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PROPOSALS TO CHANGE THE MARYLAND APPELLATE COURT SYSTEM

By WALTER H. BUCK*

The legal profession in Maryland is greatly indebted to Herbert M. Brune, Jr., and to John S. Strahorn, Jr., for their exhaustive article, *The Court of Appeals of Maryland, A Five-Year Case Study* in the MARYLAND LAW REVIEW for June, 1940.¹

In the same number of the REVIEW the Hon. Carroll T. Bond, the historian² of the Court of Appeals and its able Chief Judge, contributes a valuable paper out of his abundant experience, entitled *An Introductory Description of the Court of Appeals of Maryland*.³

Later, in the February, 1941, issue of the REVIEW, appears still another article, an unsigned editorial, entitled *The Pending Proposal to Reorganize the Court of Appeals of Maryland*.⁴

It is fortunate that we now have in the MARYLAND LAW REVIEW a forum in this State where legal subjects can be discussed by those who presumably know the most about them; namely, the members of the legal profession.

A question so important as ". . . an amendment to the State Constitution to re-constitute the Court of Appeals of Maryland in a fashion entirely different from that by which its members are now chosen and to have it function in a somewhat different manner from the present one . . ." is not one to be considered hastily. Nor should such a proposal be submitted for approval at a meeting of the State Bar Association without full discussion and adequate notice

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¹ Brune and Strahorn, *The Court of Appeals of Maryland, A Five Year Case Study* (1940) 4 Md. L. Rev. 343.

² Judge Bond is the author of *THE COURT OF APPEALS OF MARYLAND, A HISTORY* (1928).

³ Bond, *An Introductory Description of the Court of Appeals of Maryland* (1940) 4 Md. L. Rev. 333.

⁴ Editorial, *The Pending Proposal to Reorganize the Court of Appeals of Maryland* (1941) 5 Md. L. Rev. 203.

⁵ *Ibid.*, 203-204.

in advance.⁶ It is plain, too, that such a question is ill-adapted to the "hurly-burly" and partisanship of a press campaign.

Now, that the proposed amendment has been defeated and an interval occurs when the legal profession has an opportunity to consider this important question more calmly, it may be well to take up the points urged in behalf of this proposal.

That, from time to time, the Court of Appeals of Maryland has been criticized for its decisions is nothing remarkable. All courts have been. To the extent that the criticism of the Court is honest and constructive, no one should object to it. Thoughtful men must believe in the theory of progress despite its halting ways. In an address on this subject before the American Law Institute in 1936,

⁶ A "special" meeting of the Maryland State Bar Association was held in Baltimore on January 11, 1941. No advance notice was given to the members of the Association that any proposal for changes in the Court of Appeals would be considered at the meeting. Nor did the Association have a Committee charged with the duty of reporting on that subject. However, when "new business" was reached in the order of the Association's proceedings, an elaborate written report was read to the members entitled: *Report on the Re-organization of the Maryland Court of Appeals*. Article XVIII of the Association's Constitution provides that no action on any such proposal shall be had by the Association until the subject matter thereof shall have been reported upon by the appropriate committee to which the same shall have been referred. However, though, as stated, there was no such committee, this Article was suspended, a formal resolution was thereupon offered which, in effect, approved the report, and the resolution was declared adopted. The report contained the following:

- (1) That the Court of Appeals consist of five Judges elected by the entire State.
- (2) That two of these Judges come from Baltimore City.
- (3) That the Counties be divided into three designated districts, with one Judge coming from each district.
- (4) That the jurisdiction of the Judges of the Court of Appeals be limited to appellate work, and that they be given specific power to make rules to govern the taking of appeals and the practice and procedure in the Court of Appeals, including the fixing of the number, time of beginning, and length of the terms of that Court.
- (5) That the office of Chief Judge in each of the Circuits in the Counties be continued, but without such Chief Judges being members of the Court of Appeals, and that the present provision for the election by Baltimore City of one member of the Court of Appeals be repealed.

In creating the three new districts outside of Baltimore City, the report proposed that these districts be formed "by combining the present circuits and not to break up any of the circuits." Such districts were as follows:

The First District to be composed of the First, Second and Seventh Circuits, which Circuits comprise Worcester, Somerset, Dorchester,

the great Chief Justice of the United States, Charles Evans Hughes, said:

“How amazing it is that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion upon difficult legal questions! In the highest ranges of thought—in Theology, Philosophy and Science—we find differences of view on the part of the most distinguished experts, theologians, philosophers and scientists. The history of scholarship is a record of disagreements. And when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty.”

Wicomico, Caroline, Talbot, Queen Anne's, Kent, Cecil, Prince George's, Charles, Calvert and St. Mary's Counties.

The Second District to be composed of the Third and Fifth Circuits, which Circuits comprise Baltimore, Harford, Carroll, Howard and Anne Arundel Counties.

The Third District to be composed of the Fourth and Sixth Circuits, which Circuits comprise Garrett, Allegany, Washington, Frederick and Montgomery Counties.

The resolution which was adopted, as aforesaid, proposed that the Court of Appeals of Maryland be re-constituted to consist of five judges, exercising appellate functions only, and that two of such judges should come from Baltimore City. The President of the Association was also authorized to appoint a committee of five of its members to draft a bill proposing a constitutional amendment to effect the changes, and such committee was to submit the bill to the Legislature and to endeavor to secure its approval “without further action by this Association.”

For the above, see Transactions, Maryland State Bar Association, Vol. 46, pp. 17-30, 81-87.

On February 14, 1941, House Bill 347 was introduced and referred to the Committee on Judiciary. Instead of providing for five judges for the Circuits formed by combining the present circuits, and electing said judges by a State-wide vote, six judges were provided for to be elected by the respective voters of certain new so-called “Appellate” Judicial Circuits, which were to be established. The first four of these circuits were to comprise the following counties:

First Circuit: Cecil, Kent, Queen Anne's, Caroline, Talbot, Dorchester, Wicomico, Worcester and Somerset—One Judge.

Second Circuit: Harford, Baltimore, Howard and Carroll—One Judge.

Third Circuit: Prince George's, Charles, St. Mary's, Calvert and Anne Arundel—One Judge.

Fourth Circuit: Garrett, Allegany, Washington, Frederick and Montgomery—One Judge.

Fifth Circuit: Baltimore City—Two Judges.

This bill was amended in the House of Delegates by eliminating Howard County from the Second Appellate Judicial Circuit and adding said County to those comprising the Third Appellate Judicial Circuit.

After passing the House of Delegates as so amended, House Bill 347 went to the Senate, where amendments to it were made on March 28, 29, and 31, 1941; the bill, however, never came to a final vote in the Senate.

May the writer be permitted to say that after some years of practice in the Courts of Maryland, and in those of several other States, it is his deliberate judgment that the system of law as it is administered in Maryland is, on the whole, the least expensive to litigants, the most common-sense in its results and the promptest in the disposition of the business which comes before its courts. For this result, the Court of Appeals is entitled to the credit, for the Court gives direction to and pronounces finally on the law of Maryland.

Advocates of the proposed amendment, illogically enough, take pride in the present standing of the Court of Appeals. They say:

“The proposal represents a much-needed reform and is one which most certainly ought to be passed by the General Assembly and approved by the voters of the State if the Court of Appeals of Maryland is to maintain its high position among the Country’s appellate courts.”⁷

The most desirable feature of the proposed change is said to be:

“. . . that the Court of Appeals Judges shall exercise appellate functions only. In this aspect of the proposal lies most of the hope for the Court’s continuance to maintain its traditional prestige.”⁸

Here, it is suggested that not only does assertion take the place of argument, but, as will be shown later herein, the history of the appellate court in Maryland is directly to the contrary.

Reference is made in the same article to the fact that the Judges of the Court of Appeals write their opinions in their respective Circuits without adequate law libraries, without law clerks and stenographic assistance, and without the circulation of copies of their provisional opinions among their fellow-members of the Court prior to the consultations which are to follow. But, certainly, such facts would not justify the proposed constitutional amendment.

⁷ Editorial, *supra*, n. 4, 204.

⁸ *Ibid.*, 205.

That there should be adequate law libraries throughout the State, and that there should be adequate stenographic service for the Judges of the Court of Appeals, is obvious, but this could and should be done by a mere legislative act.

The writer doubts very much the wisdom of law clerk assistance. It is the writer's view that on difficult questions of law the lawyer, himself, who is preparing his case, or the judge, himself, who is preparing his opinion, is the only person who can look up the law properly. It is also a part of the mental discipline which should go with the work of Appellate Judges.

The statement is made in the same article with respect to the Judges of the Court of Appeals that ". . . they are primarily trial judges and only secondarily, or ex-officio, appellate ones."⁹

No factual basis is given for that statement, and none, I submit, can be. It may be that in one or more of the Circuits of Maryland the Chief Judge does more trial work than should fall to his lot, but, again, that is no reason for the proposed Constitutional Amendment. The fact is well-known to be that at the present time we have more Judges in the State of Maryland than are needed for the work of our Courts. Thus, all that is needed to relieve the Appellate Judges of an undue amount of trial work would be an amendment to the Constitution whereby, under rules to be adopted by the Court of Appeals, Judges could be assigned, from time to time, to the particular Circuits where the work had accumulated.

The recent report on the cases in Baltimore City by the Clerks will show to what a great extent litigation has declined. With the right, therefore, to assign Judges as suggested, all that would be necessary to co-ordinate the appellate work would be a new practice on the part of the Judges of the Court of Appeals to meet more frequently in consultation and to distribute their proposed opinions to the various members of the Court prior to their consultations.

⁹ *Ibid.*, 204.

It has been suggested^{9a} as another objection to our present system that the Judges of the Court of Appeals may be reluctant to reverse a case in which one of the members of that Court sat below. There never was any foundation for this suggestion, and it is now completely disposed of by Table VII in the Article of Messrs. Brune and Strahorn.¹⁰

One feature of the proposed amendment, which was slurred over in its public discussion, was obviously unsound. It has just been stated, and can easily be shown, that we have more than enough judges in Maryland for our judicial business at the present time. Yet, the proposed amendment would not only have retained the number of judges we now have, but would, in addition, have added a separate appellate court of six additional judges, together with the expenses which would go with such new court.

No matter, therefore, what opinions may be entertained of the proposed new appellate court of six judges to do appellate work only, chosen in the manner proposed, no one could justify the permanent retention of unnecessary judges as a part of the same proposal.

We come then to the argument of a "more equitable representation of Baltimore City on the Court"¹¹ because the City contains one-half of the population of the State. What is meant by the argument that Baltimore City is entitled to a more "equitable" representation on the Court of Appeals? Has the Court of Appeals in any way dealt inequitably towards the City? If so, no illustrations have been given, nor, in the writer's judgment, could be given for such a contention, so that this is not an argument, but what appears to be a groundless assertion.

Moreover, there is nothing new in the present disproportion of population as between Baltimore City and the rest of the State. An examination of the census figures for six periods (1860-1910) shows that during such periods Baltimore City had at least one-third and sometimes one-

^{9a} Elsewhere than in any of the treatments of the subject in the REVIEW.—Ed.

¹⁰ Brune and Strahorn, *supra*, n. 1, 256.

¹¹ Editorial, *supra*, n. 4, 204.

half of the total population of the State. It has always, too, had a greater number of appeals than all the other Circuits combined. But it has never been suggested that representation on the Court of Appeals should be based on population or on the number of appeals. And no one would suggest, I imagine, that the size of the community in which the particular judge resides bears any relationship to that judge's understanding of the law, or to his ability to reason in a judicial manner.

The further argument is made, in favor of the proposal, that the areas of the present Circuits are in themselves too small to secure able members of the Court of Appeals from the Counties. This suggestion is, in the writer's opinion, untrue. Under our system it nearly always occurs that the Governor of the State in the first instance appoints the judges for our courts. If, therefore, the Governor is conscientious in the performance of his duty, making the inquiries which he should make, avoiding both partisan and factional politics and personal preferences, there can be no doubt that in every Circuit in this State good judges can be obtained for the Court of Appeals.

And here it should be emphasized that, whether we like it or not, law is made in the courts, and it is those lawyers who practice in the courts, and who study in the law libraries, who make good judges. Indeed, in England, only barristers, that is trial lawyers, are elevated to the Bench, and while the English system of solicitors (office lawyers) and barristers (trial lawyers) is not in effect here, the point is worth attention.

The mere tabulation of lawyers, therefore, in a large City like Baltimore is apt to lead to wrong conclusions. A great many of these lawyers are corporation employes, title examiners, real estate dealers or clerks of various kinds, whereas, in the Counties lawyers usually have had trial experience. The leading members in most of the large law firms in this City are to a great extent only business advisers, and as such advisers are important. But they do not study in the law libraries, and they seldom appear in the courts, either the trial courts or the Court

of Appeals, and this is easy to verify by examining the court records.

The history of the changes in the Court of Appeals of Maryland shows that Maryland has tried and rejected the plan of a separate Appellate Court. From 1778 to 1805 and from 1851 to 1867, the judges of the Appellate Court performed no Circuit, that is, trial court duties. By the Constitution of 1867, the original plan of 1805 was restored, save that the Appellate Judge from the City of Baltimore was given no Circuit duties to perform. We have the judgment on this point of the late Chief Judge James McSherry, who is acknowledged to be one of the greatest Chief Judges ever to sit on the Court of Appeals, and whose opinions were collected and published in 1914 by the late Judge N. Charles Burke. In an address entitled *Former Chief Justices of the Maryland Court of Appeals*, to be found in the Ninth Annual Report of the Maryland State Bar Association,¹² Judge McSherry had this to say:

“The chief defect in an independent system lies in the fact that the Judges being wholly withdrawn from contact with the practice at *nisi prius* become more theoretical, and decisions are consequently apt to deal with abstract principles rather than with the practical application of them. The present system brings the members of the Bar and the Judges in closer touch, and that circumstance is of great advantage to both in the administration of justice. The practical side of a case is often as important to be considered as is its technical legal aspect and the Judge, who for years has been removed from the attrition of the trial Court, is liable to grow oblivious of conditions which ought to have their due weight in reaching just conclusions. I think I may safely say that the best and most satisfactory work which the Court's records disclose has been that done under the system first adopted in 1805.”

It is difficult, too, in view of the successful Federal practice, where judges sit both above and below, to understand the position of those who, in terms, would prohibit

¹² Transactions, Maryland State Bar Association, Vol. 9, p. 106.

the judges of our Appellate Court from having the advantage of sitting in the trial courts at such times as can be spared from their appellate duties.

The plan of a small Appellate Court, withdrawn from the conflicts of the trial courts, pronouncing precise answers to the legal questions propounded to it, is attractive to a certain type of legal mind, which gets great pleasure from such apparent orderliness.

But, while certainty in the law is, and must remain the legal ideal, the fact is that in the complex situations so often presented to the courts, only harm can result by a failure to be acutely aware of the practical side of a case and by trying to attain certainty through forcing cases into legal Procrustean beds. Law is pragmatic, and the judges who apply it should not lose contact with reality.

In a small Appellate Court, too, there is a greater danger that one of the judges through the force of his dominant personality, or because of his legal reputation, may, in effect, control the decisions of the Court. Such a small Appellate Court with its members leading a club-like existence would be approved, no doubt, by some few Maryland lawyers who share such views, but such a court is not, in my opinion, demanded by the Bar of Maryland.

It is the writer's belief that the appellate judges should come from the different parts of the State, and should, in a sense, be localized there in order to know and understand the people and their problems in an intimate and personal way. But, whether the views expressed in this paper are sound or not, the Bar of Maryland ought to welcome a full discussion of this whole subject.

Experienced lawyers having had the benefit of practicing under a judicial system acknowledged by the advocates of the proposed change to be of established "prestige", should be slow to believe that it is necessary, in order for the court to "maintain its traditional prestige", that it should be abolished.

Those who advocate the separate Appellate Court certainly have a heavy burden in maintaining their proposal in view of the history of the Appellate Court in Maryland.

In no event, have they the right to ask those who oppose it to do so by continuing the offices of the Chief Judges in the present Circuits when we already have judges enough.

Some re-arrangement of, and reduction in the number of Circuits outside of Baltimore City may well be considered, whereby those seven Circuits will be reduced to five and an additional Appellate Judge be provided from Baltimore City. Such a change may and probably will encounter political difficulties, but if it is sound, it should be advocated by the State Bar Association because of its soundness, and not for reasons of political expediency.

It would seem that in view of the success which has attended the Maryland system, the system itself should be retained, and that the industry and learning of the Bar of Maryland should be employed in an endeavor to make it still more successful. Suggestions have been made in this paper for such improvement. The Court of Appeals, too, should have but one term like the Supreme Court of the United States, so that its judicial business can be transacted to the best advantage and the costs of taking appeals should be reduced.

Our Court of Appeals has recently lost some of its ablest and sturdiest members; men who came up along the hard road of trial practice and the close application required in the study of the law. But, in the writer's judgment, the Court as now constituted, and as it can be constituted with proper selections in the next few years, will compare favorably with the Court at any time since the writer came to the Bar in 1907.

And to conclude with a quotation from the article by Messrs. Brune and Strahorn:¹⁸

"More than once in its history, the entire personnel of the Court has been replaced at one time by a new set of Judges. At other times, as many as half of the members of the Court have ended their service within two or three years. But the quality of the Court has remained, and fears expressed that the new Judges would not live up to the standards set by their predecessors have always proved groundless."

¹⁸ Brune and Strahorn, *supra*, n. 1, 378.