconstitutional.

This is perhaps a minority view in this country, for we usually think of change of venue as a privilege in the defendant to be free from prejudices against him, reflecting the unusually high regard for the defendant's rights in criminal cases. We usually think of the defendant as having a right to be tried by a jury of his peers in the locality where his crime was committed. But, just as Maryland has equally allowed the State to pray a jury trial or to appeal from a magistrate's acquittal,<sup>26</sup> so it allows the State a change of

---

<sup>19</sup> *State v. Dashiell*, 6 Har. & J. 268 (1824); *Price v. State*, 8 Gill 295 (1849); *Negro Jerry v. Townshend*, 2 Md. 274, 278 (1852); *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N. E. 369 (1911); *State v. Albee*, 61 N. H. 423, 60 Am. Rep. 325 (1881); *Barry v. Truax*, 13 N. D. 131, 99 N. W. 769 (1904).

<sup>20</sup> *Negro Jerry v. Townshend*, *ibid.*; *Wright v. Hamner*, 5 Md. 370 (1854); *Griffin v. Leslie*, 20 Md. 15, 18 (1863); *Cooke v. Cooke*, 41 Md. 362 (1875).

<sup>21</sup> *Ex Parte Bowles*, 164 Md. 318, 165 A. 169 (1933).

<sup>22</sup> *Cooke v. Cooke*, *supra*, n. 20; *Belair Social, etc. Club v. State*, 74 Md. 297, 22 A. 68 (1891); *Co. Commrs. Charles Co. v. Wilmer*, 131 Md. 175, 101 A. 686 (1917).

<sup>23</sup> *Baltimore v. Libowitz*, 159 Md. 28, 149 A. 449 (1930); *Baltimore v. Krupnick*, 159 Md. 39, 149 A. 454 (1930).

<sup>24</sup> *M. & C. C. of Baltimore v. Kane*, 125 Md. 135, 93 A. 393 (1915).

<sup>25</sup> Md. Const. (1867), Art. 4, Sec. 8.

<sup>26</sup> On which see Note, *Still Further on Appeals by the State in Criminal Cases*, 12 Md. L. Rev. 68 (1951).

venue under exactly the same circumstances. This is allowed the State under the Constitutional provision which, of course, obviates any objection that might be found in the constitutional provisions of other States which only allow the defendant a removal in pursuance of the traditional common law attitude in the matter.

Furthermore, and incidentally mentioned in the *Heslop*<sup>27</sup> case, is the problem of the time of appeal from a ruling of a trial court on a petition for change of venue. As indicated above, the defendant wanted to appeal immediately from the trial court's ruling, but was told that he could not do so until after a conviction, and he did wait until then. By dictum,<sup>28</sup> the Court of Appeals affirmed this, and quoted the rule of *Lee v. State*,<sup>29</sup> to the effect that there is no appeal from a ruling on change of venue until the end of the case at trial, save in the exceptional situation of a complete denial of any change of venue in a case where there is a constitutional right to it without showing cause.<sup>30</sup>

This was pointed out in this case to be limited to capital charges, despite the attempt of the 1952 Legislature to provide otherwise. So this case affords an interesting footnote to the celebrated *Lee* case which had involved the point of immediate appealability. It will be remembered that in the *Lee* case the Court of Appeals dismissed the untimely appeal by Lee, who was dissatisfied with the locality to which his requested change of venue had been granted. He was complaining that he would not receive a fair trial there, either, but the Court dismissed the appeal, stating they had no power to rule in the matter. However, it did lay down a very broad hint to the trial court that it would be desirable for the court, of its own motion, as it had power to do, to strike out its order and to substitute a new order sending the case to a much more clearly impartial locality. The trial court did that, and the case went on to a new locality for trial in orderly fashion, which eventually led to an affirmed conviction and execution of sentence.

While conceding the correctness of the Court's opinion on the constitutional point as it now stands, yet in view of the attitude of two recent legislatures, it would seem desirable to propose a Constitutional amendment allowing the

---

<sup>27</sup> 95 A. 2d 880 (Md., 1953).

<sup>28</sup> Since the appeal was from the final judgment; *ibid*, 881.

<sup>29</sup> 161 Md. 430, 157 A. 723 (1931).

<sup>30</sup> *Ibid*, 433.

voters of the State to decide whether the right of absolute change of venue should be extended beyond capital cases to the more serious non-capital cases, as was the object of the 1952 legislation, held to be unconstitutional because the Court felt that the 1875 amendment froze the matter in that regard pending further constitutional amendment.

It would seem that the *Heslop* ruling is an obvious interpretation, in view of the fact that the purpose of so amending the Constitution in 1875 was to put an end to what were then regarded as abuses of the unlimited right of removal. It may be now that newly arisen factors make other changes in order seventy-five years and more after that amendment.

Thus it is that, as the law now stands, while there is an absolute right of removal in *all* civil law cases, there is such a right only in *capital* criminal cases, and cause must be shown and the matter left to discretion of the trial court, subject to review for abuse, in *non-capital* criminal cases, howsoever serious the crime and severe its punishment.