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The Virginia Special Court of Appeals: Constitutional Relief for an Overburdened Court

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THE VIRGINIA SPECIAL COURT OF APPEALS:
CONSTITUTIONAL RELIEF FOR AN OVERBURDENED
COURT

The elimination of delay in the trial of cases and the prompt dispatch of court business are prerequisites to the proper administration of justice.¹

INTRODUCTION

The evils inherent in a delay of justice are, in many instances, the equivalent to a denial of justice. The problem of delay in the adjudication of cases before the highest tribunals of many states is one of the most pressing problems facing the Bar today. One of the most paramount causes for this problem has been the special emphasis of the United States Supreme Court in the last decade in relation to its vehement protection of fundamental freedoms and individual rights. Certain decisions by the Supreme Court, especially those in the field of criminal law,² have given rise to much litigation since the ultimate effect of these cases has been to change the rules of law in criminal proceedings which existed in many states.

In Virginia, the impact of these opinions is exemplified by the sharp rise in the number of habeas corpus petitions filed by prisoners seeking their release.³ As a result of these petitions being filed, each one must

1. *Sweeney v. Anderson*, 129 F.2d 756, 758 (10th Cir. 1942).

2. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *White v. Maryland*, 373 U.S. 59 (1963) (Sixth Amendment right to counsel made applicable to the states by virtue of the Fourteenth Amendment); *Beck v. Ohio*, 85 S.Ct. 223 (1965); *Linkletter v. Walker*, 85 S.Ct. 1731 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment protection against unreasonable searches and seizures incorporated into the Fourteenth Amendment and applicable to the States).

See also, *Griffin v. California*, 85 S.Ct. 1229 (1965); *Malloy v. Hagan*, 378 U.S. 1 (1964) (Fifth Amendment protection against self-incrimination made applicable to the states); *Pointer v. Texas*, 85 S.Ct. 1065 (1965) (Eighth Amendment right of confrontation made applicable to the states).

3. Harp, *VIRGINIA LAW WEEKLY, DICTA*, Vol. 19, No. 6 (1966). "During the past fiscal year over 500 new cases were filed by Virginia prisoners, and this is an increase of more than 100 over the previous fiscal year. While statistics can be misleading, the foregoing clearly indicate the tremendous increase in the number of cases filed, tried, briefed, and argued." This statement demonstrating the sharp increase in the number of habeas corpus petitions was made by the Assistant Attorney General of Virginia, Reno S. Harp III.

be processed by the Supreme Court of Appeals since that court has original jurisdiction over habeas corpus cases.⁴ The court must either hear the petitions or remand them to a lower court. This, in effect, represents a tremendous administrative workload which the Supreme Court of Appeals must handle in addition to its normal annual caseload.

It should be emphasized, however, that the recent increase in habeas corpus cases is not representative of the total problem involved; that is, the overburdened docket of the Supreme Court of Appeals. Although the habeas corpus cases have contributed substantially towards the present problem, they are by no means the sole cause. For many years in Virginia, there has been a steady increase in appellate litigation, both in civil and criminal cases. This development has been accompanied by an increasing delay in the processing and hearing of cases before the High Court.⁵ This delay can in many instances cause undue expense and a denial of justice to litigants.

Remedial measures in this area have been proposed on many occasions by members of the Bars of several states which have experienced a similar increase in litigation in their courts. These measures have ranged anywhere from increasing the number of justices and consolidating their highest tribunals,⁶ to interposing special intermediate appellate

4. VA. CONST. art. 6, § 88 (1902) (as amended). "The Court shall have original jurisdiction in cases of habeas corpus, mandamus, and prohibition, but in other cases in which it shall have jurisdiction, shall have appellate jurisdiction only."

5. See, *The Business of the Supreme Court of Appeals: Statistical Summary, 1960-65*, 7. WM. & MARY L. REV. 267, 269-274 (1966). From TABLE I, ANNUAL STATISTICS ON BUSINESS OF THE COURT, it can readily be seen that although the total petitions filed in the Court has increased by 79% over 1961, the seven justices of the Court have only been able to handle a set amount of business on the average. It appears, however, that the Court has exerted a superhuman effort in attempting to cope with their ever-increasing docket. However, as TABLE II, FINAL DISPOSITION OF CASES DOCKETED BY TERMS OF COURT reflects, it appears that the Court is able to dispose of roughly 50% of the petitions filed in a year. It then becomes apparent that the delay inherent in the present Court in hearing a case from the date of the submission of the petition is over one year.

For a further breakdown of the principal business of the Court of Appeals, see TABLES III and IV, *ibid.*, which concern the principal issues for adjudication before the Court and the number of opinions written by each justice over this period.

6. See, e.g., Karcher, *New Jersey Streamlines Her Courts: A Revival of "Jersey Justice"*, 40 A.B.A.J. 759 (1954). Although this revision in the New Jersey judicial system was made in 1954, it reflects the demands for modernization which were needed at this time to prevent undue delay in the hearing of cases. New Jersey, prior to this revision, had a tripartite system of supreme courts which included a Supreme Court, a Court of Chancery, and a Court of Errors and Appeals. As a result of the revision, these courts were abolished in favor of one Supreme Court having seven justices and

courts of limited jurisdiction,⁷ and, finally, to completely revamping their entire judicial structure through constitutional amendments.⁸

This problem has drawn considerable attention in Virginia due primarily to the tremendous influx of habeas corpus cases and one proposal tendered would set up a special court to hear those cases only.⁹ However, this proposal seemingly fails to take into consideration the fact that the present state of the docket is due to more factors than simply habeas corpus cases. The history of the Supreme Court of Appeals reflects an ever increasing amount of litigation and the problems of an overburdened docket are by no means new.

Rather than merely creating a new court to meet one specific problem area, it might be much more beneficial to provide for a court of general jurisdiction which would not only be an aid in solving the present problems but could also provide the flexibility necessary to counter any and all problems that might arise in the future.

There now exists within the Constitution of Virginia a means of sufficiently alleviating the problem which has beset us again today in regard to an overburdened Supreme Court docket. This method of relief is in the form of a Special Court of Appeals which is and has been waiting in the wings for over a century for just such a contingency and, while possibly not a panacea, it will most assuredly be a step in the right direction. The Special Court of Appeals is provided for in the Constitution as follows:

The General Assembly may, from time to time, provide for a Special

an elaborate system of intermediate appellate and trial courts. The results of these sweeping provisions were that delays in deciding cases were reduced to a fraction of the time previously required and the dockets were reduced to a minimum.

7. See, e.g., Joseph and Land, *A Discussion of the Proposed Intermediate Appellate Court for Maryland*, 25 Md. L. Rev. 300 (1965). The authors herein advocate a proposal adopted by the Maryland State Bar Association which called for an intermediate appellate court to be known as the Court of Special Appeals. This Court's jurisdiction would be strictly limited to criminal appeals.

8. See, e.g., Freedman, *The Organization of a New Judicial Structure for Pennsylvania*, 35 TEMP. L. Q. 373 (1962). Judge Freedman, a U. S. District Judge for the Eastern District of Pennsylvania, is pressing for a complete judicial revamping of the court system of Pennsylvania whereby their present system would be replaced by a system much like the federal system and would contain a Supreme Court, Superior Court, and Court of Common Pleas.

9. Harp, *supra* note 3. "A subcommittee of the Virginia Advisory Legislative Council (VALC) . . . is presently studying this extremely complex and difficult problem. One suggestion which has been made is that a special court could be set up to handle habeas corpus cases."

Court of Appeals to try any cases on the docket of the Supreme Court of Appeals, in respect to which a majority of the judges are so situated as to make it improper for them to set; and also to try any cases on said docket which cannot be disposed of with convenient dispatch. The said Special Court shall be composed of not less than three nor more than five of the judges of the circuit courts and city courts of record, or of the judges of either of said courts, or of any of the judges of said courts, together with one or more of the judges of the Supreme Court of Appeals.¹⁰

However, to better understand the potentialities of this Court as provided for within the Constitution and to determine its application both to the existing problems and to those which may be encountered in the future, we must look first in retrospect at its historical development for over a century and its previous contributions toward the solution of problems quite similar to those existing today.

LEGISLATIVE HISTORY OF THE SPECIAL COURT OF APPEALS: 1776-1851.

The Special Court of Appeals found its birth neither through specific design nor through a provision in the original Constitution of Virginia. It came into existence gradually through amendatory legislation providing relief, in certain instances, for the Supreme Court of Appeals when it was unable to act. The Special Court is in reality the child born of the need of its parent, the Supreme Court of Appeals, and, therefore, to better understand the child, it is necessary to look first to the parent.

The first Constitution of Virginia was drafted by a convention consisting of members of the colonial House of Burgesses which met at Williamsburg, Virginia, on May 6, 1776. Subsequently, this convention adopted the Constitution on June 29, 1776. This document established the original judicial department for Virginia which included a Supreme Court of Appeals, General Court, Court in Chancery, and Court of Admiralty.¹¹ In compliance with the Constitution, the General Assem-

10. VA. CONST. art. 6, § 89 (1902) (as amended).

11. 9 HEN. STAT. (Va.) 117 (1821). In the VIRGINIA CONSTITUTION OF 1776, article 14 provided that "(t)he Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governour, and continue in office during good behavior. In case of death, incapacity, or resignation, the Governour, with the advice of the Privy Council, shall appoint persons to succeed in office, to be approved or displaced by both Houses."

bly established a Court of Admiralty in 1776,¹² a High Court of Chancery¹³ and the General Court¹⁴ in 1777, and a Court of Appeals in 1778.¹⁵ Whereas the other courts were composed of judges assigned specifically as judges of their respective courts, the Court of Appeals was to be composed of a combination of judges of the aforementioned courts.¹⁶ As such, the Court of Appeals would have jurisdiction not only of suits originating there but also appellate jurisdiction over judgments of the General Court, decrees of the High Court of Chancery, and sentences of the Court of Admiralty.

On August 30, 1779, the Court of Appeals convened at Williamsburg, qualified, and commenced to do business.¹⁷ As it was previously shown, the Court as composed, could hear all cases in law and equity even though at this time, law and equity cases were heard by separate lower courts. This, in essence, was the reason why the Court of Appeals was composed of judges of the various courts.

The Court of Appeals continued its business as so constituted until the General Assembly passed an act on January 2, 1788,¹⁸ which established District Courts. The effect of this act was that four additional judges were to be elected by the Assembly in addition to the judges of

12. 9 HEN. STAT. (Va.) 202 (1821). The Court of Admiralty was to consist of three judges to hold their offices during good behavior.

13. 9 HEN. STAT. (Va.) 389 (1821). The High Court of Chancery was to consist of three judges to hold their offices during good behavior.

14. 9 HEN. STAT. (Va.) 401 (1821). The General Court was to consist of five judges to hold their offices during good behavior.

15. 9 HEN. STAT. (Va.) 522 (1821).

16. *Ibid.* The Court of Appeals was to consist of judges as follows: (1) In cases removed from the High Court of Chancery, the judges would be those of the General Court and three assistant judges; (2) In cases removed from the General Court, the judges would be those of the High Court of Chancery and three assistant judges; and (3) In cases removed from the Court of Admiralty, the judges of the High Court of Chancery and the General Court would sit with the Chancery Judges taking precedence.

In a subsequent act of May, 1779 (10 HEN. STAT. (Va.) 89 (1822)), the composition of the Court of Appeals, was simplified to include merely "judges of the high court of chancery, general court, and court of admiralty . . . of whom the first shall take precedence, and the second be next in rank and five of them shall be a sufficient number to constitute the court." *Id.* at 90.

17. See, First Case of the Judges, 4 Call. (8 Va.) 135, 137 (1788). See also, cases of the Judges of the Court of Appeals, 4 Call. (8 Va.) (1779), where it was held that the first Court of Appeals was a legislative court only and it was not necessary for the judges to produce commissions because the act constituting the Court had not directed such commissions to be issued. Therefore, since the judges knew each other to be judges of their respective courts, they qualified themselves, administered the oath, and commenced business.

18. 12 HEN. STAT. (Va.) 532 (1823).

the General Court who were also on the Supreme Court of Appeals. Therefore, the judges of the General Court were assigned certain districts and the judges of the Court of Admiralty and the High Court of Chancery were assigned the remainder of the districts. The judges were opposed¹⁹ to the act on the ground that equity and admiralty judges had gained jurisdiction over common law cases and a greater load was placed on the General Court judges. As a result, the January act never went into operation and another act, passed by the Assembly in December of 1788, repealed the Act of January, 1778, and provided more reasonable requirements in establishing the District Courts.²⁰

This act of December, 1788, called for the addition of three judges to the present nine constituting the General Court. These twelve judges were to hold court in the District Courts for half the year in addition to their regular duties in the General Court. The purpose for the creation of the District Courts was to alleviate congestion in the General Court which had caused unreasonable delays in the adjudication of common law cases,²¹ and this is related to the problem of congestion faced by the courts of the Commonwealth today.

To further implement this first act of December, 1788, a second act of Assembly was passed in December of 1788,²² which concerned the Court of Appeals. This second act provided that the Court of Appeals would hereinafter consist of five judges to be chosen by joint ballot of the Assembly and to be commissioned by the Governor. The importance of this second act was that, finally, the judges of the Court of Appeals would no longer serve in a dual status. Henceforth, those judges so elected would only sit as judges of the Court of Appeals, and no longer would judges of the lower three courts contribute judges to the High Court.

19. 4 Call. (8 Va.) 135, 145-147 (1788). The Court of Appeals vehemently opposed this act and considered it an encroachment upon the judiciary by the legislature. They were especially perturbed by the fact that, though their duties had been increased, their salary had not. As a result, the Court delivered a remonstrance to the Governor to present to the General Assembly at its earliest session.

20. 12 HEN. STAT. (Va.) 730 (1823).

21. *Id.* at 733. See also the Preamble to this act where it was recited as follows:

Whereas the delays inseparable from the present constitution of the general court may be often equal to a denial of justice, the expenses of the criminal prosecutions are unnecessarily burdensome to the citizens of this commonwealth, violations of the laws frequently pass with impunity from the difficulty with which witnesses attend from great distances, and the authority of those laws would be more diffusively promulgated by the establishment of district courts

22. 12 HEN. STAT. (Va.) 764 (1823).

A third companion act, also enacted in December of 1788,²³ provided that the High Court of Chancery would be reduced to one judge who would sit in Richmond. The reduction in judges from three to one was to be accomplished by attrition.

In looking at these three acts together, it becomes evident that the intent of the General Assembly was to relieve the burden on overtaxed judges, to reduce delay encountered by litigants, and to place the judges of the Court of Appeals and the Court itself above all other courts as the Supreme Court in the Commonwealth.

Of most importance to this discussion, however, was a particular section of the second act of 1788 concerning the Court of Appeals.²⁴ This section of the act proved to be the virtual embryo of the Special Court of Appeals. For the first time, the Assembly recognized that there might arise certain cases in which one or more of the judges of the High Court might be interested. Therefore, they provided that if such a case arose, for instance, from the High Court of Chancery and a judge on the Court of Appeals was interested, the case would be heard and final judgment rendered in the General Court. The same in reverse applied if the case came up through the General Court. This, in effect, made those two lower courts into *special* courts of appeals when the High Court was prevented from acting.

This particular section, which provided for substituted special courts of appeals from the two lower courts, proved in reality to be impractical and unreasonable. Therefore, the Assembly, on the 19th of November, 1787, repealed the above section concerning the substituted courts and provided in its place still another solution.²⁵ This solution

23. 12 HEN. STAT. (Va.) 766 (1823). In section V of this act, to alleviate the burden to be imposed upon one judge, it was provided that Commissioners in Chancery could be appointed by the judge to find facts in certain cases and to make reports to the judge.

24. *Supra* note 22, at 765. Section IX of this act provided as follows:

If any one of the judges of the court of appeals be interested in any suit finally decided in the high court of chancery, an appeal if prayed for, shall be to the general court. If such judge be interested in any suit finally decided in the general court, such appeal shall be to the high court of chancery; and in either case the decision of the high court of chancery, or general court, shall be final . . .

25. 13 HEN. STAT. (Va.) 24 (1823). This act of 1789 could most justly be classified as the birthplace of the Special Court of Appeals. Although it was not called by this name in the statute, its history can be traced to this provision and the act of 1788. Although it is not recorded, a need for such a substituted Court of Appeals must have arisen during the ten years immediately preceding the adoption of these two acts for the Assembly seemed to feel it quite necessary to adopt a practical and workable Court of Appeals when that Court became hampered by judges with an interest in a case coming before them.

See also, 13 HEN. STAT. (Va.) 118 (1823). This act passed on October 25, 1790, pro-

provided that so long as a quorum of three of the five judges of the Court of Appeals were not interested, they could sit in judgment of the case without transfer. Also if a majority of the judges were interested in a case arising from the Court of Chancery, the case would be heard by the remaining judges and other uninterested judges from the General Court would be provided until a court of five was seated. If the case arose from the General Court or a District Court and a majority of the judges of the Court of Appeals were interested, the case was to be heard by the remaining judges and, in addition, the remaining seats were to be filled by the judge of the High Court of Chancery and a sufficient number of uninterested judges of the General Court until a quorum of five judges was reached. Finally, if all the judges of the Court of Appeals were interested, the case would be heard by a court of five judges which included the judge of the High Court of Chancery and a sufficient number of qualified judges of the General Court. In all of these cases, the decisions rendered by the Court of Appeals as constituted due to any one of the above contingencies would be final and binding just as if rendered by all the permanent judges of the Court of Appeals. The major effect of this act was that the Court of Appeals would be transplanted only in extraordinary circumstances and, in all others, it would continue to sit along with other substituted judges as the situation demanded. It must be emphasized, however, that this act provided only for the situation in which judges of the Court of Appeals were unable to sit. It did not attempt to solve the problem (which it may be presumed did not appear at this time) of an overburdened docket of the Court of Appeals. It only posed a solution to the problem of interested judges.

In 1791, amendatory legislation was passed²⁶ which attempted to straighten out any possible conflicts in time schedules that might arise by virtue of the fact that the General Court might be sitting at a time when the Special Court of Appeals was called. Therefore, this act simply set a time for the calling of the Special Court which would not

vided for the taking of oaths by the substituted judges whenever they were summoned to sit on the Court of Appeals.

26. 13 HEN. STAT. (Va.) 255 (1823). This act, passed in 1791, was the first in which the Special Court of Appeals was referred to by that name.

See also, 13 HEN. STAT. (Va.) 256 (1823). This act, passed on December 3, 1791, also changed the times for convening the Court of Appeals and the High Court of Chancery so that none of the convening dates of the courts would conflict and there would be no problem for the judges who were summoned to sit on the Special Court as to whether their court was in session.

conflict with any sessions of the General Court. It was to meet, if necessary, for two periods each year; i. e., the twentieth day of June and November. This act also provided that if the judge of the High Court of Chancery was unable to attend a session of the Special Court due to sickness or disability, the court could be convened by the other judges without him. This had the effect of allowing the Special Court in certain instances to be composed strictly of the common law judges of the General Court and the uninterested judges of the Court of Appeals in all suits in both law and equity. In the following year, 1792, all of the previously mentioned diverse acts not repealed were consolidated into one compact act concerning the Court of Appeals and the Special Court of Appeals.²⁷

The Special Court of Appeals, as constituted by the act of 1792, continued in that form until on February 11, 1814, the General Assembly enacted a law concerning the Special Court²⁸ which amended only a small segment of the previous law but constituted a great step forward for the Special Court. By virtue of this act, no longer was the sole cause for the convening of the Special Court to be grounded upon the interest of judges in cases before the Court of Appeals because now the court could convene on the grounds that there might be sickness or disability among the judges of the Court of Appeals. For example, if two judges of the Court of Appeals were interested in a pending case and one of the remaining judges was disabled due to sickness, under the old law, the Special Court could not be summoned. However, by virtue of this amendment, since there was not a sufficient number of judges to constitute a quorum for the Court to conduct business due to interest and sickness, the Special Court could now be summoned. This act is important because it signified a legislative intent to remedy

27. 13 HEN. STAT. (Va.) 405 (1823). It is interesting to note that this act was the first instance where Assembly placed the Special Court of Appeals alongside the Court of Appeals in the title of the act. This is significant because it appears as if the legislators were starting to recognize the Special Court as a separate entity from the Court of Appeals and to give it recognition as such.

In section 8 of this act, it was provided that if cases were pending before the Special Court and had not been heard when a sufficient number of the judges of the Court of Appeals qualified to hear the case, it would be resumed by the Court of Appeals just as if it had never been committed to the Special Court. *Id.* at 408-409.

28. Va. Acts 1813-1814, c. 12. In section 1 of this act, it was provided as follows:

(I)n case of the sickness or disability of the remaining judge or judges of the said court of appeals not so disqualified, or either of them, the remaining judges appointed by this law to hold such court, or any five of them, attending, may proceed to a hearing and decision of the cause, in the same manner as if all the judges of the court of appeals not so disqualified had been present.

the evil caused by delay in the hearing of cases before the High Court and cases no longer needed to languish on the docket of the Court of Appeals for lack of sufficient legal purpose to call the Special Court.

As if the previous extension of the causes for the calling of the Special Court had not been broadened enough, the General Assembly extended the previous provision still further. In an act passed on March 1, 1819, the Assembly, fearing that the previous provision would encompass only the temporary illness of a judge, provided for the calling of the Special Court in cases where the Court felt that the illness of that judge would be of a long duration.²⁹ By this provision, the Assembly wanted to make it crystal clear that there should be no unnecessary delay in the administration of justice in the High Court.

In 1828, the Assembly, feeling the need for general revision of the 1776 Constitution, passed a bill calling for an election to determine whether a Constitutional Convention should be called.³⁰ It passed by an overwhelming majority. As a result, the Convention was convened in Richmond from October 5, 1829 to January 14, 1830, and the result was a second Constitution which was subsequently ratified by the people. This Constitution did not specifically sanction the Special Court of Appeals by including within it as a Constitutional Court. However, it must be presumed that the drafters were aware of the Special Court and sanctioned its use as a substituted Court of Appeals.³¹ It should be noted, that by this Constitution only one Constitutional Court, the Supreme Court of Appeals, was created but the General Assembly was given the authority to vest judicial power in other such Superior Courts as they might establish from time to time. Also, the Assembly was given the sole power to regulate the jurisdiction of these courts. It thus appears that the Special Court of Appeals, though its

29. 1 VA. REV. CODE c. 65, § 1 (1819). This act provided as follows:

That, whenever a Judge of the Court of Appeals shall be disabled by sickness or infirmity from attending the said court, and, in the opinion of the court, such disability is likely to be of long continuance; and if, at the same time, one or more of the Judges of the said court be interested in any suit or suits pending therein, so that, from the combined causes of disability and interest, a court cannot be formed for the trial of such suit or suits, a Special Court shall be summoned for the trial thereof

30. See Preface to the PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830 (1830).

31. VA. CONST. art. 5, § 1 (1830). "The Judicial power shall be vested in a Supreme Court of Appeals, in such Superior Courts as the legislature may from time to time ordain and establish, and the Judges thereof, in the County Courts, and in Justices of the Peace The Jurisdiction of these tribunals, and of the Judges thereof, shall be regulated by law."

constitutionality had never been questioned, was within the provisions of the Constitution of 1830.

Two years later, on March 15, 1832, the General Assembly modified slightly the composition of the Special Court by providing that when it became necessary to convene that Court due to the interest or disability of a majority of the judges of the Court of Appeals, the substituted judges would be chosen only from the General Court and from the judges therein who were not interested in the pending case.³² Also, if all the judges of the Court of Appeals were interested, the five senior judges of the General Court not interested in the case would sit as the Special Court. Thus, the total effect of this act was the exclusion of the chancery judges from sitting on the Special Court.

The Special Court of Appeals, as previously constituted, continued in existence merely as a substitutionary court, waiting in the background and ready to convene whenever the need arose and the Supreme Court of Appeals was unable to transact business. However, during the years preceding the session of the General Assembly of 1848, the Supreme Court of Appeals accumulated a backlog of cases to such an extent that in 1848, it would take approximately eight or nine years to dispose of the cases presently on the docket. It became obvious that the delay of litigants before the Court could not be remedied by the unassisted efforts of the judges. Several proposals had been made to the Legislature but none were found satisfactory.

On January 24, 1848, the Speaker of the House of Delegates received a report³³ from the Revisors of the Code, J. M. Patten and Conway Robinson, in which they advanced legislation which appeared to be the best solution yet proposed. They stated their proposals as follows:

(O)ur conclusion is that the judges of the court of appeals can be best served and most properly aided in dispatching the business therein, by means of a special court of appeals, composed of judges of the general court

We propose that the special court of appeals shall be composed of the five judges of the circuit courts, who for the time being, shall stand first in commission with respect to precedence and seniority

(W)e also propose to constitute the judges of the special court the sole judges of the general court relieving from attendance upon it all the other judges of the circuit courts

32. Va. Acts 1831-1832, c. 47, § 1.

33. See Doc. No. 36, *Report of the Revisors*, DOCUMENTS, HOUSE OF DELEGATES, 1848-9.

(T)his special court should annually commence its session in December, on the day after the general court adjourns; and that it may adjourn from time to time, and sit as often and as long as the judges thereof may consider they can properly sit without interfering with their other duties.³⁴

The great significance of this proposed act³⁵ drafted by the Revisors was that, for the first time in its history, the Special Court would be a second or additional Court of Appeals that would sit alongside the Supreme Court and not merely be a substituted Court that would sit only when the latter Court was unable to hear certain pending cases. Also, by reducing the General Court to five judges (the same number of judges that sat on the Supreme Court of Appeals) and limiting their duties to the General Court and the Special Court instead of the previous situation where they also sat on the circuit courts, they would not be overtaxed by possibly having to sit on three different courts in the space of a single year.

This proposal appeared to the Assembly most acceptable, and, on the 31st of March, 1848, it was enacted into law³⁶ with certain significant additions³⁷ made by the legislators. The Assembly intended, in enacting this sweeping provision, that litigants before the High Court should have the right to object to having their cases heard by the Special Court and, instead, have their case decided by the Supreme Court. In addition to this provision for objection, the only other limi-

34. *Id.* at 4-5. The Revisors concluded their report with a salutary note by stating as follows:

We think it is no slight recommendation of this plan that it proposes a remedy which will come into action, whenever it is needed, and be dormant when it is not wanted; that if the occasion for it be temporary, so also will be the expense . . . and finally, that it is a measure not attended by the danger encountered when a new judgeship is created, but one that will always be under the control of the legislature, and may at any time be modified or repealed altogether, unless it be found to work beneficially.

35. Report of the Revisors, *supra* note 33. See the proposed act, entitled "A Bill Establishing a Special Court of Appeals and Diminishing the Number of Judges of the General Court," recited in full at the conclusion of the Revisors' Report.

36. Va. Acts 1847-48, C. 68.

37. *Id.* § 7. This provision provided a solution for the problem that might arise when a majority of the judges of the Supreme Court and the Special Court were unable to sit. In light of the fact that three judges were necessary to constitute a quorum for doing business, if such uninterested judges could be obtained from either or both courts, then the deficiency would be filled with circuit judges. See 1 VA. CODE, c. 160, § 15 (1849).

For the other addition made by the General Assembly, see note 38 *infra*.

tation placed upon the jurisdiction of the Special Court was that it could only hear seventy cases in a session and only those that had been pending on the docket of the Supreme Court in excess of two years.³⁸

As the result of the passage of the March 31, 1848 act, the Special Court of Appeals, comprised of the five judges of the General Court, were to appear in Richmond on December 13, 1848, and commence the business of the Court. However, four days prior to the date of the convening of this Court, Judge John Scott, who was to take his seat on the Special Court declined to do so in a letter addressed to the Speaker of the House of Delegates.³⁹ The primary reason expressed by Judge Scott for his declining a seat upon the Court was that the Court itself was unconstitutional. Scott felt that as long as the Special Court remained substitutionary in nature, it conformed to the applicable provisions of the Constitution.⁴⁰ However, he felt that when the Special Court became, in effect, an additional Supreme Court of Appeals (by virtue of the act of March 31, 1848), the Constitution was violated.⁴¹

Despite the fact that Judge Scott refused to sit upon the Special Court, it was duly convened by the other four judges on December 13, 1848, and commenced its business. On the 20th of January, 1849, the Special Court handed down its opinion in the case of *Keese v. Sharpe*⁴²

38. 1 VA. CODE c. 160, § 11 (1849). It was provided that:

(t)he clerk of the court of appeals at Richmond shall . . . make a docket of all causes which on the day of such commencement shall have been pending in the court of appeals more than two years without being heard and are ready for hearing, *exclusive of cases which any party or his counsel objects to being placed on said docket*. But if the number of cases so pending and ready exceed seventy, there shall only be placed on said docket [of the Special Court] the seventy of them, (*wherein there is no such objection*), which have been longest pending in said court. [Emphasis added.]

The two year requirement set out in the above statute as one condition precedent to the Special Courts jurisdiction was repealed by an act passed three years later. See Va. Acts 1850-51, c. 32.

39. See Doc. No. 26, *A Communication from the Honourable John Scott*, DOCUMENTS, HOUSE OF DELEGATES, 1848-49.

40. VA. CONST. art. 5, §§ 1-9 (1830).

41. *Ibid.* The foundation of Judge Scott's constitutional objections were based upon the provision of article V, § 1 which stated that "(t)he judges of the supreme court of appeals and of the superior courts, shall hold their offices during good behavior, or until removed in the manner prescribed in this constitution. . . . He felt that the new Court as well as the judges comprising it were temporary in nature and that the tenure of these judges was governed by legislative grace.

His other objections were based upon a supposed violation of § 4 providing for the election of judges by the legislature and § 5 which provided for judges to "receive fixed and adequate salaries."

42. *Supra* note 36, § 11. There was no citation to this case due to that fact and § 11

in which it entered a decree for the appellee, Hanry Sharpe. Sharpe was denied the entrance of his decree upon the records of the circuit court, Judge Robertson presiding. Sharpe, thereupon, petitioned the Supreme Court of Appeals for a writ of mandamus to compel Judge Robertson to enter and execute the decree of the Special Court of Appeals. The resulting case of *Sharpe v. Robertson*⁴³ brought a direct attack by Judge Robertson upon the constitutionality of the Special Court and the validity of its decrees.

In his lengthy answer to petitioner's request for the writ, Judge Robertson, in comparing the Court created by the act of March 31, 1848 with the Supreme Court of Appeals as provided for in the Constitution, found that they were identical in design, power, functions, and in all essential features and that the legislature had in fact created a second co-ordinate Supreme Court of Appeals. Therefore, he concluded that the Special Court, being in direct conflict with the Constitution which provided for only one Supreme Court,⁴⁴ was a nullity and its decrees invalid.⁴⁵

The majority of the Court⁴⁶ upheld the constitutionality of the Special Court, rendering the protests of its antagonists mute. Judge Baldwin, expressing the opinion of the Court, stated:

The effect of this law [the act of March 1848] is, by a uniform regulation, to withdraw from this court a portion of its business and send it to the determination of another forum. Its operation is, in the first place, to reduce the docket within a reasonable compass, and afterwards to keep it in the same condition. It affects the jurisdiction and not the supremacy of the Court. In truth, the difficulty of this question . . . has arisen from confounding the jurisdiction of the Court with its supremacy, which are far from being identical: the former is derived from the laws, the latter from the Constitution; the former is temporary and mutable, the latter permanent and immutable; the former is the field for the exercise of judicial power, the latter is in itself the exercise of that power.⁴⁷

provided that cases decided by the Special Court were not to be reported unless done so free of expense to this state.

43. 5 Gratt. (46 Va.) 518 (1849).

44. *Supra* note 40, § 1. This section provided that "(t)he judicial power shall be vested in a supreme court of appeals . . ." [Emphasis added.]

45. *Supra* note 43, at 524-536. (Judge Robertson's answer.)

46. The majority of the Court was composed of Judges Baldwin, Allen, Brooke, and Cabell. The only dissent was registered by Judge Daniel.

47. *Supra* note 43, at 608.

Judge Baldwin held, in the majority opinion of the Supreme Court of Appeals, that, rather than being a second co-ordinate Supreme Court of Appeals:

(T)he Special Court is a subordinate tribunal, as much so as any other Superior Court which the legislative department may, in its discretion, from time to time establish; and is as much bound to defer to the authoritative decisions of the Supreme Court of Appeals.⁴⁸

With the constitutional challenge to the Special Court set aside, the Supreme Court granted Sharpe's petition for a writ of mandamus to compel Judge Robertson to enter the decree of the Special Court of Appeals.

During the next three years, until 1851, the Special Court continued its existence as an invaluable assistant to the Supreme Court of Appeals in the business of judicial review. During its short duration, the Special Court decided one hundred and eighty appellate cases. The two courts, working together, were able to render a full two hundred and twenty-eight more decisions than had been rendered by the Supreme Court of Appeals sitting alone during the three years immediately preceding the creation of the Special Court.⁴⁹

Although the direct attack upon the constitutionality of the Special Court has been successfully met in the Supreme Court of Appeals, the strong challenge that was presented motivated the Constitutional Convention of 1851 to transform the Special Court from a legislative into a constitutional court.

CONSTITUTIONAL HISTORY OF THE SPECIAL COURT OF APPEALS: 1851—PRESENT.

The Constitution of 1830 had been in effect for about twenty years when again a convention was called to form a new constitution. The convention met in Richmond from October 14, 1850 until August 1, 1851. The result was a third Constitution which was subsequently ratified by the voters in October of 1851.⁵⁰

The new Constitution⁵¹ brought with it several significant changes in the judiciary department. One major change was that the state was

48. *Ibid.*

49. See, *Abstracts from the Reports of Clerks of the Court of Appeals and Circuit Courts*, DOCUMENTS, HOUSE OF DELEGATES, 1848-49, 1849-50, 1850-51.

50. See VA. CODE p. 35 (2d ed.) (1860).

51. VA. CONST. art. 6 (1851).

to be divided into twenty-one judicial circuits, ten districts, and five sections. Several of the circuit courts would form a district, and two district courts would form a section.⁵² The circuit judges, in addition to sitting in their respective courts, would also comprise a district and they would sit upon their respective district court. Also, the five judges of the Supreme Court of Appeals were to come from each of the five sections and, since each section was composed of two districts, the judges would, in addition to sitting on the Court of Appeals, sit once each year upon their respective district courts which in turn were from their particular section. Thus, the district courts were to be composed of circuit judges and one judge from the Court of Appeals. This, in effect, imposed double judicial duties upon all the judges.

Another significant change brought about in the new Constitution was the election process of judges. Previously, these judges had been elected by the joint vote of both houses of the General Assembly. Under the new provisions, judges of the circuit courts were to be elected by the voters of their respective circuits and the judges of the Court of Appeals were to be elected by the voters of their respective sections.⁵³

In reviewing all these new provisions together and considering the dual positions thrust upon the High Court judges, it becomes obvious that the possibility of interested judges in the Supreme Court of Appeals could occur frequently. For example, if a Court of Appeals judge is sitting in a district court and decides a case that later comes before the High Court, he would be interested. To remedy this possible situation, two provisions relevant to this discussion were included in the new Constitution. One provision stated that "no judge shall sit or decide upon any appeal taken from his own decision."⁵⁴ This resolved the situation in which only one or possibly two judges were interested and the High Court could still decide the case having a quorum of three judges.

However, if a majority of the judges were interested, a new situation arose in which the High Court could not hear the case as such. To meet this new situation, the convention included the following provision:

Special courts of appeals, to consist of not less than three nor more than five judges, may be formed if the judges of the Supreme Court of Appeals and of the circuit courts, or any of them, to try any cases

52. *Id.* §§ 2-5.

53. Compare, VA. CONST. art. 6, §§ 6, 10 (1851) with VA. CONST. art. 5, § 4 (1830).

54. *Supra* note 51, § 8.

remaining on the dockets of the present court of appeals when the judges thereof cease to hold their offices; or to try any cases which may be on the dockets of the Supreme Court of Appeals established by this constitution, in respect to which a majority of the judges of said court may be so situated as to make it improper for them to sit on the hearing thereof.⁵⁵

Obviously, this provision concerning the Special Court of Appeals was included in the new Constitution in order to meet the contingency concerning interested judges which might arise, and to provide for the situation where judges, for any reason, might cease to hold their offices and the Court of Appeals would not have the quorum of three necessary to conduct business. However, it might also be concluded that the provision for the Special Court was included as a result of *Sharpe v. Robertson*.⁵⁶ Although the Supreme Court of Appeals had held there that the Special Court was constitutional, the challenges raised by Judge Scott and Judge Robertson had been well-considered and vehement.⁵⁷ Therefore, it must be concluded that the delegates to the convention, in order to remove the last vestiges of doubt concerning its constitutionality, included it at last within the Constitution of 1851.

The immediate effects of the above provisions were two-fold. First, the status of the Special Court was transformed from a legislative court into a constitutional court and, second, the act of March, 1848⁵⁸ and the Special Court of Appeals provided thereunder were reduced to a nullity. This was the reason why the Special Court did not convene again after the completion of its term in August of 1851.

The overall significance of this constitutional provision was that no longer could the Special Court be convened to relieve the overburdened docket of the Supreme Court of Appeals and to sit as an additional Court of Appeals and decide appellate cases. Now, it could only be used as a substitutionary court to provide relief in the two contingencies specifically stated.⁵⁹

In delineating the jurisdiction of the various courts under the new Constitution, the General Assembly, in June 5, 1852, passed an act which specifically repealed the previous act of March, 1848 and provided in its place that the Special Court, by virtue of the Constitution,

55. *Id.* § 12.

56. *Supra* note 43.

57. *Supra* notes 39 and 45.

58. *Supra* note 36.

59. *Supra* note 55.

would meet only when a majority of the judges were interested in a case and the Court would be composed of the remaining uninterested judges along with enough circuit judges to constitute a quorum of five.⁶⁰ This law had the effect of returning the Special Court to its post-1848 status.

On February 25, 1854, the General Assembly, feeling the above provision inadequate due to the fact that it only provided for one of the two contingencies that might arise under the new Constitution,⁶¹ passed an act which repealed the earlier provision of 1852 providing for the Special Court⁶² and superseded it with an elaborate system of Special Courts which took cognizance of both constitutional contingencies.⁶³ This act provided for the appointment of certain circuit judges who were to constitute a permanent Special Court of Appeals which would sit in Richmond. However, the Court was to be dormant until one of the two contingencies arose. In the first instance, when a majority of the judges were interested, the Court could, in its discretion, either transfer the case to the Special Court or supplement its membership with certain circuit judges until a quorum of five was reached and then hear the case itself.⁶⁴ In the second instance, when the judges ceased to hold their offices due to pending elections, in addition to the Special Court in Richmond, the district courts would be transformed into Special Courts of Appeals for their respective districts and, during this interim period, they would decide all appellate cases arising from their respective districts. However, if the parties thereto registered an objection to these Special Courts hearing their cases, their case would be heard by the Special Court of Appeals in Richmond.⁶⁵ This in effect meant that, during this interim period, there would be eleven Special Courts. It must be noted, however, that judgments entered by district Special Courts were to be enforced as though rendered by the district courts while the decisions emanating from the Special Court in Richmond were to have

60. Va. Acts 1852, c. 61, §§ 15, 16.

61. *Ibid.* This act provided for the convening of a Special Court of Appeals only when a majority of the judges thereof were interested and did not provide for the situation in which the judges might cease to hold their offices as per VA. CONST. art. 6, § 12 (1851).

62. *Supra* note 60.

63. Va. Acts 1853-54, c. 17.

64. *Id.* §§ 5, 6.

65. *Id.* §§ 1-3.

the force and effect of decisions rendered by the Supreme Court of Appeals.⁶⁶

With the growing bitterness between northern and southern states rapidly approaching open secession and war, on February 13, 1861, a convention was called in Richmond which passed an ordinance of secession and amended the Constitution of 1851 to reflect Virginia's transfer of allegiance to the government of the Confederate States of America. This amended Constitution, however, left the judiciary department with the same structure as it had under the previous Constitution.⁶⁷

During the War Between the States, the amended Constitution continued in full force and effect until, in early 1864, with a large part of Virginia within Union lines, a convention was called to draft a new Constitution. This convention, composed of delegates from those areas within Union lines but not including the recently formed state of West Virginia, met at Alexandria on February 13, 1864. The result of their labors was a new Constitution which was never submitted to the voters but was subsequently adapted by the convention on April 11, 1864.⁶⁸

The Constitution of 1864 made several significant changes in the judicial structure. First, both the judges of the Court of Appeals and the judges of the circuit courts were to be elected by the joint vote of both houses of the General Assembly upon nomination by the Governor.⁶⁹ Second, the number of judges on the Supreme Court of Appeals was reduced from five to three.⁷⁰ And, third, the provision providing for Special Courts of Appeals was extended to provide, in essence, the same elaborate provisions as were enacted by the General Assembly in the act of 1854.⁷¹

66. *Id.* §§ 14-15.

67. See VA. CONST. art. 6 (1851) (as amended by the Convention of 1860-61).

68. See JOURNAL OF THE CONSTITUTIONAL CONVENTION (1864).

69. VA. CONST. art. 6, § 1 (1864). Compare with VA. CONST. art. 6, § 10 (1851) which provided for these judges to be elected by the voters.

70. *Id.* § 11.

71. *Id.* § 12. This provision, recited in full, is as follows:

Special courts of appeals, to consist of not less than three nor more than five judges, may be formed of the judges of the supreme court of appeals, and of the circuit courts, or any of them, to try any cases being on the docket of the supreme court of appeals when this constitution goes into operation; or to try any cases which may be on the dockets of the supreme court of appeals, in respect to which a majority of the judges of said Court may be so situated as to make it improper for them to sit on the hearing thereof. And a special court of appeals to consist of not less than three nor more than five judges, may be formed of the judges of the circuit courts, to exercise the jurisdiction and perform the duties of the supreme

However, on February 21, 1866, the General Assembly totally repealed the previous act of 1854 and in its place substituted an act⁷² which provided that, in the one contingency in which the judges were interested in a pending case, two modes of relief were made possible. In one instance, a sufficient number of circuit judges would be summoned to sit with the remaining uninterested judges thereby constituting a Special Court of Appeals to hear and determine the case. In the second instance, the Court of Appeals could, in its discretion, transfer the case to a District Court to which the judge of the Court of Appeals who was not disqualified belonged, provided that Court had jurisdiction under the Constitution.⁷³ The decision of the District Court rendered would be final. The Special Court, by virtue of the aforementioned act, digressed in scope for now it could be utilized only when the problem of interested judges arose.

During the Reconstruction Period immediately following the War, the need arose again for a new Constitution. As a result, a convention was assembled at Richmond from July, 1867, to April 7, 1868. The result was Virginia's sixth Constitution which was subsequently ratified by the electorate on July 6, 1869.

Three significant changes were wrought in regard to the Judiciary Department as a result of this Constitution. District Courts were abolished⁷⁴ and the number of judges sitting on the Supreme Court of Appeals was increased from three to five, any three of whom could constitute a quorum.⁷⁵ The most significant change, in relation to this discussion, was set forth as follows:

Special Courts of Appeals, to consist of not less than three nor more than five judges, may be formed of the judges of the Supreme Court of Appeals and of the Circuit Courts, or any of them, to try any cases on the docket of such court, in respect to which a majority of the judges thereof may be so situated as to make it improper for them to sit on the hearing of the same; *and also to try any cases on the said docket which cannot be otherwise disposed of with convenient dispatch.*⁷⁶

court of appeals and of the judges thereof, until the judges of the supreme court of appeals shall have been duly chosen and qualified.

Compare the above section with the Act of 1854, *supra* notes 63-66.

72. Va. Acts, 1865-66, c. 60, § 5.

73. See VA. CODE, c. 159, §§ 13-14 (1860).

74. VA. CONST. art. 6, § 1 (1869).

75. *Id.* § 2.

76. *Id.* § 3.

This Constitutional provision represents a landmark in the developing history of the Special Court of Appeals. Here, for the first time since this Court was transformed from a legislative into a constitutional court in 1851, its jurisdiction was extended not only to include the situation where judges were interested but also to try cases in which the Supreme Court of Appeals could not dispose of within a reasonable time. It is therefore evident that the delegates definitely intended that the new Constitution should provide a permanent remedy for the inherent evils arising from an undue delay in the administration of justice.

The General Assembly did not immediately wish to take advantage of this novel provision because on June 23, 1870, in repealing the previous act of February, 1866⁷⁷ and making provision for the Court of Appeals pursuant to the new Constitution,⁷⁸ they only granted to the Special Court jurisdiction over cases in which a majority of the judges of the Court of Appeals were interested.⁷⁹

Almost three years later, however, on February 28, 1872, the General Assembly took full advantage of their new constitutional prerogative and enacted a law creating a Special Court of Appeals⁸⁰ to sit for a period of two years and to decide cases on the docket of the Court of Appeals which [could not] be otherwise disposed of with convenient dispatch.⁸¹ The legislators made their intention crystal clear as to the specific problem they were attempting to solve by the creation of this Court when they stated:

Whereas, it appears that the business of the Court of Appeals has increased so much by reason of the numerous questions to which the war has given rise, that the causes upon its docket cannot be conveniently tried within a reasonable time⁸²

The Court was to be composed of three judges of the circuit courts who would assemble in Richmond and hear all cases, both civil and criminal, which had been long pending on the docket of the Court of Appeals. The only apparent limitation imposed upon their jurisdiction

77. *Supra* note 72.

78. Va. Acts 1869-70, c. 171, § 1. (Chapter 160, §§ 13-16 of VA. CODE (1860) as re-enacted.)

79. *Cowan v. Daddridge*, 22 Gratt. (63 Va.) 458 (1872). (The act of 1869 was upheld as constitutional.) See also, *Kent v. Dickinson*, 25 Gratt. (66 Va.) 817 (1875).

80. Va. Acts 1871-72, c. 124.

81. *Supra* note 74, § 3.

82. See the Preamble to the act of 1872, *supra* note 80.

was that they were limited to one annual session which could be no longer than ninety days and they could hear a maximum of fifty cases per session. After two years, the Special Court was to terminate its activities by operation of law.⁸³ Also, the Constitution provided specifically that the Supreme Court of Appeals should have exclusive jurisdiction over cases involving the constitutionality of state laws. Thus, the Special Court was precluded from hearing these cases.⁸⁴

The constitutionality of this act was never doubted until a direct attack was waged upon it in the case of *Bolling v. Leisner*.⁸⁵ Petitioner, appealing from an adverse decree of the Special Court, based his challenge upon numerous contentions which the Supreme Court of Appeals ignored. The Court found it unquestionable that the act was well within the Constitutional provision appertaining to the Special Court and dismissed the appeal.

During the first session of the Special Court commencing in July of 1872, fifty cases were assigned to it of which twenty-four were decided.⁸⁶ In 1873, seventy-nine cases were assigned to the Court in addition to those remaining from the previous year. Of these, the Court decided seventy-two and, with various other dispositions, twenty-six cases remained on its docket.⁸⁷ During the first month of 1874, the Special Court rendered final judgments in 30 cases. Then, by operation of law, the Special Court expired.⁸⁸ Though the tenure of the Court was brief, its impact in relieving the docket of the Supreme Court of Appeals was great. It was able to hear and decide one hundred and

83. See, Va. Acts 1872-73, c. 39. This act, passed on January 17, 1873, provided for the removal of causes from the docket of the Special Court to the Supreme Court wherever it appeared that one of the judges of the Special Court had tried the cause as a circuit judge, or for any other good cause shown.

84. VA. CONST. art. 6, § 2 (1868). This section provided that "the assent of a majority of the judges elected to the court [Supreme Court of Appeals] shall be required, in order to declare any law null and void by reason of its repugnance to the federal constitution, or to the constitution of this state."

85. 26 Gratt. (67 Va.) 38, *writ dismissed for want of jurisdiction*, 1 Otto (91 U. S.) 594 (1875). President Moncure, speaking for the Court, discussed briefly the history of the Special Court, the several constitutional provisions concerning it, and the legislative history of the act of 1872, and in a detailed opinion upheld every section of the act as constitutional and parried every separate objection raised by counsel for the Petitioner.

86. See *Abstract of the Returns of Clerks of Courts*, Doc. 3, JOURNAL, HOUSE OF DELEGATES, 1872-73.

87. See *Abstract of the Returns of Clerks of Courts*, Doc. 3, JOURNAL, HOUSE OF DELEGATES, 1874.

88. See *Abstract of the Returns of Clerks of Courts*, Doc. 7, JOURNAL, HOUSE OF DELEGATES, 1874-75.

twenty-six cases. However, as noted by the Clerk of the Court of Appeals, it had not existed long enough to substantially reduce the docket of the Court of Appeals and when it went out of existence in 1874, the delay in appellate cases being heard by the High Court was still on the average of two and one-half years.⁸⁹

Although the Special Court was only allowed to function as an additional Court of Appeals for two years, this period did, however, bear definite proof as to the great utility and flexibility of the Special Court. It was a demonstration of how the General Assembly could provide temporary relief for the Supreme Court of Appeals when an emergency arose. After the emergency subsided, the assembly would make the Special Court inactive only to await another period of emergency. Thus, the flexibility and economy of the Special Court proved the wisdom of the delegates of 1868 in establishing it, and they foresaw that periods would arise in which relief would be needed but that such periods might only be temporary. A Special Court would more readily provide the flexibility needed than would a permanent court which might, in periods of slack dockets, sit idle but still require appropriation for its continued existence.

Upon the condition of the statutory existence of the Special Court,⁹⁰ the previous provisions of the act of 1870 providing for the Court only in the case of interested judges continued in force as the law of the Commonwealth.⁹¹ With these provisions in effect in 1899, the Special Court of Appeals was summoned because three of the five judges on the Supreme Court of Appeals were so situated as to make it improper for them to sit on the hearing of a case. To supplement the Special Court, three circuit judges were summoned to sit along with the remaining two uninterested judges of the High Court.

Stuart's Ex'or v. Peyton et al.,⁹² decided in the Special Court of Appeal, held that the decisions of that court were final when rendered and all issues decided therein were *res adjudicata*. It was therefore beyond the power of any other court within the state to reverse or

89. *Id.* at 11.

90. *Supra* note 80, § 9. The Act of 1872 was only of a temporary nature. It was provided that:

(t)his act shall be in force from its passage, and so continue for two years unless the supreme court of appeals shall enter an order of record that the existence of said court is no longer necessary; provided, that said special court shall not decide any question arising under the homestead provision of the constitution of Virginia.

91. *Supra* note 78. See also, VA. CODE, c. 150, §§ 3095-3099 (1887).

92. 97 Va. 796, 34 S.E. 696 (1899).

modify its decisions. These decisions were only to be assailable by the Special Court itself and this prerogative only lasted until the expiration of the term in which the cause had originally been heard. This decision, in effect, reiterated the constitutionality of the Special Court as compared, and further clarified the code provisions as to the finality of its decisions.

As the Twentieth Century approached, the need for constitutional revision was readily apparent. The Constitution of 1868, though sufficient for its period, had proved to be too rigid and inflexible so far as the Constitution in its entirety was concerned. The Constitution had been drafted during the period of Reconstruction immediately following the War Between the States to meet the situation then at hand. However, by the end of the Nineteenth Century, Virginia still had not substantially recovered from those perilous days of military occupation immediately following the war.

As a result, a constitutional convention was assembled in Richmond on June 12, 1901, to completely revise and modernize the Constitution to make it more flexible and adaptable to the changing situation in which the Commonwealth now found itself.⁹³ In relation to the Judiciary Department, the major revision adopted by the convention concerned the jurisdiction of the Supreme Court of Appeals. Under the old Constitution, it had been continuously held that the Constitution did not confer jurisdiction upon the Court of Appeals, but left that to be regulated by laws and stated only the character and limits of jurisdiction.⁹⁴ However, under the new Constitution, original jurisdiction was specifically conferred in habeas corpus, mandamus, and prohibition cases, and appellate jurisdiction in cases involving constitutional questions or the life or liberty of any person. However, this original jurisdiction was not to be exclusive.⁹⁵ The Constitution did limit appellate juris-

93. See 2 DEBATES OF THE CONSTITUTIONAL CONVENTION 1709 (1901-1902). Governor-elect Andrew J. Montague in his inaugural address to the convention summed up the perplexing problems facing the delegates when he said:

No similar convention was ever confronted with the difficulties which stand in your pathway—difficulties political, economic and sociological. You are called upon not only to extricate the Commonwealth from political conditions wrongfully imposed, but to safeguard and make room for great and rapidly-growing industry and commerce, and to preserve inviolate the precedents and mighty mission of our race.

94. *Barrett v. Meredith*, 10 Gratt. (51 Va.) 650 (1854); *Page v. Clopton*, 30 Gratt. (71 Va.) 415 (1878); *Gresham v. Ewell*, Judge, 84 Va. 784, 6 S. E. 134 (1888); and *Price, Auditor v. Smith*, 93 Va. 14, 24 S. E. 474 (1896).

95. *Prison Ass'n v. Ashby*, 93 Va. 667, 25 S. E. 893 (1896).

diction in civil cases but did not impose any limitations in criminal appeals. In certain other instances, the Constitution specifically delineated jurisdiction, but in all others it was left to be regulated by law as previously done.⁹⁶ In essence, the delegates had removed much of the power of the Assembly to regulate the jurisdiction of the Court of Appeals and conferred it specifically in the new Constitution.

The section providing for the Special Court of Appeals, by contrast, received little attention. One delegate, however, did reiterate the affirmation of the Bar toward the Special Court when, in addressing the convention, he stated:

(T)hose of us who are lawyers and those of us who have had the honor to be on the bench know that it will be absolutely necessary to have a special court of appeals. No practicing lawyer, no public sentiment, is going to submit to business being clogged up in the court of appeals for five to ten years without a speedy termination of it. *Public sentiment and the bar of this State will demand that we shall have a special court of appeals.*⁹⁷

When the convention adjourned on June 26, 1902, a new Constitution had been adopted which incorporated many changes both in revisions and innovations. However, the provision relating to the Special Court of Appeals emerged virtually unscathed, receiving only a face-lifting revision which merely reorganized the section but did not alter the substance of it. This section approved by the convention was as follows:

The General Assembly may, from time to time, provide for a Special Court of Appeals to try any cases on the docket of the Supreme Court of Appeals in respect to which a majority of the judges are so situated as to make it improper for them to sit; and also to try any cases on said docket which cannot be disposed of with convenient dispatch. The said Special Court shall be composed of not less than three nor more than five of the judges of the circuit courts and city courts of record in cities of the first class, or the judges of either of the said

96. VA. CONST. art. 6, § 88 (1902). For a good comparison of the previous provision and its counterpart, § 88, in the new Constitution, see generally HURST, *NEW CONSTITUTION OF VIRGINIA ANNOTATED*, 76-80 (1903).

97. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION 1496 (1901-1902). Delegate C. J. Campbell continued, in this speech, discussing the injustice and expense of delay in the Court of Appeals, as well as in lower courts, both to civil litigants and criminal defendants

courts, or of any of the judges of said courts together with one or more of the judges of the Supreme Court of Appeals.⁹⁸

Impliedly, the convention of 1901-1902, by adopting the section relating to the Special Court in basically its same substantive form, sanctioned the Special Court of Appeals as it had previously existed under the Constitution of 1868 and the subsequent acts of the Assembly providing for it to meet both contingencies where the Court of Appeals could neither sit nor hear cases without undue delay.

On December 10, 1903, the General Assembly amended and re-enacted the section of the Code relating to the Special Court⁹⁹ to provide again for the case where judges were interested in a pending case. However, the section was also broadened to conform to the new Constitution which provided for the Court of Appeals to 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."¹⁰⁰ This act simply provided that when the issue before the Court of Appeals concerned a constitutional question and a full court (all five judges sitting) could not be obtained due to one or more interested judges, the Court of Appeals would be supplemented by additional judges as provided for by this act.¹⁰¹ Under the Constitution of 1868 and subsequent legislation, the Special Court could not hear and decide constitutional questions.¹⁰² Thus, this act merely elaborated upon that previous holding and provided for a supplemented, substitutionary Court of Appeals and called it the Special Court of Appeals when so constituted. However, in reality, it was the same act in substance as was passed by the Assembly in 1870.

The Special Court of Appeals remained in this dormant state derived from the act of 1903 until 1924.¹⁰³ It can be concluded that during the major part of this period, there was no real need for the General Assembly to activate the "convenient dispatch" provision of the Constitution and provide for an additional Court of Appeals.

98. VA. CONST. art. 6, § 89 (1902). It should be noted that this section extended the previous section by allowing judges of city courts of record of cities of the first class to sit also with the circuit judges and the judges of the Court of Appeals.

99. See VA. CODE, c. 150, § 3095 (1887).

100. *Supra* note 96.

101. VA. ACTS, 1902-3-4, c. 414, § 1 et seq. See also, 2 VA. CODE ANN., c. 150, §§ 3095-3099 (1904).

102. See *Stuart v. Peyton*, *supra* note 92.

103. *E.g.*, VA. CODE ANN. tit. 59 §§ 5873-5877 (1918).

However, in 1920, the Assembly passed a law which provided that "in all criminal cases where petition for a writ of error is presented the same shall be granted as a matter of right."¹⁰⁴ By virtue of this act, the docket of the Supreme Court of Appeals became so congested that the act was repealed *two* years later and the former law was restored.¹⁰⁵ This, however, was only a move designed for the future but did not relieve the congestion which presently existed on the docket.

Therefore, on March 15, 1924, the General Assembly exercised its prerogative under the Constitution and extended the jurisdiction of the Special Court of Appeals. The Special Court would not only be allowed to hear those cases previously provided for under the act of 1903¹⁰⁶ but also whatever cases were on the docket of the Supreme Court of Appeals which could not be disposed of with convenient dispatch.¹⁰⁷

By virtue of this act, the Special Court of Appeals would come into being not as a substitutionary court to meet only when the Court of Appeals could not conduct business, but as an additional court sitting independently and hearing cases assigned to it by the Supreme Court of Appeals. The Court would be composed of not less than three nor more than five judges from the circuit courts and/or city courts of record of cities of the first class as designated by the Supreme Court of Appeals. The time and place of its sessions and its subsequent adjournment would be determined by the Supreme Court of Appeals. The only limitation imposed upon the Court was that it did not have the power to grant or refuse writs of error or appeals in any case. The Special Court of Appeals created by this act was to exist for only two years unless re-enacted by the General Assembly.¹⁰⁸

104. Va. Acts 1920 c. 300, § 1.

105. Va. Acts 1922, c. 45, § 1.

106. *Supra* note 101.

107. Va. Acts 1924, c. 264. This amendment can also be found in VA. CODE ANN. tit. 59 § 5873 (1924). For a good discussion concerning the passage of the act of 1924, see *Virginia Statutes of 1924*, 10 VA. L. REG. N. S. 326-327 (1924).

108. *Ibid.* The pertinent parts of this act in relation to the existence of the Special Court were as follows:

The special court of appeals, created by this act, shall cease to exist when it shall have completely disposed of all cases designated as aforesaid, by the supreme court of appeals, provided that in no event shall such special court continue after the first day of July, nineteen hundred and twenty-six, but a special court of appeals to meet the emergency mentioned in section eighty-eight of the Constitution, or to try cases on the docket of the supreme court of appeals in respect to which a majority of the judges are so situated as to make it improper for them

The Special Court commenced its sessions in June of 1924, and between that date and June of 1926, the Court handed down one hundred and twenty-four final decisions.¹⁰⁹ The Special Court, during this period, served as an able partner to the Supreme Court of Appeals and was able to reduce the docket of the latter Court considerably.¹¹⁰ Unfortunately, the termination date of the Special Court arrived before the Court could successfully dispose of all the cases assigned to it by the Supreme Court of Appeals and, on July 1, 1926, the Special Court ceased to exist as an additional court by operation of law.

In the 1926 session of the General Assembly, a bill was introduced in the Senate to re-enact the act of 1924 providing for the Special Court.¹¹¹ It was subsequently passed by that body and referred to the House of Delegates for their approval.¹¹² However, prior to reception of the Senate bill, the House had become embroiled in a controversy concerning the compensation of Special Court judges. The disagreement was in relation to the interpretation of the Attorney General concluding that the judges were to receive per diem compensation for each day of the Court's existence. The House vehemently disagreed with the interpretation and felt that the proper meaning was that the judges were only to receive this compensation while they were actually sitting. This disagreement was recited in a resolution passed by a majority of the House.¹¹³

Because the Delegates were in disagreement over the Special Court when the Senate bill appeared on the floor of the House, it was rejected.¹¹⁴ The untimely demise of the Special Court, during the peak of its effectiveness, was ably expressed on behalf of the Virginia Bar as follows:

The Special Court of Appeals has made a splendid record. Its

to sit, may at any time be created by the supreme court of appeals in the manner provided by the Constitution.

109. The decisions handed down by the Special Court of Appeals are reported in the following Virginia Reporters: 139 Va. 612 et seq. (1924); 140 Va. 589 et seq. (1924); 141 Va. 599 et seq. (1925); 142 Va. 677 et seq. (1925); 143 Va. 641 et seq. (1925); 144 Va. 689 et seq. (1925-26); and 146 Va. 309 et seq. (1926).

110. See generally, Editorial, *Special Court of Appeals*, 10 VA. L. REG. N. S. 672-673 (1925). For a summary of two cases handed down by the Special Court of Appeals, see, *id.* at 673-674.

111. VA. S. JOUR. AND DOC. 36 (1926).

112. *Id.* at 541.

113. VA. N. D. JOUR. AND DOC. 150 (1926). See also, *id.* at 61, 88-90, 105, and 170 for the progress of this resolution through the House.

114. *Id.* at 742, 853, 860, 910, and 978.

passing will, we are confident, be regretted by the entire bar. Composed as it has been of six of our ablest circuit judges, one of whom has been during its short life elevated to a seat on the higher tribunal, its decisions have compared in substance and in form quite favorably with those of the Supreme Court and will we believe be cited in the future as of almost equal authority.¹¹⁵

Even though the Special Court ceased its operations in 1926, it was highly significant that the General Assembly had recognized the potential of the Court and had utilized it to its fullest capabilities in that short period of time. The flexibility exemplified by such use, together with the past use of the Court in 1872-74, proved to be clearly indicative of its potentialities as a constitutional instrumentality which could be employed to relieve an overburdened docket when, and if, the need arose.

The Special Court of Appeals, after its demise on July 1, 1926, remained dormant until the General Assembly revived it again on April 18, 1927.¹¹⁶ Evidently, since the Special Court had existed for only two years previously, it had not had sufficient time to entirely reduce the docket of the Supreme Court of Appeals. Therefore, the Assembly re-enacted the act of 1924 with only two revisions of any significance. The major revision concerned the section of the act involving compensation of judges. The question on this point which had caused the House to reject the Special Court was now resolved in favor of the House interpretation that the judges would only be compensated for the days they were actually sitting.¹¹⁷ Also, the section of the act providing for the termination of the court was altered to provide that the court would cease to exist no later than December 31, 1928.

As a result of the passage of this act, the Special Court convened again in November of 1926 and conducted business until December 31, 1928, when it again ceased to exist by operation of law. During this brief period, the Court rendered one hundred and five final decisions

115. See Editorial, *No More Special Court*, 12 VA. L. REG. N. S. 30-31 (1926). See also, Editorial, *An Enlarged Supreme Court of Appeals*, *id.* at 31-33 in which it discusses a resolution passed by the General Assembly, much as a compromise to its failure to re-enact the Special Court, which proposes that the number of judges on the Supreme Court of Appeals be increased from five to seven in order to prevent further congestion from building up on the docket of that Court.

116. Va. Acts 1927, c. 56, § 1 (extra session).

117. *Supra* notes 113 and 114.

and was a great aid to the Supreme Court of Appeals in reducing their congested docket.¹¹⁸

In 1927, the need for constitutional revision became apparent and, upon the request of Governor Harry F. Byrd, a commission was established in 1927 to formulate proposed constitutional amendments. These amendments were subsequently ratified by the people on July 19, 1928. The result was an amended version of the Constitution of 1902 which made substantial changes in the Judiciary Department.¹¹⁹ The composition of the Supreme Court of Appeals was increased from five to seven judges, any four of whom would constitute a quorum. Also, the Court, when not deciding constitutional questions, could sit in divisions of not less than three judges. However, for the decision of a division to become the final judgment of the Court, that decision must be the unanimous concurrence of at least three judges. Any case involving the construction of the Constitution of the United States or of Virginia had to be heard by the full Court sitting en banc and in final judgment could only be rendered by a majority of the judges concurring.¹²⁰ It is obvious that the purpose of the delegates in making these changes was to effectuate a better dispatch of business in the Supreme Court of Appeals by permitting the Court to divide itself into two sections, in effect, two courts, for the hearing of non-constitutional cases. Also, increasing the number of judges from five to seven makes the above provision practicable since the increase allows the divisions a quorum of three.

As far as the provision relating to the Special Court was concerned, no significant change was wrought in the existing provision except that the words "in cities of the first class" were omitted to prevent discriminating against judges of courts of record in cities of the second class.¹²¹

The act of 1927 providing for the Special Court of Appeals has remained in full force and effect from that date until the present.¹²² However, the provisions of that act providing for the Court to meet in accordance with the "convenient dispatch" provision of the Constitution

118. The decisions of the Special Court of Appeals rendered under the act of 1927 are reported in the Virginia Reporter as follows: 147 Va. 717 et seq. (1927); 148 Va. 751 et seq. (1927); 149 Va. 479 et seq. (1927-28); 150 Va. 623 et seq. (1928); and 151 Va. 565 et seq. (1928).

119. VA. CONST. art. 6 (1902) (as amended).

120. *Id.* § 88.

121. Compare VA. CONST. art. 6, § 89 (1902) (as amended), with VA. CONST. art. 6, § 89 (1902).

122. See VA. CODE ANN. § 5873 (1936) and VA. CODE ANN. § 5873 (1942).

had expired by operation of law in 1928. Therefore, in 1948, when the Code of Virginia was recodified, this act was re-enacted within the Code of 1950 with the "convenient dispatch" provisions omitted.¹²³ The law relating to the Special Court of Appeals as it exists today is as follows:

A Special Court of Appeals to meet the emergency mentioned in section eighty-eight of the Constitution, or to try cases on the docket of the Supreme Court of Appeals in respect to which a majority of the judges are so situated as to make it improper for them to sit, may at any time be created by the Supreme Court of Appeals in the manner provided by section eighty-nine of the Constitution. The Special Court of Appeals shall not have power to grant or refuse writs of error or appeals in any case.¹²⁴

As a result of this law, the Special Court of Appeals can only meet when one of the two above contingencies arises. It does not have the statutory authority to aid in relieving congestion on the docket of the Supreme Court of Appeals.

Since the end of 1928 and the last session of the Special Court, the General Assembly has not seen fit to utilize the "convenient dispatch" provision of the Constitution in assailing the evils of delay in litigation before the High Court.

CONCLUSION

Looking at the history of the Special Court, it becomes readily apparent that the Court as it exists within Constitution reflects the product of the diligent efforts of both legislators and constitutional drafters in attempting to remedy the evils of delay in appellate litigation brought on either by the sickness or disability of the judges, or merely an over-

123. See generally, 1 VA. CODE ANN. XIX (1950). In the Report of the Commission on Code Recodification, submitted on December 15, 1947, it was stated that:

It has been the intention of the Commission to omit statutes and parts of statutes which have been in whole or in part repealed, expressly or by clear implication, and statutes which have expired by their own terms, or have been superseded by more recent legislation, or have otherwise become obsolete.

The section of the act of 1927 providing for the Special Court under the "convenient dispatch" provision of § 89 of the Constitution had contained an express expiration date of December 31, 1928. Therefore, until this 1950 recodification, that section in previous Codes had been merely superfluous. The 1950 Code simply omitted that portion and left the remainder of the act in full force and effect.

124. 4 VA. CODE ANN. § 17-104 (1950).

burdened docket due to an overabundance of appeals. The history of the Constitutions of Virginia also reflect the jealous desires of their drafters that the three great writs; that is, writs of habeas corpus, mandamus, and supersedeas, shall remain within the original jurisdiction of the highest Constitutional tribunal in the Commonwealth. Therefore, it follows as a reasonable corollary that these writs should continue to be protected within the sanctity of the High Court or courts specifically provided for in the Constitution. It is well recognized that these constitutional courts seem to be of higher prerogative and dignity than courts established by the legislature under constitutional authority in respect to their security against legislative interference.¹²⁵

The problem in existence today concerning the congested docket of the Supreme Court of Appeals, although caused substantially by the tremendous influx of habeas corpus cases, is not due solely to that cause. This problem has been building up for many years and it can be expected to continue as the Commonwealth continues to grow. The Special Court of Appeals could, therefore, be the ideal solution to this problem since by its very nature, it could be brought in existence by the Assembly in times of temporary strain and it could just as easily be retired either by operation of law or by act of the Supreme Court of Appeals. The flexibility, utility, and economy of the Court as evidenced by its previous accomplishments stands as a vivid testimony as to its potentialities in remedying the present situation.

The Special Court could be utilized only for the hearing of cases. It would not be used to relieve the Supreme Court of Appeals of its administrative duties. By relieving the Court of Appeals of the hearing of certain cases, the Special Court could therefore leave it with a greater amount of time which could be devoted to routine business. This distinction was best exemplified by Judge Brooke in *Sharpe v. Robertson*¹²⁶ when, in distinguishing the Special Court from the Supreme Court of Appeals, he stated:

The first objection made to this act is that it violates that article of the Constitution which declares that there shall be one Supreme Court of Appeals. This act, it is said, creates another Supreme Court of Appeals. But this Special Court has no appellate powers. It cannot grant an appeal, writ of error, or *supersedeas*, in any case, and can

125. See *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780 (1899).

126. 5 Gratt. (46 Va.) 518 (1849).

only decide the cases sent to it from their court from whence process of appeal must issue.¹²⁷

Although this statement was made in 1849 concerning the Special Court when it was a legislative court, these remarks are highly relevant to the Special Court as it exists today under the Constitution.

The process by which the Special Court could be re-established to meet the present situation would be simply amendatory legislation enacted by the General Assembly. The present statute¹²⁸ providing for the Court is in essence the act of 1927¹²⁹ as revised in 1950 with the sections relating to the Court's convening in accordance with the "convenient dispatch" provision of the Constitution deleted. Since that section of the act had expired by operation of law on December 31, 1928, re-establishment of this Court need only require a re-enactment of those pertinent provisions which had expired and a terminal date for the expiration of the Court, if desired, some time in the future.

In summary, the Special Court of Appeals was not only useful in the past but stands today as an invaluable constitutional weapon in combatting the inequities and injustice wrought by delays in the hearing of appellate cases.

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127. *Id.* at 643.

128. *Supra* note 124.

129. *Supra* note 116.