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## AN INTRODUCTORY DESCRIPTION OF THE COURT OF APPEALS OF MARYLAND

By CARROLL T. BOND\*

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[*Editor's Note:* This article was prepared by Chief Judge Bond in helpful response to a request to do so made jointly by the REVIEW and by the authors of the statistical article which follows immediately after Judge Bond's article in this issue of the REVIEW. Accordingly, Judge Bond's article serves, as it was planned to serve, as an introduction to the statistical one. The REVIEW and the authors of the latter article are very grateful to Judge Bond for preparing the introductory article, and for his valuable suggestions concerning the statistical material, which he made at the beginning of the undertaking. All concerned wish to make it clear, however, that the authors of the statistical article alone are responsible for the decisions as to what facts to seek for and present therein, and for any conclusions or recommendations, expressed or implied, which are contained in the latter article.]

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The information requested by the editors of the REVIEW, and by the authors of the statistical study of the Court of Appeals of the State to be published in it, is twofold. They wish both a statement of the method of organization of that Court under the several Constitutions of the State, and an explanation of the methods followed by the judges in disposing of the appellate work committed to them. The

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first can be given very briefly. The second requires a more extended discussion.

The method of providing judges for the Court of Appeals of Maryland has varied since the formation of the State government. From 1778 to 1806 there were, disregarding vacancies, five judges appointed without specific reference to place of residence, to hold office during good behavior. These served only as appellate judges. From 1806 to 1851, six Chief Judges of so many districts or groups of the county trial courts held the Court. One district, the first, was of St. Mary's, Charles, and Prince George's counties; the second was of Cecil, Kent, Queen Anne's and Talbot counties; the third of Calvert, Anne Arundel and Montgomery counties; the fourth of Caroline, Dorchester, Somerset and Worcester counties; the fifth of Frederick, Washington and Allegany counties; and the sixth of Baltimore and Harford counties.<sup>1</sup> These judges, too, held office during good behavior.

The circuit system was abandoned in the Constitution of 1851, and four judges were elected from four different divisions of the State, to sit on the Court of Appeals alone, like the judges before 1806, that is, to have no trial jurisdiction. One judge was to come from the Western Shore north of a line drawn about east and west through Baltimore, another from counties south of that line, one from Baltimore City, and one from the Eastern Shore.

The Constitution of 1864 provided an additional judge, and necessarily, if the five were to come from different parts of the State, a redivision of territory had to be made for the purpose. The Eastern Shore, under the redivision, constituted one district, as it had done before; Harford and Baltimore counties, with seven wards of Baltimore City constituted a second; the remainder of Baltimore City constituted a third; what we now call the Western Maryland counties, including Carroll, made a fourth; and a fifth was made up of St. Mary's, Charles, Anne Arundel, Calvert, Prince George's and Montgomery counties. The

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<sup>1</sup> At the time of this division, Baltimore City, and Carroll, Garrett, Howard, and Wicomico Counties had not been separately organized.

addition of the fifth judge was due to impatience with a long-continued waiting list of appeals on the docket carried over from term to term, an excess that had existed since before the Revolution. The gain made was not satisfactory, and the docket of the Court for the April Term, 1867, contained 187 cases, arguments in each of which might, according to the practice of the time, have consumed most of a court day, and in many, more than one day. A somewhat drastic step was needed to overcome the excess, and it was taken by the Constitution of 1867.

Instead of five judges, eight were made available by a return to the circuit system. Chief judges of seven groups of county courts and a judge from Baltimore City, were to make up the Court, and the new Constitution directed that these judges should sit on the Court of Appeals at least ten months in a year, if necessary to dispose of the business before the court. For a number of years they did sit, not ten, but nine months of sessions, from the beginning of the October Term, six hours a day on five days a week, until some time in the following July, with a short recess for Christmas, and one for a large part of the month of March. And it was not long before every case on the docket of each term was given an opportunity for a hearing at that term; and this has been done ever since. It may be questioned whether it was the expectation of the framers of the Constitution that all eight judges should feel obliged to sit at all sessions of this Court, if they could. Giving them local work and retaining a provision that four should constitute a quorum, rather indicates that absences of some of them would be regular. It would often be helpful to a judge to absent himself to work on cases already heard, but ordinarily none feel at liberty to do so.

The Constitution of 1867 required that two terms should be held in each year, one beginning on the first Monday in October, and the other on the first Monday in April, but the General Assembly was given power to designate other times for sessions, and by an Act of 1886, Chapter 185, it added the January term, evidently to prevent deferring

to the April Term the hearing of appeals entered after the opening of the October term but before January. This cut the October term down to three months instead of six. And as that term has always had the heaviest docket, the judges have, in some years, been pressed for time to hear all arguments before January and file opinions within three months of hearings, as the Constitution requires. Perhaps it would have been better if the cases entered up to the month of January had merely been added to October term dockets, so that the whole work might have been distributed evenly through the six months.

The Court knows nothing of an appeal until a transcript of the record in the case below is received at Annapolis. When received, the Clerk of the Court then obtains from a printer an estimate of the cost of printing it, and informs attorneys for the appellant. The amount is required to be paid or secured in ten days, under penalty of dismissal if the case is reached for argument before the printed record is in hand. There is no State printer; the Clerk distributes the work of printing among private printers. The cost of this printing constitutes the greatest item of expense to the parties in the Court of Appeals, that is, after payment of the cost of the transcript below, and it is a frequent subject of complaint.

Appeals are expensive. As it was put by a woman recently prevented from appealing, the Court of Appeals maintained by the State is open only to those who can command a considerable amount of money. But the alternative of hearing and deciding a case without printing, using only the original transcript as received from the court below, is unsatisfactory because only one judge at a time can have it for study. And, of course, there would then be no copies of records accessible to attorneys in the local libraries. The original transcript itself, indeed, might soon be worn out by use. Methods of making copies other than by printing have been discussed by the judges from time to time, and proposals have been obtained from owners of patented processes, but so far none has been found to provide a wholly satisfactory substitute.

The cost of briefs is at the disposal of counsel; but the Court sometimes interferes to deny a successful party on the appeal reimbursement for the entire expense of a long brief in the costs imposed on the opponent.

The docket of each term is required by the Constitution to include appeals entered up to and including the last day of the preceding term. But for special reasons, of course, cases received later are advanced for argument.

Appeals are regularly called for argument in their numerical order on the docket of a term. Changes of order are not freely made. Doubtless the refusals of requests for advances or postponements sometimes seem to counsel unnecessarily severe, but they will not seem so if the number of requests is borne in mind. Only a small number of compliances would be necessary to upset the calculations and arrangements of counsel in other cases; and putting many cases off to the end of the docket might roll the docket over, to the surprise and inconvenience of those who look to the order of cases on it for guidance. The Court has found it impracticable to accommodate its work to outside engagements of counsel, and has long insisted that anyone who means to argue an appeal shall keep himself available for it or surrender the argument to another. And as there are about thirty courts of original jurisdiction in which attorneys might have conflicting engagements, accommodation of appellate work to trial engagements in the State has been regarded as impracticable, and lower courts have regularly been required to suspend and yield to the demands of the Court of Appeals when necessary.

In courts of more than one judge measures must be taken to distribute the work equally among the judges, and the work of preparing opinions in this Court is distributed automatically, by an order of rotation adopted at the opening of a term. When the judges are assembled for the new term, the Chief Judge selects and announces an order to be followed, from right to left as the judges sit, or the reverse, or in some other order. Alterations by exchanges among the judges or otherwise are not pre-

vented; and for a variety of reasons cases may be allotted now and then contrary to the accepted order. The criticism that allotment at the time of argument may relieve all but one judge of concern with a particular case is obvious, but at present there need be no fear that interest in a case in this Court is abandoned to one judge, and no responsibility for it felt by the others. One of the judges retired in recent years remarked that the views of the writer of an opinion had to run a gauntlet before gaining any acceptance.

The greater number of cases are argued orally, and should be. The value of oral argument is sometimes questioned, but whatever the answer may be in other courts, in this one oral arguments are in most cases valuable and important. The doubt of it overestimates the efficacy of the print. In the first place, not all men receive understanding best through the eye, by reading. One of the leading attorneys of a generation ago in Baltimore City customarily passed all papers to an office assistant to be read to him; and some of the best judges have the same propensity. But even those who feel the need of reading to gain command of a case acquire their first impressions and a large part of their understanding from the oral arguments. Certainly no judge would feel qualified to vote on a decision without having heard oral argument in the case when there was any. In our practice no judge would be permitted to do so. A second reason for not trusting as a rule to the printed brief alone lies in the sum total amount of print submitted to the judges at each term in records and briefs together. Some years ago the shelf space occupied by printed records and briefs at an October Term of the Court was found to equal that occupied by eighteen volumes of Maryland Reports. The amount has been smaller since that time, both because records have, on the average, been smaller, and because there are not so many of them; but there is still a good deal of reading to be done, and some skilful skimming is necessary to get through the printed material in many cases. Yet, by contrast, in oral argument the parties have the en-

tire attention of all the judges directed to the one case in the manner and to the extent that counsel desire. These observations do not, of course, apply to all cases. Some are eminently fitted for submission on briefs, and there are not too many of them. The cases so submitted have to be read thoroughly to enable the judges to debate and decide them. It could hardly be done with a large number of appeals.

During the weeks of sittings in Annapolis the judges regularly remain there during four days, and hence have a few hours after adjournment in the afternoons for library work, or any other demands upon them. Consultations are held at night as a rule, but portions of days not used up in sittings are availed of for the purpose. The consultations preliminary to the writing of any opinions are usually held a week or two after the arguments. This affords time for examination of cases, and the authorities to be considered, but not always sufficient time, for the judges in this State have no law clerks or assistants of any kind, and must do all the work of investigation as well as that of decision.

At these preliminary consultations the Chief Judge, taking up each undecided case in its order on the docket, calls for a report from the judge to whom the case has been allotted for writing. That judge, if he is ready, states the facts briefly, then the questions for decision, and the results of his investigation, and his conclusion, with his reasons for it. Each other judge, in the order of seniority in service, is then called on for his views. The Chief Judge speaks last, as the Governor in his function of Chief Judge spoke 250 years ago. The length of time the preliminary consultation takes may be a matter of minutes; on the other hand more than one meeting for consultation has sometimes been devoted to a single case. Frequently consultations have to be carried over for further study. It sometimes happens that the judge to whom a case has been assigned feels unable to agree in the views of the majority, and the case must be reassigned, and an exchange of cases accomplishes the purpose. During con-

sultation on any case in which one of the judges sat below, that judge, of course, withdraws from the consultation room.

The opinions are written in the respective circuits or the City when the Court is not in session. Court stenographers are commonly employed and paid by the county judges for the typing. There is a stenographer on the staff of the Court of Appeals, living in Baltimore, but the opinions are not often ready in time for her writing all. Except in rare instances there is no circulation of opinions in advance, so that all judges may read them before they are finally taken up and read for adoption or rejection. Doubtless by some process copies in sufficient number might be made for this purpose if the opinions could all be ready for it, but they are not. Here again, it must be remembered that the appellate work is not the only work of seven of the judges. A good many opinions would not require preliminary reading in any event; and in some cases of more than usual importance or difficulty copies are, in fact, circulated in advance of final consultation.

These final consultations follow the same course as the preliminary ones, but the votes given are not always the same. The separate study of one judge or another may have altered his conclusion, and the exposition in the written opinion sometimes brings new light. Dissenting votes are not always noted; from the absence of a report of dissent it cannot be inferred that the conclusion has been unanimous. Dissenting judges may think the differences of opinion unimportant in some cases.

After all changes and corrections have been made, opinions are delivered to the Chief Judge, who keeps books on the cases, so to speak, and he in turn delivers them to the Clerk for filing. In their final form they are typed on sheets of uniform size, and folded lengthwise. The original opinions of this Court, from the time when such deliverances were first made, seem to be all extant, in the Hall of Records.

It was the Constitution of 1851 that first required a written opinion to be filed in every case decided. A few

such opinions, but very few, had been filed to explain decisions shortly before 1800, and after that time the number increased. But there were still cases decided without opinions. And the reporting of any that were filed was at the judgment and discretion of the unofficial reporters, who chose their own material. The new Constitution of 1851 required that provision be made by law for publishing reports, and a legislative enactment of the next year provided the official reporter. The Constitution of 1864 added that the causes reported should be those which the judges should designate as proper for publication. And to this day an opinion bears on its back the legend, "To be reported," or "Not to be reported," usually the former, for failure to report a case has become exceptional. Beyond that, the judges do not, as they need not, concern themselves with publication.

A statement of the methods of work of the Court would be incomplete without an appreciative reference to the work of Mr. Herbert T. Tiffany, the official State Reporter. He not only arranges the material given him for publication, and prepares headnotes; he verifies and corrects all citations, picks out of opinions, and refers to the writers before publication, any slips in composition, any inaccuracies in expression, and any words or sentences which he thinks may be lacking in clearness to readers. For this he has, of course, had unusual training in the preparation of his text books; but he seems also to be peculiarly gifted for painstaking exactitude in testing the written word. The benefit to the Court and to the Bar is not small.

There has been a renewal recently of complaints of the length of published opinions, and the consequent expense entailed to lawyers who must buy the reports. A reply to this may be ventured. The primary purpose of an opinion is to give the parties answers to their contentions. In those answers, and the satisfaction given by the consideration shown, a large part of justice lies. A secondary purpose, of hardly less importance than the first, is the attainment by the judges of the thoroughness and exactitude which only writing can insure. Every experienced

judge must have been made aware of the importance of this object. Writing disciplines the judicial process.

In 1923, at the dinner of lawyers attending the first meeting of the American Law Institute, Charles E. Hughes, who had been an Associate Justice of the Supreme Court from 1910 to 1916, and is now Chief Justice, spoke of this, and turning to Mr. Chief Justice Taft, said: "How often, Mr. Chief Justice, the justice to whom the writing of an opinion has been assigned, and who has the direction of a unanimous vote, comes back to say, 'Gentlemen, it won't write!'"

To the attainment of what are here described as the foremost objects, it is submitted, the reports and digests are by-products only. And if there must be a reduction in the published output of appellate courts, one remedy, if not the first remedy, may be in reduction in publication.