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Georgia Law Review

Volume 1 Number 1

The Lumpkin Law School

DR. SYLVANUS MORRIS

At the regular meeting of the Trustees of the University of Georgia in 1859, the board determined to reorganize the University, and in the plan that was then adopted it was determined to establish a law school, "in which facilities for the best legal education would be afforded." In pursuance of the plan, on August 4, 1859, on motion of Governor Herschel V. Johnson, Joseph Henry Lumpkin (the first Chief Justice of Georgia), William Hope Hull and Thomas R. R. Cobb were elected professors, and the law school opened in the autumn of that year. On December 19, 1859, by an Act of the General Assembly of Georgia, the Lumpkin Law School was incorporated, and these three gentlemen were both the incorporators and the professors. From that time to the death of Judge Lumpkin in 1867 (Mr. Cobb having died in 1862), the Law Department of the University was conducted under the name of the Lumpkin Law School, and the graduates were awarded their diplomas by the Trustees at the regular Commencement. The exercises of the law school were suspended during the War between the States. Since 1867 the Law School has been conducted under the name of the Law Department of the University of Georgia.

SKETCHES OF FOUNDERS

William Hope Hull was at one time law partner of Governor Howell Cobb. He was a deep student of the law. Added to broad scholarship his was a well balanced temperament and judgment. His opinion was sought in many cases in which he did not appear. His great strength lay in his ability to give wise counsel.

Joseph Henry Lumpkin was Georgia's first Chief Justice. To the decisions of the Court, rendered during the years shortly after its establishment, one must look for the systematizing, harmonising of the laws; the application of the laws to the affairs of the citizens of the State. That Chief Justice Lumpkin was easily first in this work, no one, familiar with those early formative opinions of the Court, can doubt.

Thomas R. R. Cobb was many minded. He won distinction in many fields; in education, religion, war, law. His impress upon the laws of the State is deeper than that made by any other person. He was a lawyer in full practice, reporter for the Supreme Court, compiler of Cobb's Digest of the Laws of Georgia, and one of the committee of three which codified the laws of the State. To him fell largely the codification of the substantive law. The committee ar-

ranged the laws by subjects, harmonizing them, omitted redundancies and repetitions, added new laws, and produced a symmetrical whole, a great law book, perhaps the first of the kind in the Union. Unique is the codification of the doctrines of equity, elsewhere there were codes of Procedure, this is a code of all the laws of the State.

FOUNDATION AND GROWTH

More than half a century ago these three distinguished Georgians founded a law school which exists today as the Law Department of the University of Georgia. While methods of legal study and education have, in these years, changed, nay undergone a revolution, the great underlying principles of the founders are today the inspiration of the teachers and the norm of the progress of this school. No men were by temperament and training better fitted to impress on the students the due relation of principles and practice, the accurate adjustment of the laws to the law. Thus this school seeks to instill those unchangeable principles of the law which must animate all philosophically framed rules of conduct, and at the same time give actual practice as far as possible in the application of those rules. While it strives to attain a standard of excellence in the academic training of the lawyer, law is a business, the most intensely practical of all human pursuits.

The high standard of professional honor and courtesy set by the founders is the priceless heritage of the school today. Unceasing effort in all the work of the school, is made to impress the student with the solemn responsibility of the lawyer, and the sacredness of the trust imposed upon him. The ideals of the school are high and clean.

PROGRESS

For many years the school has been moving forward steadily, and as rapidly as the conditions in the state allow. More than ten years ago the Law Department became in reality an integral part of the University, and the transfer from the Academic to the Law School of any but worthy men ceased. The adoption of the two years' course soon followed. The wisdom, if not the necessity, of that action was never doubtful. The efficiency of the work was more than doubled. The approval of the State Bar Association has been repeatedly expressed. The election of additional teachers has been an untold advantage. The requirement of fifteen academic units for entrance went into operation with the opening of the session of 1908, and has borne good fruit in the better class of students admitted.

Beginning with the autumn term of 1919, the course for graduation was extended to three years. The successful inauguration of this change was evidenced by the gratifying attendance upon the first year course. Beginning with September, 1924, the entrance requirement is one year of college work.

Among the many advantages offered by the school most worthy of note is the connection with the University. The advantages of this connection at once occur to the student. Access to the academic schools, the libraries, debating societies, participation in literary and other University activities, wider acquaintanceship with the young men of the State University fellowship is invaluable to the lawyer.

That an institution cherishing such ideals and earnestly endeavoring to fulfill its obligations to State and people receive the recognition of Georgia is no surprise to its alumni, and is a source of gratification to all friends of thorough training for the practice of the profession.

HISTORICAL

In 1867 Benjamin H. Hill and William L. Mitchell were elected by the Trustees to fill the two vacancies.

From the time of Mr. Hill's election to the United States Senate in 1877, his connection with the school was nominal, and the classes were under the sole care of Mr. Mitchell until 1881, when Pope Barrow and George Dudley Thomas were elected professors of law. Dr. Mitchell died in 1882 and Mr. Barrow resigned in 1883. In 1884 Andrew J. Cobb was elected, and from that time until 1890 Mr. Thomas and Mr. Cobb filled the Chairs.

SKETCHES OF TEACHERS

Benjamin H. Hill, as all know, was one of Georgia's greatest sons. As a logical debater he was supreme. His command of strong, forceful language was unexcelled. He honored the State at the bar, in the United States House and Senate.

William L. Mitchell was one of the most experienced teachers who ever filled a chair in the school. His knowledge of the underlying principles of law was phenomenal. The teaching, in his day, was by daily quiz from text books. He never openel a book in class. His memory of the subject made it unnecessary.

George Dudley Thomas, while a young man, went easily to the front of the bar. Few lawyers have in the same length of time attained such signal success as he did. His mind was clear, analytical, and his ability to communicate his knowledge equalled his mental concept.

Andrew J. Cobb was one of the profoundest lawyers every living in the State. His opinions, as a Supreme Court Justice have been cited more frequently than those of any other member of that Court. His temperament was equable, his manners courteous. In expressing his convictions he was fearless. Of him it was said: "He was strong as steel and pure as prayer."

In 1890, Howell Cobb was elected. In 1893 Mr. Thomas and Mr. Andrew J. Cobb having resigned as regular professors, and become lecturers, Sylvanus Morris was elected.

The chair of lecturer on Medical Jurisprudence was filled by Dr. R. D. Moore from 1873, to 1879 by Dr. R. M. Smith, from 1880 to 1883 by Dr. John Gerdine, and in 1883 Dr. S. C. Benedict was elected. In 1907, Dr. Benedict having resigned, T. F. Green was elected Lecturer on Medical Jurisprudence. In 1908, Mr. Green having resigned, Dr. James C. Bloomfield was elected Lecturer on Medical Jurisprudence.

From 1873 to the time of his death in January 1888, Chancellor P. H. Mell delivered lectures on Parliamentary Law to the class in connection with the Senior class in other departments of the University. In 1894 John D. Mell was elected Lecturer on Parliamentary Law.

Dr. J. H. T. McPherson was elected Lecturer in Roman Law in 1899.

In 1900 Sylvanus Morris was elected Dean.

In 1901 the Course of Study was extended from one to two years.

In 1906 Thomas F. Green was elected Lecturer on Federal Procedure.

In 1908 Hon. Andrew J. Cobb was elected Lecturer on Procedure and Constitutional Law.

In 1909, Hon. Howell Cobb having resigned as regular professor and having been made professor emeritus, Mr. Thomas F. Green was elected regular professor of Law.

Hon. Howell Cobb died during the year 1909.

In 1909, John D. Mell resigned as Lecturer on Parliamentary Law.

In 1912 Joseph S. Stewart was elected Lecturer on Parliamentary Law.

In 1913 H. Abit Nix was elected Instructor in Law.

In 1916 the Chair of Medical Jurisprudence was abolished.

In 1918 Messrs. Green and Nix resigned and Messrs. Walter G. Cornett and Henry G. Howard were elected Instructors in Law. Mr. Howard was called to the military service, and resigned. Mr. Stephen C. Upson was elected to the vacancy in 1919.

In 1919, the building, the "Lumpkin Law School," was formally opened.

In 1920 the course was extended to three years.

The subjects of Parliamentry Law and Medical Jurisprudence are now in charge of Hon. George F. Gober and Prof. W. G. Cornett, respectively.

In June 1921, the Faculty was reorganized, the three members in office being retained, Professors Cornett and Upson being made regular professors, and Hon. Andrew J. Cobb being elected a regular professor. In 1923 R. L. McWhorter was elected professor.

In 1924 entrance requirement of one year of college work was adopted.

In 1923, Robert L. McWhorter was elected instructor and in 1925 was made full professor.

In 1925, Hon. George F. Gober was elected President.

In 1925, entrance requirement of two years of college work was adopted.

EQUIPMENT AND FACILITIES

Some years ago the graduates and friends of the school purchased the present Law Building. The equipment and facilities are ample, except for the lack of library space and reading rooms. The library contains many valuable publications which are now procurable. Within the last two years additions of modern works, text-books, reports, digests have been made. The library is now as complete as any one of the size to be found in the State.

GRADUATES

To name the graduates of the school who have attained distinction would too greatly extend this sketch. They have been United States Senators, Congressmen, Governors, and Chief Justice, and As-

sociate Justices of the State Supreme Court; Justices of the Court of Appeals; Judges of the Superior, City, County Courts, Solicitors General, and Solicitors of other Courts. In every legislature are found graduates of the School who take prominent part in the deliberations. In practically every County of the State the graduates of the School have taken and are now taking prominent position in the affairs of the community. It has been said by one, not a graduate, that;

"No single institution has made a deeper impress upon the life of the State than the University Law Department. During the half century of its existence nearly one thousand graduates have left its halls, whose lives and achievements in peace and war have blessed the State."

Competitive Conspiracy

HAROLD HIRSCH

The limitations to which this article will be confined must first be stated. Unfair competition can readily be divided into two groups; the one dealing with "passing off", that is, the selling of one man's goods as those of another, whether by way of substitution or infringement of a trademark, the other dealing with what has been called "economic unfair competition", that is, any competition that is not based upon efficiency. The former is based upon fraud and deception, while the latter is based upon an interference with the natural law of supply and demand. The former has been subject to equitable action for years, while the latter has been subject to legal review for a comparatively short time, and the culmination is found in the legislation against "unfair methods of competition", commencing with the Sherman Anti-Trust Law,[1] and the interpretation thereof in the cases of the United States v. Standard Oil Company[2] and United States v. American Tobacco Company,[3] and ending with the passage of the Clayton Act,[4] and the Federal Trade Commission Act,[5] and the interpretation thereof by many late decisions by our Supreme Court. It must be remembered that contracts in restraint of trade were invalid under the common law, that "passing off" has for years given a right of action, but that "unfair methods of competition", except as above, find their condemnation in the last two mentioned statutes. As to what constitutes such methods is left finally to the Courts,[6] and to the decisions we must look for our boundary lines. With the general subject of "passing off" we are not here interested, and with the subject of "unfair methods of competition" we are only interested in one phase thereof, that is, the fiing of resale prices—price restriction. And, we must assume for our present purposes that the legislation against restraint of trade by price restriction is based upon sound economic principles, and no attempt will be made to discuss that phase of the situation. For those interested in this problem, reference is made to the admirable work of William H. S. Stevens,[7] article by Prof. Bruce Wyman,[8] report of the Federal Trade Commission, statement by Mr. Justice Brandeis[9], and the report of the Special Committee of the United States Chamber of Commerce[10]. The economic argument is well stated by the manufacture of trademarked goods, that the merchant buys not only the product, but buys the name

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1 Act of July 2, 1890, 26 Stat. 209, Chap. 646.

2 221 U. S. 1

3 221 U. S. 106

4 Act of Oct. 15, 1914, 38 Stat. 730

5 Act of Sept. 26, 1914, 38 Stat. 717

6 Federal Trade Commission v. Gratz, 253 U. S. 421.

7 Unfair Competition—The University of Chicago Press

8 Article by Prof. Bruce Wyman, Vol. 42, July, 1912, Page 69, Annual of American Academy of Political Science

9 Hearings before the Committee on Interstate and Foreign Commerce 63rd Congress, 2nd and 3rd Sessions

10 A brief concerning the Maintenance of Resale Prices

and good will, the market and waiting customers, and the manufacturer should have the right of price control, while the price cutting merchant states that having purchased he should have the right to resell as he pleases.

In so far as we are now concerned the conflict is between the two well recognized legal principles. In the case of United States v. Colgate[11] the Supreme Court announced that a manufacturer might legally refuse to sell his product to a dealer who cut prices that the manufacturer had previously announced as a minimum price[12]. This decision was undoubtedly based upon the fundamental principle that so long as the title to the product remained in the manufacturer, he could sell or refrain from selling as he saw fit. This was but following the doctrine of the Eastern States Lumber Association v. United States[13] when it was held that a "retail dealer has an unquestionable right to stop dealing with a wholesaler for reasons sufficient to himself." In other words, it is now established beyond dispute "it is the right long recognized of a trader engaged in entirely private business freely to exercise independent discretion as to the parties with whom he will deal"[14]. On the other hand the purchaser has the undoubted right to sell the product he has purchased at such price as he sees fit to sell it, and the Courts have not yet held that selling at a loss constitutes unfair competition[15]. The question is, where do the respective rights and obligations begin, and where do they end?

The vitals of the decision in the Raymond Bros. case revolves around the expression "independent discretion", and the sentence "an act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy which may be prohibited if the result be hurtful to the public or to the individual against whom the concerted action is directed." In other words, one can do by himself, and independent of others, what he can not do with others by way of conspiracy or agreement, implied or expressed. What is this competitive conspiracy, and what limitation has it engrafted upon the doctrine heretofore set out? The most illuminating decision on this subject is the case of Federal Trade Commission v. Beech-Nut Packing Company[16]. That decision "required the Company to cease and desist from carrying into effect its so-called Beech-Nut Policy by *cooperative methods* in which *respondent and its distributors, customers and agents* undertake to *prevent others* from obtaining the company's products at less than the prices designated by it—(1) by the practice of reporting the names of dealers who do not observe such resale prices; (2) by causing dealers to be enrolled upon lists of undesirable purchasers who are not to be supplied with the products of the company unless and until they have given satisfactory assurances of their purpose to maintain such designated prices in the future; (3) by employing salesmen or agents to assist in such plan by report-

11 250 U. S. 300
12 Frey v. Cudahy Packing Co., 256 U. S. 2081
13 234 U. S. 600
14 Federal Trade Commission v. Raymond Bros., 263 U. S. 565
15 Miles Medicine Co. v. Park & Sons, 220 U. S. 373
16 257 U. S. 441

ing dealers who do not observe such resale prices, and giving orders of purchase only to such jobbers and wholesalers as sell at the suggested prices and refusing to give such orders to dealers who sell at less than such prices, or who sell to others who sell at less than such prices; (4) by utilizing numbers and symbols marked upon cases containing their products with a view of ascertaining the names of dealers who sell the company's products at less than the suggested prices, or who sell to others who sell at less than such prices in order to prevent such dealers from obtaining the products of the company, (5) by utilizing any other equivalent corporate means of accomplishing the maintenance of prices fixed by the company." It is well to note that the Supreme Court reversed the finding of the Circuit Court of Appeals, but at the same time held that the order of the Federal Trade Commission was too broad. The Commission ordered the company to cease and desist "refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices." The Commission was reversed because in the opinion of that Court, while the facts appeared to bring the case within the case of Miles Medicine Company v. Park[17], nevertheless it regarded the cases as controlled by the decision in the case of United States v. Colgate[18]. The Supreme Court in the Beech-Nut case discusses the two last mentioned cases, and refers to its decision in the case of United States v. Schrader's Son, Inc.[19], and says:

"In the subsequent case of United States v. Schrader's Son, Inc., 252 U. S. 85, this Court had occasion to deal with a case under the Criminal Appeals Act, wherein there was a charge that a manufacturer sold to manufacturers in several States under an agreement to observe certain resale prices fixed by the vendor,—which we held to be a violation of the Sherman Anti-Trust Act.

"In referring to the Colgate case we said: 'The court below misapprehended the meaning and effect of the opinion and judgment in that case. We had no intention to over-rule or modify the doctrine of Dr. Miles Medical Company v. Park & Sons Co., (220 U. S.) where the effect was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.'

"In the still later case of Frey & Son v. Cudahy Packing Company, 41 Sup. Ct. Rep. 451, wherein this court again had occasion to consider the subject, it was said of the previous decisions in United States v. Colgate and United States v. Schrader's Son, Inc., supra, 'Apparently the former case was misapprehended. The latter opinion distinctly states that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances.'

"By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."

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17 220 U. S. 373
18 250 U. S. 300
19 252 U. S. 85

It is sufficient here to add that the Supreme Court at once upheld the doctrine announced in the Colgate case, but at the same time declared "from this course of conduct a court may infer * * * that competition among retail dealers is practically suppressed * * *". The course of conduct in the Beech-Nut case, that is of interest here, is found in paragraphs one and three of the decision, the reporting of dealers who do not observe the resale prices. Interpretative of the Beech-Nut decision, we have the case of Hills Bros. v. Fderal Trade Commission[20]. The facts disclosed that Hills Bros, announced a minimum resale plan, and learned when its minimum resale was violated through its salesmen and from competing retail dealers located near the dealer who was cutting the price. The Court stated the position of Hills Bros. as follows: "This brings us to the principal contention of the petitioner, namely, that it has simply fixed a minimum resale price for its coffee, and has refused to sell to dealers who will not maintain the minimum price, and that in so doing it has acted within its rights and kept within the law." The Court then held: "If the petitioner has done nothing more than this, it will be readily conceded that the charge of unfair competition has failed." But the order to cease and desist was granted, due to the fact that the reports were made by salesmen and retailers. Moir v. Federal Trade Commission[21] and Q. R. S. Music Company v. Federal Trade Commission[22] follow the above decisions. These decisions show conclusively that although one has the right to refuse to sell and may withhold his goods from those who will not sell them at the prices fixed for their resale, one can not go beyond that right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade[23], that one of the obstructions is a conspiracy that is created when salesmen or competitors report a violation of a minimum price policy. Has the latter part of this conclusion been modified by other decisions, whereby the manufacturer can use a weapon to substantiate the right given in the former part thereof? Let us for the moment consider the case of American Tobacco Company v. Federal Trade Commission[24]. In that case the Tobacco Company "bluntly told its jobbers that if they were not interested in making a fair profit and for notions of their own elected to sell at less than a living profit, the Company would feel at liberty to remove them from the list of direct customers." The Court held that such did not constitute a conspiracy. In United States v. Hudnut [25], Judge Hand stated:

"It is hardly useful to review in detail the 73 cases of retailers to whom the defendant sold its goods, and who were cut off for price-cutting, and reinstated. These are but a small fraction of 40,000 customers, who purchased its perfumes and toilet articles. I should not regard the suit as a reasonable one, except for the recent case of the Supreme Court in Federal Trade Commission v. Beech-Nut Co., 257 U. S. 441, 42 S. Ct. 150, 66 L. Ed. 307, 19 A. L. R.

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20 9 F. (2) 481.
21 12 F. (2) 22
22 12 F. (2) 730
23 Colgate Case, supra.
24 9 F. (2) 570, Certiorari Granted, 70 L. Ed.
25 8 F. (2) 1010

882, decided by a narrow majority. That case, however, did not hold that a suggestion by a seller to his customer of a resale price, with a statement that further dealings would be discontinued if the customer cut the suggested price, was unlawful under the Sherman Act (Comp. St. Sec. 8820 et seq.)

It is true that the distinction between an agreement by word or conduct to maintain a reselling price on merchandise sold and delivered, and a warning that, if such a price is not maintained, future sales will be withheld, is delicate, and that the second may be accompanied by such circumstances as to show conclusively that a contract is really made. Yet there is a difference, and, if it is not observed, the right to refuse to sell to a customer, who does not by his conduct satisfy his vendor, will disappear. Certainly reckless price-cutting cheapens a product in the eyes of the community, and often greatly injures its future marketability and value. On the whole, there were among the 73 cases very few instances indeed where Hudnut's salesmen, even with the inevitable enthusiasm of such persons, did anything like make an agreement to fix a resale price. The facts, taken as a whole, more nearly resemble those in United States v. Colgate, 250 U. S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 7 A. R. L. 443, and Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 41 S. Ct. 451, 65 L. Ed. 892, than those in Federal Trade Commission v. Beech-Nut Co., supra. See, also, my opinion in Baran v. Goodyear Tire & Rubber Co. (D. C.) 256 F. 571."

In the case of Toledo Pipe-Thrashing Machine Company v. Federal Trade Commission[26], the Commissioner ordered the Machine Company, among other things, to cease and desist (3) by informing dealers that price cutters reported, who would not give assurance of adherence to the suggested resale discounts, had been or would be refused further sales; (4) by employing its salesmen to investigate charges of price cutting reported by dealers. * * * The Court reversed this part of the order, saying:

***"Subdivisions 2, 3, and 4 specify acts which seem to us to be of necessity reasonably incidental to the fair exercise of this right of selection. They represent the irreducible minimum of means by which one who adopts the policy of not selling his goods to price cutters may endeavor to maintain that policy, and they indicate only that inevitable degree of 'co-operation' naturally and selfishly coming from dealers who uphold the system; and they should not be enjoined."

The Court distinguishes the Beech-Nut case, supra, in the following manner:

"The Beech-Nut Case is not completely parallel, because in the present case we have no system of identifying marks, and no group of salesmen or agents engaged chiefly in finding and reporting violations, or at all in penalizing offeders by diverting from them the retail business, nor yet the elaborate plan of 'do not sell' lists, with the accompanying co-operative effort to prevent other dealers from selling to the price cutters. We do have the general and encouraged practice by dealers to report, as far as they happen to develop, the names of price cutters and we do have the general practice of refusal by the manufacturer to sell to them further unless they agree to maintain the schedule. Whether these things amount to such 'co-operative methods' between the manufacturer and the dealers as the court refers to in the Beech-Nut Case, or are merely a refusal to sell to price cutters, enforced by what so far as has been pointed out is the only available method, is not clear."

It is also interesting to note what is said of the American Tobacco Case, supra, and the Hills Bros. Case, supra;

"The two recent price-maintenance cases in the Second and Ninth Circuit Courts of Appeals (American Tobacco Co. v. F. T. C., 9 F. (2) 570, Oct. 20, 1925, and Hills Bros. v. F. T. C., 9 F. (2d) 481, January 4, 1926), although distinguishable in details, appear to us fundamentally in conflict with each

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[26] 11 F. (2) 337

other. It would seem that the Tobacco Company and the Wholesale Association exercised a concert of action to constrain the price cutters, at least as much as did the petitioner, the Toledo Company, and its distributors in the present case. The discussion by Judge Rogers of the controlling decisions and principles would support the conclusion that the practices of the Toledo Company are lawful. In the Hills Bros. Case, the co-operation between petitioner and its customers was no more in kind, though probably greater in amount, than we have here, and the opinion of Judge Rudkin concludes that this kind of co-operation is the thing forbidden by the rule of the Beech-Nut Case."

And, but recently the Circuit Court of Appeals in the case of Cream of Wheat Company v. Federal Trade Commission[27] amended the order of the Commission on objection made to paragraphs 2 (a) and (b), and paragraphs 4 and 6. The Court stating the proposition, as follows:

"The objections to paragraph 2 (a) are that the petitioner construes it as directing petitioner to desist from securing from customers or prospective customers or from dealers or trade associations reports of customers, who fail to observe its resale prices.

"But the order does not warrant such an interpretation. The language is to desist from "soliciting and securing" from customers, etc., such information. Merely securing the information is not prohibited, unless the information is also "solicited." If the order had employed the disjunctive "or" instead of the conjunctive "and," consel's contention would be entitled to greater consideration, a question not before us and not decided.

"This order does not prohibit the petitioner from acting on information received by it without solicitation, but communicated to it voluntarily by some of its customers, or from advertisements of price cuttings. This also applies to the objections to paragraph 2 (b).

"Paragraph 4 only requires the petitioner to desist from "employing its sales agents to assist in such plan by reporting dealers who have failed to observe its resale prices, *** and furnishing said agents the names of customers to whom it has refused further sales because of price cutting, and instructing them not to sell to such customers." The words "to assist" in such plans must be construed in connection with paragraphs 2 (a) and 2 (b) "to solicit and secure," and is limited to information solicited and secured from customers, etc., the names of customers guilty of price cutting or in other words they must not solicit customers to furnish them with information of those cutting prices of the articles manufactured and sold to the trade by the petitioner, and act on information thus obtained."

And finally, the case of Ayer v. Federal Trade Commission[28]:

"As long as the manufacturer does not monopolize his line of products and use unfair or fraudulent methods, he should be permitted to exercise the privilege which the law accords him of selecting his customers and refusing to sell to customers who undermine the market by becoming price cutters. ***No court has gone so far as to hold that an occasional instance in the business career of a firm as where an agent has solicited or urged a retailer not to cut prices, amounts to an unfair business policy or constitutes a method of merchandising which is condemned by the act. *** It (the respondent) had about eight thousand customers, and there were not more than fifty complaints of customers as price cutters. It did not seek out such price cutters but from time to time they were reported by competitors in the jobbing and retail business. ***Very rarely was an investigation made by a salesman or representative of the petitioner (the respondent). It had but nine Salesmen in its large business. No list of price cutters was kept, no system of follow-ups was pursued after the form letter was sent out, and there was no established method of interviewing or keeping in touch with the retailer or jobber. *** There was no cooperation with its jobbers and retailers or other distributors which was effectual either as an agreement, expressed or implied, intended to accomplish purposes of price fixing."

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27 C. C. A. 8th Circuit, decided July 26, 1926.
28 C. C. C. 2nd Circuit

These cases again substantiate the proposition that one has the right to select his customers, they also go to the extent of holding that a manufacturer can suggest to his customers that he will be discontinued unless a resale price is maintained, and that reports can be used to maintain the right of selection, that is, can secure the information without solicitation.

Truly Judge Denison was correct when he stated "The state of the law as to price maintenance may rightfully be said to be in confusion".[29]

The question that seems to be open is, does the Beech-Nut Case hold that the mere reporting of price cutting by competition and or salesman is a conspiracy that constitutes "unfair methods of competition"? If it does, the decisions are in hopeless conflict, and that the right of selection of one's customers is to a great extent nullified; if, on the other hand, such does not constitute a conspiracy, the decisions can be reconciled.

The basis of a conspiracy is a combination or agreement, expressed or implied. Can it be said because a manufacturer announces a minimum resale problem, then receives information from a competitor of the person cutting prices, and cuts that person from his list, that such constitutes a combination or agreement in restraint of trade? Does such constitute a conspiracy? It would certainly appear that such does not constitute an agreement. Another question might arise if under the given circumstances the price cutter should be cut off for price cutting and then restored upon an agreement not to again cut prices. But this is an agreement and not a conspiracy.

HAROLD HIRSCH, '01.
of Candler, Thomson & Hirsch,
Atlanta, Georgia.

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[29] Toledo Case, supra.

The Courts and the People

By
GEO. F. GOBER

Our constitution provides:—All government or right originates with the people, is founded on their will only and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and at all times answerable to them. It further assures the right of freedom of speech. We could not afford to detract from the great importance of these constitutional safeguards; they are necessary to preserve our liberties under our form of government. We have also the slogan that ours is a government by the people, for the people, which is brought forth and made to do duty in many political contests. These are the texts of every demagogue seeking office upon which he rings the changes when he presents himself with a patriotic air and saintly pose asking the electroate to support him. He is either a reformer or iconoclast as his exigencies demand. Ignorant of the past and with no care for the future he paints a glorious rainbow of future prosperity provided he be elected. He would tear down old institutions for the sake of the space; an iconoclast never builds; he conceives his mission is to destroy regardless of value and intrinsic worth. Like a chameleon he takes on the cloro of his surroundings. If he offers a remedy it is usually empirical and untried. He promises many things impossible but anything to catch his hearers. To listen to him, the Government is all wrong from top to bottom; officers are not doing their duty; graft controls and the jails and penitentiaries ought to be enlarged to accommodate the delinquents. As a rule he is not taken seriously and like a storm soon blows over. Some demagogues write and others speak.

The people rule and by majorities control. They, through their representatives framed our constitutions and ratified them. We live under a dual government; each one within its powers is sovereign. The people elect the congress, the legislature and the executive officers. They elect the judges, the solicitors general and the clerks and Sheriffs of the courts. Each one of these officers exercises delegated power given by the people; they are told by the laws where their authority begins and where it ends; what they can do and what they cannot do; their duties and obligations are specifically defined. Every officer in this State must be able to point to some law that gives him the official authority that he assumes to exercise.

The people making the laws and, electing the officers, they are responsible for the courts. The Grand jurors and the traverse jurors are part of the people; the people furnish the litigants and the witnesses;—they furnish the criminals. It must be concluded that we live under a pure democracy and the people rule.

Every citizen having a part in the government is privileged to criticise any officer and every official act not in conformity with the delegated power. Such criticism when fair is a patriotic duty. If any officer betrays his trust or any department of the government be not properly carried on, fair criticism would call attention to the

fact and it would be remedied; if there be nothing wrong, confidence would be restored which is of greatest importance to any officer or department of government.

There has been much said and written about a wave of crime. That there have been many violations of the criminal law cannot be denied. It is not local. This condition exists from one ocean to the other; from Canada to the gulf; it has been magnified and held up as something for which the courts were responsible. It has been a great theme for demagogues. A physician when called to treat a patient first makes a diagnosis of the trouble; he determines what treatment is necessary and then from his professional knowledge he applies the remedy.

We have more people in the United States than we ever had. It is estimated we have a population of about 120,000,000. This is a great population, as many as Rome ever had in the time of her greatest power. As a result we have more criminals—a greater variety of criminals. We have more money and property than ever before and more opportunity and inducement to steal. We have a large number who want to enjoy the luxuries the age affords and to do so without work. Clothes and high living, expensive hotels and bootleg liquor cannot be enjoyed without money and, criminals habituated to these things, feel that they must have them either one way or another. On this account we have mail robberies, burglaries and bank robberies often with murders attending to accomplish the purposes. If there be a wave of these crimes courts can no more ward it off than can physicians ward off a scourge of the plague. A court cannot move itself; the people must move it through indictments and the furnishing of the evidence. This is the work of the people through their selected officers. A judge is not a court anymore than a court is a judge. A court is a place where justice is judicially administered. A court is the assembling of the proper officers at a particular time and place fixed by law to dispose of the business properly before it.

Every important criminal case in the world today is broadcasted by the daily papers throughout the land. The newspapers are not to blame for this since they print what the people want to read. Gerald Chapman, Dutch Anderson, Whittemore and many others have been on the front page during the last year with their pictures and doings as wonderful examples of the product of the criminal class; also the Hall case in New Jersey where it is charged a preacher and his female choir leader caught in flagrante delicto were murdered. The law abiding people reading about these things can well conclude that there is a wave of crime.

In our diagnosis let us see further. We have more laws than we have ever had; more statutes to be enforced. In thirty-nine states last year thirteen thousand laws were passed. Ignorance of law excuses no one and the very minute each one of these was approved by the Governor everybody was presumed to know them and held to be accountable for their violations. Many of these laws were necessary to prescribe the rights and obligations arising under our progress and complicated civilization. The automobile, the aeroplane, the radio and other things have required new statutes but many were the result of propaganda of one-eyed fanatics seeking to govern

the people by criminal statutes. Criminal statutes are important and necessary for reasonable needs but no government can or ever has ruled a people by drastic criminal statutes and penalties. Henry VIII reigned thirty-six years and under his laws seventy-two thousand during his reign were executed for theft and burglary. It was a capital offense to steal as much as twelve and one-half pence about twenty-five cents. There were many other trifling offenses punished with death. He was followed by Mary who burned about two hundred at the stake as heretics and non-confomists. Blackstone wrote his commentaries in 1765 and at that time there were in England one hundred sixty felonies punishable by death. There are only two now. In America, during the administration of John Adams the Alien and Sedition laws were passed. Under these laws it was said one could not criticise the cut of a Congressman's coat without violating the law. There were many convictions and on account of these laws and the party of Adams was driven from power and the laws repealed. Jefferson went out of power rendered unpopular by the Embargo law, which was defied and repealed. Public sentiment was not in favor of the law for the reason that it was unreasonable and deprived the citizens of fundamental rights.

The judge under our system in misdemeanor cases has a wide discretion in the imposing of penalties. There are some that assume to think that a judge is not doing his duty unless he imposes maximum penalties in every case. Ignorant of every principle of penology they set themselves up as critics over him. Some have gone so far as to publish a list of his penalties with criticisms. It would be a disgrace to the State if it had even one judge who could be intimidated from his duty under his oath of office by such contemptible doings. Any one ought to know there is a difference in cases, in the circumstances, in the defendants and their ability to pay, in their records and even where two defendants have violated the same criminal statute, circumstances often make a difference in their proper penalties.

The question comes, if the laws and procedure are wrong what remedies and changes should be made to better conditions? The demagogue attacks the present status but he does not offer any plan or suggestions for betterment. Would he abolish the jury system and would such a remedy be successful? This system has been imbedded in the laws of the English speaking people for a thousand years; it has been tried out and found to be the greatest protection yet found for the rights and liberties of the citizen against arbitrary and irresponsible power; it is firmly fixed in our Constitution; to take away this right would be revolutionary and no thinking man would countenance such an undertaking. The protagonist would find it impossible. A defendant under our law is presumed to be innocent until the contrary is made to appear by evidence beyond a reasonable doubt. Would the reformer change this rule and set up that a defendant is presumed to be guilty when brought before the court on a criminal charge and put the burden on him to show his innocence to the satisfaction of the court? Such a proposition is ridiculous and to state it is to argue its absurdity. Would the reformer insist a defendant should not have a fair trial conducted under the

form of law? If such be his remedial change there is no room for further argument. If such changes were made we might as well **abolish the courts and live in a state of anarchy.** Life, liberty, and property would have no protection; physical might would be the measure of right and chaos would reign supreme. Such changes are unthinkable and no sane man would consider such propositions for a moment.

If our legal machinery is not doing its proper work we should remedy it. The law should be properly enforced but one who would criticize it should be able to point out the trouble, to show where the defects are and let improvements be made. This duty is upon the people through their representatives in the law making body. The judges and Solicitors General do not belong to the criminal class; none of them have been indicted and convicted of violations of any criminal law. On the contrary Georgia has as honest, able and hard-working judiciary as she ever had; as fearless as ever before in the enforcement of the law. This may be said of the judges in all the courts from the highest to the lowest. The people know the hard work the circuit judges are compelled to do to dispose of the business; they work early and late often under disadvantageous conditions. The Court of Appeals and Supreme Court are made up of justices whose ability and high professional character are equal to that of any who have ever presided in those courts. They work harder for the money they get than do any other officers in the State.

In the last fifty years only two justices of the Supreme court have been defeated for reelection. This was not on account of their lack of ability as lawyers nor on account of their wanting in character as men but their successors were easily the peers in character and ability of any justices who had ever served in that court. The members of the Court of Appeals have each served for a long time and have shown by their work their great ability and appreciation. From these facts, with the power of the people at each recurring election to change the personnel of the courts, it may be safely assumed that the people are satisfied with their work. Many of our Superior Court judges have occupied the bench from twenty to thirty years. Their work is done in the open; the public has a right to be present as it usually is and to see how the business is transacted and how the law is enforced. If the Judges had failed in administering even handed justice they would have been quickly retired. A judge in a circuit in Georgia who occupies the bench for ten years if he has not maintained a character for uprightness and fair dealing would be beaten in an election before the people by the litigants against whom he had decided cases and the criminals he had sentenced if they did not respect him.

The lawyer has been prominent from the time of the colonies up to the present. **He has done his part in civic affairs. He gave to the struggling colonies his advice and help.** Lawyers wrote the Declaration of Independence and the Articles of Confederation. They framed the Constitution of the United States and wrote the constitutions of the 48 states of the Union. They have helped to make the laws and have stood up against every effort to invade the rights and liberties of the people. Loyal to their profession and its

history and traditions the lawyers have always exhibited a conscensus of opinion and a brotherhood in effort against innovations and radicalism.

There has never been a time in the history of this country when there was a greater responsibility upon the legal profession than at the present.

During the first development of the country there were few public question upon which there was not an agreement of opinion. One was the protection of the colonies from the aborigenes; the other was the securing of their rights from England. There was little room for division. The great business of the first colonies along with these things was agriculture, the cutting away of the forests and the development of the country. There were no great interests claiming advantages in their favor; there were none of the troublesome matters that have since arisen; there was no race question and the population of the different colonies were not split up into factions over local questions. It is different to-day; there is the great question as to whether the American people can govern themselves and perpetuate their government. As soon as the Constitution framed by our forefathers is thrown aside or emasculated the end will come in chaos and confusion.

We speak of the traditions of the professions. To some the name is indefinite and uncertain. These are not defined in the Code. We do not find the law of gravitation nor any of the unalterable laws of chemistry in the Code nor in the Ten Commandments, but this does not deny their existence. Some think that one is a good citizen who keeps out of the criminal court and is not sent to jail. For one to perform his civic obligations, to be on the side of right against wrong, to regard the unwritten moral laws, and to do unto others as he would have them do unto him, is to fulfil the duties of a good citizen and this name is reserved for such a member of a community. The traditions of the legal profession are the unwritten laws over and above the stringent regulations laid down in the code that apply to the lawyers; they have been developed out of necessity from the relation that the bar sustains to the people and the courts. This is a fiduciary relation involving trust and confidence and faith in loyal devotion. They spring from the obligation of the Bar in the administration of the law. The lawyer who does not live up to them will fall short of success and fail in his professional career.

It is demanded that the highest standard of courtesy and integrity shall be maintained and the work of the Courts and Bar shall show an endeavor to give to every one his due.

In the decisions of our higher Courts from their establishment till now, presided over by learned Judges, there may be found written and between the lines unwritten many of the traditions of the profession. These things show the heart and soul of the men who wrote the opinions and a loyalty and **appreciation of the proper standard of professional obligation and responsibility.** There have been Judges of the Superior Court now dead and gone whose memories are cherished and whose administrations are remembered from the impartial manner in which they meted out justice. The same can be

said of Judges now in commission. The lawyer who acting within the written law does not regard the traditions of the profession to pursue a fair and honorable course of professional conduct is condemned by his fellows and will lose much by any success achieved in such way.

Rufus Choate at one time a United States Senator and the greatest trial lawyer this country ever produced said:

"The necessity of the legal profession to the machinery of the social fabric in a free State is undeniable, and all history shows that popular liberty is best preserved, advanced and defended, where the legal profession is most unrestricted and free. There is, and there has been, no free profession in a despotism. When a celebrated Emperor of Russia was in England, he expressed the utmost astonishment at the consideration in which the legal profession was there held. **He declared that there never was but one lawyer in his dominions, and he had caused him to be hung.** And well he might, for such a man would be much in the way of the arbitrary proceedings in a despotic country. And even in free and enlightened governments, the popular excitement against private individuals, who happen to incur popular odium, is a dangerous element, which requires some check in the machinery of society itself, or great wrongs will often be done. When popular excitement is at the highest point—when popular clamor is loudest, and a victim is absolutely demanded, and seems necessary for peace, it is no small safety for every member of the community to have a class of men educated and trained for the purpose of defending those who can not defend themselves, to step forth as the advocate, if not the friend, of those who are hunted by popular clamor, to give their time, their talents, their learning and their skill in defense of those whom all others desert—to breast the fury of the people—to stem the popular current—and to insist upon a full, fair and impartial investigation before the victim is offered up. And when we reflect that men have been convicted and have suffered the extreme penalty of the law, whose innocence was afterwards made manifest to the world; that men have sometimes confessed themselves guilty of crimes of which they were entirely innocent, we shall see more clearly the need of a legal profession, and shall be more cautious of condemning those who enter into their duties with zeal and energy and enthusiasm—who mean to do their whole duty irrespective of the applause or clamor of the public while laboring under temporare excitement."—Reminiscences.

Of Rufus Choate his biographer said:—

"His manner to the judge was always in the highest degree deferential. **It was almost filial.** He had a feeling of poetic veneration for the judge, as the titular sovereign of that forensic scene which was the theatre of his love as well as of his labors. How splendid a character and how august a figure was his ideal of the judge, appears in the word-picture of such a magistrate, which he drew in his great speech in the Massachusetts Convention against an elective judiciary. He said every judge should have something of the venerable and illustrious attach to his character and function in the feelings of men; and he went on to observe: 'the good judge should be profoundly learned in all the learning of the law, and he must know how to use that learning. **Will any one stand up here to deny this? In this**

day, boastful, glorious for its advancing popular, professional, scientific, and all education, will any one disgrace himself by doubting the necessity of deep and continued studies, and various and thorough attainments, to the bench? He is to know not merely the law which you make and the legislature makes, not constitutional and statute law alone, but that other, ampler, that boundless jurisprudence, the common law, which the successive generations of the State have silently built up; that old code of freedom which we brought with us in the Mayflower and Arabella, but which in the progress of centuries we have ameliorated and enriched and adapted wisely to the necessities of a busy, prosperous and wealthy community,—that he must know. And where to find it? In volumes which you must count by hundreds, by thousands; filling libraries; exacting long labors; the labors of a lifetime, abstracted from business, from politics; but assisted by taking part in an active judicial administration; such labors as produced the wisdom and won the fame of Parsons, and Marshall, and Kent, and Story, and Holt, and Mansfield. If your system of appointment and tenure does not present a motive, a help for such labors and such learning; if it discourages, if it disparages them, in so far it is a failure.

'In the next place, he must be a man, not merely upright, not merely honest and well-intentioned—this of course—but a man who will not respect persons in judgment. And does not every one here agree to this also? Dismissing, for a moment, all theories about the mode of appointing him, or the time for which he shall hold office, sure I am, we all demand, that as far as human virtue, assisted by the best contrivances of human wisdom, can attain to it, he shall not respect persons in judgment. He shall know nothing about the parties, everything about the case. He shall do everything for justice, nothing for himself, nothing for his friend, nothing for his patron, nothing for his sovereign. If on the one side is the executive power, and the legislature, and the people—the sources of his honor, the givers of his daily bread—and on the other, an individual nameless and odious, his eye is to see neither great nor small; attending only to the 'trepidations of the balance.' If a law is passed by a unanimous legislature, clamored for by the general voice of the public, and a cause is before him on it in which the whole community is on one side and an individual nameless or odious on the other, and he believes it to be against the Constitution, he must so declare it, or there is no judge. If Athens comes there to demand that the cup of hemlock be put to the lips of the wisest of men, and he believes that he has not corrupted the youth, nor omitted to worship the gods of the city, nor introduced new divinities of his own, he must deliver him, though the thunder light on the unterrified brow."

Coleridge says, "Strength may be met with strength: the power of inflicting pain may be baffed by the pride of endurance: the eye of rage may be answered by the stare of defiance, or the downcast look of dark and revengeful resolve: and with all this there is an outward and determined object to which the mind can attach its passions and purposes, and bury its own disquietudes in the full occupation of the senses. But who dares struggle with an invisible combatant, with an enemy which exists and makes us know its existence,

but where it is we ask in vain? No space contains it, time promises no control over it, it has no ear for my threats, it has no substance that my hands can grasp or my weapons find vulnerable; it commands and cannot be commanded, it acts and is insusceptible of my reaction, the more I strive to subje it, the more am I compelled to think of it, and, the more I think of it, the more do I find it to possess a reality out of myself, and not to be a phantom of my own imagination;—that all but the most abandoned men acknowledge its authority, and that the whole strength and majesty of my country are pledged to support it; and yet that for me its power is the same with that of my own permanent self, and that all the choice which is permitted to me consists in having it for my guardian angel or my avenging fiend. This is the spirit of LAW,—the lute of Amphion,—the harp of Orpheus. This is the true necessity which compels man into the social state, now and always, by a still beginning, never ceasing, force of moral cohesion."

If there be on earth a people who think less of justice and liberty than the laborer does of his harvest, or the workman of his daily bread, or the merchant of his wealth, or the mariner of his repose, or the soldier of his glory:—build around that people a high wall, that their breath may not infect the rest of the world.

And that people who are rising above mere material good, have placed their affections on the true good; who, to obtain that true good, have spared no labor, no fatigue, no sacrifice, shall hear this word: "For those who have a soul, there is the recompense of souls. Because thou hast loved justice and liberty before all things, come and possess forever liberty and justice."—*From Words of a Believer.*

Our Constitution in the preamble provides that it is established "To perpetuate the principles of free government, to insure justice to all, promote the interest and happiness of the citizen and transmit to posterity the enjoyment of liberty." To this end laws are framed and the courts are provided to enforce the laws. The criminal who violates the laws is an enemy of government; he defies it for his personal and selfish aims. The courts are all the protection the people have and it is true patriotism for the citizen to sustain them with all his help. A small portion of the population is ever in the criminal courts—less than one per cent. The people must depend upon the courts for personal liberty, personal security and the protection of private property. Courts should maintain the confidence of the people by carrying out the spirit of the laws. It does not help to criticise them unjustly, to hold them in disrespect and disparage their efforts to carry their burden. The greatest boon to all is liberty for which the people must depend upon the laws. The Supreme Court of the United States in 262 U. S. 390 in the case of *Meyer vs. Nebraska* said:

"The liberty of all persons without doubt denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by

freemen."

The Constitution guarantees all of these fundamental rights. They have been vindicated in many decided cases. It is not strange that criminal laws should be broken. This was expected when they were passed; otherwise there would have been no provision for punishment. There has never been a law that has not been violated, nor a statute but by some it was disregarded. This is true of the "Thou shalt nots" of the Decalogue that was given to us by the Great Jehovah; some people act as if these were negligible and not binding.

Home Rule for Home Affairs

(Advocating a Constitutional limitation on the Legislative power to interfere in the municipal control of matters of local concern).

(Joseph M. Jones—A. B. Univ. of Ga.; Ll. B., Harvard.)

In taking up a matter of such vital importance to the welfare of the American municipalities, it is not amiss to delve, somewhat briefly, into the historical development of the alleged Home Rule doctrine. At a general rule, the citizens of our country are wont to justify their fundamental and almost inherent rights of local self government, religious freedom, and personal equality on vague generalities, as were outlined in the Magna Charta, and successive Bills of Rights, with which our ancestors were so fervently imbued when they first reached these shores.

This is all very well, but it seems much more desirable to have the whole matter settled once and for all, in so far as it can be settled without court action, by inserting a clause in the State Constitution expressly providing for at least a limited local self-government for the municipalities, in matters of local concern. But this argument runs counter to the time-worn, over-emphasized idea that the Legislature can exercise a free hand in the regulation and control of the municipalities, since the latter are only created arms of the State. Iit is often said with laconic emphasis, that the "Legislature is all-powerful—the Legislature created the municipal corporation and can destroy it, so the Legislature must have the absolute control, and if it wishes to exercise such control it may do so, unhampered by any court action." But in dissolving a Municipal Corporation the Legislature is limited by Constitutional provisions, prohibiting the impairment of contracts and the deprivation of property without due process of law. Then why can we not say that the Legislative power of control over Municipal Corporations is subject to, and limited by, the Constitutional privilege of local self government in affairs having no direct relation to outsiders or outside activities. But, since there is great uncertainty as to whether the courts will recognize this Constitutional privilege as being an inherent right in the American people (though some half dozen states have so recognized it), it is highly desirable to so amend the State Constitution as to insure protection from arbitrary interference on the part of the Legislature. In advocating such a Constitutional limitation we must determine— (1), if such is in keeping with the historical development of the Municipal Corporation; (2), if there is a logical basis for such a distinction; and (3), if such action can be justified from a legal viewpoint.

First as to the historical development: When our ancestors first came to settle this country, they brought with them ideas of liberty and polity, and left at home all the undesirable and oppressing principles of the Royal Government. On reaching these wild and undeveloped regions they found a field of unexampled extent, for the free development of such ideas. Accordingly, the system of intrusting the direction of local affairs to local constituencies has from the earliest

colonial periods, been developed by us to a much greater extent than in England. As you pass from one section of this country to the other, alike in the older regions as in the newest organized settlements, you find the affairs of each road district, school district, county or town, locally self managed, including the administration of Justice. Every county has a local court with full power to summons a jury of the vicinity, thereby bringing Justice home to the business and bosoms of the people, and making it their own affair.

Each State binds together the local institutions which it creates and regulates, independently of Federal control; thus happily preventing an undue concentration of the power and duty of regulating the affairs of the local communities, throughout a country of such extent that with its needs and interests it would be impossible for Congress to become adequately acquainted. The number and general freedom of the Municipal Corporations invested with power to decide and control local and subordinate matters, pertaining solely to their respective communities, constitutes a marked feature in our system of Government They are simply the administrative form of the fundamental idea of American Government, viz, that the people are the source of all political powers, and have the right to exercise them.

When our forefathers left their homes to brave the storms and ravages of this country, they came with definite notions of freedom, both in home and public life. They brought with them the forms of local organization, involving the right to local self government, and dating back to the time of the Saxon who invaded England, divided the country into civil divisions, and instilled in the people their first principles of civic patriotism.

The Constitutions of the States were adopted at a time when this form of local self government was uniformly recognized, and it can be argued with considerable force, that in as much as this right was recognized as being vested in, exercised and enjoyed by, the people of the respective communities, it remained in them unless expressly yielded up and granted to one of the departments of the State by the terms of the Constitution. (This argument is chiefly emphasized by those few theorists who claim that the State Constitution, like the Federal, is to be regarded as a mere grant of powers by the people, who still remain all-powerful except where expressly placed under Legislative control). With this argument in mind, the courts of Michigan, Indiana and Kentucky, have held that the people have an inherent right to local self-government in regard to matters of local concern, and have read such ideas into the Constitutions. It seems more desirable, however, and at least more certain, to follow the notable example of New York, in assuring such right to the people by a constitutional amendment, which expressly provides that every municipal officer, whose election or appointment is not provided for in the Constitution, shall be elected by the Electors of the Municipality, or of some division there of. This is only a modified form of Home Rule. Most of the Constitutional provisions go the full length and allow local self-government in all matters of purely local concern.

Then it seems clear that the adoption of such an amendment to the Constitution is in keeping with the historical development of the Municipality—in fact some of our states have recognized the doctrine

without any express Constitutional provision.

Second, as to whether there is a logical and common sense basis to such action in distinguishing between matters of local and of public concern in this connection: Before trying to answer such a question, we should first closely examine the whole subject to determine if possible, where and how this distinction is to be made—where the dividing line is to be drawn, and what activities are to be classed as public and what as local. The uncertainty of results, based on the mass of inconsistent decisions, force us to leave the court as the final oracle of wisdom, except for a few outstanding activities. We might say that the powers of the Municipality, which relate to the health, good government, and efficient police, in which all citizens have an equal interest, are of public concern. While those which directly involve the expenditure of money, and especially those relating to the various local improvements, the expense of which ultimately falls on the local property owners, are to be regarded as of purely local concern, and in respect to these the controlling voice ought to be with those who must bear the burden. This seems to be logical enough; in fact it would seem wholly inconsistent with the fundamental ideals of American Government to hold otherwise. Our forefathers rose in arms when the mother country tried to impose burdens on them when they had no control over the assessment of such burdens. Why should the people in a remote part of the State be allowed, through their Representatives in the Legislature, to assess owners of distant city property large sums of money to help pay for a Municipal Park? Why should the political party in control of Legislature be allowed to send their supporter down to control the water plant of a city in which the said supporter was wholly disinterested, save to fill his purse with the city's money?

No Municipal Management will, in the long run, be other than extravagant and unwise, where members of the Governing body have no substantial interests in the welfare of the community, and where they have more to gain by plundering than protecting it. To insure good Government there must be a real identity of interest between the members of the Governing Board and the Community. A system of popular municipal organization and local administration is undoubtedly the fairest to the individual citizen. Any other conclusion would be equivalent to an admission that the people in this country are incapable of enlightened self-government, in regard to matters of local concern, and that the few ought to govern the many. Thus it seems that this doctrine of local self-government in regard to matters of local concern, is not only logical in its distinction, but reasonably justified on grounds of fairness and expediency. Then since local matters can better be regulated by the people of the locality than by the central powers, we should provide in our Constitutions that each city shall, as to its local matters, be self-governing. Not only is the doctrine of local self-government wholly logical and fair, but to deny it seems dangerous to the stability of our political instituions.

Under color of Legislative control, politicians, Legislators ignorant of Constitutional law, if no worse is to be said of them, and Judges accepting the doctrine without adequate study of the history

and development of the American Colonies, are unconsciously cooperating to deprive our towns and cities of their right to self-government in their local affairs.

It is further to be noted that Legislators are prompted to interfere with local self-government as a general rule, only when the dominating political machinery of their party is losing its control in the particular city sought thus to be brought into subjection. Legislature always purports to be acting in the interest of sound morality, on the ground that the inhabitants have shown themselves incompetent to manage their own affairs; but this system of paternalism, of government by an outside body, which was the essence of the Roman system of governing the colonies by Prefects, always works to the injury of the community.

The case of *State v. Smith,* 44 Ohio St. 348, might be given at this point, as a notable example of the attitude of the courts on this matter. The members of the local Boards, under the Act there in question, were to be appointed by the Governor, though the duties of the officers were clearly local, i. e., "to supervise the cleaning and improving of the streets, wharves, markets, and the sewers of the city." Each officer was to receive $4,000 a year, a rather high price in those days, certainly high enough to make the Act a desirable one for the party in power, that it might have some nice fat "plums", with which to reward its henchmen, free from control by the local community. *Owen, C. J.,* in a vigorous dissent at page 382, characterizes the Act as "a scheme of conspiracy and fraud, unparallelled in the history of the Legislature." Even in the opinion of the Majority of the Court admitted the character of the Act when it said, at page 374: "Over the wisdom or policy of this Legislature this court has no control," citing the language used in *Sharpless V. Mayor,* 21 Pa. St. 162: "There is no shadow of reason for the supposition that the mere abuse of power was meant to be corrected by the Judiciary. The remedy in such cases is with the people."

As to the Georgia law on this point, the case of *Mayor of Americus v. Perry,* 114 Ga. 871 seems to be outstanding, where Judge Cobb laid down the rule that, "There is nothing in the Constitution of this state which guarantees to the people living within the limits of a municipal corporation the absolute right of local self-government. How far people so situated may be allowed to participate in the choice of officers who are to administer the affairs of the local government is a matter exclusively within the judgment and discretion of the General Assembly. The power to appoint public officers is not purely an executive function, but this power may be exercised by the General Assembly, when not otherwise provided in the constitution, either by naming a given person for the office, or providing the manner in which the officer shall be chosen; and the General Assembly also has the authority to provide for the appointment of a number of officers to discharge a given duty, and provide that vacancies in such number may be filled by those remaining in office, thus creating a self-perpetuating body."

In the early case of *Churchill v. Walker,* 68 Ga. 681, Judge Speer held an Act of the Legislature constitutional, where it subjected the town of Darien to the control of the commissioners of the county in

which it was situated, merely stating that "All acts of the legislature are presumably valid and constitutional, and this is conclusive unless it can be shown that the act is prohibited by the constitution."

Thus it seems that the courts of this state have reluctantly upheld such interferences, leaving it to the people to remedy the situation by a constitutional amendment.

Then, if the courts are to be so technical in their decisions, and so strict in their interpretation of the Constitution, it is for the people to step forward and demand an Amendment to the Constitution, expressly limiting this arbitrary power of the Legislature.

The fact that the Municipal Corporation is liable for its Torts, committed in the exercise of the private or business functions, seems to furnish another logical basis for distinguishing between matters of public and of local concern, though the terms *private* and *local* are not entirely synonymous. If a Municipal Corporation is to be held liable for the negligent acts of the Water Plant Commissioner or the Wharf Commissioner, then it seems only fair that it should be allowed the exclusive privilege of selecting such agents. Of course, if the city, acting in its capacity as an arm of the State, enjoys the privilege and immunities of the State as in police powers, then it is only natural for the State to assert control over such officers. In the former case the city seems to be acting just like a private corporation, or private citizen and as such, should be allowed to select its own agents and conduct its own business. In the latter case the city is not a real corporation at all, but only a subordinate branch or unit of the State itself. So, in its Governmental or public character, the Municipal Corporation is made by the State, one of its instrumentalities. It is the local depository of State Government and it prescribes the political powers to be exercised for the public good and on behalf of the State rather than for itself. As such the Municipal Corporation is only a part of the governing machinery of the Sovereign State which creates it, and in this respect the Legislature is supreme.

But in its proprietary or private character, the powers are concerned not so much with considerations connected with the Government of the State at Large, but with the private advantage of the compact community, which is incorporated as a distinct legal person, or corporate individual. As to such powers and property, and contracts made in reference thereto, the corporation is to be regarded, quo ad hoc, as a private corporation. Then, the limitations on the Legislative power over the property and contracts rights of a private corporation throw light upon like questions as respects the municipal corporation. As to private corporations, the Legislature has no power of control, other than to dissolve them—it cannot impair or affect the property or contract rights of the corporation, but can only control its right to exist. On this analogy, the Legislature, though it possesses full power to dissolve the municipal corporation, cannot deprive it (or rather the people of the locality at whose expense it has been acquired or for whose benefit it was granted) of such property.

Third, as to the question whether such action, in adopting a constitutional amendment securing local self-government, can be justified from a legal point of view, let us first see if the Federal Consti-

tution **forbids such action.** Municipal affairs, being inherently local in their origin and nature, are clearly left to the respective states by the Federal Constitution. It is inconceivable that the Federal government should try to control the local affairs of the municipalities scattered throughout this large country. So, municipal law is generally regarded as a matter to be determined and controlled by the state acts and decisions, and if such a case gets to the Federal courts, the state law will govern unless it violates rights guaranteed by the Federal Constitution, such as the deprivation of property without due process of law or the inpairment of contracts. There is nothing in the Federal Constitution to prevent the state from giving, if it sees fit, by constitutional amendment, full jurisdiction of this matter to the courts, thereby taking the control as to details entirely away from the Legislature. In fact, perhaps fully one-half of the state constitutions now have provisions forbidding legislative regulation of internal affairs in the municipalities, and a number of other states have forbidden Legislature to appoint local officers.

Though such a constitutional amendment is more certain, the same desirable results have sometimes been reached by court action showing further that such an amendment is justified from a legal point of view. A New York court, in 67 N. E. 129, held unconstitutional an Act of the New York Legislature prohibiting anyone who contracted with state or municipal authorities from requiring more than 8 hours of labor a day. Ordinarily, when Legislature regulates labor contracts, it only exercises a right to prescribe the terms of contracts made by its agents (in connection with roads, bridges, and such matters of public concern). But local concerns, as municipal buildings, adornment of streets, and improvement of city parks cannot be thus controlled by the state. The weakness of the New York Act lies in the breadth of the language which includes contracts made in connection with all sorts of municipal works, local as well as public.

On studying the past history of France, Germany and Russia, one seems justified in drawing the conclusion that no country can live after destroying local self-government. The weak spot in our system is the exaltation of state rights at the expense of town rights and local home rule. The relation of the states to the Federal government is all right but the relation between the states and towns is all wrong, if the views of some courts are to prevail. It is the denial of this fundemantal right of local self-government that forces cities to pay large salaries to officers appointed by the state, who are under no responsibility to the city whose affairs they manage and whose money they disburse. To remedy this, the principle should be established that the authority that pays shall appoint and control in all local matters. To help in restoring a better state of things, every new Constitution should, in its bill of rights, recognise local self-government along with religious freedom and personal equality. It should state expressly the right of Legislature to pass laws only on application of the particular municipality affected, and even then subject to ratification by its own voters. If no new constitution is being adopted, the provision securing local self-government can be set forth in an amendment.

The foregoing argument is based on the solid and rational foun-

dation that the control of local affairs and consequential responsibilities should be vested in those who are directly interested and who will reap the advantages of care and good management, or suffer the consequences of neglect and mismanagement. Local self-government will create and cultivate in the citizen a feeling of civic patriotism, and where civic virtues exist the local community will neither suffer from public indifference and neglect, nor become tainted with political "graft" or corruption.

Good government in local affairs is the best assurance of good government in state and national affairs. Judging from the experience of the states adopting the principles herein advocated, the result will work for the betterment of not only the municipality affected but the state and nation as well. Under this doctrine, municipal misrule and neglect cannot go beyond a certain limit. On the other hand, the author is confident that there is in every municipality in this land civic virtue enough, whenever called into activity, to secure a well-ordered and honest municipal home rule.

References:
Goodnow's Home Rule.
1 Dillon, Municipal Corporations, 182, 190.
14 Harvard Law Review 34, 130.
15 Harvard Law Review 470.
16 Columbia Law Review 299.
17 Harvard Law Review 50
19 Harvard Law Review 203.

This address was delivered by Julius M. Mayer of New York who was a United States Circuit Judge of the Court of Appeals for the Second Circuit. It was delivered before the Alumni of the Columbia Law School. Judge Mayer has since died, but previous to his death he sent the manuscript of it to Judge Gober with permission to print it in the Foreword of Gober's Georgia Evidence, and by permission of Judge Gober it is printed here.

The Lawyer and the Judge

Lawyers and judges are human beings. They have good days and bad days, pleasant moods and disagreeable moods. There are times when they are at their best and times when they are at their worst.

But, in the main, subject equally to human frailty, the lawyer and the judge strive honorably and earnestly to do their duty to the trust they have assumed. That trust, in the case of the lawyer, is something more than the endeavor to attain the result desired by his client. It comprehends the obligations so to act as to contribute to the dignity of the administration of justice and to the respect in which the law shall be held in the community at large. That trust, in the case of the judge, involves not merely the aspiration to render a just decision but the obligation to give all who have the right to be heard an attentive hearing and so to conduct himself as to inspire confidence in the earnest character of his endeavor and the mental integrity of his decisions, whether they be regarded as correct or not.

In this common effort, each in his own way, to do his duty, the lawyer and the judge must cooperate in the work-a-day tasks each is called upon to undertake.

The lawyer is entitled to the best there is in the judge. The least to which he and his cause are entitled is a judge alert and not worn, interested and not indifferent, appreciative of the seriousness of the cause to those concerned and not scornful because the controversy may seem petty in comparison with other causes.

The judge is entitled to the best there is in the lawyer. The least to which the judge is entitled from the lawyer is conscientious preparation, perfect frankness, good manners and relief from unnecessary labors.

To accomplish any result of consequence, many small steps are necessary. The artistic figure of justice standing on the eminence of a fine temple would not have its place but for the infinite toil with instruments in themselves not beautiful, which laid the foundation and built the superstructure upon which the figure ultimately rests.

To speak, then, of small things is not a descent to the petty, if as a result, the lawyer will better understand the judge and thus make easier the daily task of each.

There is probably no responsible court, Federal or State, first instance or appellate, which is not working under great pressure. Litigations arising out of or as a result of the war, the increase of statute law, civil and criminal, national and state, the creation and

development of new kinds of industries and businesses, the unceasing complexity of economic problems giving rise to questions of constitutional and commercial law in foreign and domestic commerce have all combined to place a heavy burden on the courts.

Many courts, at the moment, are in serious need of more judges and the time of judges should not be encroached upon uselessly or carelessly. A few cases in every court can wait for decision and delay will not work injury but most cases should be decided promptly and the judge in the court of first instance should have the opportunity of giving them fair consideration; for not infrequently his decision ends the litigation. In order, however, physically to read the papers in law suits not to speak of examining authorities and writing opinions and memoranda much time must be occupied.

Thus, verbose affidavits, or other papers which drag in extraneous matter or substitute argument for a simple statement of the essential facts are undue and unfair drafts upon his time. They accomplish nothing; for the experienced judge readily sees through them. Inadequate or inaccurate references to the testimoney and lack of reference are annoyances which add to the physical labor of the judge from which he should have been spared and the time spent by him in searching for or checking up the testimony, to which he might easily have been referred, might be spent much more profitably.

It is surprising, also, how extensively the word "brief" has become a nisnomer. This is partly due to lack of courage and partly to lack of careful preparation.

The law, in most instances, is plastic. The lawyer studies and makes his points. He is the one who moulds and initiates. To him, is often due the credit of a sound or an able judicial decision because he has pointed the way.

If he has not the courage to emphasize the outstanding points of the case and fills his brief with minor catchalls, he will not infrequently lose the advantage which his opponent gains by driving home to the mind of the busy trial judge the major propositions and letting the driftwood go.

Nothing is more important in a brief either in the court below or in an appellate court than an accurate, orderly and clear statement of the facts and, nothing is more important than a succinct presentation of the facts with a knowledge so complete that counsel can readily turn to the record to substantiate any testimony questioned or drawn into argument.

So. too, with the citation of cases. Resort to encyclopedias of law and the citation of a great mass of cases therein cited is the lazy man's way of briefing so called. The lawyer who aids the courts and soon becomes known as able and reliable is he who has the courage and discernment to make selection and one case in point is as good for the purpose of convincing the court as a hundred.

If a case closely in point cannot be found, then, ordinarily, it is sufficient to state the principle with reference to a recognized writer such as Cooley, for instance, and a limited number of cases which though distinguishable, may show the trend of judicial thought.

The lawyer, who has not the courage of selection and depends wholly on the judge in a court of first instance, forgets that the judge rarely has time to make as thorough an independent investigation as he would wish and must depend largely on the assistance of counsel.

But the poor brief or the feeble argument is due most usually to lack of preparation. That lack is obviously unjust to the client and unfair to the court. The long and, sometimes, dreary hours spent by men in their early days at the bar in the thorough preparation of the simplest cases are often the foundation of an able and seasoned career. No quotation should appear in a brief unless its writer has examined the case from which the quotation is extracted and nothing is more annoying to courts that quotations isolated from context where a reading of the case shows that it is not in point either on principle or authority and that the quotation was an expression of the court in another connection. In brief making, also, where the construction of statutes, ordinances or regulations made in pursuance of law are under discussion, it is a convenient aid to the court, to incorporate the statute in the brief on in an appendix thereto.

In briefs as well as in oral argument, it is well to be frank and concede a point which cannot be sustained. An equivocal answer to the court, accomplishes nothing. It suggests weakness and lack of confidence and no advocate is so strong as he who believes in his case and shows it by his earnestness and his enthusiasm.

In describing events or things, simple illustrations are often useful. It must be remembered that the court is hearing about the subject matter for the first time, while counsel, presumably, have lived with the case. The nature and action of complicated machinery in, for instance, a tort case can be much simplified in illustration by eliminating technical terms and resorting to terms familiar to the lay mind. I recall the able presentation of a well known patent lawyer in opening a very diffuclt case when referring to a certain electrical instrumentality he said that this man was the "Tight wad" who had his eye on the other instrumentality who was the "spendthrift". He vitalized these electrical instruments and forces into human beings and, of course, what he meant was that while one instrument expended electricity unduly, the other checked it. That illustration though, perhaps, inelegant, at once explained the action under discussion and remained in the memory of the judge long after many technical details had been forgotten. The strength of the so-called country lawyer lies in his ability to make his point with homely illustrations, drawn from his knowledge of the animal kingdom and the products of the field. He is keen in his knowledge of human nature and he rarely takes the wisdom of the judge for granted.

Not the least important acquisition of a lawyer is a well modulated voice. It would be idle to deny that even the healthiest judges, physically speaking, may show weariness as the day grows long, especially if they conscientiously concentrate on the argument or trial in progress. The raucous voice is wearing and the shouting voice almost unberable. The lawyer thus afflicted is prab-

ably unconscious of the difficulty but no better service can be done by his friends than frankly to suggest to him to try to cultivate his voice.

I am not speaking tonight of jury trials. Advocacy in that branch is an art by itself. But, the oratory of passion and of gesture is no longer necessary in addressing judges.

Then, there are some other tribulations of a judge, which may seem trifling, but are time takers and irritants. The submission of proposed conflicting orders upon notice of settlement where the differences could readily be adjusted by fair minded counsel but where failure to agree requires that the judge should wearily check up the differences, if he confines his labors to the papers or listens to arguments as to the details, if he is willing to hear an oral presentation. So, also, in the preparation of records on appeal, where weeks or months after the trial, the judge is expected to remember whether the witness testified that he did or did not see the defendant on Wednesday, the 3rd of April, and counsel are in controversy as to an error in the stenographer's minutes or where, in the Federal Courts, counsel are unable to agree upon a bill of exceptions at law or a record on appeal in equity (and doubtless the same prevails in the State courts), when the exercise of some patience and of a spirit of cooperation would result in an agreement between counsel and thus a saving of time, which the judge might more profitably employ.

In brief, the duty which the lawyer owes the judge is to agree with his adversary to the fullest extent not inconsistent with the protection of the rights of his client in respect of the detail and machinery attendant upon the average law suit.

Leaving now these considerations which may be regarded as minor, a word or two may be said in respect of the more important relations which the lawyer bears to the court and which at the same time involve the dignity of the profession.

Codes of ethics are, of course, of great value as expressing the contemporaneous conception of the lawyer's duty, but codes of ethics do not always induce conduct in conformity with their rules or principles.

Besides, there are certain rights which a lawyer has in respect of public discussion which it would be unwise to endeavor to restrain, even if there were power so to do, and I doubt such power. The lines between the discipline to which the bar may be subjected and the right of free speech is very delicate and should not be meddled with. Yet, in the last analysis, the strong deterrent is the desire for good repute; for few lawyers are indifferent to the favorable opinion of their brethren at the bar and of their brethren on the bench. The lawyer and the judge rarely need any formula to tell them what conduct is consonant with the dignity of the profession.

The tendency to conduct a private litigation through the agency of press publicity seems to be growing instead of diminishing. The newspaper reporter and publisher are not to be blamed. The lawyer is furnishing them with the commodity known as news. It is, of course, very difficult to see what the lawyer gains by this plan of

campaign. If he thinks he may intimidate someone whom he supposes to be a weak judge, he may miss his guess and find that he is before a strong judge. If he thinks that he may influence a jury about to be drawn, he may find that the twelve men ultimately chosen never head of the case. Such a plan of publicity campaign tends to give laymen an unpleasant impression of the law. They see only the picture of snarling, undignified lawyers trying their cases, as the expression goes, in the newspapers and thus misrepresenting the profession and causing humiliation to those who respect and love the profession and consider it a privilege to be part of it.

In respect of those lawyers who occupy public offices as legal advisers to public bodies, it is, of course, frequently necessary that they keep the public informed in regard to matters effecting the public interest. This can be done in a manner entirely consistent with the announcement of a policy or the giving of information according to the orderly and dignified usages of the profession. The extravagant predictions as to what will be accomplished in a particular litigation, civil or criminal, frequently fail to come true. The result is that the public is led into doubt and confusion. The impression sometimes goes abroad that somehow the law has broken down and that there is something wrong with judges and juries, when the truth is that the lawyer in public office who made the dazzling promises as to success never had a case to start with and yielded to the pressure of momentary public clamour or desire for notoriety instead of being faithful to the high purposes and traditions of his profession.

It is an interesting fact, as may be checked up by the recollections of events in any lawyer's lifetime, that the lawyer who in private or public litigation departs from the ideals of the profession usually is the tiny craft passing away in the night to oblivion. He may have a little temporary renown of a certain kind but long after he is forgotten, his professional brother who, day after day, has done his work with an eye single to his duty to his client and the court is sooner or later appreciated and leaves behind hime, if not always a great reputation, at least a respected reputation.

I have been speaking about the lawyer. Let me say something about the judge. There are some men whom the judicial life makes solitary, but unless a man is solitary by nature, it is well for him that he should move among men. The courts are dealing with great human affairs, questions of welfare and liberty, questions which reflect the problems of the commerce on land and sea and the relations of men to each other in every conceivable aspect. It is, in my view, of benefit to a judge that he should have social relations with the lawyer. That relation rubs off the rough edges. The lawyer discovers that the mysterious person called a judge is pretty much like anyone else. He has his little vanities, his particular opinions and generally he has the same desire for agreeable companionship as anyone else. The Judge by social contact with the lawyer or the man of affairs learns of the new problems or if interesting variations of the old problems with which the worlds of finance and commerce are confronted and from conversation and discussion and

even gossip, the judge is kept in touch with the affairs of the big outside world upon whose rights and relations he is daily adjucating.

Courtesy and reasonable consideration for the lawyer are among the most important attributes of a judge. By this method he gains the cooperation of the lawyer and the lawyer is disposed to be more frankly helpful than he would be, if he feels that he must treat with the judge at arm's length.

On the other hand, one must be a judge to realize how important is the observance of rules of procedure and of court routine. At times, these rules seem harsh, yet so constant is the requirement that the court's business should be kept going that compliance with rules is not a matter of choice with the courts but of necessity.

The respect in which the court is held depends, of course, very largely upon the judge. He will have not much difficulty, if he will remember the simple terms of his oath of office. I wonder how many men know the phraseology of that oath. To read it, carries its own comment and it reads:

"I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

I know of no finer statement of the position which a judge should take than that expressed by an eminent contemporary American, recently appointed to the highest judicial office in the gift of his fellow countrymen. I doubt whether the letter to which I shall refer was wisely read. Under date of July 13, 1921, when Mr. Chief Justice Taft announced that he would cease to be a contributor to the editorial column of a newspaper, he wrote:

"The degree in which a Judge should separate himself from general activities as a citizen and a member of the community is not usually fixed by statutory law, but by a due sense of propriety, considering the nature of his office, and by well-established custom. Certainly, in this country at least, a Judge should keep out of politics and out of any diversion or avocation which may involve him in politics. It is one of those characteristic queer inconsistencies in the British judicial system, which was the forerunner of our own, that the highest judicial officer in Great Britian, the Lord Chancellor, is often very much in politics and has always been. He changes with each administration, and his is a political appointment; but all the other Judges of the High Courts of England are as little in politics as in this country.

A Judge should avoid extra judicial activities, not only because they may put him in an attitude actually or seemingly inconsistent with absolute impartiality in the discharge of his judicial duties but also because he owes his whole time and energy to his judicial work."

If then, the lawyer and the judge shall conscientiously attempt to do their work along the ideals of the great and responsible profession to which they belong in common, each will have done his duty and, in the long run, it makes small difference what fame each may or may not attain.

In the history of the world, in the development and administra-

tion of governments, the lawyer and the judge have played no small part. They have borne their full share and responsibility in safeguarding life and liberty and promoting the pursuit of happiness. That responsibility is, if anything, greater today than before, when new problems are facing the world in every corner. It is for men like ourselves, graduates of a great institution, who have had the privilege of sitting under great teachers and learned men to contribute our share in our humble way to the performance of the true duties of the lawyer and the judge and to safeguard the repute of the profession. Our relations must be those of mutual respect and of mutual regard to which we shall be entitled only if we earn that right, and, in the future as in the past, the lawyer and the judge shall walk along the corridors of time, arm in arm, in the common aspiration to be true ministers of justice.

Andrew J. Cobb, The Supreme Court Judge

(By A. W. Cozart)

Opinions written by Judge Cobb appear in the Georgia Reports **from 100 Georgia to 128 Georgia., both inclusive.** His first opinion appears in the case of Behere v. National Cash Register Company, 100 G. 213, and his last opinion appears in the case of Sapp v. Williamson, 128 Ga. 743, filed July 13, 1907, but on the same date he filed opinions in two other cases, to-wit: Hodges v. Stuart Lumber Company, 128 Ga. 733; Rountree v. Gaulden, 128 Ga. 737. His resignation took effect from October, 12, 1907.

An examination of our reports has led me to the following conclusions, which I believe to be correct:

1. No other Appellate Court judge in Georgia has ever rendered as many opinions in cases simplifying and systematizing questions of pleading and practice.

See the following cases; Kelly v. Strouse & Bros. 116 Ga. 872; Toole v. Edmondson & Seay Bros., 104 Ga. 776; Glover v. State, 128 Ga. 1; Watson v. State, 116 Ga. 607.

2. He rendered opinions in more cases which have been cited more times, within the same length of time, than did any other Georgia Appellate Court Judge.

See the following twelve cases;

Name of case.	No. of times cited.		
	Supreme Court.	Court of App.	Total
Toole vs. Edmondson & Seay Bros., 104 Ga. 776	15	23	38
City of Dawson v. Dawson Water Works Co., 106 Ga. 696	40	8	48
Mitchell v. Ga. & Ala. Rwy. Co., 111 Ga. 760.	24	17	41
Forsyth Mfg. Co., v. Castlen, 112 Ga. 199.	26	26	52
W. &. A. RR. Co. v. Ferguson, 113 Ga. 708.	19	21	40
Welborn v. State, 114 Ga. 793.	36	17	53
Kelly v. Strouse & Bros., 116 Ga. 872.	45	49	94
Langley v. City Council of Augesta, 118 Ga. 590.	13	21	34
Cawthon v. State, 119 Ga. 395.	25	11	36
Moore v. Dublin Cotton Mills, 127 Ga. 609.	3	25	28
Moultrie Repair Co. v. Hill, 120 Ga. 730.	10	21	31
Rawlings v. State, 124 Ga. 31.	14	20	34

3. He rendered the opinion in a case which has been cited more times than any other case decided by a Georgia Appellate Court, the one in the Kelly case—cited 94 times.

Chief Justice Logan E. Bleckley's greatest opinion, according to his own judgment, was written in the Ellison case, 87 Ga. 691, and this case has been cited by the Supreme Court 44 times and by the Court of Appeals 23 times—total 67.

Mr. Justice William A. Little's greatest opinion was written in the Powell case, 101 Ga. 9, which has been cited by the Supreme Court 45 times, and by the Court of Appeals 20 times—total 65.

One of Mr. Justice Joseph Henry Lumpkin's greatest opinions was written in the Lyndon case, 129 Ga. 353, which has been cited by the Supreme Court 26 times and by the Court of Appeals 47 times —total 73.

One of Chief Justice Thomas J. Simmon's greatest opinions was written in the Anglin case, 120 Ga. 785, which has been cited by the Supreme Court 29 times and by the Court of Appeals 32 times—total 61.

4. Judge Cobb rendered opinions in many noted murder cases. The first of these was in the Ryder case, 100 Ga. 528, and the last was in the Glover case, 128 Ga. 1. The most famous murder case in which he wrote an opinion, I presume, was the Rawlings case, 124 Ga. 31.

5. He was to the Supreme Court of Georgia what Joseph Story was to the Supreme Court of the United States.

Georgia as a Litigant in the United States Supreme Court

I.

GEORGIA V. BRAILSFORD ET AL., 2 DALLAS 402 (1792); 3 DALLAS 199 (1796.)

Hampton L. Carson in "The History of the Supreme Court" says: "The first cause of note was that of the State of Georgia v. Brailsford et al. In 1782, by an Act of Confiscation, a bond which had been given, in 1774, by Kelsall and Spalding to Brailsford and others, alleged aliens, had been sequestrated to the State of Georgia, Brailsford and his co-partners had brought suit on the bond in 1791, in the United States Circuit Court for the District of Georgia. The State had unsuccessfully applied for permission to assert her claim and judgment for the plaintiffs was rendered. The State now filed her bill in equity in the Supreme Court for an injunction to stay proceedings in the lower Court, and praying that the Marshal should be directed to pay over the moneys in his hands to the treasurer of the State. A motion was subsequently made to dissolve the injunction and dismiss the bill, but it was allowed to stand until the next term, but the right of the State was tried by a special jury, upon an amicable issue, before the Supreme Court."

The Court charged the jury, practically directing a verdict against Georgia.

This was the first case tried by a jury in the Supreme Court. Two other cases were tried by a jury in the Court.

It is an interesting fact that the first opinion which appears in the Reports was a dissenting opinion by Mr. Justice Johnson, being in the case wherein Georgia was the plaintiff, reported in 2 Dallas 402, supra.

II.

CHISHOLM V. GEORGIA, 2 DALLAS 419 (1793).

Chisholm, a citizen of South Carolina, brought a suit against the State of Georgia in the Supreme Court, and one of the questions was whether under the Constitution a citizen of one State could sue another State. Chief Justice Jay, writing the majority opinion of the Court, (which was the most important opinion he ever write) held that the Court had jurisdiction. This decision brought about the Eleventh Amendment. The decision produced great excitement. The States were burdened with debts. Several States had been sued and Hampton L. Carson said in his great work above quoted: "The Legislature of Georgia responded by a statute denouncing the penalty of death against any one who should presume to enforce any process upon the judgment within its jurisdiction."

Mr. Carson is in error in this statement. The House of Representatives of the General Assembly of Georgia passed such a bill but the Senate did not pass it, so far as the records show. Hon. Robert Alston, when he was President of the Bar Association of Georgia, in his President's Address, stated the true facts touching this matter.

III.

FLETCHER V. PECK, 6 CRANCH 87 (1810).

In "The Supreme Court of the United States," Hampton L. Carson thus speaks of this case: "The case of Fletcher v. Peck will always be memorable as the first case of that long line of instances in which the statutes of a State repugnant to the Constitution have been held to be void. It is the first judicial determination of a constitutional restriction upon the powers of the States. It towers above the decisions of a period of many years, important and imposing though they are, and, with Marbury v. Madison, stands as an outspur of that magnificent range of adjudication which bear to our constitutional jurisprudence the relative strength and majesty of the Rocky Mountains to our physical Geography. The State of Georgia had sought by Legislative enactment to destroy rights acquired under a previous statute of the same State, granting lands to an individual. It held that a grant was a contract executed, the obligation of which continued; and since the Constitution drew no distinction between contracts executed or executory, the Constitutional clause must be so interpreted as to comprehend both."

This case grew out of the Georgia "Yazoo Fraud Acts," and while Georgia was not a party technically, she was vitally interested in the issue.

IV.

CHEROKEE NATION V. GEORGIA, 5 PETERS 1 (1831).

A motion was made in the United States Supreme Court to restrain by injunction the execution of certain laws of Georgia, in the territory of the Cherokee Nation, the tribe claiming they had a right to proceed as a foreign State. Chief Justice Marshall, delivering the majority opinion of the Court, held that the tribe was not a foreign Nation and could not maintain the action, the Court not having jurisdiction, and he further held that to maintain the action the Court would have to exercise political power which was not within the province of the judiciary.

It is said that the opinion of Chancellor Kent, in favor of the jurisdiction, had been obtained by counsel, William Wirt and John Sergeant, before the bill was filed.

V.

WORCESTER V. GEORGIA, 6 PETERS 515 (1832).

William Wirt and John Sergeant, who appeared for the Cherokee Nation in the Supreme Court, re-appeared as Counsel for Worcester in the above case, and Chief Justice Marshall, delivering the opinion of the Court, held: "The Cherokee Nation is a distinct community, occupying its own territory with boundaries accurately described, in which the laws of Georgia can have no force*** The Act of the State of Georgia, under which the plaintiff in error was prosecuted, is, consequently void and the judgment a nullity."

Georgia treated this judgment with defiance and Worcester was still kept in prison. President Jackson is reported to have said: "John Marshall has made the decision, now let him enforce it." However, at the end of eighteen months Georgia relented and the prisoner was released.

VI.

GEORGIA V. MADRAZZO, 1 PETERS 110; 7 PETERS 627.

In this case, it was held: "Admiralty process cannot issue when it is not a case where the property is not in custody of a Court of Admiralty, or brought within its jurisdiction, and in the possession of any private person."

Georgia, therefore, lost this case.

VII.

SOUTH CAROLINA V. GEORGIA, 93 U. S. 13.

In this case the Supreme Court, construing the no-preference-port clause of the Constitution, held that discrimination as between States is what is prohibited, and not discrimination between individual ports, and Congress is not forbidden to make a port in one State a port of entry, while refusing to do so as to a port in another State.

Georgia won this case.

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Recovery of Losses on Cotton Futures

Is one who deposits money with another as "margins" for the purchase and sale of futures and who loses the money by subsequent fluctuations of the market, entitled to recover it?

It is well established that an executory contract for the sale of cotton for future delivery where both parties knew that the vendor expected to purchase to fulfill his contract and to put no skill, labor or expense therein and none entered into the consideration thereof but it was a speculation on chances, would be illegal (1) but if the cotton was to be bought and delivered at once and skill, labor or expense entered into the contract, it would be valid. (2) A later case states the rule thus: The sale of cotton to be delivered at a future day where both parties are aware that the seller himself expects to purchase to fulfill his contract and no skill and labor or expense enter into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law and can be enforced by neither party. (3) As a general rule when money is paid over upon an illegal contract it cannot be recovered back, the contract being executed and both parties in pari delicto. (4) This is the common law rule, but as is so often the case statutes have nullified it. Section 4256 of

1 Warren Lane & Co. v. Hewitt 45 Ga. 502.
2 Branch v. Palmer, 65 Ga. 210.
3 Thompson v. Cummings, 68 Ga. 124.
4 Ingram v. Mitchell, 30 Ga. 547.

the Civil Code of 1910 provides that money paid upon a gaming consideration may be recovered back from the winner by the loser if he shall sue for the same in six months after the loss. Contracts for the purchase and sale of cotton futures are gaming contracts. (5) And in Forsyth Mfg. Co. vs. Sastlen the Supreme Court said that if it is the intention of both parties to the contract that the goods shall not be actually delivered but that there shall be a settlement of the differences between them according to the market price of the article on a given day, such a contract would be a wager and not enforcable by either party. (6) A recent decision holds, however, that a contract for the sale of futures is not a gaming contract within the meaning of the Code Section cited above. (7) Consequently money paid under such a contract may not be recovered back by the loser. (8)

The Court in the case just referred to was able to determine the intention of the lawmakers by examining the statute from which the Code Section was codified. These were the Acts of 1764 and 1765, (9) which provided that persons who lose money or goods by playing or betting at any game whatever might maintain against the winner a suit to recover the money or goods so lost. It seems quite evident that buying or selling futures is not a "game," especially since dealing in futures is treated by the statutes and the Code, separately from other forms of gaming. It is interesting to note that the same conclusion as that reached in Lassiter vs. O'Neill was held by the Supreme Court on different grounds before the adoption of the present Code. (10)

So another peculiarity has been pointed out in the provision of our law set forth in Code Section 4256 which has always been a legal freak. Broad as are the expressions used in that section they do not cover the most pernicious form of gaming.

Argument of Counsel

"Argument of counsel shall be confined to the law and the facts involved in the case then before the court, on pain of being considered in contempt; and in all civil cases questions of law shall be argued exclusively to the court, and questions of fact to the jury. Civil Code of Georgia, 1910.

Parties have a right to appear by counsel, and it is a privilege of counsel to address the jury on the facts. The arguments of counsel as to the facts of a case, and the conclusions to be reached from the proven facts, is not to be considered as mere argument tending to sway the jury in its performance of its sworn duty, but should rather be considered as an aid,—as a very valuable aid given by one whose duty it is to assist the jury in reaching a proper conclusion upon a proven basis of facts.

It is held in the case of Daly vs. Hines, 55 Ga. 470 that "Argu-

5 Cunningham v. National Bank of Augusta, 71 Ga. 400, 51 Am. Rep. 266.
0 Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 785.
7 Section 4256.
8 Lassiter v. O'Neill, 135 S. E. 78.
9 Cobb 725-727.
10 Thompson v. Cumming, 68 Ga. 124.

ment is not only a right, but a material one. It is not a mere ornamental fringe upon the border of a trial."

The object of the argument is first, that of an aid to the court, and second, that of an aid to the jury.

1. Appearance by counsel, is an aid to the court in the ascertainment and application of the law, however profound the learning or admirable the wisdom of the Bench.***The object is not to secure, by management, or trick, or dexterity, against the law and against the evidence.*** Such is not the legitimate object of appearance by counsel.*** Its object is to aid in the ascertainment of the truth—in the strict, and, therefore, equitable administration of the laws of the land.

Wynn vs. Lee, 5 Ga. 237. "The true view of the position of the **counsel, before the jury, is that it aids or helps.** The business of the counsel is to comment on the evidence—to sift, compare and collate the facts—to draw his illustrations from the whole circle of the sciences—to reason with the accuracy and power of the trained logician, and enforce his cause with all the inspiration of genius, and adorn it with all the attributes of eloquence. It is the business of the jury to listen, to be informed, but not to obey.***." Garrison vs. Wilcoxson 11 Ga. 159.

"Remarks of counsel while addressing the jury, which do not undertake to introduce any material fact not disclosed by the evidence, but which are merely oratorical in character, do not constitute sufficient ground for declaring a mistrial." Western & Atlantic Railroad Co. vs. York 128 Ga. 687.

In the above mentioned case the remarks made by counsel in his address to the jury were in substance as follows: "Man is the noblest **creation of God. God made no greater creation than man. He is the** grandest product of Divine handicraft; and he hedged about him the law 'Thou shalt not kill'.*** 'The statutes of the Lord are right'. 'Thou shalt not kill' is the statute of the Lord God Almighty. It was made for the protection of the Lord of creation—for man, and it applies to a railroad corporation just as much as it does to an individual. If a man is dead by the reckless negligence of the servants and agents of the railroad corporation, the full consequences to him are the same; he is just as dead as if he had died by the uplifted and directed and murderous hand of his brother man. The shedding of innocent blood is just the same—just the same. Our land is defiled when innocent blood is shed therein, whether it be by the hand of a railroad corporation or whether it be by the murderer's hand or some one contending in a death grapple with his brother man; and the curse of God, which is charged against that, is upon it just the same. Gentlement of the jury, when George W. York died on that public crossing in the City of Acworth, last October was a year ago, his innocent blood stained the right of way of this defendant." These remarks were considered by the court to be purely impassioned oratorical eloquence, and considered not prejudicial to the defendant to the extent that a new trial should be granted.

In an earlier case, the case of Western and Atlantic Railroad Co. vs. Cox. 115 Ga. 712, it seems that the reverse had been held by the Supreme court; if not the reverse, there is certainly some dissimilarity

between the holding of the court in the two cases. In this case, counsel for the plaintiff in the lower court, it being an action for damages for wrongful death, in his argument to the jury used the following expression: **"The only way to reach a railroad is to make it pay money.** A railroad has no soul, no conscience, no sympathy and no God." Upon these statements being made counsel for defendant asked that the jury be retired, and moved the court to declare a mistrial on the ground that the language was inflamatory and improper. The judge in the lower court refused to do so, and it is held by the Supreme court that the lower court erred in so doing.

In the case of Patterson vs. the State. 124 Go. 409, the following words were used by the solicitor-general in his argument to the jury: "The blood of this dead man calls upon you to punish this man and protect his family and relatives; and unless you have the manhood to write it in your verdict, you should be exiled from the good county of Heard." Motion for a mistrial upon this ground was overruled in the lower court. The Supreme court, in ruling upon the question expresses itself as follows: "We do not think this language called for a mistrial, or a rebuke from the judge. It introduced no fact, but was merely a forcible and possibly an extravagant method adopted by counsel of impressing upon the jury the enormity of the offense and the solemnity of their duty in relation thereto.*** Flights of oratory and false logic do not call for mistrials or rebuke. It is the introduction of facts not in evidence that requires the application of such remedies."

Attempts to arouse indignation against crime and appeals to the jury to show no mercy to crime, but to unflinchingly administer the criminal laws are not grounds for a new trial. **Nix v. the State** 149 Ga. 309.

As the logical conclusion to be reached from the foregoing statements of law, and the cases decided thereunder, it seems as though much is left to the honesty and fairness of the attorney arguing before the jury as to whether or not he shall confine himself strictly to a logical expounding of the conclusion to be reached from the facts, or whether he shall attempt to mislead the jury by forensic eloquence and false logic. Oratorical eloquence should be used to impress the jury as to the facts, and to lead them to a logical conclusion, and not, as is so often the case, to play upon their prejudices and emotions, in an attempt to cause them to reach a verdict not in accordance with the law and the facts of the case.

Construction and Interpretation of Wills

The question of the construction and interpretation of wills receives a great deal of attention, the wording of wills, creating estates in remainder and reversion, quite often being the cause of litigation.

An estate in remainder is one limited to be enjoyed after another estate is determined or at a time specified in the furture, and is either vested or contingent[1]. A vested remainder is one limited

1 Civil Code Para. 3674.

to a certain person at a certain time or upon the happening of a necessary event. A contingent remainder is one limited to an uncertain person or upon an event which may or may not happen[2]. In Georgia, the law favors the vesting of remainders in all cases of doubt, and in the construction of wills, words of survivorship shall refer to the death of the testator in order to vest remainders, unless a manifest intention to the contrary appears[3]. Of course, in all cases, the intention of the testator is sought, and the court gives effect to the same as far as it may be consistent with the rules of law[4]. The question of whether a testator manisfestly intends that words of survivorship should refer to the death of another in a given case will depend upon the language of the will.

The use of the word "then" in wills is perhaps the revolving point in most of the controversies. In the case of Patterson v. Patterson it was held that the use of the word "then" in the will in controversy clearly indicated that a fee simple estate was vested in the daughter, subject to be divested if she died without child or children prior to the death of the life tenant[5].

On the contrary, it was held in the case of Roberts v. Wadley that the use of the word "then" in the will manifestly showed that there was no uncertainty as to who should take under the will and that the remainder vested indefeasibly in the persons appointed to take[6].

In the earlier case of Dudley v. Porter, words of survivorship expressed in a will were held to refer to the death of one other than the grantor[7]. The word "then" in this will was equivalent to the expression "in that event." In this case there was a repugnancy between two clauses of the will and it was held that the first should govern, since where two clauses are in irreconcilable contradiction to each other, the first shall prevail.

When, however, the latter clause is in explanation of the former, then the latter clause is not repugnant to the former, and the former may be controlled by it. In Georgia, where construction does not favor estates tail and where estates tail have long been prohibited, words of limitation over after a failure of issue at the death, may explain words in the instrument previously used, which import an intention to create an estate tail. The law of Georgia inhibits entails, and by the act of 1821 (Cobb's Digest 169) endorses the inhibition by enlarging them into estates in fee simple.

The recent case of Ethridge v. Leaptrot et al. clearly demonstrates the unbroken line of decisions where words of survivorship manifestly refer to the death of another than the testator[8]. In this case the testator devised lands in trust for the use of L., the wife of the testaor's son J., and the children of L., living and thereafter

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2 Civil Code Para. 3676.
3 Civil Code Para. 3680, Moore v. Cook, 153 Ga. 840 (113 S. E. 536).
4 Civil Code Para. 3900.
5 147 Ga. 44 (92 S. E. 882).
6 156 Ga. 35.
7 16 Ga. 613.
8 134 S. E. 298.

born, by her or other lawful wife that J. may have, and provided that should L. predecease J., then her interest should go to children of J., and on death of J. and wife trust should terminate and property should go to children then living of J., and it was rightly held by Judge Hardeman, who tried the case below, "that the remainder passed to the children surviving J. and wife or living at their death." Plaintiff in error was the child of a daughter of J. and L. The child's mother survived the testator, but predeceased her parents, J. and L. In this case, the words "then living" clearly referred to those children of J. and L. living at the death of J. and L.

Recent Decisions

Husband and Wife; Transfer of Title for Purpose of Obtaining Credit; Notice; Claim.

An execution in favor of plaintiff and against defendant was levied upon a certain tract of land. Thereupon the wife of the defendant herein interposed a statutory claim and an equitable amendment alleging that the land was her property; that she furnished the money and 'Paid for the land out of her own separate money, with the request and understanding that the actual paper title was to be made to her and in her name! The husband persuaded her to have the title made to him so that upon it he could gain certain credit in furtherance of his business operations. The title was thus in him at the time of execution and claim and had never been in the claimant. There was no evidence to show notice to the plaintiff of the wife's equity. Ne Smith. Vs. Calder, #5280 Supreme Court of Ga. 10-13-26.

The general rule of law covering the point is not specifically codified in the statutes of this state, therefore to ascertain the law several code sections, and the decisions thereunder, must be examined. Section 4526 of the code states that an old principle that is applicable to the case at bar, "The equity of a party who has been misled is superior to that of him who willfully misleads him." Further section 4528 states "Possession of land is notice of whatever right or title the occupant has. Possession by the husband with the wife is presumptively his possession, but it may be rebutted." Section 3011 of the code further shows the law to be "A married woman may make contracts with other persons; but when a transaction between husband and wife is attacked for fraud by the creditors of either, the onus is on the husband and wife to show that the transaction was fair. If the wife has a separate estate, and purchases property from other persons than her husband, and the property is levied on as the property of the husband, the onus is upon the creditor to show fraud, or that she did not have the means wherewith to purchase the property."

From the foregoing statutes it is clear that in this case the claim of the wife is of no legal effect and cannot therefore attach to the land.In sustenance of this view and bearing out the clearly defined statutes the following Georgia cases are cited: "If the legal title to land be in the husband and he hold the possession thereof under such title, and the title and possession so remain until one who has given credit on the faith that the property was the husband's, without any notice of the wife's equity, reduces his debt to judgment, the lien of such judgment will bind the land and will be enforced against a secret equity of the wife, resulting from the fact that her money paid for the land."—Zimmer Vs. Dansby, 58/79.

The case of Humphrey Vs. Copeland, 54/543, is also strictly in point as is Brown Vs. West, 70/201; and Burt Vs. Kuhen, 113/1143.

In Ford Vs. Blackshear Manufacturing Company, 140/670, the court said: "If a wife, having an equitable title to land to which a deed is taken in the name of her husband, permits him to hold the property and use it in his business and commercial transactions for the purpose of obtaining credit, and a third person, without notice of the equity, extends credit to the husband on the faith that the land is his, the wife, after the creditor has reduced his debt to judgment, will be estopped from asserting title to the land as against the lien of the judgment, although before rendition of the judgment the husband, in recognition of the equity, may have conveyed the land to her." Also Krueger Vs. MacDougald, 148/429, is directly in point.

With these cases and the case of The Orr Shoe Company Vs. Lee, 159/523, which is identical in point we feel that the wife's claim is in effect nil.

Automobiles—Motor Vehicle Acts—Action by driver of car which had stopped along highway with bright lights burning against owner of car which approached and collided with the automobile of plaintiff and injuring him. Judgment for the plaintiff and by the Georgia Court of Appeals reversed. "Standing car and car approaching from front are meeting in sense of statute requiring cars meeting to turn to the right: Where motor car is brought to a stop along highway and another car approaches it from in front cars are

"meeting" in sense of laws of 1921, page 257 section 3; Park's Annotated Code Supplement of 1922, Section 828 (uu-7), providing that cars meeting must turn to the right." Roberts vs. Phillips, 134 Southeastern Reporter, Page 837.

Whenever any operator of a motor vehicle or motorcycle shall meet on a public street or highway, any person or persons riding or driving one or more horses, or any other draft animal, or any other vehicle, approaching in the opposite direction, the operator shall turn his vehicle to the right so as to give one-half of the traveled roadway, if practicable, and a fair opportunity to the other to pass by without unnecessary interference; and if traveling in the same direction, he shall pass to the left side of the person or vehicle overtaken, and the person or vehicle overtaken shall give him a fair opportunity to pass. Acts of 1921, page 257, section 3; Park's Annotated Code Supplement of 1922, Section 828 (uu-8).

Where driver after bringing automobile to stop on left side of highway, alighted therefrom and placed himself in front of it, leaving car standing with headlights burning, and was run into by approaching car, it was error to fail to charge that it was duty to operate motor vehicle so as to give to other operators the right to one-half of he traveled roadway, if practicable. Held also that where plaintiff stopped automobile on left-hand side of road and on dark and rainy night and was injured by approaching car; it was error to fail to charge the jury that it was the duty of the one operating motor vehicle on dark and rainy night on left-hand side of road to be on alert to prevent injury to himself or to other persons lawfully on highway. Further held that inasmuch as the motor vehicle law does not require all motor vehicles to be equipped with dimmers, the refusal by the court to charge that it was the duty of the plaintiff to have automobile so equipped, did not constitute error.

Husband and wife—Alimony—Dower—Year's Support—Equitable Cancellation of Deed—Husband's Conveyance to Defeat Wife's Right of Alimony—Return of Wife and Child to Home of Husband and Father. A husband in order to defeat the claim of his wife for alimony for herself and for her minor child, executed a conveyance purporting to convey all of his interest in certain lands to his mother, for a valuable consideration, and the deed was duly recorded. Subsequently the husband drove his wife and the minor child from his home, whereupon the wife instigated her suit for alimony for herself and her child. The husband, fearing exposure, sent for his wife and child and they being in ignorance of said deed returned to his home and lived with him until he died. Action was brought by wife on her own behalf and as next friend for her minor child against the mother of her deceased husband praying that said deed be cancelled and set aside and asking for general relief; HELD, that the court did not err in dismissing the amended petition upon general demurrer. "Husband's deed, executed to defeat claim for alimony cannot be cancelled in equity where wife returned to husband's home and lived with him until his death, rendering judgment for alimony impossible." The petition alleged that the sole purpose of the execution of the deed was to defeat plaintiff's right of alimony, and since the cruel treatment on the part of the husband was condoned by the wife by her returning to him and the contemplated suit for alimony was abandoned, and the husband had departed this life, no judgment for alimony could ever be rendered. Such judgment being impossible, therefore equity has no jurisdiction or power to cancel the deed. Held also that there is no statute in Georgia, prohibiting the husband's voluntary conveyance to defeat his wife's right of dower, save as to lands to which title came through her. There being in this State no statute inhibiting the sale of land by the husband for the purpose of defeating his wife's claim of dower, save as to lands to which the title came through her, an actual sale and conveyance, although made for the purpose of defeating dower, will be upheld in favor of the purchaser against the widow's claim after the death of the husband. Sorrells vs. Sorrells, 134 S. E. 767, Harber et al vs. Harber, 152 Georgia 93 (3) Flowers vs. Flowers 89 Georgia 632. In this respect a voluntary conveyance stands upon the same footing and has the same effect as a conveyance based upon an actual sale. Pruett vs. Cowsart 136 Georgia 756. In this case it was held in part, that a voluntary conveyance by a husband of land in which he had an undivided interest as heir

of a former wife, would defeat the claim of dower asserted by his second wife after his death, notwithstanding that such conveyance recited that a part of the consideration was that the grantor was to remain in possession of the lands and receive the benefits as long as he lived.

Wife need not join in deed of husband to land not derived through her or from her, in order to bar dower. 92 Georgia 260: On issue whether husband's deed defeating dower was bona fide, his will, subsequently executed, in which he made no provision for his wife, would not be relevant. 89 Georgia 632 (3): The Supreme court in the 89th. Georgia page 632, held that so long as the conveyance was bona fide, it mattered not that the purchase money remains unpaid. Prior to the act of 1826 the widow was entitled to dower out of all land of which husband was seized during coverture. The Supreme Court has also held that a sale by a sheriff after the death of the husband under execution against him, does not divest the widow of her right of dower and that the purchaser at such sale takes the land subject thereto. See, 121 Georgia 429.

Bills and Notes—Genuineness of Indorsement.

A suit filed by an insurance company in the U. S. District Court for the Northern District of Georgia set up that the company issued a number of drafts on itself payable to named persons; that these were each presented by the defendant bank for payment apparently indorsed by the proper payees and payment made and the drafts taken up; but it was later discovered by the insurance company that each payee indorsement was a forgery and promptly thereafter demand was made on the bank for repayment of the entire sum as money had and received, and in a second count as damages for breach of an implied warranty of title and right to collect the drafts. One of the defenseses set up by the answer was that the loss to the company was due to its own negligence in issuing and paying the drafts over so long a period of time without discovery of the forgeries. General and special demurrers to this plea were filed and sustained. The Court holding:

The drawee, who is also the drawer of a draft, presented for payment by a bank with the names of the payees indorsed thereon is not bound to know the genuineness of the indorsements or to make inquiry before payment, but as between them presentation of the draft by the bank is an implied warranty that by genuine indorsements it is the true holder and entitled to collect it. Insurance Company of North America vs. Fourth National Bank of Atlanta 12 Fed. (2d) 100.

The relation here should be distinguished from that of bank and depositor. [1] Leather Manufacturers vs. Merchants Bank 128 U. S. 26. Where one accepts forged paper purporting to be his own and pays it to a holder for value received he cannot recover the payment. [2] 8 C. J. 606. U. S. Bank vs. Georgia Bank 6 L. Ed. 334. **10 Wheat or 333. By requesting payment of a draft a holder impliedly warrants that he has a good title and a right to sell.** [3] Ga. Code 4277 Leather Manufacturers Bank 128 U. S. 26. Since this is true, it follows that where payment is made to a person holding an instrument under a forged indorsement, the person paying the same may recover the payment from him. [4] Yatesville Banking Co. vs. Atlanta Fourth National Bank 10 Ga. Appeals 1. 72 S. E. 528 Hartman vs. Henshaw 13 L. Ed. 653. The drawee owes no duty to the holder to examine and ascertain whether the indorsements were genuine. [5] Commissioners Evchange Bank vs. Nassau Bank 91 N. Y. 74. A transferee of securities is not bound to notify the transferor of a lack of genuineness of the securities or of the title thereto, until the lapse of a reasonable time after the discovery of the fact. [6] U. S. Bank vs. Bank Fed. 855. The diligence required is not in making the discovery but in giving notice thereafter. [7] U. S. vs. Clinton Nat. Bank 159 P. A. 46, 23 L. R. A. 615.

The principles set forth in these cases have apparently been taken for granted in Georgia or at least most of them have never been adjudicated probably because the questions have never arisen.

SALES—Failure of consideration and implied Warranties in Sale.

Felder vs. Neeves. Court of Appeals of Georgia Oct. 13, 1926. 135 South Eastern reporter pags 219.

Action for price of goods where defendant pleaded failure of consideration and breach of warranty in that the machinery was unsuited for purpose intended.

Hardee vs. Carter, 94 Ga. 482. An action for the purchase price of goods cannot be altogether defeated by a plea of total failure of consideration, unless the evidence shows that they were totally worthless for any purposes.

Trippe vs. McLain 87 Ga. 536. Where, as in the instant case, the evidence clearly shows that the machine which was the subject matter of the contract could have been repaired at a reasonable cost, and when so repaired, would have performed the service for which it was purchased, a general finding of the jury in favor of the defendant of his plea of total failure of consideration is not supported by the evidence and must be set aside.

Compton vs. Woodruff, Ga. App. 803. An express warranty excludes an implied warranty of the same or a closely related subject, but not an implied warranty on an entirely different subject.

Barber vs. Singletary 13 Ga. App. 171. Thus where the defense exclusively relied upon the breach of an express warranty, the judge should not charge upon the subject of implied warranty.

In a suit for the purchase price of machinery, while the defendant cannot claim the benefit of both an alleged special warranty as to quality and the general warranty implied by the law to exist in the absence of express warranty, he nevertheless is entitled to set up inconsistent pleas and claim the benefit of such defense as he may, under the proof, be entitled to, and where, as here the defendant pleads an express warranty whereby the seller guaranteed that the engine was capable of performing work of a particular kind and character, and also set up that the machinery bargained for was totally unsuited for the purposes for which it was intended to be used, the judge did not err in charging the law governing express warranties as controlling in the case, in the event the jury should find there was such an agreement, and in thereafter charging the jury what would be the alternative rule, under the law of implied warranty in event that they should find in favor of the plaintiff's contention that no such express warranty had been actually made. Judgment for defendant, and plaintiff brings error. Reversed.

Parties Suit on Note, Transferee and Transferor.

McMillian vs. Spencer. Supreme Court of Georgia Sept. 18, 1926. 135 Southeastern Reporter 182.

The plaintiff suing as transferee of the note did not join the transferor (the payee named in the note) as party defendant. The defendants answer admitted execution of the note, and pleaded in avoidance thereof that the note was executed without consideration, that the plaintiff was not a bona fide holder for value, but that he had received it under a collusive arrangement with the transferor to protect the latter as an innocent holder against the defense of the maker. It was not certain that the defense would be sustained as against the plaintiff, even conceding that the note was without consideration; consequently the defendant amended his answer so as to set up a claim for judgment over against the transferor if the defendant should be held liable to the plaintiff, and to that end prayed that the transferor be made a party defendant. It was upon order allowing this amendment that the bill of exceptions assigns error. Judgment affirmed.

Code Section 5410.

A defendant to any suit or claim in the Superior Court, whether such suit be for legal or equitable relief, may claim legal or equitable relief, or both, by framing proper pleadings for the purpose, and sustaining them by sufficient evidence.

Code Section 5411.

Any defendant may also if it is necessary to obtain complete relief, make necessary parties.

Code Section 5406.

The Superior Courts of this State, on the trial of any civil case, shall give effect to all the rights of the parties, legal or equitable or both, and apply on such trial remedies or relief, legal or equitable or both, in favor of either party, such as the nature of the case may allow or require.

54/310. Third persons whose rights are involved in equitable plea, may be made party.

51/113, 117. Superior Court has jurisdiction under this section to pro-

ceed to do justice when all parties of interest are before it.

Code Section 5408.

Any person claiming equitable relief may make all necessary parties to secure equitable relief, either at the beginning of his suit or afterwards by amendment; and may make amendment in matter or form or substance.

124/165. Owner of land may be made party to suit to recover property brought in name of one who had collusion with owner of land.

56/222. Parties being necessary which could be added in equity only, equity will enjoin proceeding at law and administer proper relief.

Those laws make radical changes in the law relating to procedure and there can be no doubt, from application of plain language of these statutes, that the defendant had the right to set up the matter urged and relied on in his plea, and also to have the transferor made a party for the purpose of molding an appropriate decree against him as the facts may justify. It is urged that the amendment should not have been allowed, as the plaintiff should not be delayed on account of any issue between the defendant and the transferor. If that would make a difference, the plaintiff in this is not complaining and it would not afford the transferor and ground of complaint.

Cases on Constitutional Law (With Supplement)

BY JAMES PARKER HALL
Professor of Law, and Dean of the University of Chicago Law School
West Publishing Co., 1926

The latest edition of Dean Hall's excellent work on Constitutional Law is enhanced in value by an up-to-date supplement.

The book, which is one of the American Casebook Series, cites decisions taken from both Federal and State statutes. In compiling a number of cases that will clearly explain the principles as set forth in our Constitution, the author has been forced to use an abundance of material, and in order to confine his work to one volume, he has found it necessary, not only to omit all argument of counsel, but in many instances, in order to condense them, to rewrite facts.

As explained in the preface, in order to meet the requirements of the teacher, the book has been arranged in short chapters.

The book proper is divided into three parts. 'Preliminary Topics', constitutes the first part; 'Fundamental Rights', the second; 'The Federal Government', the third.

The first main-division is opened by a series of cases explaining the making of various constitutions throughout the nation, and also cites cases under the head of changes in the constitutions. The next subject taken up is the 'Function of the Judiciary in Enforcing Constitutions', and the opening division is concluded with, 'Separation and Delegation of Powers of Government'.

The second division clearly explains each of the fundamental rights, as set forth, in the Constitution of the United States.

In the third division is found an outstanding feature in the book. This feature is the chapter on Federal procedure, which might easily be used as a text on a short course on that subject.

The supplement, which in itself includes some 400 pages, is arranged in the same manner as the main book. The supplement includes an additional chapter on the much mooted question of National Prohibition, and cites many of the conflicting decisions on the aforesaid question.

The book is spite of its excellent qualities, is necessarily, because of the subject, bulky, and can hardly be fitted in the average short law course. The writer, however, expresses the hope of reducing the size in a later edition.

CASES ON CODE PLEADING. BY ARCHIBALD H. THROCKMORTON, PROFESSOR OF LAW IN WESTERN RESERVE UNIVERSITY. WEST PUBLISHING CO., ST. PAUL, MINN.

This case book contains a collection of cases and other material for the use of the lawyer and student. Professor Throckmorton unquestionably has given us one of the most practical treatises of the system of Code Pleading. This book gives us many cases that the student may obtain the more important rules and principles, as those principles are thus found in the codes of the different States.

The preference in the section of cases has been given to the most important ones, by which the system of code pleading has evolved and reached its present day development. New York in 1848, was the first state to adopt the system; now there are more than thirty States that use Code Pleading. Mr. Throckmorton has inserted in the notes, information as to the rules in the several jurisdictions and reference to cases, magazines, and articles containing discussion that will be helpful to the student.

We know the importance of pleading, and the subject of code pleading is constantly growing in importance, the tendency of most states is to simplify and remove the burdensome technicalities that existed with the Old Common Law form of pleading, and as a result many obstacles have been removed which otherwise would cause delay and unnecessary expense.

Professor Throckmorton has given us an admirable work that will meet with the approval of all who wish to learn more upon the subject. The one volume consists of 912 pages, including a thorough index. The price is $5.50 per copy. The contents are as follows:

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