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Morris A. Soper

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REORGANIZATION OF THE COURT OF APPEALS OF MARYLAND*

By MORRIS A. SOPER**

Seventy-seven years is a long time for any organization to go without change. Yet that has been the case with the Court of Appeals of Maryland, the highest court of the State, which was organized in its present form by the Constitution of 1867 and has not been changed since. So it will not come as a shock or source of regret to our people, save those who are temperamentally opposed to all change, that they will be called upon next November to vote upon a constitutional amendment designed to strengthen the Court of Appeals and to improve the administration of the courts generally throughout the State.

This is a matter which affects all of the people—not merely those who have litigation in the courts, for the State Legislature cannot and indeed does not attempt to lay down the laws that will govern the people in all of the manifold contingencies that may arise. It is the duty of the Court of Appeals in deciding the cases that come before it to promulgate the governing rules of law which the lower trial courts must follow; and the result is, whether we ever have a case in court or not, that our rights and obligations in regard to our family, our business, our property, and indeed all our relations to our fellow citizens are in large part affected and determined by what the Court of

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** A.B., 1893, Johns Hopkins University; LL.B., 1895, University of Maryland; Chief Judge, Supreme Bench of Baltimore City, 1914-1921; United States District Judge, District of Maryland, 1923-1931; United States Circuit Judge for the Fourth Judicial Circuit since 1931.

Appeals says. It is therefore of prime importance to everybody that the judges who compose the Court shall not only be men of high character and fearless independence, but that they shall be chosen from the ablest, the wisest and the most experienced judges and lawyers of the State; and that they be given the fullest opportunity to consider their judgments in all their bearings before they are delivered.

Our present system is not well adapted to this end—not so well adapted indeed as those of nearly all the other States of the Union whose highest courts, usually called Supreme Courts, have been more recently organized or improved. Our Court is composed of eight judges, and although their power extends throughout the State, they are not chosen from the State at large but each judge is chosen from one of the eight circuits into which the State is divided. One circuit consists of the City of Baltimore and each of the other circuits consists of a group of from two to five counties. Each of these judges, save the one from Baltimore City, is not only a member of the Court of Appeals but he is also the Chief Judge of his circuit and hence he sits not only in the highest court of the State but also with considerable regularity in the trial courts of his circuit. His duties in the trial courts consume a large part of his time and strength, as is shown by the fact that 18 per cent. of the cases presented to the Court of Appeals from the counties in a recent period had been previously heard and decided on circuit by one of the Chief Judges.[1] Since many cases decided in the trial courts by the Chief Judges are not appealed, it will be seen that they perform a large part of the work which the trial courts are called upon to do. This work is of course of great importance to the litigants immediately concerned; but it could be performed by the experienced associate judges of the circuits,

[1] The period in question was 1935-1939, inclusive, for which the work of the Court of Appeals was surveyed statistically by Brune and Strahorn, *The Court of Appeals of Maryland, A Five Year Case Study* (1940) 4 Md. L. Rev. 343. The specific figures for the percentage of appealed county cases heard at trial by the Chief Judges appear at page 356, and show that 55 out of the 299 appeals considered from the counties were heard at trial by Chief Judges.

as is done in other states, and the Chief Judges could concentrate their energies upon the important function of enunciating the rules of law for the guidance of the entire Commonwealth.

The people of Maryland are not only deprived of full time judges in their court of last resort by its present organization, but they are handicapped and restricted in their choice of judges to such an extent that ofttimes the best men are not available. Under the present Constitution each circuit elects one judge, and since the circuits vary in population, in the volume of law business, and in the number of resident lawyers, unfair and unreasonable discrimination is inevitable. For example, a circuit with less than 5 per cent. of the population and a circuit with 10 per cent. of the population are on the same footing—each chooses one judge. But the most glaring contrast is between Baltimore City, which has practically 50 per cent. of the population of the State,[2] but is given only one judge, and the remainder of the State, consisting of 23 counties grouped in 7 circuits, which in the aggregate choose 7 judges. The discrimination is seen to be the more pronounced when it is disclosed that 61.7 per cent. of all the cases heard by the Court of Appeals come from Baltimore City and only 38.3 per cent. from all of the counties combined.[3]

Moreover, the defect consists not merely in discrimination in respect to the number of judges allotted to several county circuits or to the city compared with the counties as a whole. The more important matter is that when vacancies in the Court occur, the people of the State, all of whom are affected by the actions of the Court, are severely restricted in the field of their choice. This comes about because in the normal course of affairs the greater

[2] In the 1930 Census the population of the State was almost exactly divided between Baltimore City and the counties. In the 1940 Census the counties had slightly more than half. Newspaper information based on interim estimates and other sources indicates that the population of Baltimore City has grown so much between 1940 and 1944 that it is safe to assert that Baltimore City now has half, and probably more than half of the population of the State.

[3] These figures are also for the 1935-1939 period, for which see Brune and Strahorn, *supra*, n. 1, 4 Md. L. Rev. 343, 366.

number of lawyers will necessarily be found where the population is more numerous and the law business more prolific. There are approximately 2350 lawyers in Baltimore City while the average number of lawyers in each of the 7 county circuits is less than 100.[4] The largest number of lawyers in any of the county areas, about 129, is found in the Fourth Circuit, consisting of the three westernmost counties of the State while the smallest number, about 70, is found in the Second Circuit, consisting of the 5 upper counties on the Eastern Shore. This means of course that Baltimore City has 2350 lawyers from whom one judge may be selected for the Court of Appeals while the 7 circuits average less than 100 lawyers from which in each case one judge may be selected.

This limitation on its face is bad enough but in actual practice it is worse than it seems. When a vacancy occurs on the Court from the counties it is seldom that the voters of the circuit have the opportunity to choose a judge from all of the resident lawyers. In several circuits a combination of constitutional, political and geographic factors causes the choice to be restricted to one only of the counties in the group.[5] Under the Constitution of Maryland,[6] when a vacancy occurs in the Chief Judgeship in the Sixth Circuit (Montgomery and Frederick Counties), it may be filled only from the other judges of the Circuit or from lawyers resident in the county from which the retiring Chief Judge came. In the Fifth Circuit (Anne Arundel, Howard, and Carroll Counties), the same thing follows from the immemorial custom that each of the three counties shall have a resident judge. In the Third Circuit (Baltimore and Harford Counties), Baltimore County; and in the Fourth (Allegany, Washington and Garrett Counties), Allegany County, by reason of their larger population, have for fifty years been given a monopoly of the Chief Judgeship. In the First and Second Circuits, which

[4] *Ibid.*, 372.

[5] Further on this, see Editorial, *The Interim Report of the Commission on the Judiciary Article* (1942) 6 Md. L. Rev. 304, 308-310; and Editorial, *The Proposed Court of Appeals Amendment* (1943) 7 Md. L. Rev. 324, 326-329.

[6] Md. Const. (1867) Art. IV, Sec. 21.

comprise the nine Eastern Shore counties, and in the Seventh Circuit, composed of the four Southern Maryland Counties, the choice of a new Chief Judge is practically restricted to the associate judges and the bars of two counties only because each circuit has at least one county without a judge and in practice the choice of a new Chief Judge goes to the county of the retiring incumbent or to the county theretofore without a judge, so as to spread the judgeships over the circuit as far as possible.

Able men in the smaller county circuits are frequently drawn to the city where the opportunities for successful practice are greater. For all of these reasons the choice of members of the Court of Appeals is restricted to the smaller number of lawyers residing in certain counties of the several circuits and the people are frequently denied the opportunity to select the best men to fill vacancies on the appellate bench as they occur. It may be added in passing that the opportunity of the members of certain county bars to secure a place on the highest court of the State is greatly promoted by the present system so that some opposition to any change is to be expected.

These weak points in our judicial system have been obvious for a long time. But Maryland is a conservative State and the legal profession as a body here and elsewhere clings to the institutions to which it is accustomed, and is slow to change. Moreover, it is not an easy matter for practicing lawyers who appear in the Court of Appeals of Maryland, one of the oldest in the United States, to suggest that changes in its organization would enable it more easily to preserve its ancient prestige amongst the highest state courts in the Union. Nor is it easy at any time to secure the three-fifths majority of the members of the two houses in the legislature that is necessary to originate an amendment of the State Constitution and submit it to the people. Nevertheless the present movement is not new. It has been the subject of discussion amongst the lawyers of Maryland and at the meetings of the Maryland State Bar Association for many years.

HISTORY OF THE MOVEMENT.

In 1907 the Committee on Laws of the Association, consisting of leading members of the county and city bench and bar, began a study of the question and in 1908 presented to the annual meeting of the Association a report in which they recommended amongst other things that the judges of the Court of Appeals be limited to appellate work, that their number be reduced to five, and that they be elected on a state wide basis.[7]

The matter was brought up again on December 3, 1921, by a special committee of the Bar Association of Baltimore City composed of George Weems Williams and Charles F. Harley, both now deceased, and Samuel K. Dennis, soon to become Chief Judge of the Supreme Bench of Baltimore City and now occupying that position. The report of the committee contained the following passage:

> "Now, the above, as we have stated, are in the main emergencies; but *we believe that the time has come for the reorganization of our whole judicial system. It is a well known fact that our State is falling behind in the administration of justice. Our decisions have lost their uniformity and certainty.* We believe that a committee of the ablest men in this State should be appointed by the Governor to study carefully our whole judicial system and methods for its improvement. This would include the advisability vel non of a State-wide Judiciary, a Municipal Court for Baltimore City and corresponding County Courts for the rest of the State, Courts of Conciliation, the expensive work of our Orphans' Courts, real salaries for our Judges, a State-wide Court of Appeals, methods of decisions in appellate courts, and all matters relating to the prompt and fair and uniform administration of justice." (Italics inserted).

[7] The Committee consisted of the late Judge Conway W. Sams of Baltimore City, the late Judge John R. Pattison of Dorchester County, the late Judge James H. Covington of Talbot County, the late Judge Alfred S. Niles of Baltimore City, Ridgely P. Melvin of Anne Arundel County, now Chief Judge of the Fifth Circuit and as such a member of the Court of Appeals, the late William Grason of Baltimore County, the late Senator Blair Lee of Montgomery County, the late William C. Devecmon of Allegany County, and the late Charles H. Stanley of Prince George's County. See Transactions, Maryland State Bar Association (1907) 281, and *Ibid.* (1908) 62.

This report resulted in the passage of a joint resolution by the General Assembly of Maryland of 1922 providing for the appointment by the Governor of a Judiciary Commission to study the whole judicial system of the State and report to the next General Assembly. Governor Ritchie appointed a committee of fourteen members, of which the late Charles McHenry Howard of Baltimore, a lawyer of national reputation, was Chairman, and the other members were: Samuel K. Dennis, now Chief Judge of the Supreme Bench of Baltimore City, J. Craig McLanahan, now Associate Judge of the Supreme Bench of Baltimore City, former Attorney General Alexander Armstrong, former Attorney General Thomas H. Robinson, Judge F. Neal Parke, subsequently a judge of the Court of Appeals and now retired, the late Charles F. Harley, the late John B. Gray, Sr., and Messrs. Sylvan Hayes Lauchheimer, Jacob Rohrback, John M. Requardt, Vernon Cook, Philip B. Perlman and Walter H. Buck.

A sub-committee of the larger body, consisting of Mr. Howard, Judge Parke, Mr. Perlman, Mr. Buck and Mr. Harley gave special study to the subject and submitted a report in January 1924 to which all of its members except Judge Parke agreed.[8] The report recommended that the Court of Appeals be composed of five judges chosen from any part of the State and not by circuits, and that the appellate judges should not do regular circuit work. It also recommended that the Chief Judge of the Court of Appeals should have the right to assign any of the judges of the Court of Appeals to do trial work where such a course would seem expedient. This report in its entirety was approved by eight and disapproved by six of the whole committee; but thirteen out of fourteen of the members favored changes in the organization of the Court of Appeals and the great majority agreed that the number of the judges should be reduced and their activities limited to appellate work. This appears from the following state-

[8] Report of January 7, 1924, to Gov. Albert C. Ritchie of the Commission appointed under the authority of a joint resolution of the General Assembly of Maryland in 1922 to study the judicial system of the State.

ment of the views of the minority which was published with the report:

> "The gentlemen dissenting agreed neither with those approving the report nor among themselves. Mr. Parke presented a separate plan. Mr. Gray thought five judges for the Court of Appeals enough and favored the limitation of the labors of this Court to appellate work; but disapproved other parts of the report, and approved some of the provisions of Mr. Parke's plan. *Mr. Dennis approved of neither the present system nor that of the sub-committee nor the plan of Mr. Parke. He thought there ought to be fewer circuits with an appellate court without nisi prius work.* Mr. Rohrback declared in favor of the present system. Mr. Robinson was against any change except the addition to the Court of Appeals of one judge from Baltimore City. Mr. Armstrong made a motion (which was not seconded) that the report be amended so as to provide for seven judges instead of five in the Court of Appeals." (Italics supplied).

Notwithstanding the strong preponderant conviction thus expressed in 1908 and 1924 by leading figures in the profession throughout the State, no proposal was presented to the Legislature. The contemplated changes would have affected a number of the members of the Court and no action was taken at that time. However, on January 11, 1941, William C. Walsh of Cumberland, Attorney General of the State, revived interest in the subject in a paper which he presented to the mid-winter meeting of the State Bar Association.[9] It was a favorable time to broach the matter again because a complete change in the personnel of the Court due to vacancies and necessary retirements was imminent. The Attorney General suggested changes similar to those previously advanced, and the Association by resolution directed its President, Walter C. Capper of Cumberland, to appoint a committee to give further study to the project. This committee consisted of F. W. C. Webb of Salisbury, Chairman, R. Bennett Darnall of Anne Arundel County, the late Walter L. Clark of Baltimore City, former Judge John A. Robinson of Bel Air, and Attorney

[9] Transactions, Maryland State Bar Association (1941) 17-24.

General Walsh. It prepared and submitted a unanimous report to the President of the Association on February 26, 1941 and therein outlined certain proposals which, after modification, are now incorporated in the proposed amendment to be submitted to the people of the State in the November election, 1944.

The Committee reviewed the history of the movement, the defects in the present organization of the Court outlined above, and prepared several bills for submission to the Legislature designed to bring the Court in line with similar high courts in other States throughout the nation. For present purposes it is sufficient to say that the bills provided for reduction in the number of judges to six, four to be chosen from the counties and two from Baltimore City, and also provided that the judges should perform appellate work only. The propriety of State-wide selection of the judges was considered but it was feared that the choice of the judges in the counties might be determined and controlled by the large population concentrated in the city, and hence the historic separation of city and county, and the division of counties in the appellate circuits, although reduced in number, were preserved.

In preparing the report the Committee had the benefit of views expressed at the 1941 Mid-Winter meeting of the State Bar Association by Carroll T. Bond of Baltimore City and Hammond Urner of Frederick, who for years had been respectively Chief Judge and Associate Judge of the Court of Appeals.[10] Chief Judge Bond showed that the eight-judge court was established in 1867 in order to get rid of a large accumulation of business which had long since been accomplished. He added:

> "Now, there is one other consideration. The work in the Circuit does now interfere with the work of the Judges on the Court of Appeals. I do not purpose going into great detail, but that observation is undoubtedly true. I think, therefore, that it is recognized as being highly desirable that those Judges who may sit on the Court of Appeals Bench should be relieved of their work in the Circuits. I honestly think that five

[10] Transactions, Maryland State Bar Association (1941) 25-28.

Judges are ample. I am heartily in accord with this plan, at least, in its general outline. I think that a Bench of five Judges would work better together than a Bench of eight possibly could. I know that they can all think better if they should have no circuit work to attend to."

Judge Urner, who had then recently retired after nearly thirty years' service on the Court, made the following comments:

"I must admit, Mr. President, in so far as my own individual judgment is concerned, I have very serious difficulty in reaching a conclusion upon any phase of the reported proposal, except, Mr. President, that the Judges of the Court of Appeals should be relieved of their Circuit work and that Baltimore City should have a larger proportion of the membership on that court.[11]

* * *

"As to whether the Judges of our Court of Appeals should have to continue to perform Circuit work I can say this. For many years I was of the opinion and I am still of the opinion—I have been of the opinion that the work of the members of the Court of Appeals should be confined to appellate work and that the Judges of that Court should not have to perform Circuit work. I think that they can perform appellate work much more satisfactorily to themselves, and certainly, probably more satisfactorily to the public if they had no Circuit duties to perform.

"They could then concentrate their attention upon their appellate duties, and they would have more time in which to read over the records, all of the records in a case. To read over all of the records in all of the cases, Mr. President. They would have more time for consultation with the other Judges in the work of the preparation of their opinions, so that upon that point, Mr. President, as I have said, I have absolutely no difficulty. I have also, for a long time been of the opinion that Baltimore City, having approximately, one-half of the entire population of the whole State and furnishing more than fifty per cent. of the cases to be decided upon appeal, ought to have a larger representation in that Court. But in regard to the

[11] Subsequently, as a member of the Bond Commission, Judge Urner approved the plan recommended by it.

other phases of the problem, although they seem to me to be very important, still, upon those questions, Mr. President, I really have not been able to reach a conclusion.

"* * * I approve of the report in so far as it recommends the constitution of the Court of Appeals, by relieving it of Circuit work and probably having the number reduced. I am a sharer of Judge Bond's opinion in that matter although I must say that my mind is moving from five to seven, backward and forward. I am not entirely clear about it although I would be perfectly willing to accept the recommendation of Judge Bond in whose judgment I have always the utmost confidence."

The Committee was not content with local expressions of opinion. It sought information and advice from the Chief Justices of the other 47 States of the Union.[12] In 42 States the judges of the highest court exercise appellate jurisdiction only and in the remaining 6 States, Delaware and Maryland alone impose regular trial work on the members of their appellate court. The Committee received replies from all of the other States and not a single Chief Judge favored the performance of trial and appellate work by the same judges although some of the Chief Judges, from lack of experience with such a system, hesitated to express a decided opinion. Chief Judge Layton of Delaware had this to say:

"We have been endeavoring for some years to have established a separate Supreme Court.

"It is my decided opinion that the highest appellate court in the State should be limited to appellate work; this for two reasons, first because it removes the confusion that is bound to exist when the members of the Court have two distinct functions to perform; and second, it permits the Judges of the appellate court to center their efforts upon the work before them."

The bills proposing constitutional amendments to carry out the recommendations were introduced in the 1941 Leg-

[12] On this, see Walsh, *The Movement to Reorganize the Court of Appeals of Maryland* (1942) 6 Md. L. Rev. 119, 132-137. Also published in the same issue with Judge Walsh's article was Buck, *Proposals to Change the Maryland Appellate Court System* (1942) 6 Md. L. Rev. 148.

islature.[13] While the proposal was endorsed by Governor O'Conor, and received an overwhelming majority in the House of Delegates, it failed of the necessary Constitutional majority for a proposed amendment in the State Senate. While it there obtained an actual majority, yet it fell short by two of receiving the necessary eighteen votes constituting the three-fifths required for a constitutional amendment.[14] Success of the movement with the Legislature thus had to await the ensuing session of 1943.

The State Bar Association at its next annual meeting in June, 1941 requested the Governor to appoint a Commission to study not only the Court of Appeals but the entire judicial system of the State. On November 1, 1941 Governor O'Conor appointed a Commission of 15 judges and lawyers from the State at large, which has come to be known as the Bond Commission, since the late Carroll T. Bond, Chief Judge of the Court of Appeals, was named as Chairman.[15] The additional members of the Commission were Charles Markell, then President of the Maryland State Bar Association; Hon. F. Neal Parke, former member of the Court of Appeals; F. W. C. Webb, Chairman of the State Board of Law Examiners; Walter C. Capper, former President of the State Bar Association, and now Chief Judge of the Fourth Circuit; Hon. Hammond Urner, former member of the Court of Appeals; Samuel J. Fisher, former President of the Baltimore City Bar Association; S. Marvin Peach; Hon. Eli Frank, then a member of the Supreme Bench of Baltimore City; Harry N. Baetjer; J. Howard Murray, now an Associate Judge of the Third Circuit; Joseph Bernstein; G. C. A. Anderson, then President of the Baltimore City Bar Association; Edward D. E. Rollins, then State's Attorney for Cecil County; and Clarence W. Miles.

Numerous meetings of the Commission were held at which prolonged discussions took place and finally an interim report was filed on June 1, 1942, signed by all the

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[13] On the proposal before the 1941 Legislature, see Editorial, *The Pending Proposal to Reorganize the Court of Appeals of Maryland* (1941) 5 Md. L. Rev. 203.

[14] See Walsh, *supra*, n. 12, 6 Md. L. Rev. 119, 140.

[15] On the appointment of the Bond Commission, see Editorial, *News of the Bar Associations* (1941) 6 Md. L. Rev. 75.

members of the Commission except one, in time for consideration at the meeting of the State Bar Association at the end of the month.[16] At that meeting the report was approved by the Association by a vote of 86 to 40. An effort to reconsider this action was voted down at the mid-winter meeting of the Association in December 1942, after the final report of the Commission had been submitted to the Governor on October 21, 1942.[17] Bills for the action of the Legislature had been drafted by the Commission and submitted to the Legislative Council of the State on November 30, 1942.

The measures submitted to the Legislature not only proposed the reorganization of the Court of Appeals but also the consolidation of the Courts of Baltimore City and the abolition of the Orphans' Courts throughout the State; but as the last two proposals did not come to a vote in the Legislature they need not be further considered. The Court of Appeals bill contained the important changes in the organization of the Court which, as we have seen, had elicited the general approval of the profession for many years, that is, a reduction in the number of judges to five, two to be chosen from Baltimore City and three from the counties at large, and the release of these judges from regular trial work in the County courts. At the same time the division of the State into Circuits was preserved and an ample number of Circuit Judges to do the trial work was provided.

In addition, a forward step of great importance was taken by a provision constituting the Chief Judge of the Court of Appeals the administrative head of the judicial system of the State. By this provision the Chief Judge is directed to require the trial judges throughout the State to report from time to time upon their judicial work and the business of their courts. He is also empowered in case of vacancy, illness, disqualification or absence of a Judge of the Court of Appeals to empower any of the County or

[16] The Interim Report was published in the Baltimore Daily Record, June 2, 1942, and was also circulated in pamphlet form.

[17] The Final Report was published in the Baltimore Daily Record, October 22, 1942, and was also circulated in pamphlet form.

City trial judges to sit on that Court; and he may designate a judge of the Court of Appeals or any of the trial judges of the State to sit in any of the trial courts of the State other than his own in any case or for any specified period. These powers conferred upon the Chief Judge are made subject to such rules and regulations as the Court of Appeals may make.

These provisions are now found in the proposed Constitutional Amendment, with certain modifications which were made during the passage of the bill through the Legislature.[18] The most important legislative change eliminated the provision that the three county members of the court should be chosen from the counties at large, and in lieu thereof, divided the counties into three Appellate Judicial Circuits, each to choose one appellate judge. The Bond Commission recognized that under an ideal system all the judges of a State-wide court should be selected from the standpoint of fitness, irrespective of residence, but the peculiar situation in Maryland seems to require the setting apart of its one great city from the rest of the State in order to guard against possible domination and control by the city in the selection of judges. The Legislature extended this compromise by requiring the recognition of each of three county areas, the Eastern Shore, Central and Southern Maryland, and Western Maryland, consisting of nine, seven and seven counties respectively, as separate Appellate Judicial Circuits. This arrangement was deemed necessary by the members of the Legislature to satisfy the people of the counties, and it so greatly improves the present system by increasing the size of the areas from which the judges will be chosen that it has been accepted by the members of the Commission as the best possible solution. The enlargement of the field of choice of a judge when a vacancy in the counties occurs is obvious.

Another legislative change eliminated a new method of selection of judges proposed by the Bond Commission,

[18] Md. Laws 1943, Ch. 772, proposing amendments to Secs. 5, 14, and 21, and an additional Sec. 18A, of Md. Const. (1867) Art. IV. See Editorial, *Court of Appeals Amendment Passes Legislature* (1943) 7 Md. L. Rev. 143.

which had provided that all Maryland judges should in the first place be appointed by the Governor to serve until the next election and should then go on the ballot automatically, subject only to opposition by those who might be nominated by petition. This proposal was said to be impracticable,[19] and its omission leaves undisturbed the accustomed method of choosing judges in Maryland.

This summary of the movements and the actuating reasons that have led up to the proposed amendment serves at least to demonstrate that the proposal is not a radical or revolutionary scheme hastily devised, but the result of a study begun 37 years ago, that has been submitted to the practical test of two legislatures, and has won the approval of three-fifths of the members of the General Assembly composed of a preponderance of county men. In essence the proposal reduces the number of appellate judges from eight to five; it promotes their efficiency by confining their regular duties to appellate work; it widens the field of choice of the judges by broadening the areas from which they may be chosen, and finally it makes the whole judicial force of the State more flexible by giving the Chief Judge the power, under the supervision of the whole court, to designate any judge to sit in any court of the State for a designated period. These proposals seem fair and reasonable on their face but since they involve changes in the highest court of the State and undoubtedly jeopardize to some extent the natural ambitions of county lawyers and judges to serve on that court, it is not surprising that some opposition has developed. It is fortunate indeed that this opposition has been voiced by two outstanding figures in the legal profession of the State of unusual ability who have had long experience on the Bench in trial or appellate work; for it is safe to say that their arguments furnish the most severe test to which the amendment can be subjected and that nothing worth saying in opposition has been left unsaid.

[19] Objection of Judge Parke, appended to the Commission's Final Report, *supra*, n. 17, and an article by Chief Judge Samuel K. Dennis, Baltimore Daily Record, February 15, 1943.

THE OBJECTIONS OF JUDGE PARKE.

The Honorable F. Neal Parke of Westminster, Maryland, was for many years and is now the acknowledged leader of the Carroll County Bar. For seventeen years, until he attained the age of seventy years and was obliged to retire from the Bench, he was the Chief Judge of the Circuit and as such a Judge of the Court of Appeals. Unlike most lawyers he possesses the capacity to serve not only as a vigorous and efficient trial judge, but also the learning and literary skill needed for a successful appellate judge. He was a member of the Bond Commission and was the only dissenter from its findings. His greatest objection, to use his own words, was to the new method proposed by the Commission for selecting judges, but this proposal, as we have seen, was eliminated by the Legislature.

In addition Judge Parke objected mainly to releasing the appellate judges from trial work. In his dissent appended to the final report of the Bond Commission he said:[20]

> "One of the grounds of objection to the Report is that it would deprive the members of the appellate bench of the advantage of continued experience in the actual application of the principles of law and its procedure of observing their incidence in litigation and in the prosecution of crime and of being brought in contact with the practical affairs of finance, commerce and life. By presiding in the circuit the appellate judge brings the law straight from the appellate tribunal into the circuit, and thereby assures to the litigants and the accused the application of the existing law as fixed by the latest decisions, and this produces a certainty and satisfaction with the administration of the law which reduces the number of appeals and the expense of litigation.
>
> "The attendance of the Chief Judge of the Circuit has always been subordinate to his appellate duties, but his presence has been of incalculable weight and satisfaction to the public in the assurance given to vigor in the enforcement of the law and the elimination of any exhibition of local prejudice, passion or subservience. It is no light matter to deprive the admin-

[20] *Supra*, n. 17.

> istration of the law of this element of confidence in the just, fearless and impartial administration of the law."

The actual experience of the State appellate courts throughout the United States does not warrant the apprehensions that Judge Parke has entertained. The appellate judges of 42 States have no trial duties at all and in only 2 of the rest, Maryland and Delaware, have they regular trial work to perform; and in Delaware the Chief Judge advocates its elimination. It is a mistake to suppose that judges confined to appellate work will suffer from lack of experience in the practical affairs of life. Lawyers are seldom elevated to an appellate court before the age of 50, after they have had 25 years of active life at the bar or on the bench of the trial court and have become thoroughly familiar with business life and with litigated cases in the making.

On the other hand it is not easy for any man to carry on successfully both as a trial and an appellate judge. Even an unusual lawyer or judge who possesses the qualifications of both places finds it difficult, if he is subjected to the labor and constant interruptions of the trial court, to make the necessary research and to do the careful writing required for the opinions of an appellate judge that are published as precedents. For our present purposes on this point it is sufficient to quote the following passage from the report of the Bond Commission, approved by such experienced appellate judges as Chief Judge Bond and Judge Urner and by the eminent lawyers who signed that document:[21]

> "The work of reviewing decisions in trial courts, with the incidental establishment of the law for future cases, requires much time for undisturbed reflection by the judges and consultation among themselves; they should not be disturbed by distracting duties. Nor should the work of expounding the conclusions of the court in opinions, with the necessary effort at clearness and definiteness, be done hurriedly. Furthermore, the principles of law which the judges are to apply, and

[21] *Supra*, n. 17.

> the practical effect of their application in the several states of the country, are nowadays made subjects of constant study and exposition in legal periodicals and text books. The appellate judges must acquaint themselves with this material, and also with much current non-legal literature."

Little need be added in answer to the suggestion of Judge Parke that the Chief Judge of a Maryland Circuit as now organized can bring down to the trial court a knowledge of the law, a vigor of law enforcement and an absence of local prejudice that cannot be expected from an Associate Judge. The opinions of the Court of Appeals are promptly published in the Baltimore DAILY RECORD so that they are at once available to all the judges and lawyers of the State alike. The Associate Judge comes from precisely the same county circuit as his Chief Judge, and in all fairness it must be said that Maryland judges, appellate and trial alike, may safely be trusted to be impartial and just in their deliverances. Maryland trial judges are quite as able to handle important business as the trial judges of other states, and there is no reason why they should not do their work unassisted and thus be given this experience and responsibility.

OBJECTIONS OF CHIEF JUDGE DENNIS.

It is equally important and helpful to examine the objections of the Honorable Samuel K. Dennis who has had practical experience in both county and city affairs, since he began his career on the Eastern Shore and later came to Baltimore to become a leading figure at the bar. Since 1928 he has been Chief Judge of the Supreme Bench of Baltimore City.

THE COMPOSITION OF THE COURT OF APPEALS AFTER DECEMBER 31, 1944.

In the first place, Judge Dennis expresses some doubt as to the composition of the Court of Appeals if the amendment is carried at the November election and goes into

effect on January 1, 1945.[22] It was necessary in drafting the measure to protect the tenure of the present members of the Court who were elected to their positions before the bill passed the Legislature. It is clear, however, that this purpose has been achieved with complete fairness to all the sitting judges. The Court consists at present of eight judges from the present judicial circuits as follows:

Chief Judge Ogle Marbury of Prince George's County, Seventh Circuit;

Judge Bailey of Wicomico County, First Circuit;

Judge Collins of Kent County, Second Circuit;

Judge Grason of Baltimore County, Third Circuit;

Judge Capper of Allegany County, Fourth Circuit;

Judge Melvin of Anne Arundel County, Fifth Circuit;

Judge Delaplaine of Frederick County, Sixth Circuit;

Judge Adams of Baltimore City, Eighth Circuit.

On January 1, 1945 the Court will be reduced to seven judges, that is to say, five judges from four new Appellate Judicial Circuits into which the State will be divided, and two additional judges from the present Court who will serve until they reach the age of seventy years and retire in conformity with the requirements of the present Constitution. From and after January 1, 1945 the Court will consist of the following:

Chief Judge Ogle Marbury, Second Appellate Judicial Circuit;

Judge Collins, First Appellate Judicial Circuit;

Judge Delaplaine, Third Appellate Judicial Circuit;

Judge Adams of Baltimore City, Fourth Appellate Judicial Circuit;

A new appointee from Baltimore City, Fourth Appellate Judicial Circuit;

and, in addition: Judge Grason of the present Third Circuit and Judge Melvin of the present Fifth Circuit.

[22] Article by Judge Dennis, Baltimore Daily Record, March 13, 1944.

THE STATUS OF JUDGES GRASON AND MELVIN AFTER DECEMBER 31, 1944.

Judge Dennis gives particular attention to the cases of Judge Grason and Judge Melvin who will remain as full members of the Court of Appeals until they reach the age limit and are compelled to retire.[23] He expresses the legal opinion, at the same time frankly admitting that able lawyers disagree with him, that these judges will be "washed off the Court of Appeals" on December 31, 1944, and thereafter will not be "full fledged members but pseudo or demi members" who will wear the "sonorous and honorary title of Additional Judges of the Court of Appeals". These epithets are amusing rather than instructive for the effect of the amendment upon the positions held by these judges cannot be questioned. It provides that except as to the additional judge to be appointed from Baltimore City, the new Court shall be appointed by the Governor from the new appellate judicial circuits from among the *elected* Judges composing the Court on December 31, 1944. The Governor, therefore, has no choice but to appoint Judge Collins from the new First Appellate Judicial Circuit, the Eastern Shore, Judge Delaplaine from the new Third Appellate Judicial Circuit, Western Maryland, and Judge Adams from the new Fourth Appellate Judicial Circuit, Baltimore City. His only authority is to appoint a new judge from Baltimore City and to choose another judge for the new Second Appellate Judicial Circuit, Central and Southern Maryland, from among Judges Marbury, Grason and Melvin. In effect he has already made this choice for he has recently designated Judge Marbury as the Chief Judge of the Court of Appeals and will doubtless continue him in this office on the new Court. The other two judges who live in that Appellate Judicial Circuit, Judges Grason and Melvin, will remain on the

[23] While the proposed amendment would permit any additional judges to serve on the Court of Appeals until the ends of the terms for which they had been elected, it so happens that both Judge Grason and Judge Melvin will reach retirement age prior to the expiry of their respective elected terms.

Court and will also continue to be Chief Judges of their present trial Judicial Circuits, since the amendment makes the following express provision:

> "Any elected Judges from [the present] Circuits, except the Eighth Circuit, in office on December 31, 1944, other than the three designated by the Governor as Judges of the Court of Appeals, *shall be additional Judges of the Court of Appeals and shall continue to be Chief Judges of their respective Circuits and shall hold office for the residue of the terms to which they were elected.*" (Italics supplied).

The Status of Judges Bailey and Capper After December 31, 1944.

It will be observed that six of the present judges will remain on the Court and a new man from Baltimore City will be added if the amendment is adopted. Judge Bailey and Judge Capper will retire from the Court, but no injustice to them is involved since both of them were recently appointed after the Amendment Bill had passed the Legislature and with full knowledge of its terms. Their present positions as Chief Judges of their respective circuits will expire January 1, 1945 but they can be and doubtless will be appointed Circuit Judges therein. Both of these judges favor the passage of the amendment. Before their elevation to the Bench Judge Capper was a member of the Bond Commission and Judge Bailey was Chairman of the Bar Association Committee appointed to sponsor the reorganization plan before the Legislature.

Five Appellate Judges in Maryland Are Sufficient.

Judge Dennis fears that a five judge court will be inadequate, especially as "men of mature age, as Court of Appeals Judges usually are, not infrequently get sick". There is no real ground for apprehension on this score as an examination of the volume of appellate work required of the Court of Appeals will disclose. A careful study of the volume of business for the five year period 1935 to 1939 was made by Messrs. Herbert M. Brune, Jr., and John S.

Strahorn, Jr., and published in June, 1940 in this REVIEW.[24] The number of cases in each of these years was as follows:

1935	144
1936	133
1937	150
1938	172
1939	115
	714

that is, an average of 143 cases per year. The number of cases during the subsequent four years, 1940 to 1943, shows a decided falling off. A supplemental count, made on the same basis as the Brune-Strahorn survey, shows that the number of cases for this subsequent period was as follows:

1940	124
1941	114
1942	103
1943	107
	448

or an average of 112 per year.

It has been stated more than once in discussions of this subject that the average number of cases does not exceed 150 annually. If this figure were accurate, five judges relieved of trial work would have no difficulty whatsoever in hearing the arguments and writing the necessary opinions. The experience of appellate courts throughout the country dispels any doubt on this matter. The fact is, however, as the tabulations indicate, that the number of cases is much less than 150 per year and there is no reasonable probability that it will exceed 125 per year in the future.

There need be no concern that the work of the Court would suffer from absence of judges due to illness or other cause. The proposed amendment includes a provision to

[24] Brune and Strahorn, *The Court of Appeals of Maryland, A Five Year Case Study* (1940) 4 Md. L. Rev. 343, 359.

be discussed hereafter that confers power on the Chief Judge to provide for such contingencies by designating any of the trial judges of the State to sit upon the Court of Appeals in case of emergency. Since the Chief Judge will have all of the Circuit Judges in the counties and all of the judges of the Supreme Bench of Baltimore City to choose from, suitable selections can be readily made for temporary service on the Court of Appeals without interfering with the work of the trial courts.

Reduction in the number of appellate judges is a matter for congratulation rather than alarm. Any person who has acted as one of a group of judges or as one of any co-operating group soon realizes that the smaller the number the greater the efficiency. With judges, the conference and exchange of views that should precede the writing of an opinion and the criticism and modification that follows its preparation are more easily accomplished and are more helpful and practicable if the number of conferees is restricted. The reduction in the number of judges in a comparatively small State is a move in the right direction, while the presence of five men gives ample assurance that the benefits of consultation and comparison of varying views will be preserved.

The Effect of the Amendment Upon Circuit Courts of the Counties.

The Bond Commission and the Legislature were careful to provide that the Circuit Courts in the counties would not be left short of trial judges by releasing the Chief Judges from trial work. The present arrangement consists of 18 Associate Circuit Judges who give full time, and seven Chief Judges who, being members of the Court of Appeals, give part time to trial work. The amendment provides that there shall be at least three trial judges in each of the present seven county circuits so that when the Court of Appeals is finally reduced to five, upon the retirement of Judges Grason and Melvin, the county courts will have 21 full time judges. During the interim the county courts will have 20 full time trial judges and two

part time trial judges. It is obvious that there will be no shortage of judges for trial work.

Trial judges are now easily available to members of the profession in all parts of the State for the passage of orders and for services other than trial work; and this condition will not be materially changed. After December 31, 1944 only one more county than at present, i. e., Kent County in the Second Circuit, will be without a resident judge. In these days of easy communication by mail and rapid transit no hardship will be imposed on the profession.

It may be added that at present the counties of Maryland have 25 judges, that is, 18 Associate Judges and seven Chief Judges, while the city has 12 judges, that is, 11 trial judges and one member of the Court of Appeals. After December 31, 1944 the counties will have 24 (temporarily 25) judges and the city 13 judges in all.

ORGANIZATION OF THE COURTS OF MARYLAND INTO AN ADMINISTRATIVE JUDICIAL SYSTEM.

A second major objective of the amendment is the establishment of an administrative system for the courts of the State headed by the Chief Judge of the Court of Appeals under the control of the whole Court. At present the judicial power of the State is without State-wide organization and without an administrative head. Organization is confined to the circuits each of which is a watertight compartment whose boundaries the judges therein have no power to cross; and there is no exchange or cooperation between them. For example, a judge in Dorchester County may sit in Somerset County but he may not sit in Talbot County or Caroline County; a judge in Baltimore County may sit in Harford County but not in Baltimore City or in Carroll County to the west or Anne Arundel County to the south; and a judge in Baltimore City may not sit in any county of the State. If there is a vacancy through illness or pressure of work in one circuit and a shortage of work in another there is no way in which the lack in one place can be made up through the excess in another. So far as the trial courts are concerned,

the courts of the Maryland circuits are as separate from each other as the courts of the several States.

Furthermore, the courts of Maryland have no common head. The average citizen would naturally suppose that a judicial system that employs so many judges and entrusts them with powers that so vitally affect the rights of the people would have some responsible head to direct its business affairs. But it is not so. There is complete lack of integration of the judicial circuits of the State. Every circuit stands alone wholly independent of all others and every judge stands independent and alone save for the power of reversal in the Court of Appeals. Of course complete independence of decision must be and will be preserved but there is no reason why the judicial manpower of the State should not be organized for purposes of efficiency with a supervisory head.

The Bond Amendment proposes to remedy these defects in a very simple manner. It provides that the Chief Judge of the Court of Appeals shall be the administrative head of the judicial system of the State and shall from time to time require from the judges of the county and city courts reports as to their judicial work and business. He is also empowered in case of vacancy, illness, disqualification or absence of an appellate judge, to designate any trial judge to sit on the Court of Appeals; and he may also designate a judge of the Court of Appeals or a trial judge to sit in any trial court of the State. These powers are given to the Chief Judge subject to such rules and regulations as the Court of Appeals may see fit to make.

The lack of such a system in the past has hampered the courts of the State in the disposition of business. Twenty-two years ago the Courts of Baltimore City were running behind while trial judges in other parts of Maryland were not fully occupied. The only remedy under the existing law was the passage of an act by the Legislature of 1922 creating another judgeship in the city. It turned out in the course of time that the pressure of work was temporary and the result is that today there are more judges in the city than are needed. Sometime ago cer-

tain associate judges in a Western Maryland circuit were absent on account of illness and the Chief Judge, who also had his appellate work to do, was obliged to take over their assignments. This burden could easily have been carried without inconvenience to any one if a judge from Baltimore City or some other part of the State could have been designated for the purpose. The institution of the proposed system will easily take care of all such emergencies.

Equally meritorious is the provision for reports of the business of the trial courts to the Chief Judge of the Court of Appeals. There is now no source from which accurate information can be readily obtained as to the number of days in which the trial courts of the State are in session or as to the amount or character of the business which they perform. Statistical information is wholly lacking and no one in authority has any means of knowing how the work is being done. A comparison of the work of the several circuits and of the city would show where judges are overburdened and where they have time to spare and the interests of the public and of the legal profession would be served by raising the prestige and efficiency of the trial courts. It is safe to say that no other business activity would tolerate the present lack of organization of the courts; and that no Maryland judge, if given the opportunity, would be loath to cooperate in the interest of efficient administration.

Judge Dennis also criticizes this part of the proposed amendment. He thinks it will put too great a burden upon the Chief Judge of the Court of Appeals and he fears that the Chief Judge may be an objectionable person. He says:

> "All will agree that those clerical and administrative duties must divert the Chief Judge from adjudicating cases. If the Chief Judge is unreasonable, meddlesome, blundering, or disposed to evil, he can make judges subservient, plague and pack the courts, put judges of the Court of Appeals, nisi prius judges and the bar to irritating inconvenience and loss".

Neither of these objections will seem tenable to any one who is willing to give to the courts of Maryland the

same efficiency which characterize the courts of other jurisdictions. The Governor and the Legislature of the State may be safely trusted to furnish the Chief Judge of the Court of Appeals with such clerical assistance as he may need; and one has only to name the Chief Judges of the Court since 1907, when the present movement began, to wit: A. Hunter Boyd, Carroll T. Bond, D. Lindley Sloan and Ogle Marbury, to realize that the sort of judicial ogre whom Judge Dennis imagines is unknown in this State. Even if such a man should secure the office, he would be subject to the control of his colleagues under the terms of the amendment.

The operation of the proposed administrative system is not a matter of guesswork for there is ample experience to serve as a guide. One has only to observe the administration of the United States Courts in which a similar system operates on a national scale. Every United States trial court in the country is required to make periodic reports of the business done to the Administrator of the Courts at Washington so that the amount and character of the work done in each District becomes a matter of public information, open to all. Moreover, every United States District trial judge and every United States Circuit appellate judge is subject to call to service in any part of the country. Within any federal circuit the presiding Circuit Judge may assign any of the Circuit or District Judges to sit in any United States Court in any state in the Circuit; and with the cooperation of the presiding judge, the Chief Justice of the United States may assign the judges in any circuit to sit in any other circuit of the nation. The flexibility of this arrangement and the willing cooperation of the judges have had a notable influence in keeping the United States Courts abreast of their dockets. Any judge who has operated under such a system will acknowledge the interest of the work and its stimulating and broadening influence. In Maryland it would tend to bring the members of the judiciary closer together, acquaint them with the various parts of the State, and afford them the opportunity of observing the advantages of pre-

vailing local procedures. There need be no fear of resulting hardships. The system would be administered under the supervision of the appellate judges who would be entirely sympathetic with the problems of their colleagues in the trial courts. Traveling and living expenses for a judge while away from his circuit could readily be provided in the legislative budget, and in most instances prolonged absences from home could be avoided. Some burden of administration on the part of the appellate court and some inconveniences on the part of the trial judges would of course ensue, but they would be well worth while in view of the benefits that would be obtained; and it is not likely that any judge would contend that he should be free from the inconveniences that men in all other lines of endeavor are called upon to endure.

THE SECOND CONSTITUTIONAL AMENDMENT AFFECTING THE COURT OF APPEALS PROPOSED BY CHAPTER 796 OF THE ACTS OF MARYLAND OF 1943.

In his search for grounds to oppose the changes proposed in the Court of Appeals amendment, Judge Dennis finds another argument in the fact that the Legislature of 1943 in addition to the amendment suggested by the Bond Commission proposed another amendment[25] which also relates to the assignment of the trial judges to sit in the various judicial circuits throughout the State. It is said that this amendment was proposed by reason of the inconvenience which resulted from the emergency caused by the absence of judges in the Western Maryland circuit above referred to. The measure was introduced in the Legislature before it was known whether or not the proposal of the Bond Commission would be approved. It requires the Legislature to provide by general law for the assignment by the Court of Appeals of any of the Chief or Associate Judges of the present circuits of the State, including the judge of the Court of Appeals from Baltimore City and the trial judges thereof, to sit in any other or different judicial circuits for designated or limited periods in order to relieve the accumulation of business or to take

[25] Md. Laws 1943, Ch. 796.

care of the indisposition or disqualification of any judge. Judge Dennis thinks that this proposal presents a serious inconsistency because it directs the Legislature to provide for the assignment of judges by the whole Court of Appeals whereas the Bond Amendment is self executing and invests the power in the Chief Judge of the Court. As a matter of fact there is little difference in the practical effect of the two measures, and even if both should be adopted by the people, no irreconcilable conflict would arise. Judge Dennis fails to note that under the Bond Amendment the administrative power lodged in the Chief Judge is made subject to such rules as the Court may enact, so that in either case the full court has the ultimate control. The Bond plan is to be preferred because the other amendment makes no provision for filling temporary vacancies in the Court of Appeals. Moreover, emergencies may arise when the Court of Appeals is not in session and the Chief Judge could proceed with more expedition if he were not obliged to wait for the approval of the entire Court.

From whatever standpoint the proposed Constitutional Amendment is viewed, it is obvious that it deserves the wholehearted support of the people of the State. At last, after many years of careful study, the leaders of the legal profession in all parts of the State have agreed upon an improvement in our judicial system, and this improvement has received the approval of the State Legislature. The areas from which the members of the Court of Appeals will be chosen will be broadened so as to include larger numbers of highly qualified men; an unnecessarily large Court of Appeals will be reduced to a more efficient body; the appellate judges, freed from the distractions of the trial court, will be able to do work of as high a grade as any appellate court in the country; the trial judges will be given full control of the work in their respective circuits and will grow in strength by reason of the experience; and finally, the administration of the entire judicial system in Maryland will be integrated and reorganized so as to make available at any point all the judicial resources which it comprehends.