Criminal cases not punishable by death.

In criminal cases other than those punishable by death, in absence of proof that lower court acted arbitrarily and abused, or refused to exercise the discretion vested in it, its action will not be reversed. Proof held insufficient. Affidavits. Newspaper comments. Downs *v.* State, 111 Md. 246.

Act of 1874, ch. 364 (amending art. 4, sec. 8, of Md. Constitution) held applicable where it was in force when traverser's suggestion of removal was filed, although it was not in force when he was indicted. The requirements of this section not having been complied with, traverser was not entitled to removal. Smith *v.* State, 44 Md. 533. And as to application of act of 1868, ch. 180, see Price *v.* Nesbitt, 29 Md. 266.

Generally.

Where a party complies with the conditions prescribed by this section, the court (in all civil cases and in criminal cases punishable by death), has no discretion in matter of ordering removal, and subsequent proceedings are *coram non judice*. Griffin *v.* Leslie, 20 Md. 18.

An order removing or refusing to remove a case, civil or criminal, if punishable by death, finally adjudicates a constitutional right and an appeal or writ of error may be immediately prosecuted. The state may remove a criminal case upon an affidavit made by state's attorney, and removal may be made at any time before panel of jurors is completed by being sworn. McMillan *v.* State, 68 Md. 309. And see Griffin *v.* Leslie, 20 Md. 19; Price *v.* State, 8 Gill, 297; Kimball *v.* Harmon, 34 Md. 402.

Right of removal should be brought before court of appeals by petition assigning errors, and not by bill of exceptions. Smith *v.* State, 44 Md. 533; McMillan *v.* State, 68 Md. 309.

It is within discretion of court to direct removal of case to another court either within or without the same circuit. Removal of case from court of common pleas to superior court of Baltimore city is a removal "to some other court." Weiskittle *v.* State, 58 Md. 156; Demurgiondo *v.* Frazier, 63 Md. 95. And see Atlantic, etc., Co. *v.* Maryland, etc., Co., 64 Md. 304.

Right of removal may be waived, and an agreement by a party not to remove a case in consideration of a promise by other party not to press it to trial at a certain term prevents a removal at any subsequent term, unless there should be some new cause for removal. Caledonian, etc., Co. *v.* Traub, 86 Md. 93. And see Seth *v.* Chamberlaine, 41 Md. 194. *Cf.* Biscoe *v.* State, 68 Md. 294.

The court in which the action was originally instituted retains jurisdiction until that of court to which case is removed attaches upon receipt of transcript, and former court has power to determine what constitutes record and to enforce execution of order of removal. When order of removal need not be signed by judges of court. Seth *v.* Chamberlain, 41 Md. 194. And see Manly *v.* State, 7 Md. 147. *Cf.* Biscoe *v.* State, 68 Md. 294.

A case cannot be tried before court without a jury without consent of both parties, and such consent should appear, upon appeal, by the record. A suggestion for removal stating that "the parties *believe* they cannot have a fair, etc.," not passed upon as to its validity, but criticised. Desche *v.* Gies, 56 Md. 137.

The same party cannot remove a case twice. Cooke *v.* Cooke, 41 Md. 367; Price *v.* State, 8 Gill, 296.

An order for removal of a case to a court which has no existence is void and leaves case pending as if there had been no order of removal. State *v.* Manly, 1 Md. 141. *Cf.* Stewart *v.* State, 1 Md. 129; Biscoe *v.* State, 68 Md. 294.

Purpose of this section; it has been liberally construed. Hayer *v.* Colton, 43 Md. 422; Cooke *v.* Cooke, 41 Md. 368; Price *v.* Nesbitt, 29 Md. 266; Gardner *v.* State, 25 Md. 152; Griffin *v.* Leslie, 20 Md. 18.

As to the removal of a case from a state court to a United States court, see Adams Express Co. *v.* Trego, 35 Md. 47 and note (*b*).

For a note reviewing the authorities on the removal of cases, see Wright *v.* Hamner, 5 Md. 370.

For a case dealing with this section as it stood prior to act of 1874, ch. 364, and now apparently inapplicable by reason of said act, see Kimball *v.* Harman, 34 Md. 401.

For cases construing this section as it stood prior to acts of 1874, ch. 364, and 1868, ch. 180, see Trayhern *v.* Hamill, 53 Md. 91; Gardner *v.* State, 25 Md. 146; Griffin *v.* Leslie, 20 Md. 18; Raab *v.* State, 7 Md. 483; State *v.* Shillinger, 6 Md. 449; Wright *v.* Hamner, 5 Md. 370; Negro Jerry *v.* Townshend, 2 Md. 274; Stewart *v.* State, 1 Md.