21st Century Dockets, 19th Century Machinery

— Richard A. Money

The appellate process of our court structure is facing severe congestion, and is falling from its pillar of virtue in the thoughts of the American public. The National Conference on the Judiciary which was held in Williamsburg in March, 1971 realized this foreboding situation facing the state court system, and it issued a statement to the effect that the appellate process should be re-examined and revised in such a way that appeals become speedy, fair, and inexpensive, so that the court system regains the merit it deserves and the confidence of the public it serves.

The Virginia General Assembly, realizing this situation, in March, 1968 established the Virginia Court System Study Commission. The Commission was to make a "full and complete study of the entire judicial system of the Commonwealth" which included the appellate court system of the state.

The severe strain on the court system and the desirability of administering justice more effectively and swiftly caused the people of Virginia to revise their constitution. The revised constitution, which became effective on July 1, 1971, provided in Article VI, section 2, that the General Assembly may increase the number of justices on the Supreme Court to no more than eleven justices and to no fewer than seven, which is its present size. The General Assembly also revised Article VI, section 1 to provide that it may establish from time to time "such other courts of original or appellate jurisdiction subordinate to the Supreme Court."

We look first at the provision increasing the number of justices to a maximum of eleven; it seems that this will not solve the problem of the workload of the justices by itself. Justice Story, in 1838, made the following comment concerning the effect of increasing the number of members of the United States Supreme Court, "We made very slow progress, and did less in the same time than I ever knew. The addition to our numbers has most sensibly affected our facility as well as rapidity of doing business. 'Many men of many minds' require a great deal of discussion to compel them to come to definite results; and we found ourselves often involved in long and very tedious debates. I verily believe, if there were twelve judges, we should do no business at all, or at least very little." (2 W. Story, *Life and Letters of Joseph Story*, 296, (1951)). Therefore a greater problem is created if all that the General Assembly does is increase the size of the court. A large court can not function properly if it

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remains tied down to old forms of procedure. There will be more debates, more conferences, and more dissent if the courts function as they have in the past.

In order to overcome this potential breakdown of the administration of justice by the Supreme Court, procedural changes are also needed. Changes as to the process of particular justices writing opinions, as to the reading of briefs submitted to the court for review, as to the hearing of oral arguments, and as to rulings upon petitions for appeal are procedures in which rumination is required in order to achieve the needed results. The revised Virginia Constitution, Article VI, section 2 provides, "The Court may set and render final judgment en banc or in divisions as may be prescribed by law. No decisions shall become judgment of the Court, however, except on the concurrence of at least three justices . . ." Hence panels and divisions of less than the entire court may dispose of the bulk of the cases which burden the Court and lower its efficiency.

In Virginia, appeal is usually not a matter of right but discretionary by the Court. The standard of discretion used by the Virginia Supreme Court in the past has been that no case will be declined review where there is shown to have been a substantial possibility of injustice in the lower court. The court's standard of discretion, which is so important to the efficacy of justice, has not been prejudiced by social or jurisprudential pressures but has been based on the merits of each case. Today, as the burden of the court increases, the court must begin to decline cases by way of a standard less than just, a standard not in the ideal of justice but a standard regulated by overpopulation and an increase in crime. The General Assembly must help the courts with its new Constitutional power to provide a system which produces substantial justice in relation to the realities of our society.

We now look to reform external to the functions of the Supreme Court; the revised Constitution of Virginia permits the General Assembly to establish subordinate courts of appellate jurisdiction. A lower appellate system will relieve the Supreme Court of a majority of its burden and let the Supreme Court retain its expertise of top quality control on matters of social and Constitutional importance. This lower appellate court should be terminal in its nature thus relieving the issue of double appeals. In eleven of the twenty-four states which have adopted the use of a lower appellate court they are terminal rather than intermediate, in the sense that the Supreme Court's business usually comes directly from the trial courts and not as a second appeal.

In order to avoid the problem of double appeal and the cost which ensues, the division of the Supreme Court's jurisdiction to the lower appellate court must be decided carefully. The significance of the appeal on the legal system as a whole and also of the particular parties, eg. a life sentence or death sentence imposed, may be used to determine if the appeal has the merit to go to the Supreme Court, or if it can be tried justly in the lower appellate court. As this is an important issue, decisions regarding its outcome will meet with various forms of acceptance from the society which it will serve. It may not be the ideal form of justice, but the exigence of the situation in society today requires that the Supreme Court retain its expertise without the burdens of economics, population, and increases in Legislative and Constitutional rights from destroying what is left of its honor and integrity.

The revised Constitution is the stepping stone for the General Assembly of Virginia to provide a more credible system of justice to its citizens. Without the confidence of the public in the system of justice as it is known in this country, a state of anarchy will develop. Chief Justice Warren Burger, in an address to the Judicial Conference at Williamsburg stated, "We are rapidly approaching the point where this quiet and patient segment of Americans will totally lose patience with the cumbersome system that makes people wait two, three, four or more years to dispose of an ordinary civil claim while they witness flagrant defiance of the law by a growing number of law breakers who jeopardize cities and towns and the life and property of law-abiding people, and monopolize the courts in the process. The courts must be enabled to take care of both civil and criminal litigants without prejudice or neglect of either." In order for the courts to decide issues on the merits, society must realize that the times are changing, and what was efficient yesterday is not of value today, except in history books. The courts have not completely fallen from their pillar of virtue; that which is essentially good in them may still be brought out of the shadow of their burden into the light of justice by achieving meaningful reform and modernization to meet the realities of society today.

Note: For further discussion of the problems facing appellate justice see, "Appellate Justice: A Crisis in Virginia," **Virginia Law Review** Vol. 57, Number 1, February, 1971. ■