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LEARNING SOMETHING MORE THAN LAW FROM MARYLAND DECISIONS

Ian Gallacher*

As lawyers, and law students, we look at cases in a somewhat clinical manner. We tend to glide over the facts and concentrate on the point of law articulated by the court. If we need to use a case to support a position we are taking, or if we want to distinguish a case used by an opponent, we might look to the facts of the case to see if they affect our argument. But the facts themselves, and the story they can tell us about the people involved, tend to be ignored.

There is nothing surprising or wrong about this. We are lawyers, after all, not historians or sociologists, and our clients are not interested about why Mr. Tompkins was walking on the tracks of the Erie Railroad Company or whether Krause v. Rhodes tells us more about life in America in 1970 than it does about the narrow legal issues discussed by the Supreme Court. But just as our clients require us to focus on their needs and to solve their problems, we should remember that each of the cases we use as the building blocks of the common law meant something profoundly more important to the individual litigants.

Three years ago I was looking for the first reported class action in Maryland in support of an article I was writing.¹ My search methodology was not the sophisticated plan taught in the University of Baltimore's LARW program. Rather, I started reading on the first page of the first volume of the Maryland Reports and kept going until I found the case. The search was short – I found the case at 2 Md. 574 (1852) – but when I read the case I realized that it offered an insight into much more than the history of representative litigation in Maryland. It, and two subsequently reported decisions (at 5 Md. 287 (1853) and 9 Md. 145 (1856)), tell a compelling story of life in rural Maryland in the middle of the 19th Century. They also tell of courage, the importance of freedom, and

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¹ Representative Litigation in Maryland: The Past, Present, And Future Of The Class Action Rule In State Court, 58 U. Md. L. Rev. 1510 (1999). A shorter version of the story told here can be found in this article.

the corrosive quality of greed. And, if these other elements weren't enough, they teach us lessons about 19th Century civil procedure, evidence and trial practice as well.

In telling the story here, I have tried to stay away from the traditional scholarly apparatus that usually accompanies articles about the law. Footnotes have a way of interfering with narrative and I want to focus here on the story itself. The basic facts of this story are largely contained in the Court of Appeals' three reported decisions. Other sources are identified in an endnote.

I. John and Jeremiah Townshend

In the middle of the 19th Century, John Townshend was a farmer in the Piscataway district of Prince George's County, where he probably farmed tobacco on his 1,500 acre farm. John was a religious man who claimed to speak directly with God, and had long been regarded as an eccentric in the area. Despite his religious beliefs, though, John was a working farmer with a sizeable farm to manage. As with all businessmen, now and then, John sought to maximize his profits by minimizing his expenses, and the cheapest source of farm workers in America at that time was slave labor. Accordingly, John maintained about 70 slaves on his property.

John's conscience was troubled by his slave ownership, however, and his divine conversations helped to clarify a plan to free his slaves. As a pragmatic farmer, though, John could not free the slaves immediately. So it was that on Christmas Eve, 1831, and again on February 6, 1846, John executed deeds of manumission that freed the slaves at his death. Indeed, he went further than that and left his slaves all his real estate, including his farm. This must have been a crushing blow for John's son, Jeremiah.

We know a little, though only a little, about Jeremiah Townshend. He was 28 years old when his father died, was married and had at least one child. The first accurate information we have about him comes from the 1850 Federal Census which tells us that, by then, he had five children and lived on land valued at \$1,260. The slave schedule attached to the 1850 census indicates two Townshends in the Piscataway district who were slave owners. The first, William Townshend, (perhaps Jeremiah's brother or uncle) had eight slaves. The initial of the second Townshend is unreadable, but it is likely that this second Townshend was Jeremiah. At the time of the 1850 census, Jeremiah had increased the number of slaves on the farm to 99, 58 men and boys, and 41 women and girls, ranging in age from 2 to 77 years old. No further information about the slaves is recorded.

II. The Legal Maneuvering Begins

John died in May, 1846, and Jeremiah acted to consolidate his position. He, along with John's other heirs, filed a petition in the Orphan's Court of Prince George's County, and later in the Circuit Court for Prince George's County, claiming that John had been insane since 1794. This was an astounding contention: a son was claiming that his father had been insane for 50 years, despite John's ability to farm the land and otherwise manage his affairs. Nonetheless, the petition was successful and John's will was declared null and void. As soon as it was, Jeremiah took possession of John's 70 slaves and must have thought that his battle for control of his father's property was over. But the invalidation of John's will had no effect on his deeds of manumission, and in 1847, two slaves – known only by their first names, "Jerry" and "Anthony" – petitioned for freedom based on them. Their petition was filed on behalf of themselves and the 68 other slaves whom John had sought to free.

The slaves faced a daunting prospect. They can have known little, if anything, about the legal mechanisms necessary to bring their petition, and the odds were stacked against them by the Maryland legislature. Chapter 67 of the 1796 Acts of the General Assembly of Maryland was a clear attempt to dissuade members of the Maryland bar from helping slaves obtain their freedom, stating that in all cases of petitions for freedom where the petition was dismissed, "the attorney prosecuting or appearing to the same shall pay all legal costs arising thereon, unless the courts, before whom the same may be brought, shall be of the opinion, under all circumstances, that there was probable ground to suppose that said petitioner or petitioners had a right to freedom." Even worse, the Act decreed that all petitions for freedom should "commence and be tried only in the county where such petitioner or petitioners shall reside." And both parties to the petition for freedom could request a jury trial and exercise peremptory challenges to up to twelve of the prospective jurors.

In other words, even if Jerry and Anthony could find a lawyer willing to incur the costs of a failed petition for freedom, their case would be heard in Prince George's County, and Jeremiah Townshend could not only require the case to be heard by a jury, he would be able to exercise sufficient challenges to ensure that the jury was, in large part, composed of farmers and slave owners like himself. Slaves seeking freedom could hardly face a less sympathetic audience.

Despite the odds, Jerry and Anthony found a lawyer, Thomas S. Alexander, who stayed with them throughout the nine years their case moved through Maryland's legal system. I have been unable to find to more about Alexander, but in addition to being loyal to clients who could not have any hope of paying him for his work, and being someone willing to incur significant potential expenses as the result of his representation (not usual practice for lawyers, even in the 19th Century), he was clearly someone who knew what he was doing.

Recognizing the impossibility of winning the case in front of a Prince George's County jury, Alexander sought to remove the case to Anne Arundel County. In support, he filed an affidavit alleging that the slaves could not obtain a fair and impartial trial in Prince George's County, and invoked Chapter 518 of the Acts of 1849 which provided that:

in any suit or action of law now pending, or hereafter to be commenced or instituted, in any county courts of this State, or in the court of Howard District, the judges thereof, upon suggestion in writing, by either of the parties thereto or their attorneys, supported by affidavit or other proper evidence, either before or after issue joined in said cause, that a fair and impartial trial cannot be had in the county courts of the county, or in the court of Howard district [sic.] where such writ or action may be depending, shall and may order and direct the record of their proceedings in such suit or action, to be transmitted to the judges of any county court of any adjoining judicial district for trial, and the judges of such county court, to whom the said record may be transmitted, shall hear and determine the same in like manner and to the same extent as if such suit or action had been originally instituted therein.

Alexander's strategy worked at first: the Prince George's County court allowed the removal. But Jeremiah petitioned in Anne Arundel County court for a remand of the case to Prince George's County, and his petition was granted. This decision was appealed to the Court of Appeals and the case made the first of its three appearances before that Court in 1852.

III. The First Court Of Appeals Decision

Jeremiah Townshend had also retained a lawyer, and in contrast to the little we know of Thomas Alexander, much is known about his counterpart, Thomas Fielder Bowie. General Bowie, as he was known, was born in 1808 in Prince George's County, and was educated at Charlotte Hall and Union College in Schenectady. He had served as Deputy Attorney-General for Prince George's county, and had also been elected to the State Legislature. Bowie mounted an unsuccessful challenge for his cousin's

Congressional seat in 1851, and in 1854 he was successful in his Congressional bid, remaining for two terms. He died in 1869.

Bowie raised two technical questions before the Court of Appeals: first, he questioned the constitutionality of chapter 518 of the 1849 Act which Alexander had used to gain the removal of the case to Anne Arundel county; second, he questioned whether a petition for freedom was a suit at law, as required by chapter 518. Although this second point appeared to be a relatively benign question, it was potentially devastating to Jerry and Anthony's case. Maryland slaves could not bring actions at law. Accordingly, if a petition for freedom was not an action at law – and self-evidently it could not be because it could only be brought by a slave – then chapter 518 could not, under its plain terms, apply to the case, which would therefore have to be heard in Prince George's County.

Somewhat paradoxically, Bowie then used the common law in support of his first position. Because, he argued, the common law provided that a trial should be argued in the same vicinage where a fact occurred, any legislation which permitted the removal of a case beyond the bounds of the judicial district where the relevant acts occurred was in derogation of the common law, and was therefore unconstitutional.

The three judges of the Court of Appeals (Chief Justice Le Grand and Justices Eccleston and Mason) were not impressed. Justice Mason delivered the Court's opinion, in which he observed that the 1849 Act was consistent with Maryland's constitution, and that the ability of the legislature to "regulate at will the subject of removals" had been well established since at least the Act of 1804. Accordingly, the Court found the 1849 Act to be constitutional and held that cases meeting its requirements could be removed from one judicial district to another.

On the second, and more difficult, question, the Court of Appeals confronted the problem directly.

All laws for the removal of causes from one vicinage to another, were passed for the purpose of promoting the ends of justice, by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests and rights of one or the other of the parties to the suit. This is a common law right belonging to all our courts, and as such can be exercised by them in all cases, when not modified or controlled by our constitutional or statutory enactments. . . . The reason of the law would apply with equal force to a case like the present, as to one strictly and technically embraced within the term "action at law." The plaintiff in the present suit, of all the classes in our community, belongs to that which is the most defenseless. Our laws give him a standing in court to prosecute his petition for freedom. An unimpeachable attorney of the court makes oath that he cannot have justice done him in his own county. Under such circumstances, would it not be a mockery of justice to refuse

him his application to have the cause removed? Would it not involve a contradiction of terms to say that he shall have the benefit of our courts of justice, but at the same time that his case shall be tried in a county where he cannot have a fair and impartial trial?

This is an interesting early example of judicial nullification. A plain reading of the 1849 Act supports Bowie's position, yet the Court of Appeals recognized that to give the Act its plain meaning would deprive the slaves of any realistic opportunity to exercise their limited rights under Maryland law. So the Court of Appeals held that a petition for freedom, although not technically an action at law, was "embraced within the meaning of the terms 'suit or action at law.'" Jerry and Anthony's case would be heard in Anne Arundel County.

IV. The Second Court Of Appeals Decision

Jeremiah Townshend, though, was not finished. Thomas Bowie was no longer his lawyer – whether because Jeremiah was dissatisfied with his representation, because of a fee dispute or because Bowie was preparing for his successful Congressional bid is unclear – but Jeremiah had an interesting legal strategy up his sleeve. He filed a bill in equity back in the Circuit Court for Prince George's County, arguing that his father's insanity meant that his deeds of manumission should be considered inoperative and invalid. He also acknowledged, however, that the deeds appeared to be valid and that he would therefore be compelled to defend against them. Thus, Jeremiah argued, he would be "put to enormous and ruinous costs from the multiplicity of suits, and be unjustly and greatly harassed, and put to great charges in defending the same, which will be a direct charge upon the common property of complainants." So he sought consolidation of all the claims of freedom in one equity suit, and he sought an injunction restraining the petitions for freedom from being heard until John Townshend's personal estate (which included the slaves) was divided among his heirs and until the issue of John Townshend's sanity had been litigated.

Jeremiah's position conveniently ignored the fact that the slaves were bringing one petition for freedom which would resolve the rights of all slaves manumitted by John Townshend. His solution to the straw problem he had set up has an eerily contemporary ring to it. In essence, Jeremiah sought a cram-down class action, whereby a defendant seeks to litigate an issue one time against all potential plaintiffs. This is a little-used but recognized class action tactic, usually invoked by a confident defendant in an attempt to gain the preclusive effect of a class victory that an individual win would not provide. Certainly that was the case with Jeremiah: although the Court of Appeals' decision

required Jerry and Anthony's case to be heard in Anne Arundel County, Judge Crain of the Prince George's Circuit Court granted the injunction, meaning that Jeremiah's injunction would be heard by a Prince George's chancellor, not an Anne Arundel judge.

The Court of Appeals, though, was not amused. Although several issues were raised on appeal, the Court decided that it need only rule on one of them to dismiss Jeremiah Townshend's equity bill. Justice Mason recognized the implications of Jeremiah's strategy, and wrote that the "alleged slave" would be unable to challenge his servile status if the injunction was heard in Prince George's County. The Court held that John Townshend's sanity, and his capacity to execute a deed of manumission, would be determined by the same tribunal that heard the petition for freedom. The Court's irritation with Jeremiah's ploy is evident from the tone of the opinion, and from the fact that it levied costs against him, not only for the Court of Appeals proceedings but also for the proceedings in Prince George's county.

V. The Trial And Final Appeal

At some point in the proceedings, Anthony appears to have ceased to be a plaintiff. His name is not listed in the caption of third Court of Appeals decision, and the Court's second opinion refers to the "alleged slave" in the singular. Most tellingly, the trial in Anne Arundel County began with Jeremiah Townshend's contention that Jerry, and only Jerry, was over 45 years old when John Townshend executed his deed of manumission. (This was an important point. Under Maryland law, a slave over 45 could not be manumitted.) Whether Anthony had died in the interim, whether he lost his willingness to continue as a plaintiff in the action, or whether the slaves had realized that he was so clearly over 45 that his continued presence in the case would harm the other slaves' chances of freedom is unknown. The trial court refused to grant Jeremiah's request for a directed verdict based on Jerry's age and the case proceeded.

As Jeremiah had admitted during his petition for an injunction, the deeds of manumission appeared to be valid on their face. Accordingly, the evidentiary burden was on him to show that his father was insane when he executed the deeds, and he applied himself to the task with gusto. He produced a witness who testified that he had known John Townshend between 1826 and 1831 and that he had conversed frequently with John during this time. From John's conduct, manner, conversations and general appearance, this witness testified that, in his opinion, John Townshend was insane and incapable of executing a valid deed or contract. This witness also testified to other conversations he had had with John subsequent to his execution of the 1831 deed of

manumission “to throw light upon the state of his mind at the time of its execution.” Despite Alexander’s objections, this testimony, and the testimony of other witnesses offering substantially the same testimony, was admitted.

The most damaging testimony offered by Jeremiah, however, came from Dr. John Fonderen, the director of Maryland’s Hospital for the Insane. Dr. Fonderen had attended the trial and listened to the testimony of the other witnesses. Jeremiah’s attorney then called him to take the stand and asked him the following question.” “Upon the hypothesis that the testimony given by the witnesses in this case, of the acts and declarations of John Townshend as to his personal intercourse with God, is all true, and that at the time Townshend made these declarations, as to this intercourse and its character, he believed what he declared, what would be your opinion as to the condition of his mind at the times of such declarations?” Over objection, this question was allowed and, although the answer is unrecorded, it cannot have been favorable to Jerry and the other slaves.

The trial court ruled in favor of Jeremiah and, for the third time, the slaves found themselves before the Court of Appeals. This time, though, the Court ruled against them. Justice Mason wrote that the admissibility of evidence tending to show John Townshend’s alleged insanity prior to and at the time of the execution of the 1831 deed was not objectionable. Moreover, the testimony concerning John’s mental status after the 1831 deed was executed was similarly admissible “because it tended to show the nature and character of the insanity under which the party was supposed to labor.” In this regard, the Court found the continuing nature of John Townshend’s eccentric behavior to be of particular importance.

The Court of Appeals was less certain about Dr. Forderen’s testimony, noting that the issue was “not free from difficulty upon the authorities.”

Upon an examination of the cases it will be found, that there is considerable conflict among them. It is clear that you cannot ask a witness, an expert, his opinion, as to the state of a party’s mind, upon the evidence submitted to the jury. To do so would be to transfer the functions of the jury to the witness, and would permit him to decide upon the very fact at issue, and thus to control the verdict of the jury. It is equally clear, on the other hand, that you may ask such a witness his opinion upon a state of facts, hypothetically put, based upon the evidence, and this is in fact, the proper way to submit such questions to a witness.

Although the Court was not happy with the form of the question as asked by Jeremiah's attorney, it decided that it was sufficiently close to the usual form of such questions that the trial court did not commit reversible error in allowing it. Accordingly, the Court held that there was no reversible error and affirmed the jury's verdict.

VI. Conclusion

Nine years after their bid for freedom had begun, Jeremiah Townshend's slaves had no more options open to them. They would remain slaves for another eight years when, in the wake of the Civil War, the Maryland Constitution was amended and slavery was abolished. Nothing more is known about them. Jeremiah died in 1892, at age 74, and is buried together with his wife and children in the McKendree Methodist Church Cemetery. Ironically, an unidentified family slave (it seems unlikely to be Jerry) also has an unmarked grave in the family plot.

There are many lessons to be drawn from this trilogy of opinions from the Court of Appeals. Apart from the insight into what was deemed to be appropriate trial practice in the 1850's, the realization that seemingly contemporary legal maneuvering has been around for a long time, and the beneficial impact of one dedicated pro bono lawyer, the cases teach us powerful lessons about the importance of freedom and the lengths to which those who will be economically disadvantaged by it will go to keep people enslaved.

On a less emotionally charged plane, though, perhaps the overarching general lesson that these 150 year old decisions can offer is that cases are more than just dry recitations of the law. To the extent that Negro Jerry v. Townshend, 2 Md. 274 (1852) will ever be studied for its legal significance, it stands as one of the early leading opinions on intra-state removal, as well being the earliest reported class action in Maryland. For those involved in the case, though, and hopefully for us today as well, it tells us that cases are about people, not just principles. As lawyers, and as citizens, this is an important lesson to remember.²

² In addition to the Court of Appeals' decisions, and the various statutory enactments referred to in the text, the following materials supplied valuable information: Hall v. Mullin, 5 Har. & J. 190 (1821); Effie A. G. Bowie, Across the Years in Prince George's County, (1947); Jean A Sargent, Stones and Bones: Cemetery Records of Prince George's County Maryland (1984).