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HISTORY OF THE SUPREME COURT OF APPEALS
OF VIRGINIA

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INTRODUCTION

This paper is an attempt to describe in brief compass the evolution of the Virginia Supreme Court of Appeals since its beginning in the year 1779. This period, which historically began with the Virginia Constitution in 1776 and extends to the present day, is truly modern history. The problems which it solved and the problems which it left unsolved are of vital concern to the present generation.

It is obvious that such a subject as the one chosen is one about which volumes could well be written; but such a task would require a great deal of time and a skilled knowledge of legal terms. The author lacks both of these requirements. Therefore it is necessary that the subject matter be limited, and a clear definition of the aims of this paper be made before going further.

In the main, this paper will attempt to make a survey of the growth of the court, indicating the changes and variations in its organization down to the present day. There will be no attempt to present a case history of the court, although that would be a highly interesting and valuable study. However, where the author feels that a particular case will add to the picture, that case will be included.
A study of the personnel of the court would be an equally interesting study, but for similar reasons to those stated above, the author must confine his bibliographical remarks to only a few of the outstanding personalities who have served on the supreme court.
Virginia's courts date back to the colonial period, but it was not until the Constitution of 1776 that this state was provided with a Supreme Court of Appeals. That Constitution provided for three separate and distinct branches of government—executive, legislative and judicial. That document declared that:

"The two Houses of the Assembly shall, by joint ballot, appoint judges of the Supreme Court of Appeals, and General Court, Chancery Court and Court of Admiralty, commissioned by the Governor, and to continue in office during good behavior."[1]

The Constitution had created a supreme tribunal, but had conferred upon the General Assembly the duty and authority to establish such a court, and to prescribe for its personnel and define its authority. Accordingly, in October 1778, the legislature took definite action, at which time the following act was passed. I quote the entire act because of its importance to the judicial history of the state.

"For establishing a court of appeals for finally determining all suits and controversies, Be it enacted by the General Assembly, That at such place as shall be appointed by act of the

General Assembly there shall be holden a court of appeals, which, in causes removed after decision from the high court of chancery, shall consist of the judges of the general court, and three assistant judges chosen by joint ballot of both houses of the Assembly; in those from the general court shall consist of the judges of the high court of chancery, and the said assistant judge; in those from the court of admiralty, and in those adjourned into the said court from either of the others before decision, on account of difficulty, shall consist of all the said judges, in which court of appeals the high court of chancery shall take precedence, and next to them the judges of the general court, three-fourths of the members who are to be of the said court in any case shall be sufficient to proceed with business, the judges also of that court from which the cause is removed after decision, shall attend at their places in the hearing thereof, and shall there deliver the reasons for their judgment. Every judge, before he enters upon the duties of his office in said court, shall, in open court, take and subscribe the oath of fidelity to the Commonwealth, and take the following oath of office to wit:..." (2)

"Whereas by act constituting the Supreme Court of Appeals, the said court is to be held at such place as the legislature shall direct, and no place hath as yet been appointed for that purpose, Be it therefore enacted by the General Assembly, That for the term of one year after the end of the present session of the Assembly, and from thence to the end of the session next ensuing, the said court shall be held at the capitol in the city of Williamsburg." (3)

By these two acts the legislature had established our first supreme court. As stated in the first act, the court was composed of judges from three different courts— the general court, the high court of chancery and the court of admiralty. By the second act the court was to hold its sessions at the state capitol.

2. Hening's Statutes at Large, Vol. IX., p. 522
3. Ibid., p. 539
The first session of the court was held in the city of Williamsburg on Monday, August 30, 1979. (4) The court consisted of judges Pendleton and Wythe from the high court of chancery; judges Waller, Cary and Curle from the court of admiralty; and judge Blair from the general court. There were five judges absent from this first session. These included judge R.C. Nicholas from the chancery court; and judges Tazewell, Lyons, Carrington and Deñdrige from the general court. Just why those five were not present is not known, since no reason for their absence was given in the records of that session. (5)

Before we continue with a discussion of that first session it is well that we pause for a moment to see what manner of men these were who sat at that session.

Justice Pendleton was the president of the court. He was the son of respectable but poor parents. His father was too poor to give him more than an English education. Under the supervision and instruction of Mr. Robinson, who had taken keen interest in the young man, he had learned the law, admitted to the bar, and had established for himself a substantial practice. He was for a long time a member of the

4. Hurst and Brown, Annotated Digest of the Virginia Reports 1730-1896, p. 85
5. Ibid., p. 81
6. Ibid.
7. Ibid., p. 82
House of Burgesses, in which he served as a member of the Committee of Correspondence in 1773. He was a member of the first Continental Congress in 1774, and later served as president of the convention which met in Richmond in 1775. He was the president of the Virginia Constitutional Convention which met in 1776. He was appointed to the court of chancery which made him a member of the first supreme tribunal. He declined an appointment to the United States District court, preferring to remain on the Virginia bench, over which he presided as president until his death. 

Judge Wythe was born in Elizabeth City County in 1726. His father died before he finished school, and it was through the efforts of his mother that he acquired his education which consisted in large part in the study of Latin and Greek. He later studied law under an uncle. The family estate had gone to the eldest of the sons who had shown little inclination to aid or assist young George. Due to some reason, George became careless and dissipated very much until he had reached thirty years of age. After his marriage he began a more sober and energetic life. He soon became

8. Ibid, p.14-15
successful at the bar. He was a member of the House of Burgesses; a delegate to the Constitutional Convention 1775-1776; with Jefferson revised the laws of Virginia; became speaker of the House of Delegates; the judge of the high court of chancery, and thereby, of the first supreme court.

Judge John Blair was a gentleman of fortune and strong family connections. He studied at the Temple in London, where he took the barrister's degree. He returned to this country, practiced in the general court at Williamsburg; a member of the Constitutional Convention in 1776; chief justice of the general court and thereby a member of the new supreme court. He resigned in 1780; and later became a justice on the Supreme Court of the United States under an appointment by President Washington.

Judge Waller came to the supreme court well qualified for his duties. He was from a good and influential family. He had been the recipient of a good legal training. After serving as clerk of the general court he was made judge of that court, and thereby becoming a member of the court of appeals.

9. Ibid., p.18
10. Ibid., p.19
11. Ibid., p.22
The above named men were the most conspicuous personalities of the court at that time. At the first session the court occupied itself in formulating rules and methods of procedure. Our interest in mainly in the first session in which cases were argued before the tribunal. Our wishes are granted in the case of Commonwealth vs. Caton, et al., which was a precedent-establishing case. This case was decided by the court in November, 1782. The history of the case is briefly as follows:

The case came to the Supreme Court by adjournment from the general court. The case involved three men- John Caton, Joshua Hopkins and John Lamb- who were sentenced to death for treason by the general court under an act of the legislature concerning that offense in 1776, which had taken from the Executive the power to grant pardons in such cases. The House granted a pardon while the Senate had refused to vote with the House. The Attorney-General appealed the case back to the general court from which it had come to the Supreme Court. The question involved, therefore, was the constitutionality of an act of the legislature.

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12. Call, Virginia Reports, Vol.IV, p.5
13. Ibid., pp. 9-10
Judge Wythe delivered the opinion of the court, which, for the first time in history, declared an act of the legislature unconstitutional. I quote from part of that decision:

"...if the whole legislature, an event to be deprecated, should attempt to overlap the bounds prescribed by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the constitution, will say to them, here is the limit of your authority, and hither shall you go and no further." (14)

Sitting with judge Wythe were judge Pendleton, president of the court, and judges Lyons, Carrington, (15) Danridge, Mercer and Carey.

It would be difficult for us to appreciate the courage and fearlessness of that court in rendering such a decision. There were no precedents to follow, and in this decision the court ran a grave risk of probable dissolution. What more assumption of power could be made than this? This court, established by the legislature, had now clothed itself with the power to veto an act of that Assembly. It is impossible to over-estimate the importance of this decision, and it can be fairly safe to say that it greatly influenced the decision of Chief-Justice

14. Hurst and Brown, p.84
15. Hurst and Brown, p.83
Marshall in the famous case of *Marbury vs. Madison.*

The court had established for all time the supremacy of the judiciary over either of the other two branches of government. It had set the tempo for the entire nation.

The Court of Appeals remained the same in organization until 1788 when the legislature organized it as a separate tribunal of five judges, elected for life. By that act it was declared that:

"Be it enacted by the General Assembly, That the Court of Appeals shall consist of five judges, who shall be chosen from time to time by joint ballot of both houses of the Assembly, shall be commissioned by the Governor, and shall, respectively, continue in office during good behavior." (16)

The judges comprising this newly organized body included judges Penelope, Lyons, Blair, Carrington and Fleming.

For the next two decades there were no changes in the organization of the court. It was not until 1807 when the legislature passed an act to reduce the number of judges to three—do we have any changes other than in personnel. Judge Penelope died in 1803 after twenty-five years service on the court, during which time he was the strongest figure. He was succeeded by St. George Tucker. Judge Blair left the bench in 1790 and was replaced by Judge Mercer.

16. Hening's Statutes at Large, Vol. 12, p. 764
17. Hurst and Brown, p. 80
who resigned in 1794. He was succeeded by judge Henry Tazewell who served only one year, resigning in 1794 who was succeeded by one destined to be one of the greatest figures ever to sit on the court—Judge Spencer Roane. Judge Paul Carrington died in 1807 to be succeeded by Francis F. Brooke. The act of the legislature of that year reduced the court to four members until there should be a vacancy, and then to three. Such a vacancy occurred in 1809, by the death of judge Peter Lyons.

Before going further it is well that we review briefly the careers of Judge Roane and Judge Tucker. The former was born in Essex county, April 4, 1762. He was educated at William and Mary College, and studied law under George Wythe. He practiced for a while and then entered politics; served in the legislature for a number of years. In 1789 he was appointed to the general court, coming to the court of appeals in 1794.

Judge Tucker was born on the island of Bermuda. He came to Virginia at an early age; attended William and Mary College, taking his law at the same place. He fought with gallantry in the revolution. He was a delegate to the Annapolis convention in 1786. In 1788 he was appointed to the general court and in the same

18. Hurst and Brown, p. 81
20. Hurst and Brown, p. 81
year he became professor of law at William and Mary. In 1803 he published five volumes of "Blackstone's Commentaries", annotated, under the title of "Tucker's Blackstone." Few men have come to the bench as well prepared as Judge Tucker, and his service on the bench was a credit to that body, as well as to the entire judiciary. (22)

Thus the court stood in 1809 with three members. But it was not destined to remain as such any length of time, for on January 9, 1811, the legislature passed an act restoring the membership back to five members. That act also provided definite salaries for the judges of the court. I quote from that act:

"Be it enacted by the General Assembly, That so much of the act entitled "An act, to amend an act, reducing into one act the several acts concerning the court of appeals," passed January fourteenth, one thousand eight hundred and seven, which reduces the number of judges to three; and so much of the said act as declares that the sum heretofore appropriated for payment of the five judges of the court of appeals, shall be equally divided among three judges, when that court shall be reduced to that number agreeably to the act, shall be, and the same is hereby repealed."

"And be it enacted; That the court of appeals shall hereafter consist of five judges; any three of said judges shall constitute a court; the said court shall commence its sessions on the first day of March next, and its sitting shall be permanent if the business of the court requires it...." (23)

"The salary of each judge shall be twenty-five hundred dollars annually...." (23)

22. Hurst and Brown, p. 73
For over two decades the activities of the court had been very quiet. The court had transacted its business with the least possible excitement. But peace was not to remain long; a case decided in the general court at Winchester in 1794 involving land claims of part of the estate of Lord Fairfax. Why the case was so long in getting before the court of appeals is not explained, but in 1810, while the membership of the court was only three, this case came before the court under the title of Hunter vs. Fairfax's Devisees. The controversial points up to this time were:

Lord Fairfax had conveyed 300,000 acres to his nephew, T.B. Martin, who conveyed them to Fairfax in fee. The Virginia legislature had passed an act of confiscation of the property of aliens. Denny Fairfax, Lord Fairfax's heir, was a British subject; he had always lived in England up to the time of his death in 1803.

John Marshall and his brother, James Mc. Marshall, had bought Denny Fairfax's claims to the estate in the Northern Neck of Virginia.

John Marshall had agreed to the act of compromise, passed by the legislature, but later, realizing to what full effect the provisions of Jay's Treaty could be used, had (so the Supreme Court of

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24. G. Myers, History of the U.S. Supreme Court, p. 270
Appeals said) violated, if not repudiated it, in (25) bad faith. Judge Roane delivered the opinion of the court which reversed the decision of the lower court. He severely indicted the actions of John Marshall and his brother, wherein he stated:

"I consider the compromise as having been deposited with this court for the purpose of settling all the causes embraced thereby, according to the provisions thereof; and I can never consent that the appellees after having got the benefit thereof, should refuse to submit thereto, or to pay the equivalent; the consequences of which would be that the Commonwealth would have to pay to the appellant (Hunter) for the land recovered by him. Such a cause cannot be justified on the principles of justice or good faith." (26)

So far this was only another case in the long history of the court. No one could foresee at that time what was to come later. But the appellees were not to be defeated. They saw a possible opening whereby they could get the case before the Supreme Court of the United States, where they anticipated better results. Under the form of Fairfax's Devisee vs. Hunter's Lessee the case came before that court in February, 1813; and a decision was handed down. Justice Marshall was absent from the court at that time and Justice Story delivered the opinion in which the court reversed the decision of the (27) court of appeals of Virginia. In that decision

25. G. Myers, History of U.S. Supreme Court, p.271
27. G. Myers, p.272
Justice Story decided that although Denny Fairfax was an alien enemy at the time of Lord Fairfax's death, he nevertheless had legitimately inherited the estate under Lord Fairfax's will. He held further that the testament could not be divested on the grounds of alienage, except by official act, or its equivalent. A general act would not suffice for confiscation. And, since no proceedings of escheat had been taken against the estate before the adoption of Jay's Treaty in 1794, therefore the feasible title in the alien, Denny Fairfax.

To Virginians, this was a vast assumption of powers by the Federal Government, but it was not until a year later that the full import of the decision had its effect. This delay was probably due to the war with Great Britain which absorbed the entire attention of the nation for the time being. But in 1814, the Court of Appeals, sitting at Richmond, reiterated to the decision of the United States Supreme Court. The Supreme Court of Appeals of Virginia defied the mandate of the national tribunal in the Fairfax case, and declared that in presuming to pass upon an appeal upon purely State litigations, the Supreme Court of the United States

28. Ibif., p. 272
had usurped powers. There was an unusual situation of one supreme tribunal denouncing another. Point by point the judges of the Supreme Court of Appeals of Virginia reviewed the history of the case, and left no stone unturned in exposing the legal technicalities employed to recover the estate. But they dealt mainly with showing that the Supreme Court of the United States had overstepped its Constitutional powers in even hearing the case after it had been decided by the highest tribunal in the State. The judges of the Virginia Supreme Court of Appeals both delivered a collective opinion and individual remarks. This was the collective opinion of the judges, as entered on the records:

"The court is unanimously of the opinion that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the act of Congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this case was improvidently allowed under the authority of that act; and that obedience to its mandate be declined by this court." (31)

The individual pronouncements follow:

Judge Cabell: "Upon every view of this subject which I have been able to take, I am of the opinion that the writ of error was improvidently allowed, and that this court should decline obedience to the mandate of the Supreme Court of the United States." (32)
Judge Roane: "My conclusion consequently is, that everything done in this cause, subsequently to the judgment of reversal by this court is corem non judice, unconstitutional and void, and should be entirely disregarded by this court...." (33)

Judge Fleming: "...it is inexpedit for this court to obey the mandate of the Supreme Court of the United States." (34)

Judge Brooks severely criticized the opinion and declared that it was in violation of the Constitution of the United States. (25)

Here was an unparalleled situation. The Virginia Supreme Court had taken grave risks in making such an answer to the nation's highest tribunal. It was indeed a novel case. The Virginia judges had held themselves to no restraint in their denunciations of the United States Supreme Court. What would be the outcome?

The answer to that question was given in 1816 after the case had gone back to the Supreme Court of the United States. Again Judge Story delivered the opinion, in which he held that the Court had acted within its Constitutional powers in its previous decision in 1813. Instead of rebuking the Virginia judges, Justice Story went out of his way to say suave things about them, but confined his decision to upholding the previous ruling of the Court. He held that the Constitution gave the Federal Government jurisdiction in all matters wherein the validity of a treaty, a statute of the United States was involved.

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33. Ibid., p.54
34. Ibid., p.58
35. Ibid., p.25
regardless of what State the litigation was entered.

Thus ended one of the most outstanding cases in Virginia history, even in the nation's history. Although the Virginia Supreme Court of Appeals lost its case, the final analysis of the case was only a more pronounced evidence of the independence of the judiciary, previously laid down by the Court of Appeals of Virginia thirty-four years prior to that time.

The next sixteen years was the calm after the storm. The court continued to function as a five-judge tribunal, without any alterations by either the Constitution or the legislature.

But the Constitution of 1830, and the subsequent legislature which met in 1831 imposed new provisions upon the court.

The Constitution provided for a third court of appeals, to be appointed after the termination of the legislature of 1831. It provided that the newly elected members should remain in office during good behavior; that they should be elected by joint vote of the two houses of the legislature; that they should have fixed and adequate salaries which could not be diminished during their continuance in office; and that the legislature was empowered with authority

36. G. Myers, p. 281
37. The precedent established in the case "Commonwealth vs. Caton et. al."
to impeach any member or members of the court.

On April 8, 1831, the legislature passed an act as follows:

"Be it enacted by the General Assembly, That the court of appeals from and after the termination of the present session of the assembly, shall consist of a president and four other judges, to be chosen and commissioned in the manner prescribed by the Constitution, and the office of president shall be so far distinct from that of the other judges of the said court, that vacancies occur in the said office of president shall be filled by particular appointment and commissioned thereto. The president and other judges of the court of appeals, shall, before entering office, take the several oaths, now required by law to be taken by any judge of the court of appeals; which oath may be taken before the Governor or Council, or any court of record, or any justice of the peace; and a certificate thereof being obtained shall be entered on the record of the said court of appeals. Any three of the five judges shall constitute a court, and in the absence of the president, the oldest judge in commission present, shall be the presiding judge.

"The said court shall hold a session annually at Lewisburg, in the county of Greenbrier, to commence on the first Monday in July, and to continue ninety days, unless the business be sooner dispatched, and to be divided into such terms as the court shall from time to time direct and appoint, for the hearing and determining of such cases which shall or may be brought to the court, by appeal, writ of error, or supersedeas, from or to decrees, judgments, sentences or orders, of the courts held in those counties of the Commonwealth which lie west of the blue ridge mountains; and another session at the capitol in the city of Richmond, to continue one hundred and sixty days, unless the business be sooner dispatched, and to commence at such times and to be divided into such terms as the court shall or may from time to time direct and appoint, for the hearing and determining of all cases which shall come to the court in any one of the methods mentioned above, from those counties of the Commonwealth which lie east of the blue ridge mountains." (39)

38. American Charters and Constitutions, Vol. 7, p. 3628
That act continues with a determination of the manner of appointing clerks, specifying their duties and providing for their salaries. In the conclusion of the act the salaries of the judges are adjusted; giving the president of the court a salary of twenty-seven hundred and fifty dollars annually, and twenty-five hundred dollars annually for the associate judges; and allowing each judge four dollars for every twenty miles that he is compelled to travel in the performance of his duties.

By this act it was evident that the complexity of the court was increasing. Its activities were growing, and it was necessary that provisions be made whereby the court could function with the greatest possible efficiency. In the following year this fact was more clearly evidenced when the legislature passed another act on March 15, 1832, establishing a special court of appeals. This was the first special court of appeals that we had, and has since then been in effect whenever the business of the regular court became too heavy for that court to handle with care and speed. That act follows:

"Be it enacted by the General Assembly, That whenever a majority of all the judges of the court of appeals are interested in any cause, depending in

40. Ibid., p.39
41. Ibid., p.40
"said court, or disqualified from sickness, or otherwise, from sitting therein, that fact shall be entered of record and certified to the general court, together with the names of the parties, and the court whose decision is to be examined, and the place of the session of the court of appeals where the same is depending; of which certificate, a copy shall be transmitted to the clerk of the general court, to be laid before that court at its next session: Whereupon it shall be the duty of that court, to designate and appoint, so many who are not interested in such causes, and who did not render the judgment or decree applied from, as, together, with the judges of the court of appeals not so interested, will make the number five; who, or any three of whom, shall constitute a special court of appeals for the trial of such cases; or if all the judges of the court of appeals are interested, then five at least shall be appointed, who, or any three of whom, shall constitute a special court for such trial." (42)

The act stated further that the compensation for members of such a court should be five dollars a day, with an allowance of four dollars for every twenty miles that any judge or judges were compelled to travel to execute his duty. The act specified also that the supreme court of appeals might also appoint the special court in the event the case at question permitted the same. (43)

From 1832 the court of appeals continued its work uninterrupted until 1850, when, as a result of that wave of democracy which swept over the country during Jackson's administration, and continued to spread, the new State Constitution of that year subjected the court to the sweeping winds of that movement. By that Constitution the judges of the court of appeals ceased to be appointed, and were henceforth to be elected by popular vote.

42. Ibid., p. 41
43. Ibid.
In section eleven of that Constitution dealing with the court of appeals, the court was to be chosen as follows:

"The supreme court of appeals shall consist of five judges elected by the people; and three of whom shall constitute a court." (44)

Accordingly, the legislature provided for the election which took place in 1852. The judges elected to the court at that time were judges John J. Allen, William Daniel, R.C.L. Moncure, George H. Lee, and Green B. Samuels. While the new court consisted of men of the highest callibre and qualifications, it was nevertheless the product of that period in our history when democracy reigned supreme. This method of election of the court was a wholesome theory and entirely in keeping with our ideal of government, but it was a dangerous method when unscrupulous politicians should come on the scene.

The Constitution of 1850 also made provisions for the special court of appeals, and defined the jurisdiction of the supreme court of appeals, limiting its original jurisdiction to cases of habeas corpus, mandamus or prohibition.

44. American Charters and Constitutions, Vol. 7, p. 3845
45. Acts of the General Assembly 1850-51, p. 29
46. Hurst and Brown, p. 81
47. American Charters and Constitutions, Vol. 7, p. 3846
For the next eight or nine years the business of the court was transacted uninterruptedly. When the War of Secession came the court was affected, but not to the extent that one would at first think. When West Virginia proclaimed its sovereignty and adopted its Constitution it became necessary to alter the location for the sitting of the court of appeals. Had there been no war it is probable that Virginia would have revised her Constitution immediately; but the war consumed all the energies of the time, and Virginia met the new situation by simply holding sessions of that court in Richmond alone. No legal action was taken to change the court in any way, except that the court held its sessions in the State capitol instead of its previous quarters.

The Constitution of 1864 did, however, make several changes in the court. First of all the method of choosing the judges was reverted to that previously practiced whereby the persons were commissioned by the Governor and subject to the approval of the General Assembly.

A second change that was made was a reduction in the number of judges from five to three, with any two of them constituting a court.

49. American Charters and Constitutions, Vol. 7, p. 3865
50. Ibid., p. 3867
That Constitution also made provision for the special court of appeals, providing that said court should consist of not less than three nor (51) more than five judges.

These changes in the court were the product of the War. And when the armistice was agreed upon in 1865, with the exception of these provisions mentioned above, the court was functioning under the authority of the code of 1860, section one hundred and sixty; which code was enacted as an emergency measure at that time. Now, that the war had closed, it was necessary to adjust the court to the new conditions resulting from the War. Consequently, the legislature, in 1866, set about to do this. Under an act, dated March 3, 1866, it was provided that:

".....That the first and sixth sections of the code of 1860 be amended to read as follows:
"The judges of the supreme court of appeals shall appoint one of their number as president of the court."
"The supreme court of appeals shall be organized within sixty days after the judges thereof shall be commissioned. The said court shall hold its sessions in the city of Richmond, in the capitol, or in any such other buildings as may be provided by the government." (52)

51. Ibid., p. 3868
The legislature of 1866 went further in its efforts to reconstruct and included a provision repealing the entire section one hundred and sixty-five
from sub-section seven to the end of the chapter. And in an effort to clarify the cases pending on the docket of the court by the following clause:

"...There shall be placed on the docket of the Supreme court of appeals, all causes which were depending in the former court of appeals on the seventeenth of April, eighteen hundred and sixty-one, and not disposed of or determined by the court of appeals, sitting under the secession government." (54)

Reconstruction had begun in the South, and the court of appeals was naturally called upon to do its share of the undertaking. It was natural, therefore, that the work of the court would greatly increase under such circumstances, and it soon became evident that the court needed a larger personnel. The new Constitution of 1870 restored the number of judges from three back to five, with the same provision as to what should constitute a quorum as the Constitution of 1850. The judges were to be elected by joint ballot of the two houses of the General Assembly. And it is interesting to note that the terms of service were limited to twelve years instead of the life appointment. A special court of appeals was provided for. The jurisdiction of the supreme court

53. Ibid., p. 174
54. Ibid., p. 175
was limited to appellate jurisdiction only, except
in cases of habeas corpus, mandamus and prohibition.
And finally, it was determined that the court of
appeals was to meet at two or more places in the
State, to be fixed by law.

Accordingly, the General Assembly passed an
act complying with the Constitutional provisions,
which determined that the three places for the
sessions of the court to be held would be at
Staunton on August tenth for a period of sixty
days, unless the business of the court was dispensed
with sooner; at Wythville on June tenth for the same
period, and under the same conditions; and at
Richmond on November first, January fifth, and
March fifth for a term of one hundred and twenty
days, unless the business of the court be sooner
concluded.

These changes in the court of appeals
were of great assistance to the court in handling
the constantly increasing number of cases before the
court. It facilitated greater speed and efficiency
in the work of the court. It is interesting to note
here that the court was never to have less than five
members after this date. And the places selected
wherein the court was to hold its sessions have
remained the designated locations for its sessions

55. American Constitutions and Charters, p. 3866
down to the present.

The next thirty years the court enjoyed complete freedom from legislative changes. There were changes (57) in the personnel from time to time, but in the main, the activities of the court were uninterrupted.

The Constitution on 1902, like all the others in the history of the State, carried provisions which modified certain features of the court of appeals. Like other Constitutions of the State, it gave the court original jurisdiction in cases of habeas corpus, mandamus and prohibition, and no further. And the remainder of its jurisdiction must be appellate jurisdiction. However, it was more explicit in defining the appellate jurisdiction than were any of the previous Constitutions. It stated:

"...it shall by virtue of this Constitution, have appellate jurisdiction in all cases involving the Constitutionality of a law as being repugnant to the Constitution of this State or of the United States, or involving the life and liberty of any person." (58)

It retained the clause limiting the terms of the judges to twelve years each. In providing for the special court of appeals this Constitution provided that at least one or more members of the regular court of appeals must be on the special court. This clause, so far as the writer is able

57. Roster of the judges in the appendix of this paper.
58. American Constitutions and Charters V.1. 3921
59. Ibid.
to learn, has never particularly affected the make-up of the special court of appeals. The only justification for the provision would be that it serves as a safeguard for keeping the special court equipped with qualified judges who are familiar with the order and procedure of the court of appeals.

Since there were no sharp changes in the court as a result of that Constitution, there was no need for any additional legislative enactment concerning the court, and the legislative records of that year contain no act regarding that court.

But while that Constitution necessitated no additional legislation regarding the court of appeals, it was the basis for a most interesting case which came to the court that same year. The case involved the validity of that Constitution itself. I quote the circumstances of the case in brief as it was recorded in the court reports.

The case came to the court of appeals under the title of *Taylor vs. Commonwealth*.

"An indictment was formed against the plaintiff in error, charging him with house-breaking with intent to commit larceny. The plaintiff in error pleaded guilty to the charge, and thereafter, with the consent of the attorney of the Commonwealth, entered of record, the court, without the consent of the plaintiff in error, proceeded to hear the case.

60. Acts of the General Assembly 1902
"without the intervention of a jury, and upon such hearing adjudged the person guilty of a felony as charged, and sentenced him to confinement in the State Reformatory for one year; or if the the defendant so desired, in the State Penitentiary for one year. The contention is: that the court had no authority or power, to adjudge the plaintiff in error guilty of a felony, and to sentence him without the interference of a jury. It is conceded that the proceeding complained of was in strict conformity of section eight, Article I, of the new Constitution of the State of Virginia, ordained and promulgated by a Constitutional Convention assembled in Richmond during the years 1801-'02; but it is insisted that this Constitution is invalid, and without force or effect in the State; that the Constitution adopted in the year 1869, which provides in section ten, Article I., that in all criminal prosecutions a man hath a right to a speedy and impartial trial by a jury of his vicinage, without whose unanimous consent he cannot be found guilty, is the only legal and valid Constitution existing throughout the State of Virginia; that the provisions of section ten, Article I., thereof, have never been legally modified, and that the plaintiff in error was entitled to have his case heard and determined in accordance with these provisions." (61)

These were the facts of the case and the arguments of the plaintiff in error. The court of appeals, after a careful review of the case, sustained the judgment of the lower court. In its opinion, the court of appeals called attention to the fact that the Constitution of 1802 was framed by representatives elected by the people; and that at the time of the adoption of that Constitution no organized group contested the government which had been sworn in under the new Constitution, and that said government had been in force a year without any opposition anywhere in the State. And therefore,

61. Virginia Reports, Vol. 101, p. 629
the court could not rule invalid a Constitution
which it had already sworn to uphold and enforce,
and which had been actually accepted by the people
by the fact that the government under that
Constitution had been in force for a reasonable
62
length of time.

This was a very unusual case. The court of
appeals did not actually rule on the validity of
the new Constitution, yet in actual effect it did.
While it did not rule directly upon whether or
not the Constitution was the only existing
Constitution in the state, its refusal to recognize
the argument of the plaintiff in error had the effect
of declaring that Constitution in force.

Again the court of appeals enjoyed another
period of approximately twenty-five years in
which there were no legislative or constitutional
changes made in the court. In 1928 the amended
Constitution carried provisions which made several
changes in the court. Section eighty-eight of
that Constitution increased the number of judges from
two divisions of not less than three judges each, as
the court may from time to time determine, but
requiring that all decisions of the branch courts
62. Ibid.
be concurred in by a majority of the entire court before going into effect, in any case there is any dissention, and that no decision of any division shall become the decision of the court unless concurred in by at least three judges; and no case involving the construction of the Constitution of this State or of the United States shall be determined except in full session of the court, any four judges of which may constitute a quorum; and further, that no law can be declared repugnant to the Constitution of this State or of the United States unless at least four judges of said court concur in that opinion.

The amendments further decreed that judges of the supreme court of appeals shall have the title of justice. It further declared that the judge longest in continuous service shall be chief justice; and in the event that two or more judges shall have served for the same period, the senior in years shall serve as chief justice.

In section ninety the amended Constitution declared that:

"when a judgment or decree is reversed, modified or affirmed by the Supreme Court of Appeals, the reason therefor shall be stated in writing and preserved with the records of the case."
This was the first time in the history of the court that it was made mandatory that reasons be made in writing and preserved in the records for any decision made by the court in which a judgment was reversed or affirmed.

The present judges of the court are:


What the future of the court will be remains a subject for debate. Perhaps the future will bring equally as interesting and important cases as the past has witnessed. Perhaps no state in the union can hold claim to a more illustrious court than the Virginia Supreme Court of Appeals. Virginia can be justly proud of her highest tribunal; for its record is one great service to the Commonwealth and to the Nation. It judges have been learned men of the highest integrity, and its decisions have been landmarks in the judicial history of the Nation.

66. Virginia Reports
- APPENDIX-

The following is a roster of the judges of the Supreme Court of Appeals. "P" after the name indicates those who have served as president of the court up to the time at which the title president was changed to chief justice, which title will be indicated by "C.J." after the name of those who have served in that capacity. The names are given in the order in which they served on the court, but the dates of their terms will be omitted due to the fact that for a large number of them there is no exact record of the time they served. To attempt to guess at the terms of those whose terms are doubtful would only confuse, and the author would run the risk of making errors. Therefore, the writer thinks it best that these be omitted.

Edmund Pendleton, P
George Wythe
Robert C. Nicholas
John Blair
Paul Carrington
Peter Lyons, P
William Fleming, P
Bartholomew Dandridge
James Mercer
Henry Tazewell
Benjamin Waller
William R. Curle
Richard Cary
James Henry
John Tyler
Richard Parker
Spencer Roane

67. These names have been secured in part from Hurst and Brown's Annotated Digest of the Virginia Reports 1730-1896, and partly from the Virginia Reports.
St. George Tucker
Francis Brooke, P
Leabney Carr
William H. Cabell, P
John Coulter
John W. Green
St. George Tucker, P (68)
William Brackenbrugh
R. H. Perker
Robert Stanard
John J. Allen, P
Briscoe G. Baldwin
William Daniel
R. C. L. Monroe, P
George H. Lee
Crean B. Samuels
William J. Robertson
William T. Joyner
Lucas P. Thompson
Alexander Rives
Joseph Christian
Waller R. Staples
F. T. Anderson
Wood Boulten
E. C. Burks
L. L. Lewis, P
T. T. Fauntleroy
R. A. Richardson
Drury A. Hinton
James P. Keith
John W. Riley
John A. Buchanan
R. H. Curwell, P
George V. Herring, P
Archer A. Chelgar
Stafford G. Whittle, P
Joseph L. Kelly, P
F. W. Sims, P
R. R. Frantiss, P
H. P. Burks (69)
Edward W. Saunders
Jesse F. West
Preston W. Campbell, C. J.
R. H. L. Chichester
Henry W. Holt
Louis S. Epes
Edward W. Hudgins
Herbert B. Gregory
George L. Browning
Joseph W. Chinn
Jonh W. Eggleston (70)

68. Justice Tucker resigned from the court and was later reappointed.
69. Virginia Law Register, Vol. V.
70. Judge Eggleston was the 57th judge appointed to serve in this court.
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VII. Virginia Reports.

VIII. Constitution of Virginia as Amended, June 19, 1928.

IX. Gustavus Myers, History of the Supreme Court of the United States, 1919; Chas.H.Kerr and Company, Chicago, Illinois.