REPORT

OF THE

COMMISSION ON THE JUDICIARY ARTICLE

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CONSTITUTION OF MARYLAND

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To His Excellency,
Herbert R. O'Conor, Governor of Maryland,
Annapolis, Maryland.

Your Excellency:

This commission, having finished its deliberations, now submit this report of its conclusions and recommendations. Drafts of consti tutional amendments to carry out the commission's recommendation will be submitted later.

Summary.

The subjects considered comprise: (1) Reorganization of th Court of Appeals and separation of the duties of judges of the Court o Appeals and judges of the Circuit Courts for the counties; (2) Consoli dation of the courts of Baltimore City; (3) Selection of judges; (4) Number, distribution and assignment of judges; and procedure; (5) Abolition of the Orphans' Courts. Juvenile Court jurisdiction i related to several of these subjects. It involves details which, thoug beyond the original scope of the commission's work, have been con sidered because of the need for legislation instead of the pendin Juvenile Court constitutional amendment.

The commission's recommendations comprise those previously submitted in its interim report, dated June 1, 1942, with two additions (1) the same method of selection of judges for the trial courts as fo the Court of Appeals and (2) abolition of the Orphans' Courts. Con sequently this report is principally a reaffirmance of the interim report

None of the commission's recommendations are revolutionary; all are closely related to experience in Maryland and elsewhere. As to the organization of the Court of Appeals and the trial courts the commission's recommendations are a unification of existing provisions for Baltimore or for the several counties. In Baltimore, since 1851, judges of the Court of Appeals have *not* been judges of the local courts; the commission recommends that like provision be made for the counties. In the counties, since 1851, one trial court has exercised all legal, equitable and criminal jurisdiction; the commission recommends that like provision be made for Baltimore. In both respects the commission's recommendations are in accord with the best practice, long established (now, but not in 1867) in England, in the federal courts and in most of the state courts.

In Maryland, since 1867, judges have been selected by a system combining appointment and election; since 1941, party designations on the ballots have been abolished. The commission recommends that this system be strengthened by making it more uniform and by abolishing primary elections--a logical corollary to abolition of party designations.

In Maryland no provision whatever is made for assignment of judges to different localities in emergencies; but for years there have been complaints that there are more judges than are needed. In the federal courts and in the best organized state judicial systems flexible provision is made for utilizing judicial "man-power" by assignment of judges from one locality to another, when needed. The commission recommends that such provision be made for economy of judicial "man-power".

In 1851, when the Court of Chancery was abolished and the local courts were given all legal, equitable and criminal jurisdiction, reasons for the separate existence of the Orphans' Courts ceased. In the Constitutional Convention in 1851 both the majority and the minority committee reports recommended abolition of the Orphans' Courts. The commission now makes this recommendation, which is in accord with practice long established (now, but not in 1851) in England, in the District of Columbia and in many states.

Although the five subjects above mentioned can conveniently, and will be separately discussed, obviously they are all closely related and must be coordinated. This the commission has tried to do.

COURT OF APPEALS.

Most of the criticisms of our judicial system have referre organization and work of a Court of Appeals, or court for re decisions of trial courts. The commission has considered this first. As previously announced, it has concluded to recomme such a court be composed of five judges, two to be chose Baltimore City, and three from the counties at large, and tha judges be confined to appellate work as a rule, with a provis assignment to trial work upon occasion.

The principal needs that require this recommendation a concentration of the efforts of appellate judges upon appellat by relieving them of regular trial work in circuits and (2) r of narrow territorial limitations upon the selection of judges dentally removal of such limitations will effect a readjustment large and increased proportion of the lawyers of the state in Bal City. Baltimore now contains about half the population of th and far more than half the lawyers. The greater growth of tl has made the limitation to one judge from Baltimore out of eigh and more unreasonable.

To many of the members of the commission, perhaps to a ma of them, there appeared to be weighty advantages in selection judges from the state at large, without restriction of any t graphical sections. Judges are so elected in 39 states. Bu peculiar distribution of the population of Maryland— about half large city and the rest in rural districts or comparatively small and cities—has seemed to justify a limitation of the city of Balt to a minority of the judges. Otherwise there might be fear (wh justified or not) that the concentrated city vote would domina selection of all the judges, from the counties as well as from the c

It is recommended that the three county judges be chosen the counties at large and not from smaller sections of the state section needs representation, because the judges do not act in r sentation of sections, and never in fact divide in opinion accordi sections. There should be no compulsory distribution which m deny to the state the services of two desirable judges who might ha to reside in any one group of counties. In practice there would

narily be a distribution among lawyers of different sections, but this should not be compelled at all times by a rigid constitutional provision.

At the coming November election seven of the eight judges of the Court of Appeals will be elected. Every citizen of Maryland is interested in the election of each of these seven judges. No citizen, however, is permitted to vote for more than one. None of the seven will be elected by a majority of the population. One will be elected by 47 per cent., one by less than 5 per cent., each of the others by less than 11 per cent. This sectional method of selection should be abolished.

Five judges would be an ample number for the work to be done. Judges in this state, in common with judges in all other jurisdictions, have in recent years seen their dockets considerably reduced. In all state courts, and in all federal courts below the Supreme Court, litigation has been falling off. In the year from October 1, 1941 to October 1, 1942 there have been 118 cases presented for decision in the Maryland Court of Appeals, and these, equally distributed among five judges, would require the writing of not more than 24 opinions by each. The judges would have time to study other cases more thoroughly, and to confer together frequently without interruption, instead of occasionally at intervals. Some members of the commission are of the opinion that five judges could work with better cooperation, and a greater feeling of responsibility for all cases, than is possible with eight. Five is the number in several states with dockets much larger than can be expected in Maryland, and where the number of opinions to be written by each judge is correspondingly larger.

The separation of trial work and the work of review is recommended by the experience of all the states of the country except Delaware, and in that state there has long been a desire expressed by the bar that the combination of the two be discontinued. In New Jersey, where the judges have engaged in both kinds of work to a limited extent, the recently appointed commission on a proposed new constitution has recommended complete separation. The principal reason for adopting a like course in Maryland is that work on the trial circuits interferes with the proper performance of duties on appeal. The appellate judges are not giving to cases, other than those assigned to them respectively for the writing of opinions, the study and reflection they would like to give, and which the bar and people of

the state would like them to give. And it is reported by judges who have sat on the court for some years that complaint of delay in writing opinions, because of circuit court work, is too frequently heard from the judges.

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 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.

The commission recommends that until the number of judges is reduced to five through occurrence of vacancies, the elected judges in office continue to be judges of the Court of Appeals for the remainder of their terms. Three of the county judges would be designated by the Governor as the permanent three judges, without regular circuit duties. The others (not exceeding three) would be additional judges of the Court of Appeals and also continue to be Chief Judges in their circuits. As vacancies occur, each additional judge would be designated to one of the three judges. The three judges and the additional judges would have precisely the same powers, duties and status as judges of the Court of Appeals.

Opinions.

It was urged upon the commission that the existing requirement of a written opinion upon every decision of the Court of Appeals be relaxed by leaving it to the judges themselves to determine whether or not an opinion should be filed. That recommendation was not adopted. The three members of the commission who had sat on the court bore witness to the fact that the desired thoroughness of comprehension of a case is attained only by having an opinion worked out, and the commission considers it a measure necessary to the satisfaction of litigants, in which justice largely consists. It is valuable as a dem-

onstration that the case pro and con has been heard, and dealt with, even if decided wrongly. It was concluded that the evil of excessive publication of opinions which is piling shelves with too many books, must be met without sacrificing the advantages of explanatory opinions, and that, possibly, a more stringent prohibition against publishing all, indiscriminately, might accomplish this. But so far no satisfactory device for it has been found, and the suggestion has brought no action.

THE TRIAL COURTS OF BALTIMORE CITY.

The Court of Appeals suffers from combination of incompatible duties of appellate judges and trial judges. The Baltimore trial courts suffer from an opposite evil—useless multiplication of courts.

It is again recommended that the six courts of Baltimore City, with their distinct clerks' offices, be consolidated. The distinctions have been preserved for many years out of good will for the clerks, or those who might become clerks, solely to provide the extra offices and salaries. But candor compels anyone faced with a question of justifying the present separation of the courts to answer that it is not supported by any acceptable reason, and is an abuse. When the separate courts were provided by the Constitution of 1851, it was considered that the several judges would each constitute a court. Such was the general conception of a court. But in the convention of 1867 it was agreed that this was undesirable, and the judiciary committee recommended consolidation, under the name of the Supreme Court of Baltimore City. After debate the subject was referred to the delegates from the city, and these, by a majority vote, offered the compromise plan adopted, namely, that the judges be consolidated, under the name of the Supreme Bench of Baltimore City, for service in all the courts, while the distinctions be retained in the clerks' offices. That the several branches of the law can be administered from one clerk's office is made manifest by the fact that it is done in all the counties of Maryland, in cities of other states, and in all the United States District Courts.

For a single consolidated court the Commission recommends the name of the Superior Court of Baltimore City, which would correctly describe its jurisdiction as superior to that of the People's Court, without appropriating the misdescriptive name of Supreme, which the

commission concludes might well be left to the Supreme Court of the United States.

The commission recommends that the clerk of the consolidated court be appointed by the Court, but that for the remainder of the terms of the six clerks in office, one of them shall be designated as the clerk of the new court and the other five shall be deputy clerks. In these capacities they could serve more usefully than as clerks of six separate courts. Without multiplying law records in three offices and equity records in two, the clerk's office would doubtless maintain separate law, equity and criminal records, besides the Record Office and the license bureau. These five departments would furnish more useful occupation for one clerk and five deputies than six separate courts.

MODE OF SELECTING JUDGES.

It is recommended that all judges of the Court of Appeals, and of the trial courts in Baltimore City and the counties, be appointed in the first instance by the Governor, and that they be assured of one year of service by virtue of the appointment, and then, after that year, at the time of the next election in the state, either for national or state officers, be required to stand for election by popular vote if they wish to continue. In the opinion of the commission the term of office of those elected should continue to be fifteen years, as under the present constitution.

Appointments in the first instance are recommended out of a desire to commit the selections at that stage to some responsible agency who could act with knowledge of the individual lawyers and their qualifications. It will be agreed that a place on the bench is one for a skilled man of high character; to satisfy the people of the state with the dispensation of justice, the judges must be men who will give it that character, and the court should have approximately the best material for judges that the state affords. But the voters of the state cannot reasonably be expected to initiate a choice of such men from the bar, because they lack the expert knowledge to enable them to judge of their qualifications. The Governor of the state seems to be the proper representative for that purpose. After a judge has been acting for a length of time sufficient to disclose his fitness then a popular election may have an office to perform, and the commission

has concluded that a year's service would be sufficient, and that the appointed judge should then stand for election or rejection. It is recommended that the names of appointed judges, designated as such, be placed on the ballots without contest in primary elections, but that facility for proposal of names of other candidates who may reasonably expect support by a substantial number of voters shall be preserved. To this end, the commission recommends that the names of opposing candidates be placed upon the ballots only upon petitions of 5,000 voters in the case of trial judges in Baltimore City and all judges of the Court of Appeals, and of 1,500 voters in the case of trial judges in the county circuits.

The method recommended does not differ greatly from that actually prescribed and practiced under the Constitution of 1867. Even at the expiration of a fifteen-year term the Constitution requires an appointment for a year until the next election. Most of the judges are added to the courts to fill vacancies caused by retirement or death of predecessors, and as those events seldom occur at the exact times of elections succeeding judges are appointed by the Governor to serve until the next state election. As the interval between state elections is four years, the service under the appointments lasts for various periods short of that time limit. This seems to the commission too long if the judges are to hold office ultimately by election.

The members of the commission have not overlooked the advantages of appointment alone as a method of selecting judges: many, perhaps a majority, thought that in Maryland, as in some other states and in the federal jurisdiction, that method might procure the best judges in the long run, but they also felt that the people of the state would prefer to have the ultimate power of election, and the effort has been made to retain the opportunity for this.

It is trite, but true, that no method of selection will assure satisfactory judges unless the selection of such judges is actively urged and supported by a vigilant public sentiment, led by the bar and the press. In appointing judges a Governor will seldom flout such a sentiment. When the sentiment exists, a petition of 1,500 or 5,000 voters will be of little avail to a mere self-seeking or partisan candidate against a capable judge, but will furnish ample opportunity to displace an unfit judge by a candidate supported by a genuine public opinion.

In its interim report, the commission recommended provision f this method of selection of judges of the Court of Appeals, and reserv for further discussion questions concerning the selection of trial judg The commission now recommends the same method of selection trial judges; no valid ground for differentiation has been seen. T commission recommends provision by constitutional amendment this method of selection of *all* judges.

NUMBER, DISTRIBUTION AND ASSIGNMENT OF JUDGES—PROCEDURE.

For many years there have from time to time been complai that in parts of the State there are too many judges.

An excessive number of judges is a natural consequence of total absence of any provision for special assignments of judges fi one court to another. This is an unusually rigid feature of the M land constitution. In the past, while the number of judges in B more was inadequate. there were too many judges in some of counties.

The commission recommends provision that the Chief Judg the Court of Appeals (1) in case of a vacancy or of absence designate any judge of a trial court to sit in lieu of a judge of the C of Appeals and (2) may designate to sit as a judge of any trial c any judge of the Court of Appeals or of any other trial court.

At present, both in Baltimore and in the counties, there are t trial judges than are needed. Baltimore, with about half the po tion of the state and more than half the business, has eleven judges. The counties have about twice as many as Baltimore, eighteen full-time associate judges and seven part-time chief ju (who are also judges of the Court of Appeals). The commissi satisfied, from observation and from expressions by judges and yers, that the work now done in Baltimore by eleven could be done by eight.

The commission's conclusion that there are too many judg the counties is supported by study of the volume of business o courts in the several counties. The commission will hereafter su a summary of some statistical information collected by it, conce the volume of such business.

Incidentally, study of the volume of business indicates that in a number of counties establishment of trial magistrates, with jurisdiction increased to $200 or $250 or $300, has worked so well that magistrate appeals have greatly decreased. The commission recommends for the consideration of the General Assembly the question whether the jurisdiction of the People's Court in Baltimore should not be similarly increased by statute. The present limit to cases involving $100 (Code, Art. 52, sec. 7) was first fixed in 1852, (Act 1852, Chapter 239), when it was increased from a previous limit of $50.

The commission recommends (1) that the number of trial judges be limited to ten in Baltimore and an aggregate of twenty-one in the counties, *i. e.*. the present number of associate judges, plus the maximum number of additional judges of the Court of Appeals (and the Circuit Courts) during the transition period, (2) that within these *maximum* limits the Legislature be empowered from time to time to decrease or increase the number in Baltimore or in any particular county circuit, and (3) that no decrease in number of judges shall shorten the term of any elected judge. In recommending this decrease in Baltimore the commission assumes that transfer of Juvenile Court jurisdiction and Orphans' Court jurisdiction will each consume approximately full time of one judge.

The commission recommends no present regrouping of counties in circuits, but is aware that disparities in the amount of business in the different circuits require some redistribution of the number of judges among the different circuits and further redistribution may be needed from time to time hereafter. For instance. the smallest circuit in population and volume of business has three associate judges; several larger circuits have only two.

The commission suggests that trial judges residing in the more sparsely populated counties spend less time sitting together in ordinary cases and more time (if necessary) in periodic attendance in other counties to sign routine orders and hear equity cases.

The commission recommends to the Legislature that judges specially assigned outside their own circuits—and also judges while in attendance outside their own counties but within their own circuits —be allowed their actual expenses (not exceeding a specified *per diem*) for travel and maintenance.

The commission proposes that the present complicated cons tional provision as to residence of judges be simplified so as to pro that no county shall have more than two trial judges (except pos Baltimore County during the transition period) and none other Baltimore, Montgomery, Prince George's and (if the number of ju in the Fourth Circuit is increased) Allegany Counties shall have more than one.

The commission recommends that the present powers of the C of Appeals to make rules of practice and procedure be reaffirmed also be enlarged so as to cover other details, *e. g.*, terms of the C of Appeals and of trial courts, now governed by statute. The practice in England, in the federal courts and in modernized courts is to leave matters of procedure to the courts themselv regulated by rules of court. The commission likewise recomm in accord with approved practice elsewhere, that the Chief Jud the Court of Appeals be made the administrative head of the ju system of the State, subject to rules and regulations of the Cou Appeals.

THE ORPHANS' COURTS.

Consultation of members of the commission with lawyers others from various parts of the state has disclosed a widesp opinion that the jurisdiction over matters of probate and the adm tration of estates of deceased owners should now be committe the trained judges of the trial courts, and that the Orphans C should be abolished. Plainly the work of the courts of untrained men in the counties causes dissatisfaction. This is the opinio members of the commission, and they recommend that the chan made, both in the counties and in Baltimore City, effective Janu 1947, when the terms of the judges elected in the November, election will expire.

The use of persons untrained in the law as judges of the Orp Courts is a survival of the practice existing before the Revol when trained lawyers were not required on any court of the pro although the need of training was in fact bringing lawyers t higher courts before 1776. Beginning with the constitution of year, all other courts of the state were by the year 1805 equipped trained judges, but although the problems to be disposed of in pr

and administration of estates were of no lesser importance and difficulty lawyers have not been required to preside over Orphans' Courts. The result has been that the regular courts of law and equity have been made available to aid in the disposition of special matters, and this division and duplication of machinery still exists. In recognition of the need for it, the Orphans' Court of Baltimore City has in practice been equipped with trained lawyers in recent years; three of them have been exercising the restricted powers of these old courts, whereas one trained judge, without the restrictions appropriate to untrained judges, could effectually dispose of the problems presented. The jurisdiction, freed from the restrictions of the special tribunals, should be placed in the ordinary trial courts. The commission is of opinion that one judge might well be permanently assigned to the work in Baltimore City, but that any such assignment should be left to the discretion of all the judges of the city courts together.

JUVENILE COURT JURISDICTION.

The commission reaffirms (without repeating) what was said in its interim report under the caption "Juvenile Court Amendment"

A sub-committee of this commission, together with representatives of other groups and organizations especially interested in or affected by Juvenile Court problems, is now engaged in drafting proposed legislation. This commission will hereafter submit such a draft of proposed legislation embodying its recommendations as to clarification and transfer of Juvenile Court jurisdiction.

CONSTITUTIONAL AMENDMENTS TO BE SUBMITTED.

It is the opinion of the commission that the present Judiciary Article of the Constitution is needlessly and inconveniently long. Comparison with other states, and especially the constitution recommended by the commission in New Jersey, confirms this opinion.

The commission will hereafter submit drafts of four separate constitutional amendments to carry out its recommendations: (1) for reorganization of the Court of Appeals, including all other recommendations *except* consolidation of the Baltimore courts and abolition of the Orphans' Courts; (2) for consolidation of the Baltimore courts; (3) for abolition of the Orphans' Courts; and (4) a blanket amend-

ment, rewriting the entire Judiciary Article and including *all* the mission's recommendations and some additional abbreviations or plifications. The blanket amendment, if adopted, would supersed others. The commission recommends that four such amendmen submitted by the General Assembly to the people.

All of which is respectfully submitted.

The signature of Judge Hammond Urner to this report is la because of his death on September 27, 1942. Until that time h been an active worker on the problems dealt with by the commis and the work had so far progressed then that his wisdom and experience in the judicature of the state were brought to bear in them. He concurred in the commission's interim report, all the re mendations in which are now reaffirmed.

CARROLL T. BOND

CHARLES MARKELL.

F. W. C. WEBB.

WALTER C. CAPPER.

SAMUEL J. FISHER.

S. MARVIN PEACH.

ELI FRANK,

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J. HOWARD MURRAY.

CLARENCE W. MILES.

JOSEPH BERNSTEIN,

G. C. A. ANDERSON.

EDWARD D. E. ROLLINS.

October 21, 1942.

THE OBJECTION OF F. NEAL PARKE, A MEMBER OF THE COMMISSION.

I do not concur in the major conclusions and recommendations of the Commission.

It is my conviction that any change in the judiciary structure of the State should not be made unless the proposed change be unquestionably an improvement of the long established provisions of the Constitution of 1867.

The proponents of the proposed constitutional amendment bear the burden of showing a clear advantage in the changes advocated by the Report of the Commission. Unless these changes will result in providing a sufficient number of appellate and trial judges efficiently to dispatch the affairs of the courts; and in procuring judges of greater capacity, learning and independence than under the subsisting Constitution, no change is justifiable. It is respectfully submitted that the Commission does not achieve this result. While the objections now to be stated have been rejected by the Commission, it is to be hoped that it will not be regarded as presumptious for some of them to be submitted for consideration.

1. The Report reduces the number of the appellate judges to five and practically confines these judges to appellate work.

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

All these benefits are lost in lessening the number of judges of the Court of Appeals to five. The reduction in number does not of itself improve the judicial qualifications of the surviving number. Nor is there any certainty that five will be an adequate number. An increase in labor necessarily arises. Again, more appellate work will result under the new rule which requires the court to pass upon questions of fact when the trial court sits as a jury. Should the heavy cost of an appeal be corrected, there would be a large increase in the volume of appeals.

The Report limits the number of judges for service in the circuits of the State. With the distances to be traveled between the several county seats of the court and with the added jurisdiction contemplated in probate and other fields, it is submitted some of the judicial circuits would not be provided with sufficient judges for the adequate administration of the law. The error should be in providing more judges than not enough judges.

2. The gravest objection is in the method urged in the selection of all judges. The Report advocates the ultimate appointment of the judges of the appellate and trial courts by the Governor, and that they be assured one year of service by virtue of the appointment, and then, after that year, at the time of the next election in the State, either for national or state officers, be required to stand for election for a term of fifteen years by popular vote, if they wish to continue. At the expiration of this period, the name of the appointed judge, unless he decline, shall be put on the ballot for election. The only way in which an opponent may contest his election is a nomination by petition of 5,000 voters in the case of the trial judges in Baltimore City and all judges of the Court of Appeals, and of 1,500 voters in the case of trial judges in the County circuits.

The product of this union of the appointive and elective systems of selection is a hybrid method which, with all possible deference to the judgment of the other members of the Commission, will fail to achieve the beneficial results desired.

The nomination by primary or convention is denied in favor of nomination by petition of 5,000 qualified voters for judges of the Court of Appeals and judges of Baltimore City, and 1,500 qualified voters for trial judges in the counties.

Nomination by petition is political action in its most crude and irresponsible form. It is most open to abuse, fraud, perjuries and personal manipulation. Its integrity and genuineness is most vulnerable to attack, as is notorious.

Signatures in Baltimore City, and in the counties of the State and the judicial circuits could easily be obtained in the required number when the only requisite is that the men and women who sign have the right to vote. The method is thus open to any social, political, religious group, faction or party. No one who accepts the appointment by the Governor could be certain he would not meet this opposition.

It would be difficult to induce the best qualified, competent and established lawyer to give up his practice for a short period with the prospect of encountering at the polls the nominee of men and women whose only qualification may be that of the right to vote. The power of appointment is limited in its operation to those who will accept.

Thus it would seem that the proposed method would tend to exclude the most desirable and approved lawyers from elevation to the Bench.

For these and other reasons, I am unable to concur in the Report.

F. Neal Parke.