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The History of Georgia in the Eighteenth Century, As Recorded in the Reports of the Georgia Bar Association

Orville A. Park

THE HISTORY OF GEORGIA IN THE EIGHTEENTH CENTURY, AS RECORDED IN THE REPORTS OF THE GEORGIA BAR ASSOCIATION

COMPILED BY
ORVILLE A. PARK
OF MACON.

Read before the Thirty-eighth Annual Session of the Georgia Bar Association at Tybee Island, Georgia
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In his address as President of this Association (1889) Walter B. Hill called attention to the new literature coming into existence through the instrumentality of the bar associations of the several States—"a literature," which he characterized as, "of great value, and thoroughly creditable to the associated effort which has led to its development"[1] Ten years later, having become in the meantime the great Chancellor of the University, he said:

"More important than any single utility of the Association has been the creation of a new species of legal literature. No member of the Association can fail to contemplate with pride the eighteen volumes of the reports of its proceedings. These reports are most highly esteemed and are greatly sought in other States. They contain monographs on legal topics, and valuable contributions to legal history, to the discussion of public questions, and to the literature of the law"[2]

Having served the Association in an official capacity for more than half of its thirty-eight years of life and on that account being especially conversant with its reports, the Executive Committee has asked me to prepare a paper on the Association's literature. To attempt to discuss it all, even in the briefest way, is entirely beyond the limits of a single paper. I have therefore chosen as the particular topic to present for your consideration the history of Georgia as record-

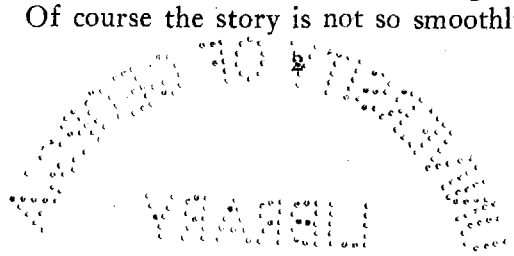
ed in the reports, and for two reasons: First, because in no field has the literature of the Association been of greater interest or of more lasting value; and second, because this valuable historical material is in large part unavailable and practically lost, scattered as it is through thirty-eight annual reports (several of which are out of print), in addresses, papers and the reports of committees, unindexed and well nigh forgotten.

Of course the Bar Association historians have been largely interested in the constitutional and legal history of the state and its military and political history are only alluded to incidentally. And each one has written on some particular topic rather than on a period of time. Some incidents or some phases of the history may be given undue emphasis or treatment out of proportion to their importance, while other and mayhap more important matters may be passed over with but scant notice. Yet I do assert that a very fair history of Georgia has been written and recorded in the annual reports of the Georgia Bar Association, and much of the legal history of the state is better told in these reports than anywhere else.

When I had collected this historical material together I confess I was amazed at its scope, its volume, and its richness. I soon discovered it would be impossible to use it all, and therefore decided to confine this paper to the first sixty-seven years, from the founding of the Colony to the end of the century.

It has seemed best to let these Association historians tell their own stories in their own language rather than to use the material which, with so much painstaking care, they have laboriously gathered, in the preparation of a new and an independent history.

The plan adopted is after the manner of the "Historians' History of the World"—extracts from different authors being put together to form something of a connected whole. Of course the story is not so smoothly told by the



lips of many as if one only had spoken. But under the plan adopted the identity of each writer is preserved—each tells his own story in his own way.

Thirty-six different papers, addresses and monographs have been used in the compilation. From some of them only a paragraph, perhaps only a sentence or two, is taken, while others are used almost bodily. On some of the topics only one author has written, while in other sections almost every paragraph is taken from a different paper.

In order not to break into the thread of the story quotation marks are not used and the names of the authors and references to their papers are omitted. Following each extract, however, and all are quoted almost literally, is an Arabic numeral referring to a table at the end of the paper which gives the name of the author and of his paper with a reference to the Georgia Bar Association Report in which the paper may be found.

For convenience of reference, the paper being much longer than the usual Bar Association paper, a table of contents is inserted.

Macon, Ga.

September 1, 1921.

ORVILLE A. PARK

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GEORGIA IN THE EIGHTEENTH CENTURY

THE ORIGINAL GRANTS

Georgia began its career as a trust estate; and the employment of a lawyer must have been among the first acts of the Board of Trustees, for, by reason of repeated and conflicting grants, the title to this wilderness was in such confusion that we can almost imagine an attorney making an examination of the various royal charters, and submitting to his clients something like a modern Abstract. It would show the original grant to Lord Raleigh; his attainder in 1603; the consequent forfeiture of this property to the Crown; then the actual grant from Charles I to Sir Robert Heath, which by reason of non-user, or failure to comply with conditions, was declared void; next, the grant by Charles II to the Lords Proprietors of South Carolina, who, in 1717, conveyed all of the land between the Savannah and the Altamaha to Sir Robert Montgomery, there to found a colony, bearing the bombastic name of "Margravate of Azilia."[3]

The grant was, however, to be void unless a settlement was effected within three years. And albeit Sir Robert devised a most marvellous scheme of settlement, and in his prospectus invited settlers on most liberal terms to come to this new Province, of which is herein set forth, "that nature hath not blessed the world with any tract which can be perferable to it; that Paradise, with all her virgin beauties, may be modestly supposed, at most, but equal to the native excellencies," this Eden remained unpeopled save by th savage. The grant expired and with it the "Margravate of Azilia."[4]

The estate again vested in the eight Lords Proprietors of South Carolina, seven of whom, in July 1726, sold their undivided seven-eighths interest to the king for the sum of 22,500 pounds sterling. (Watkins, 713.)

This Abstract showing the fee not to be in the Crown, the Trustees evidently decided to take what they could get, and a deed to this seven-eighths interest was made to them in July, 1731. Probably, in consideration of a grant by

the King to land in North Carolina, John, Baron Hawnes, Lord Carteret (afterwards Lord Granville), conveyed his interest to the Trustees on February 28, 1732, and thus the entire estate to this principality was vested in the Trustees of the Colony of Georgia for the space of twenty years.[3]

THE CHARTER

With the motives and purposes inducing the settlement of the Colony of Georgia, it is not the province of this paper to deal. That its origin sprung from the great heart of General Oglethorpe, as its successful accomplishment was due to his genius for organization and government is a matter of history—a history but recently eloquently told by a distinguished member of our profession and of this body, (Chas. C. Jones) whose performance has left nothing unsaid or to be desired. The charter which is a fine specimen of the conveyancer's art, first recites the reason for the institution of the Colony, namely, to afford to impoverished persons an opportunity to earn in the free lands of the New World that livelihood which they could not find in the old; to strengthen the Southern Colonies of America, and especially to interpose a barrier to the repetition of the Indian ravages recently committed in South Carolina. For these ends it creates "Our trusty and well beloved John, Lord Viscount Percival, of our Kingdom of Ireland; our trusty and well beloved Edward Digby, George Carpenter, James Oglethorpe, George Weathcote, Thomas Tower, Robert Moor, Robert Wicks, Roger Holland, William Sloper, Francis Eyles, John Laroche, James Vernon, William Belitha, Esqrs., A. M.; John Burton, B. D.; Richard Bundy, A. M.; Arthur Bedford, A. M.; Samuel Smith, A. M.; Adam Adderson and Thomas Coram, gentlemen; their associates and successors a corporation by the name of 'The trustees for establishing the Colony of Georgia, in North America.' " It conveyed to the corporation "seven undivided parts, the whole in eight equal parts, to be divided, of all those lands, countries and territories lying and being in that part of South Carolina, in America, which lies from the

most northern part of a stream or river commonly called the Savannah, all along the sea coast to the southward, unto the most southern stream of a certain other great water or river called the Altamaha; and westerly from the heads of the said rivers respectively, in direct lines to the south seas, and all that shore, circuit and precinct of lands within the said boundaries, with the islands on the sea lying opposite to the eastern coast of the said lands, within twenty leagues of the same, which are not inhabited already, or settled by any authority derived from the Crown of Great Britain;"[4] "with all the soils, grounds, ports, gulfs, bays, mines, as well royal mines of gold and silver as other mines, precious stones, quarries, woods, rivers, waters, fishings, as well royal fishings of whales and sturgeons as other fishings, pearls, commodities, jurisdictions, royalties, privileges and pre-eminences."[3]

THE FIRST SETTLEMENT

The province was named "Georgia." Ample powers were given to the trustees for founding the Colony. They were to act through a common council, which could dispose of the lands of the Province at will; but as a check upon large estates, it was "Provided, also, that no greater quantity of lands be granted, either entirely or in parcels, to or for the use or in trust for any one person, than five hundred acres, and that all grants made contrary to the true intent and meaning hereof should be absolutely null and void."

On the 20th of July, 1732, the corporators met, accepted the charter, and proceeded to perfect an organization. So rapidly did matters progress, that on the 17th of November, 1732, Oglethorpe sailed with the first colony for Georgia, arriving at Charleston, in the province of South Carolina, on the 13th of January, 1733, where the colonists rested for a short period, while Oglethorpe went southward to choose the foundation for this new State. Leaving Charleston, after a voyage of three days, the colonists landed, on the first day of February, 1733, at Yamacraw Bluff. In the language of Georgia's latest historian, (Jones): "The ocean had been

crossed and the germ of a new colony was planted in America."

TERMS AND CONDITIONS OF THE GRANTS OF LAND

In order to facilitate the taking up of lands, the trustees had, on the 25th day of October, 1732, conveyed to three of the colonists, Thomas Christie, William Calvert and Joseph Hughes, five thousand acres of land in the colony of Georgia in trust to convey therefrom fifty acres to every male adult who requested it and wished to settle. The terms and conditions of the grants were fixed by the trustees. The principal conditions were these:

"The grantee of a town lot was to build upon it, within eighteen months, a house twenty-four by eighteen feet, at least eight feet high, and reside in the province for three years. Ten acres of the fifty acres should be cleared and cultivated within ten years from date of grant. One hundred white mulberry trees were to be planted as soon as the clearing therefor could be made, and were to be carefully preserved, and all trees dying were to be replaced by mulberry trees.

"No alienation for any term, or of any estate, without special license from the trustees was allowed.

"Conviction of felony or the employment of negroes, without license, were the grounds of forfeiture."

In addition to these conveyances to be made by Calvert, Christie and Hughes, the trustees further offered to grant to any person who would, within twelve months from date of grant, remove to Georgia with ten able-bodied free white men servants, all of age, and remain three years, cultivating the lands and building thereon, five hundred acres at a rental of twenty shillings per one hundred acres to begin ten years from the date of the grant. Within ten years the grantee undertook to clear two hundred acres and plant thereon two thousand white mulberry trees and on every one hundred acres as cleared one thousand additional trees of like sort. Any part of the tract remaining uncultivated, uncleared, unplanted and without worm fence or paling six feet

high, after the expiration of eighteen years, should revert to the trustees.

To male servants filling a term of service of not less than four years in the province the common council agreed, that upon the expiration of their term, if requested by the grantee so to do, to grant to each of them "twenty acres of land in tail-male upon such rents, conditions, limitations and covenants, as might have been attached to grants to men-servants in like circumstances."

The grantees of the five hundred acre tracts were prohibited from keeping, lodging, hiring, or employing any negro except by special permission; in fact the general prohibition of the trustees declared: "The use of negroes and rum is prohibited in this province."

It will be remembered that by the charter of the colony it was provided that no one should hold more than five hundred acres of land. One of the principal objects of this provision was, by preventing large holdings, to repress the consequent temptation to employ slave labor and to thus prevent the importation of negroes into the province.

To the infant colony two things were of vital importance, a supply of food and an organized military force to repel Indian attacks; this last no less necessary to insure the supply of food than to protect life.

The necessities of the case, demanding that the grantor of the soil should find in his feoffee a farmer and a soldier, produced a curious repetition of history in the character of the estates granted; and as the military character of the feudal system produced the estate in tail-male, which might furnish in the tenant a soldier for the war, so in the youngest Colony of Great Britain on the American continent, the estate tail which could furnish the male tenant as a soldier and farmer was introduced in the one and universal tenure of land.

This analogy may be pursued further: Every lawyer knows the many statutes passed to prevent the alienation of estates tail, and their evasion by the Courts. And it is reassonably certain that in the earlier days of their institution,

such alienation was rigidly prohibited, in order that the number of military tenants should not be lessened by one tenant holding two or more fiefs. And so it is stated of the lands in Georgia by a writer who visited the Colony in 1735, that they may not be alienated by the owners. Says this writer: "In order to maintain many people, it was proper that the land should be divided into small Portions, and to prevent the Uniting them by Marriage or Purchase. For every time that two Lotts are United the two looses a Family, and the Inconveniency of this shows itself at Savannah, notwithstanding the care of the Trustees to prevent it. They suffered the moiety of the Lotts to descend to the Widows during their lives. Those who remarried to men who had Lotts of their own, by uniting two Lotts made one to be neglected, for the strength of Hands who could take Care of one was not sufficient to look to and improve two. These uncleared Lotts are a Nuisance to their Neighbors. The trees which grow upon them Shade the Lotts; the Beasts take shelter in them, and for want of clearing the Brooks which pass through them, the Lands above are often prejudiced by Floods. To prevent all these Inconveniences, the first Regulation of the Trustees was a strict Agrarian Law, by which all the Lands near Towns should be divided—50 acres to each Freeholder. The Quantity of Land, by Experience, seems rather too much, since it is impossible that one poor Family can tend so much Land. If this Allotment is too much, how much more inconvenient would the uniting of two be? To prevent it, the Trustees grant the Lands in Tail-Male, that on the expiring of a Male Line, they may regrant it to such Man having no other Lott as shall have married to the next Female Heir of the Deceased as is of good character. This manner of Dividing prevents also the Sale of Lands and the Rich thereby monopolizing the Country." (Francis Moore's Voyage to Georgia (1734), 27.)

Or, as it is was expressed in the rules laid down by the Trustees for the year 1735:

"All Lots are granted in Tail-Male, and descend to the Heirs Male of their bodies forever, and in case of Failure

of Heirs Male to revert, to be granted again to such Persons as the Common Council of the Trustees shall think most for the Advantage of the Colony; and they will have a special Regard to the Daughters of Freeholders who have made improvements on their Lots, not already provided for by having Married or Marrying Persons in Possession or entitled to Lands in the Province of Georgia, in Possession or Remainder.

"All Lotts are to be preserved separate and undivided, in order to keep up a number of men equal to the number of Lotts, for the better defence and support of the Colony. No person can lease out his House or Lott to another without License for that Purpose, that the Colony may not be ruined by absentees receiving and spending their Rents elsewhere. And no person can alienate his Land, or any Part, or any Term, Estate, or interest therein to any other Person, without special License for that Purpose; to prevent the uniting or dividing of the Lotts."

A modification of these rules, however, permitted the person dying without male heir to name his successor, and to him the trustees regranted the lands in like tail-male.[4]

OGLETHORPE'S TREATIES WITH THE INDIANS

By a treaty made with the head men of the various tribes of the Creek Indians, on the 21st of May, 1733, the lands between the Savannah and Ogeechee, with the exception of a reservation on the Savannah river near Pipemaker bluff, and all lands and islands within tide-water between the Ogeechee and Altamaha, except the islands of Ossabaw, St. Catharine and Sapelo, were granted to the trustees. This treaty was confirmed by another, made in 1739.[4]

The treaty of 1733 was also our first attempt to regulate commerce. In it General Oglethorpe fixed the commercial relations between us and our Indian neighbors. We agreed that a white blanket should equal five buckskins, a blue one three, a gun ten, eighteen flints one, and a knife one doeskin; and the Indians agreed "to keep the talk in our hearts as long as the sun shall shine or the waters run in the rivers."

That of 1739 reached a somewhat higher plane, when Georgia obtained her first "fugitive slave law," the Indians agreeing that they would return them and have for each live slave caught beyond the Oconee four blankets and two guns, and half that if on this side of the Oconee; but if the slave was killed running away or resisting arrest, one blanket was to be paid for the delivery of his head.[5]

The more we study the career of Oglethorpe, the more we are impressed with the broad greatness of his spirit and the long reach of his practical and business like intellect. The military dispositions he made are above criticism and his skill in dealing with the Indians suggests the highest practice of statesmanship.[7]

THE FIRST CONVEYANCES

The Trustees, having acquired all outstanding titles to the district of Savannah, and the town having been laid out and the lots distributed, on the 21st of December, 1733, Thomas Christie and William Calvert, the survivors of the three colonists, created trustees for this purpose; conveyed in one deed to eighty-four grantees, fifty acres of land to each; each fifty acres comprising one town lot in Savannah, sixty by ninety feet, a garden lot on the confines of the town of five acres, and a farm of forty-four acres and one hundred and forty-one poles. Two shillings per annum, to commence at the expiration of ten years, was to be paid as rent for each lot.

The conditions of the deeds have been already given. The lands were granted in tail-male. This, the first deed ever executed in Georgia, is of record in the Secretary of State's office. Attached to it is a schedule of the wards, tithings and lots, with their grantees. A plat of Savannah, therein referred to as attached, is not recorded with it, and has been lost.

As shedding further light on the tenures and titles of that time, the partial description of the division of the land as determined upon by the trustees, to promote the best interests of the Colony, given by Francis Moore in his

account of Savannah, which he visited in 1735, is of interest.

"Each Freeholder has a Lott in Town 60 Foot by 90 Foot, besides which he has a Lott beyond the common, of 5 acres, for a Garden. Every ten Houses makes a Tything and to every Tything there is a mile square which is divided into 12 Lotts besides Roads. Each Freeholder of the Tything has a Lot or Farm of 45 acres there, and two Lotts are reserved by the Trustees to defray the charge of the public. The town is laid out for two hundred and forty Freeholders; The quantity of land necessary for that Number is 24 Square Miles; every 40 Houses in Town make a Ward to which 4 Square miles in the Country belong; each Ward has a Constable and under him four Tything Men. Where the Town Lands end, the Villages begin; four Villages make a Ward without, which depends upon one of the Wards within the Town. The use of this is, in case a war should happen, that the Villagers without may have places in the Town to bring their Cattle and Families into for Refuge, and to that Purpose there is a Square left in every Ward big enough for the Out Wards to encamp in.

"There is Ground also kept around about the Town ungranted in order for the Fortifications. Beyond the Villages commence Lotts of 500 acres; these are granted upon Terms of keeping 10 servants, etc. Several Gentlemen who have settled such Grants have succeeded very well and have been of great service to the Colony." (Moore's Voyage to Georgia (1735), 28.)

As the freeholders of Savannah increased, deeds of like tenor with the first were duly executed to them. Other deeds were made by the trustees, through their common council, either direct or by some authorized agent. Sometimes similar deeds of trust to that above described were made for like purpose.

RESTRAINTS UPON ALIENATION REMOVED

From the beginning there was more or less dissatisfaction felt at the refusal of the trustees to grant fee simple estates, and at the restraints on alienation; and frequent

were the petitions and remonstrances sent by the colonists urging the removal of these grievances.[4]

Indeed, one writer recounts that just as the ship "Anne" was ready to sail, the Colonists insisted upon provision being made by which the widow's dower should be secured and daughters could inherit from fathers. On account of the unsettled condition of the country and the war with the Spanish in Florida, the Trustees argued that estates in tail male should be preserved as an encouragement to persons capable of performing military service; but the colonists insisted on their position, and finally the matter was unsatisfactorily compromised, by "ordaining that the widow should have her thirds, and an agreement that if the landowner died without male issue, he might by will designate his successor." The difficulty being temporized, the ship sailed. But the opposition continued in spite of the reasoning of those in control.[5]

In the complaints of the colonists this trouble always occupied a place next to the iniquities of the Judiciary. Finally the Trustees, grown desperate, formulated a reform which thickened the fog and concerning which Dr. Tailfer felt called upon to observe: "We believe this paper will perplex most people who have not studied the law, to make sense of it; and as there are no lawyers in Georgia, it would seem as if it had been sent over with no other end than that it should not be understood."[7]

On June 20th, 1739, the trustees, while refusing to grant the relief prayed, had modified the system so far as to permit daughters to inherit from deceased parents in default of male issue; and had further provided that the widow should have for life the mansion house, garden and a moiety of the lands of deceased, and that deceased, in default of issue, might devise his lands, provided that no devisee could hold more than five hundred acres. In default of devise, the land went to the heirs at law of the original grantees. Finally, on the 25th of May, 1750, the trustees, yielding to the prayers of the colonists, removed the ground of grievance by converting all estates heretofore granted, and hereafter

to be granted, by them into estates in fee simple, to be held in free and common socage. This, and the repeal of the law prohibiting the use of the slave, or negro labor, was soon felt in the impetus given to the location and settling of large bodies of land, which immediately followed.[4]

NO RECORD OF LAWS PASSED DURING THIS PERIOD

The Royal Charter authorized the Trustees "to make laws and regulations," but whether this only meant "by-laws," or whether those enacted have been lost, it is a fact that from the date of the settlement until the Trustees surrendered the property to the Crown as a Colony, there is scarcely a record of legislative action.[5]

THE TOWN COURT AND ITS JURISDICTION

In most of the colonies the courts developed according to the needs of the inhabitants. But the Trustes for the Establishment of the Colony of Georgia did not wait to find out what was wanted, but before the colonists left London, organized a court with a full complement of officers and imposed a ready-made and most elaborate judicial machinery. So that when the "good ship Ann" sailed in 1732 with the "first sixty" as passengers, there was on board an undue proportion of the judiciary—3 judges, 2 tything men, 2 constables and a clerk.

Shortly after their arrival Oglethorpe determined to commemorate the founding of Georgia by opening court. Accordingly, on July 7, 1733, the Settlers met on the Bluff, the Commission was read, the Magistrates were inducted into office, court was opened, the first Georgia jury impaneled and a case was tried. (1 Jones Hist. of Georgia, 151; 1 Stevens Hist. of Georgia, 101.) Thus the first public event in Georgia was a judicial function. And "July 7th," was long celebrated in the Colony as "Anniversary of Court Day," being its July 4th, February 22nd and Thanksgiving Day all in one. The Court thus so strikingly inaugurated was furnished with accompaniments most surprising for a tribunal in the woods of a new settlement. The judges were supplied with "purple gowns trimmed with furr," and the

Trustees purchased a "copper-gilt mace," costing the equivalent of $500, and a seal costing $150, or, together, five times the value of the log house in which court was held. They intended to give the judges a high-sounding title, and so they called them Bailiffs, after those bearing that name in an ancient English tribunal. In this they made a sad mistake, for from this now belittling title arose the impression that the court only had a petty jurisdiction. As a fact it had all the power over life liberty and property possessed by the Superior Court of the present day. This fact appears from the Commission which conferred jurisdiction "for the Hearing & Determining of all manner of Crimes Offences Pleas Processes Plaints Actions Matters & Things whatsoever arising or happening within the Province of Georgia in America or between any Persons inhabiting or residing there whether the same be Criminal or Civil & whether the said Crimes be Capital or not Capital & whether the said Pleas be Real Personal or Mixt & for awarding or Making out Executions thereupon; * * * all Treasons Misprisons of Treason Insurrections Rebellions Counterfeitings Clipping Washing Coining & other falsyfyings of the Money of great Britain or of any other Realm or Dominions Whatsoever also of all Murders Felonies Homicides Killings Burglaries Rapes of Women unlawful Assemblies Conspiracys Confederacys Transgressions Trespasses Riots Routs Rescues Escapes Contempts Negligences Concealments Maintenances Oppressions Deceits & all other Crimes Offences & Injurys whatsoever & also of the Accesorys thereunto;* * * * full Power Jurisdiction & Authority to hold Pleas in all & all Manner of Causes suits & Actions as well Real as Personal & Mixt & of any Debt Account Tresspass in Ejectment & other Trespasses Covenants Promises Contracts & Retinues whatsoever.*[6]

*The appointment of the Court and the commission of the three Bailiffs is set out in full as an appendix to Judge Lamar's "Bench and Bar of Georgia During the Eighteenth Century." 30 Ga. Bar Ass'n Rep. 52.

On July 7, 1733, at the close of a hot summer day which had been devoted to feasting and thanksgiving and patriotism, the first court was organized in Georgia, presided over by Bailiffs George Symes, Richard Hodges and Francis Scott —Noble Jones being recorder and Richard Cannon and Joseph Coles, constables.[7] An old record innocently states: "There were no pleaders of the law present, but some fine old English beer."[8] Without a lawyer; without the faintest appreciation of the terrible responsibility such a trust imposed; without learning to apprehend and, as was demonstrated, without capacity to observe or ambition to acquire, this remarkable tribunal began its career thousands of miles from the sources of its power, in a strange land and in a community made up of English, Scots, Germans and Indians. The office or the climate seems to have been too much for Mr. Hodges, who was speedily gathered to his fathers. What might have been the brilliant careers of Symes and Scott will ever be speculative, for Mr. Thomas Causton being named to the vacancy, from that moment the Court was Causton, and Causton was the Court. There being no constitutional inhibitions in those days, it befell that Mr. Causton was also the public storekeeper—an incident not without its influence on the early judicial history of Georgia. Who he was and whence he came! How he looked and in what garb moved among those dependent upon his lofty caprice, are of the mysteries as profound as the birthplace of Homer or the pleasing air which was wafted to the restrained mariners of the wandering Ulysses. By what comes pretty near being the consensus of colonial opinion, he was of a limitless ambition; passionate and proud; regarding public office as a private investment, and conducting himself generally as the central figure of a colonial system which had been exploited with the single view of enabling him to grow and develop to full proportions. It cannot but be interesting to the learned and dignified jurists who in our day toil for scant reward for the people of Georgia and who sit habitually in the blinding glare of public opinion, to consider

their far-off predecessor who, sitting in the humble hut at Savannah, which was by courtesy called a court, did as he pleased not only in defiance of public opinion but with a fixed determination, perfectly understood, to commit public opinion to jail, in his capacity of judge, if it protested, or to starve it into submission in his capacity of storekeeper. When the long-suffering trustees, at length concluding that he had sufficiently monopolized the public attention, sent Mr. Peter Gordon to take his place, the resourceful Mr. Causton simply shifted his person a few feet from the court-room to the public store, and declining to furnish Mr. Gordon with commissary supplies, that unfortunate gentleman, after a hopeless siege, maintained with fortitude and without provisions, struck his flag and moved out of his stronghold, which was at once reoccupied by Mr. Causton—that great man holding that public office was *ferae naturae* and when at large belonged to whomsoever could catch and hold it. Grand juries fulminated and petitions filled with more grievances than the Declaration of Independence found their way across the seas and were duly gathered into the Minutes and Journal of the Trustees. The reading is rich and varied. It appears that if an associate justice did not readily acquiesce in the policies and decisions of Mr. Causton, that gentlemen incited him to undue indulgence in strong liquor, of which there was no lack in General Oglethorpe's prohibition State. From the bench he declared that the laws of England were no laws in Georgia, and like a modern Caligula produced from his pocket a small book which he proclaimed contained the laws he proposed to administer. He made false imprisonments; discharged grand juries "whilst matter of felonies lay before them;" intimidated petit juries, and "in short, stuck at nothing to oppress the people." When at length an appellate tribunal was formed, the magistrates to be appealed from were the judges to be appealed to, which, to say the least, was not a promising condition and justified the very moderate criticism that "the administrators of such a policy should, in propriety, be invested with some suitable resemblance of character and equity." One grand

jury advised the trustees "that the said Thomas Causton by his office of storekeeper hath the dangerous power in his hands of alluring weak-minded people to comply with unjust measures; and also overcoming others from making just complaints;" and that "the known implacability of the said Causton, and his frequent threatening of such people, is to many weak-minded though well-disposed persons a strong bulwark against their seeking redress." A list of complainants, whose names fill three octavo pages looking like a census of the colony, forms a gruesome exhibit to the official presentment.

But grand juries and petitioners were the least of the avenging spirits which began to creep fast upon the gay footsteps of Mr. Causton. It was of his misfortune that, justly or unjustly, he had incurred the enmity of Dr. Patrick Tailfer and in "A True and Historical Narrative of the Colony of Georgia in America," with a quotation from the fourth ode of Horace on the title-page, and a dedication and preface of length and dignity, the facile pen of that far-off chronicler has preserved for all time an estimate of Mr. Causton and his associates expressed in language, to use the words of Mrs. Gamp upon a celebrated occasion, "such as lambs could not forgive nor worms forget." There was little left of colony, trustees, or the world at large when the doctor laid aside his pen; and this is the sketch he has drawn of Mr. Causton: "Whilst we labored under these difficulties in supporting ourselves, our civil liberties received a more terrible shock; for instead of such a free government as we had reason to expect, and of being judged by laws of our mother country, a dictator (under the title of bailiff and storekeeper) was appointed, * * * whose will and pleasure were the only laws in Georgia. In regard to this magistrate, the others were entirely nominal, and in a manner but ciphers. Sometimes he would ask in public their opinion, in order to have the pleasure of showing his power in contradicting them. He would often threaten juries, and especially when their verdicts did not agree with his inclination or humor. And in order to establish his ab-

solute authority, the store and disposal of the provisions, money, and public places of trust were committed to him; by which alteration in his state and circumstances he became in a manner infatuated, being before that a man of no substance or character, having come over with Mr. Oglethorpe amongst the first forty, and left England upon account of something committed by him concerning his majesty's duties. However, he was fit enough for a great many purposes, being a person naturally proud, covetous, cunning, and deceitful, and would bring his designs about by all possible ways and means. As his power increased, so did his pride, haughtiness and cruelty; inasmuch that he caused eighteen freeholders with an officer to attend at the door of the court every day it sat, with their guns and bayonets, and they were so commanded, by his orders, to rest their firelocks as soon as he appeared; which made people in some manner afraid to speak their minds, or juries to act as their consciences directed them. He was seldom or never uncovered on the bench, not even when an oath was administered; and being perfectly intoxicated with power and pride, he threatened every person without distinction, rich and poor, strangers and inhabitants, who in the least opposed his arbitrary proceedings, or claimed their just rights and privileges, with the stocks, whipping-post, and loghouse, and many times put those threatenings into execution; so that the Georgia stocks, whipping post and log-house soon were famous in Carolina, and everywhere in America where the name of the Province was heard of, and the very thought of coming to the colony became a terror in the people's mind."

Dr. Tailfer has remarks to make about other judges, but these he regarded as weaklings. Mr. Gordon was "of a very winning behavoir, affable and fluent in speech," and soon got the good-will of the people who began to lay their grievances before him. But just as they came to know him well and love him, Mr. Causton cut off his provisions "whereby he was obliged, after six weeks' stay, to leave the place." Another bailiff, Mr. Parker, according to Dr. Tail-

fer, was "a man who had nothing to support himself and large family but his day labor, which was sawing," and so he became dependent on the public store. On the same authority, he was a man of no education and was soon moulded to Mr. Causton's liking. Being a slave to liquor, he who plied him most with it (an attention which Mr. Causton never forgot) had him right or wrong on his side. Mr. Darn, who ascended the bench only to die, was crazy in body and mind; and his successor, Mr. R. Gilbert, could neither read nor write. In the Journal of the Trustees it appears that Lieutenant Colonel Cochran and Captain Thompson, late arrived from Georgia, were before the Trustees, and their views are thus noted: "That Mr. Hen. Parker, 1 Bailiff, is a tolerable magistrate; but it was a surprise and jest our appointing Gilbert the Taylor to be a magistrate. That there is not a man in the Colony fit to be a magistrate. That there is not a man in the Colony fit to make 3d Bailiff." It was of the irony of fate that Mr. John Fallowfield, who being a magistrate, yet sided with the people, was declared by the trustees for so doing to be a leader of malcontents, setting himself up as dictator and for these reasons summarily dismissed from office.

Probably the full effect of Mr. Causton's administration is best illustrated by the typical cases cited by Dr. Tailfer. Mr. Odingsell appears to have been a rural gentleman from the neighboring province of Carolina; nervous as to temperament, and uninstructed in the devious ways and strange surroundings of city life. The temptation to visit the metropolis of Georgia was too strong for him, and setting aside the natural caution of his disposition, and with the ostensible object of seeing for himself how the colony succeeded, he disembarked upon what should have been hospitable shores. After a philosophic survey of such conditions and sights as were presented to his bucolic experience during the early days of his stay, he became venturesome and undertook to see Georgia by night. He was at once apprehended as a stroller and carried to the guard-house where he was threatened with the stocks and whipping-post that "being a

mild and peaceable man," the terror and fright threw him into a "high fever and strong delirium;" and after lying in this "distracted condition" for days, crying out to all that they were come to take him to the whipping-post, he died.

But not even a trivial consideration of the judicial history of Georgia is permissible without reference to the great and celebrated case of the King versus Watson. Exactly what Mr. Watson had done it is difficult to ascertain. One record would indicate that having incurred the displeasure of Mr. Causton, he was indicted for stirring up animosities in the minds of the Indians. The Journal of the Trustees, on the other hand, suggests that he was really guilty of murder in that he had induced one Skee to indulge in unlimited quantities of rum—enough to have killed two men, and which actually did bring Mr. Skee to a conclusion. But uncertainty as to the crime seems to have presented no obstacle to an indictment. At the trial Mr. Causton presided and acted in the capacity of Judge and witness. The jury having returned several verdicts which did not accord with the views of the court, was on each occasion remanded to their room, until in desperation it found Mr. Watson guilty of "using unguarded expressions," and recommended him to the mercy of the court as a lunatic. Mr. Causton, moulding the verdict to suit himself, sent Mr. Watson to jail, from which he was subsequently released on bail. Mr. Watson, the jury and the people fiercely assailed Mr. Causton for tampering with the verdict, whilst the trustees arraigned him for bailing a lunatic which they declared was itself an act of lunacy. To the frequent representations which were made by the people of the colony, the trustees sitting in their quiet office near the Old Palace Yard, Westminster, turned a deaf ear, and through their secretary, Mr. Benjamin Martyn, expressed their displeasure with much the same indignant earnestness as was exhibited by Mr. Bumble when young Twist petitioned for his rights.

But Mr. Causton got out of perspective when he began to encroach on the power and rights of the trustees. He might do as he pleased when the practical result was only

scaring Mr. Odingsell to death and locking up the bibulous Watson. When he became freehanded in the drawing of sola bills he was summoned home for trial. To the relief of the colony and of civilization, he died at sea, and that was the end of Mr. Thomas Causton. The system survived him several years, but does not seem to have been carried on in the same magnificent way. Mr. Thomas Jones, for instance, was also "passionate and proud," and was a great stickler for Caustonian precedents. But he lacked the mentality of that distinguished man. In fact, it was said of him that he surpassed Causton in everything that was bad "without having one of his good qualifications."[7]

NO LAWYERS BUT MUCH LITIGATION

In this Lawyerless and Lawless Court the inhabitants had, as Bishop Stevens says, "to follow the old Gallic custom and plead each man his own cause in person," even though there were one or two in the colony who knew something about law. One is referred to as a "pretended lawyer," and another as having been "bred as a smatterer in law". (4 C. R. 61, 423; 5 C. R. 62, 183, 188; 7 C. R. 98.) Williamson is mentioned as having been "bred an attorney." He moved to Charleston, where Oglethorpe thought he had better remain because he could make more practicing there than in Savannah. Nothing more is said of him until 1740 when Stephens recites that "Williamson returned from Charleston and turned solicitor in a cause or two heard betwixt some of our Indian traders. But, being timely admonished, thought it safest not to appear as pleader, though he confidently affirmed that he had the Trust's leave to practice as an attorney." (4 C. R. 618, 431, 443; 5 C. R. 177; 1 C. R. 41; 5 C. R. 257.)

It seems, therefore, certain that during the government of the Colony by the Trustees there was no practicioner in Georgia and that the courts were not authorized to admit persons to the Bar.

For a part of the time this affirmatively appears from a statement made in 1745 by William Stephens that "all of

the Magistrates of Fredereka had been summoned to England as witnesses in the case of Col. Cook against Gen. Oglethorpe. And as divers felonies had been committed in the County of Fredereka, and there can be no trial because of the absence of the Judges, the officers in Savannah were in doubt as to whether they had jurisdiction and . . . . thought it expedient to take the opinion of some able lawyer as to how far they might safely proceed. We having no such gentlemen to advise us, and knowing that Captain Horton, by direction from Gen. Oglethorpe frequently advises with Mr. Rutledge in intricacies of this nature, wherein the law is not clear, thought that his advice should be the rule to proceed by, rather than that such notorious crimes should go unpunished." (6 C. R. 144-146.)

Indeed the absence of lawyers was given as one of the inducements for emigrating to the new colony. Those, however, who were already there and suffering from the Trustees' mistakes took a very different view of this fact, as appears from the "Narrative under Oath" signed by a majority of the male inhabitants of the colony. For it is there said "That the British Nation was deceived with the fame of a happy, flourishing colony and of its being free from that pest and scourge of mankind called lawyers—for want of whose legal assistance the miserable inhabitants were exposed to a more arbitrary government than was ever exercised in Turkey or Muscovy." (1 McCall, 54, 2 Ga.. Hist. Col. 204; 21 C. R. 326.)[3]

Having been all things to all men in all times, to the Trustees, the lawyer had come to be in the wilds of Georgia a plain and transparent Grecian horse, his thick sides swelling with painful possibilities for the peaceful Troy before whose gates he had been opportunely stayed. And thus it was solemnly concluded that Georgia could and would afford to do without lawyers, and incidentally, without law, taking its justice in drastic doses from a court which was at once lawyerless and lawless. It was a scoffing denial— the colonists in Savannah bragging that there were no lawyers there, and the staid Salzburger from the swamps

of Effingham lifting up his rejoicing voice that with them dwelt neither lawyers, Courts, nor Rum—a juxtaposition of terms, expressed with an irritating capital which, whilst doing great injustice to a sober calling, gravely reflected upon the habits and yearnings of the dweller in Yamacraw. When last heard from Effingham was still dry and Chatham wet.[7]

But while there were no lawyers, it does not follow that there were no lawsuits. Indeed, the scanty records and Stevens' Journal contain an undue proportion of references to court proceedings.

There are suits on notes, bonds, accounts, actions of trespass, ejectment and—no end of imprisonments for debt. The court even took cognizance of Ecclesiastical offences, and proceedings were instituted therein against Mr. Wesley for refusing communion to a member of the church and for similar charges, as though there was a complete union of church and state and as if the Town Court of Savannah had the jurisdiction of the Court of Arches in England. (4 C. R. 19.)

But it was on the criminal side that business was most active, and as there was no practicing attorney the defendants represented themselves, the King being represented by the constable. Anyone who has ever seen a trial conducted by and before laymen will not be surprised to find that with the constable on one side and the defendant on the other, technical points were insisted on with vigor. For these early settlers did not seem to need the advice of an attorney to make points in order to escape being whipped on the bare back or hung by the neck until they were dead.

These criminal proceedings had all the common law accompaniments. There was the usual "pious fraud" of finding that the value of the property was less than a penny, so as to reduce the offence below a felony. In one case a woman was convicted of bigamy and in order to save her life she was given the benefit of clergy. Such leniences, however, were rare, for usually the convictions were sure and the punishment heavy. Standing in the pillory, sitting in

the stocks, whipping on the bare back were common, and at one session three men were convicted for murder, and two hung, and all without lawyers—or perhaps because they had no attorney.[6]

LITIGATION WITH THE TRUSTEES IN ENGLAND

But although the Trustees permitted no lawyer to practice in Georgia, they themselves had occasion for their services in England, both in formal matters and in heavy litigation. The Charter required the Board to submit its accounts annually to the Lord High Chancellor, the Chief Justice of England, the Chief Justice of the King's Bench, and the Master of the Rolls. This brought the affairs of the Colony to the attention of Lord Hardwick, by many thought to be the greatest of the English Chancellors. He made a contribution to the fund and showed great interest in the colony. When the Trustees decided (3 C. R. 87) to abandon Savannah and make a new capital further south, they named it Hardwick, after him. Sir Joseph Jekyl, Master of the Rolls, and friend of Oglethorpe, also had occasion to examine the accounts and made contribution of 500 pounds, the largest single gift made to the Trust. (3 C. R. 63; 5 C. R. 252.) In recognition of the fact Jekyl Island was named in his honor and he thereby acquired the permanent fame that comes to those after whom rivers, mountains and islands are called.

But the Trustees were not solely interested in making reports to admiring judges. They were several times sued and Colonel Oglethorpe secured the adoption of a resolution that they should "employ the Attorney General and Solicitor General in all cases where the Trustees had occasion to be represented in legal proceedings." (1 C. R. 282, 285; 2 C. R. 150.) In pursuance of this resolution, Ryder, Attorney General, afterwards Chief Justice of England, and William Murray, Solicitor General, afterwards Lord Mansfield, were retained.

There were four of these legal proceedings in England. We do not know who was counsel for the Trustees in the

case brought by Bosomworth in right of his wife, (Mary Musgrove[24]) claiming that as an Indian princess she was entitled to St. Catherine's Island, by virtue of the reservation in Oglethorpe's first treaty with her tribe. The first hearings were before the Privy Council in London. It was then remitted to the Governor and Council in Georgia and resulted in a decree that Bosomworth should receive a large sum, in payment of which St. Catherine's Island was ordered to be sold. (8 C. R. 85, 323.)

The next case was brought against the Trustees, in the Court of King's Bench, by Rev. Mr. Norris, who claimed 800 pounds to be due him for ecclesiastical services rendered in Savannah. The Trustees admitted an indebtedness of 70 pounds. He recovered a verdict equivalent to $350, but the costs were $300.

Another proceeding against the Trustees was heard in Parliament. Thomas Stephens, as the representative of a majority of the inhabitants of the colony, charged that the affairs of Georgia were mismanaged and the colony misgoverned. The matter was regarded as of such importance that a public hearing was had before the House of Commons which permitted Stephens to speak for the Georgians and allowed the Trustees to be heard by counsel. They selected William Murray, who was then in the height of his fame as a lawyer. He needed to put forth his best efforts, for the vote was exceedingly close, 77 being for, and 88 against censuring the Trustees. It was, however, a technical if not a moral victory, and the Earl of Egmont sardonically enters in his journal that "Stephens is to be brought before the House tomorrow on his marrow-bones and reprimanded from the chair," and on June 30, 1742, he enters (5 C. R. 640), "This day Thomas Stephens was according to order, brought to the Bar, where on his knees, the Speaker severly reprimanded him and it is ordered he be discharged, paying his fee."

The last proceeding against the Trustees grew out of the fact that Georgia had passed an Act making it unlawful for Carolinians to trade with Indians west of Savannah

without license. Carolina attacked the act as void. There was a hearing before the Board of Trade and Plantations, the predecessor of the modern Privy Council on an application for an order in the nature of an injunction to prohibit the enforcement of the Georgia statute. Georgia was again represented by Murray and Attorney General Ryder. He had previously given an opinion that a Carolina statute requiring Virginians to get a license to trade with Indians was void as denying Virginians the right of an Englishman to trade wherever he desired. This opinion was probably quoted against Ryder and must have stampeded the Georgia lawyers, including Murray. At any rate, Mr. Wesley, who was present as a witness in the case, entered in his journal: "Till twelve o'clock, the Carolina side was heard. Then our counsel (confused enough) was heard for Georgia . . . Murray made our defence, but so little to Mr. Oglethorpe's satisfaction that he started up and ran out." (Wright's Life of Oglethorpe, 172.)

This ought to be some comfort to other lawyers to think that even Murray, the greatest lawyer of his day, could not always please his clients, nor always win his causes, for the judgment was in effect against Georgia. But the case is of three-fold interest—furnishing as it does an instance of a suit by one Colony against another before the Privy Council, where Colonial statutes, approved by the king, were nullified, because interfering with Inter-Colonial —or what we call interstate commerce.[6]

June 20, 1752
June 9, 1732
11 - 20 days

GEORGIA, A ROYAL COLONY

On June 20th, 1752, just ~~nineteen~~ twenty years and eleven ~~months~~ days from the day that they had accepted the same, and organized with such sanguine hopes, the trustees having resolved that they could no longer provide for the defence and protection of the Colony, executed a deed of surrender of their charter to the Crown[4] and a quit-claim to all the vast territory between the Savannah and Mississippi, and "defaced the seal."[6]

From thenceforth Georgia became a royal province. This surrender was for seven-eighths interest conveyed by

the Crown in 1732, and for one-eighth interest conveyed in the same year to the Trustees by Lord Carteret.

Subsequent to the surrender of the charter grants by Georgia's Trustees, King George the Second, on August 6th, 1754, issued a commission to John Reynolds as Captain-General and Governor-in-Chief over the identical territory as that contained in the grant to James Oglethorpe and other Trustees.

On May the 4th, 1761, King George the Third commissioned James Wright as Captain-General and Governor-in-Chief of the Colony of Georgia, the commission covering the same territory as that previously granted to Oglethorpe and other Trustees, and to Reynolds as Governor, except that the southern boundary extended from the Altamaha to St. Mary's River. About this period, to wit: on June 26th, 1764, George the Third issued a commission to one William de Brahm as Surveyor-General of the southern district of North America, with instructions as to surveys desired to be made by the Crown, including the boundaries of the province of Georgia. In this survey Georgia's territory was given as lying between latitude 30° 26′ 49″ to latitude 35° 30′—the north boundary being, according to that survey, 30′ north of that now claimed by our state.[9] These boundaries became of the greatest importance in the contest with South Carolina referred to hereinafter.

It was governor, Sir James Wright, who in 1773 complained of the Northern Colonists because "they take but little of our produce and drain us of every trifle of gold and silver that is brought here by giving a price for guineas, moidores, johannes, pistoles and dollars far above their real and intrinsic value, so that we can never keep any among us." We see how early began the talk here of money of real and intrinsic value, copied by Blackstone in 1776, and how soon we had trouble about money; and that, although we had gold coins of other nations, including the pistole of John of Portugal (perhaps the only lucky John who ever wore a crown) and "the dollar of our dad-

dies," though bearing the stamp of Spain, we were not happy. We see how early money acquired the habit of not staying here but going North, and that sound money commanded a premium in the markets. If we seek an explanation, we will perhaps find that we exchanged rice, corn, peas, indigo, lumber, live stock and barreled beef and pork for what the Northern Colonists sent here, to-wit, rum, flour, biscuits and provisions, and we ate and drank so much as to throw the balance of trade the wrong way.[5]

THE GENERAL COURT AND ITS JUDGES

England's experience with granting charters to American colonies had not been satisfactory, and it had been decided that no others should be issued. When the new order was to be established in Georgia the King appointed Reynolds governor and gave him a Commission which in some sense served as a charter, for it imposed on him the duty of calling a Legislative Assembly and conferred upon him authority to constitute courts and define their powers. (Stokes' "Constitution of British Colonies in America," 115, 119, 121.) The minutes show that on November 8, 1754 (7 C. R. 28), "the Governor read to the council the King's instructions for erecting courts of judicature. But as the board had been informed that William Clifton, Esquire, appointed Attorney General for this Province, was daily expected here, they thought it proper to postpone further consideration of so weighty a matter until the arrival of the Attorney General." When he reached Savannah he was asked to prepare a plan for constituting the courts. On December 12, 1754 (7 C. R. 33, 38, 43), he presented a report which was adopted and is the very germ of our Judicial system. It provided for the erection of a "General Court with like power and authority as is used and exercised by the respective courts of King's Bench, Common Pleas and Exchequer in England" and for a separate court of Chancery to be held before the Governor and Council for determining all matters of equity. Instead of a belittling title like that of Bailiff which had handicapped the Town

Court of Savannah, this Commission went to the other extreme and called them Barons, it being provided that "for any crime (except Treason or Felony) every citizen should have free liberty to petition the Chief Baron, or any one of the Judges of the Common Pleas, for a write of habeas corpus * * * And in case the Baron shall refuse to grant the Writ, the said Baron or Judge shall incur the forfeiture of his place." (7 C. R. 29.) All of the unfinished business in the town court was transferred to this court (13 C. R. 126), which seems to have had no very definite title, for it was referred to as General Court; Court of Oyer and Terminer; Court of General Sessions; Supreme Court; and Circuit Court. (15 C. R. 528; 15 C. R. 235; 15 C. R. 365.) To preserve form and dignity, the Board ordered that "the Rules and Practices of the Courts of Westminister Hall shall be as strictly followed as heretofore as circumstances will admit." (7 C. R. 53. Stokes' British Constitution in America, 131.)

All of this was the result of the work of William Clifton, Attorney General of the Province, the first lawyer authorized to practice in Georgia.

He was a faithful officer, remaining in the Province and attending to his duties in person, instead of following the then usual course of appointing a deputy and dividing the fees. He had a short leave of absence in 1758, during which time Thomas Barrington, Esquire, acted as Attorney General pro tem. (7 C. R. 826.) On returning to Georgia, Clifton resumed his duties, and evidently gave great satisfaction. For when in 1764 he was appointed Chief Justice of Florida, then in control of the British, the Commons House of Assembly of the Province of Georgia (14 C. R. 147.)—"Resolved, That the thanks of this House be given to the Honorable William Clifton, Esquire, late Attorney General of this Province and now Chief Justice of West Florida, for his upright conduct in his office as well as in all other public employments and that the Speaker do signify the same to him by letter."

For several years after his arrival in Georgia, Attorney

General Clifton had refrained from qualifying as a member of the Council, but in 1757 he decided to assume the duties of that office and thereupon (7 C. R. 591, 592) submitted a memorial to the Governor and Council in which he expressed a desire to be admitted to the Board, explaining that "on his arrival in the Province, finding a multiplicity of business arising from the appointing and establishing courts of judicature, and settling the practice thereof and otherwise (there being at that time but one other of the Profession in the Province), he did therefore decline taking his seat at the Board."

On the adoption of Clifton's Report in 1754 Noble Jones and Jonathan Bryan were appointed judges "during pleasure." (See Stokes' British Constitution in America (259), where their commission is set out in full.)[6]

Noble Jones was the Colonel of the first Regiment raised in Georgia; while Jonathan Bryan was Captain of the first troop of Horse. As junior officers of a South Carolina regiment both had been with Oglethorpe in his expedition against St. Augustine. Dr. Noble Wymberly Jones, son of the Judge and Colonel, was one of the most active of the Georgia patriots before and during the Revolution and Jonathan Bryan, though nearly eighty years of age, was a member of the Council of Safety, and was described by the British Commander as "a notorious ring-leader of rebellion."[10]

These Associate Judges were evidently to hold office until the King named a Chief Justice for the Province.

His salary of 500 pounds was paid by Parliament, and, according to the custom of the time, there were also costs and fees which sometimes amounted to as much again. This 1,000 pounds was, considering the difference in purchasing power, equivalent to at least $10,000 in the present money; and as the custom was to fill the place with an English Barrister, the King—Miller (2 Bench & Bar 97), says Gov. Ellis—appointed William Grover, a graduate of Pembroke College, Oxford, and a Barrister of the Inner Temple, London.

He remained in office until 1762, when charges were made against him because of his arbitrary and partial conduct. The Bar recommended that he should be suspended by the Governor and Council until the King's pleasure could be known. There was a hearing and an order of suspension. Grover replied in verse—which was voted a scandalous attack on Governor Wright—and left the colony. (Jones' Hist. of Ga., 54.)

He was succeeded by William Simpson, appointed chief Justice December 15, 1766. (9 C. R. 428.)

And this brings us to the next Chief Justice, "Anthony Stokes; of the Inner Temple, London; Barrister at Law; and His Majesty's Chief Justice, and one of his Council in Georgia" as he describes himself on the title page of one of his books.

"On March 23rd, 1769, His majesty was graciously pleased to appoint Mr. Stokes Chief Justice of Georgia, but as it was some time before the sign manual reached him he did not leave St. Christopher's until the 28th day of July, 1769, and on the 26th of August following he arrived at Sunbury, a southern port in Georgia, some distance from the Metropolis. He therefore did not reach Savannah until some days after his arrival and was not sworn into office until the first of September, 1769."

As you will see, he was a barrister, a practicing lawyer and, the records show, a man of integrity, courage and ability. He was our first legal author and published a pamphlet:

"Directions for the officers of His Majesty's General Court and session of Oyer and Terminer and general Gaol Delivery of the Province of Georgia. Compiled by the Chief Justice, Savannah, 1771, 4 to 24 p."[6]

THE PRACTICE OF LAW IN THE COLONY

As we have seen in Williamson's case, the Colonial courts did not admit persons to practice, that power being exercised by the Trustees in London. But beginning with the King's Government in Georgia, the courts admitted per-

sons to the Bar. We do not know what were the terms of their admission. Stokes (p. 269) says that in the Colonies generally those who had read at the Inns of Court or had served clerkship in England were admitted on producing proper certificates, but leaves it uncertain as to how those were admitted who had had no such preparation.[6]

The early province was blessed with the presence of legal advisers who had been called to the Bar at the Inns of Court, London. The duties of counselor and attorney were united in the same person, much to the disgust of Justice Stokes, who evidently considered "practice" in the making of a lawyer a great disadvantage, for he says: "The practical part has so employed the attention of colonial advocates that few have leisure to attain to any considerable degree of knowledge, and the advocate who has the greatest fluency may sometimes be considered as the ablest lawyer." He intimates, too, that the advocates were not averse to strife, because he says: "Most of the questions which arise in the colonies are founded in litigation and not in intricacy." (269-270)[3]

It was not until 1754 that the Georgia Courts admitted attorneys to practice. In that year this power was exercised, as we learn from the fact that in the list of fees payable to the Chief Justice appears this entry: "For admitting every lawyer to practice, 2 pounds,"—the fee bill also fixes the costs payable to Proctors, Solicitors in Chancery and Attorneys of Common Pleas. The colony was prosperous, and attorneys were sufficiently numerous in Savannah in 1759 to be referred to as "the Bar." (8 C. R. 736, 751.)

We do not know what were the terms of their admission in Georgia, but the English courts were authorized by act of 1729 (2 Geo. II, Chap. 23) to admit attorneys who had read 5 years. Barristers, however, were called to the Bar by the Inns of Court much as the graduates of Law schools without examination in court.

The names of Thomas Burrington, Charles Watson, William Handley, William Woodruff, William Ewing, John Lucena, Alexander Wyley, Grey Elliott, James Box,

appear as attorneys in proceedings before the Governor and Council. The Colonial Records show that money was occasionally paid out by the colony for legal service; and the names of the colonial attorneys general: Charles Pryce, William Graeme and James Hume are thus preserved in the Appropriation Bills like flies in amber.

Three of the four Colonial Governors attended the Inns of Court. William Stephens was a student of the Middle Temple and had occasion to use his legal training when he was made President of the Colony and presided in land cases and on appeals from the Town Court of Savannah. Governor Ellis read at Temple Court, and Sir James Wright, a son of the Chief Justice of South Carolina, had also read at one of the Inns of Court. Both, therefore, had a training which was valuable when they sat in the Court of Chancery or presided on appeals from the General Court.[6]

These colonial lawyers knew that "many mickles make a muckle," and that, from their standpoint, it was better to charge something for everything rather than to include all in a lump sum. They had their fee bill, copied no doubt largely from that in force in England, where every service had its price. Under the Colonial Cost Bill there was a retainer fee of 7 shillings; every time an attorney filled up a writ he was paid 2 shillings, and one shilling more for a copy to keep. Whenever he drew a declaration, replication, rejoinder, demurrer, joinder in demurrer, or other pleading, his fee was 2 shillings, with 4 pence for every copy, and 1 shilling additional for signing his name; for every attendance at court his fee was 1 shilling, and for every motion or argument after his appearance 2 shillings; he was paid for his brief and for striking the jury 2 shillings each. In fact, he charged for everything he did, for everything he said, for everything he wrote, for everything he copied, and then for everything he signed, all of which was charged in the bill of costs and paid by the losing party.[3]

In Chief Justice Stokes' Narrative is an account of a controversy with the Bar over a Rule that "if an Attorney be

absent when his case was called, he should not be reddy until he paid 20s. to the use of the poor of the Parish, and as some of the gentlemen of the Bar doubted the Court's authority to make such a rule, he produced a similar Rule of the King's Bench in England, whereupon the Counsel were of the opinion that the precedent producd justified the rule." (12 C. R. 331, 345.)[6]

COLONY DIVIDED INTO PARISHES

When the trustees originally colonized Georgia, they established only one county therein, the county of Savannah. In 1741 the county of Frederica was established. These counties were divided into numerous districts. By the Colonial Act of 15th of March, 1758, the country between the Savannah and Altamaha, including the islands as far south as St. Simon's, were divided into eight Parishes. To give their boundaries, as laid down in the Act, would be too tedious. The territory between the Savannah and Ogeechee, from the coast to the country surrounding Augusta, was divided into the Parishes of Christ Church, St. Matthews, St. George and St. Paul, stretching in this order from the sea to the Indian line. South from Ogeechee to the Altamaha, in like succession, stretched the Parishes of St. Philip's, St. John's and St. James. Frederica and the two islands of St. Simon's formed the Parish of St. Andrew. When the country between the Altamaha and St. Mary's was added to Georgia, the Turtle, Little Satilla and Great Satilla rivers formed dividing lines for the four new Parishes of St. David, St. Patrick, St. Thomas and St. Mary, which in order, reached from the Altamaha to the Florida line.[4]

THE SOUTH CAROLINA GRANTS

By the peace between Great Britain and Spain in 1763, the former acquired the Floridas. The country between the Altamaha and St. Mary's was added to Georgia, and her Governor ordered to assume jurisdiction over the same. The original province of Georgia extended only to the Altamaha on the South, and South Carolina under the lim-

its fixed by her original charters claimed jurisdiction over this region, South of that river. The contest with the Spaniards had heretofore forbidden any exercise of actual authority. As soon, however, as Great Britain acquired the Floridas, and established their Northern boundary, at the St. Mary's and thirty-first degree of North latitude, before learning the pleasure of the Crown as to this country beween old Georgia and the Florida line, Governor Boone, of South Carolina, by virtue of the rights claimed by that province, proceeded to grant to various parties, tracts of land in this new country south of the Altamaha. A stormy correspondence ensued between Sir James Wright, then Governor of Georgia, Governor Boone, in South Carolina, and the officials in England. The practice was stopped by the British Government and the convention of Beaufort, in 1787, settled the dispute in Georgia's favor. By an act of 25th March, 1765, a time was fixed within which these grants should be proven and recorded in Georgia, or be barred.

Some of the "Carolina Grants" as they were called, are registered in the Secretary of State's office and some of the titles in question draw their origin from the province of South Carolina. While commenting hereon, it may be noticed that some few claims were also made to lands under grants emanating from the Lords Proprietors of Carolina; notably, one made by the heirs of Sir William Baker to twelve thousand acres of land. Some of this land had been granted to the soldiers of Oglethorpe's regiment. McCall, in his history of Georgia, says that the heirs of Baker succeeded in their claim, and the soldiers had to re-purchase from them.[4]

THE FORMS AND CONDITIONS OF THE GRANTS

The quiet gained for the province of Georgia by the removal of the menace of the Spanish hostilities from her southern border, coupled with the availability of her unlocated land, brought many settlers to her soil. The increase of the business of the land office was considerable.

It will be interesting to note the forms of grants then in use in the province. All titles sprung from the Crown and were held in fee simple, and in free and common socage.

The town lots were granted with all the preciseness and verbosity of the old conveyancing, to the grantee, he "yielding and paying for said lot" "yearly, and for every year, one peppercorn, if demanded."

The conditions of the grant required the building of a house (as prescribed) within two years, upon forfeiture of one pound sterling per annum for failure so to do. If the house was not built within ten years, the grant was forfeited. The grant specified that it was to be void unless registered in the Register's office, "and a docquet thereof also entered in the Auditor's office" within six months from its date.

The grants to farms were drawn in the same old style, enumerating all of the appurtenances granted including the "fishings," and also the "privilege of hunting, hawking, and fowling."

To the Crown were reserved all white pine trees and the tenth part of mines of silver and gold. The rent reserved was two shillings for every hundred acres, to commence at a given time, usually one or two years after date.

The grantee was further bound, within three years, to clear and work three acres of arable land, or clear and drain three acres of swamp, or drain three acres of marsh for every fifty acres of "plantable" land in the tract. Within a like time he must put on every fifty acres accounted barren, three neat cattle, or six goats, or sheep, and keep them there until three acres for every fifty was improved. Some grants contained this additional condition: If any of the tract was stony, unfit for tillage or pasture, the grantee was to begin within three years to employ one able hand, for every one hundred acres, "in digging any stone quarry or coal, or other mine," and continue to so employ such hand for three years. This was sufficient cultivation for said one hundred acres.

Every three acres cleared, worked or drained redeemed fifty acres from the operation of these conditions and left only the balance of the tract liable to forfeiture for their breach. A proportionate amount of cattle and stock could also be removed from the tract and (if the grant contained such condition) any like quantity of quarrying and mining stopped as each three acres was fully reclaimed. If the rent reserved remained due and unpaid for one year, and no distress could be found on the premises, the grant reverted. The requirement for registry within six months is also prescribed.

These grants were in the form of deeds by way of bargain and sale, and the provision for registry, or rather enrollment, was that prescribed for such deeds by the Statute 27, Henry VIII., Chapter 16. Operating as it did in the place of livery of seizin, it differed from our registry statutes by being requisite to the validity of the deed, which unless enrolled within the time prescribed became void. The deed, by bargain and sale, having superseded all other forms of conveyance, the provision for enrollment became, by modification, the registry system extending so generally throughout the United States, and this will account for the fact that this country preceded England in the adoption of a general registry of conveyances of land.

The transfer of property between individuals was generally made by lease and release, or by deeds of bargain and sale, especially by the first method. By the Act of 1760, the wife might waive her dower, otherwise she was not debarred by the conveyance or mortgage of her husband. The Act allowing such waivers and the form prescribed survives intact in Section 4204 Park's Annotated Code. By an Act of 1755 all conveyances of realty or personalty were required to be recorded, if executed in Georgia or South Carolina, within three months; if in Europe, within a year and a day; and if in the West Indies or any part of America north of South Carolina, within six months. If this was not done, the instrument was inferior to younger instruments properly registered. This changed the enroll-

ment necessary to validity of the deed into registry affecting only its priority. Wills, unless registered within three months from testator's death, were void, except those made in Europe, for which a year and a day was allowed. By the Act of 1768 all conveyances and mortgages of realty or personalty theretofore made were to be registered within certain times, and all such instruments made in the Province of Georgia, if recorded within ten days after their execution, should be deemed the first mortgage or conveyance over any older one not duly recorded.

By an Act of 1767, all suits to recover realty must be brought within seven years from the time of the right of entry, or they were barred. Married women, infants, lunatics and persons beyond seas were excepted and allowed three years after their disabilities were removed.

A second mortgagee was permitted to redeem the first mortgage. If the first mortgage had not been made known to him in writing by the mortgagor before the second mortgage was made, the mortgagor forfeited his equity of redemption.

No deed of any sort was impeachable for want of form or for want of attornment, livery of seizin or enrollment, or because made by assignment or endorsement on another deed. Such defects could be cured by showing that if the deed had been executed as claimed, the grantor could have conveyed good title. In fact, the Provincial laws seemed aimed at two points: First, to prevent the want of form invalidating where the purpose and right was clear. Second, to cause a memorial of record of all transfers of lands or chattels to be promptly made, that written notice might exist and fraud be prevented. It was a wise policy, which should have been improved upon and aided, rather than departed from in our later law.

The common law, except when altered by statute, regulated the character of estates which might be created, their dissolution, transfer and several incidents.

In 1773 the peace with the Indian tribes was assured, and their title to a large tract of country south of the

Broad river extinguished, by the treaties made at Augusta. Active preparations were made to settle this country, when the advent of the Revolutionary struggle for a time interrupted the course of internal development.[4]

COLONIAL LEGISLATION

On January 24th, 1755, the real work of law-making began; evidently with a view of impressing the populace and shutting off discussions as to its power, one of the first acts imposed penalties upon "any person who shall declare that the Acts of the General Assembly of Georgia are not of force." At this session laws establishing the militia, fixing the rate of interest, preventing fraudulent deeds, and regulating fences, were the first feeble beginnings of that vast and ponderous mass of Statute law since enacted.

But even after the Colony began to pass laws, there was no one by whom they could be published, so that the pen had to do the work of the press. In 1762 an act was passed "making provisions for printing the laws of this Province and for encouraging a printer to set up a printing-press in the same," the preamble reciting that "whereas the laws have not hitherto been well known, and because printing is the quickest and easiest method of publishing them; and whereas, there has been no printing-press in the Province, but all public transactions have been published by handwriting." James Johnson was elected Printer of the Laws, at a salary of one hundred pounds per annum, and at once set about collecting the acts which had thus been "published by handwriting" during the preceding seven years.

He printed them separately, sometimes printing only on one side of the sheet, sometimes on both; and these undated and separate acts were distributed like handbills, and, of course, lost. But at least three persons made partial collections of these scattered papers, and bound them with the pamphlets containing the annual session laws published up to 1799. These leaves and pamphlets, thus bound together and preserved, constitute the only existing published rec-

ords and laws passed prior to 1799. Of course the annual pamphlets were very small and insignificant, frequently containing less than a dozen pages; but what they lacked in size they made up in a sounding and grandiloquent title—that of 1762, for instance, reading as follows:

"ACTS,

passed by the General Assembly at a session begun and holden at Savannah, on Wednesday, the eleventh day of November, Anno Dom., 1761, in the year of our sovereign Lord, George the Third, by grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, and so forth; and from thence continued by several adjournments to the 4th day of March, 1762, being the second session of this present Assembly." Savannah. Printed by James Johnson."

Considering that other colonies had not only published their annual session laws, but, in most instances had made compilations or abridgements of their statutes at large, the utter absence of published statutes for the Colony of Georgia is remarkable. It is more remarkable that, after attention was called to the omission, and a law passed authorizing their publication, nothing was done to correct the evil.[3]

In the colony of Georgia the fee system ran wild. The Act of 1773 for "Settling Fees" covers thirty pages in the "Colonial Acts." We smile at the toy republic of San Marino, with its standing army and its tiny public debt, but the youthful colony of Georgia, with a population smaller than many of its counties today, provided in this Act for fees to the Governor, Secretary, Clerk of Council, Messenger of Council, Doorkeeper of Council, Messenger of the Upper House, Clerk and Messenger of the Common House, Chancellor, Master in Chancery, Register in Chancery, Solicitor in Chancery, Chief Justice, Attorney-General, Clerk of the General Court, Clerk of the Crown and Peace, Provost Marshal, Judge of Admiralty, Marshal of Admiralty, Register of Admiralty, Advocate-General, Public Treasurer, Powder Receiver, Coroner, Comptroller, Notaries, Auditor General, Clerk of the Church of England, Sexton, Crier

of Court, and our old friends the Justices of the Peace and Constables.

Evidently, like some of our new regiments, which consist altogether of majors and colonels, every inhabitant of the Colony had an office, and some of them must have had two. No matter how insignificant these positions sound, they were decidedly worth having. The Sexton was paid 2 shillings for digging a grave and 2 shillings for filling it up, besides 1 shilling for ringing the bell. The Clerk of the Church got one shilling for attending the funeral, and a like amount for attending every marriage and christening. But these lucrative positions were nothing to that of the Crier. He got a fee for every case that was tried, whether he had anything to do with it or not. He was paid for every witness who was sworn, and for every non-suit that was granted, and also for every verdict which was taken, and the long list of emoluments, to which he was entitled, winds up as follows: "From every attorney at the end of each court and sessions, and from the prothonotaries one shilling." This looks very much like a legalized tip.[7]

There were many acts passed for the porpose of raising funds for His Majesty, occasionally by imposing a duty on shipping or fixing fees and dues, but mainly by taxing land under a system which practically remained in force until 1840. But it was wholly at variance with our ideas. The present doctrine is that all taxation should be ad valorem. The early statesman thought exactly the opposite, and taxes were specific. Land was divided into three classes, such as swamp land, pine land, oak and hickory land, and this subdivided into that of the first and second quality; sometimes it was again subdivided into the land between the Florida line and Savannah, between Savannah and Rae's Creek, and between Rae's Creek and the Tennessee line; then it might be again subdivided into land within one mile of the river and land more than a mile from the river. It was taxed so much per acre regardless of its market value. For example: The state laid a tax of 4 shillings on every 100 pounds, and then, relieving the taxpayer's conscience of

the burden of fixing values, the Act proceeded to assess cultivated lands at 4 pounds per acre; pine barrens within three miles of a town at 15 shillings; all good oak and hickory land from the mouth of McRae's Creek to Broad River and within one mile of the Savannah River at 15 shillings. A poll tax of 4 shillings, afterwards 31¼ cents on every white person, and 2 shillings on slaves; 9 shillings on every pleasure carriage; 50 cents on every lawsuit; 1 pound on every free negro and the same on every lawyer.[3]

The salary of the Governor was fixed at 1,000 pounds with perquisites amounting to 319 pounds more. The revenue applicable to the support of the Provincial Government was raised from the King's quit rents, and by an annual tax on houses, lands, negroes, money at interest, stock in trade, and specified articles.[11]

Every act of the Colonial Assembly was provisional. It required the royal assent to become a law. Each had a preamble stating briefly the necessity for its passage, with the following form of enacting clause: We therefore humbly pray his most sacred Majesty that it may be enacted, and be it enacted by the Governor, Council and Assembly, of this, his Majesty's Province of Georgia, and by the authority of the same; That, etc." What favor these humble petitions in the enacting clause too often met with is shown by the fact that the very first charge against the King in the Declaration of Independence is that "He has refused his assent to laws most wholesome and necessary for the public good."

The Colonial Legislatures had much less confidence in their wisdom than ours. Every law was regarded as more or less an experiment. They were not expected to be permanent. Each Act, instead of concluding, as ours do, that "laws in conflict are repealed," usually wound up with the provision that "this Act shall continue in force for two years, and from thence to the end of the next session," and occasionally a sort of omnium-gatherum Act would be passed "for continuing the several laws of this Province which are near expiring," and, instead of making them permanent

even in this sort of Act, concluded by providing "These Acts shall severally and respectively continue and be further in force during the term of one year and thence to the end of the next session."

This plan may have been resorted to at first for the purpose of having something for the little Assembly to do. For, while the early Legislature had no great subjects with which to deal, it heroically attempted to make up for the deficiency by diversity. It passed separate divorce bills, until wearied with the process, wholesale separation was attempted, and sometimes as many as twenty-five couples were divorced in one bill. It pardoned criminals; it passed bills to authorize lotteries for raising money to build churches; to establish a library for the University; to build manufacturing establishments; and one Joseph Rice, of Savannah, was authorized to establish a lottery to raise $10,000, on his representation to the Assembly "that he had in his posession watches and jewelry which he could not dispose of in the regular course of his profession as a watchmaker."

The General Assembly would pass laws for internal improvements: for laying out roads; establishing stage lines; taking the census; for selling the glebe lands. It adopted stay laws, and expressed its opinion of public men.[3]

The harshness or leniency of the administration of criminal affairs is the surest index to the condition of a people, and in truth the most surprising features of the early colonial life are found in these Criminal Statutes. It is possibly not correct to say in the Criminal Statutes, because very few were enacted. Until 1816, the Criminal Law of England was of force in Georgia almost without a change or amendment. The definition of crimes and all the Criminal Statutes, the methods of procedure and every peculiarity of the English law were rigorously followed. It has been decided that we have no Common Law crimes in Georgia; if so, it must be because the adoption of a Penal Code is construed to repeal all criminal laws not therein contained, for until 1816 we had absolutely nothing else.

The rule as to the corruption of blood as a result of

felony must have been recognized. There appears to be no record of forfeiture of property upon conviction of crime, but the provisions of the Act on the subject of "Gouging and Biting" recognize that such forfeiture resulted. After reciting that "nothing more forcibly marked the barbarity and ignorance of a country than the savage custom of gouging and biting"; this Act provides that for "the first offence the party convicted should pay a fine, and stand in the Pillory not exceeding two hours; but, if unable to pay a fine, he should receive 100 lashes on his bare back and be set at liberty. For a second offence, he should be deemed a felon, and suffer death without Benefit of Clergy; Provided that said attaint should not extend to corrupt the blood, forfeiture of dower, or the offender's goods and chattels."[3]

If biting and gouging did not "mark the barbarity and ignorance of a country," the punishment prescribed for the offense certainly did.

In 1793 the punishment for counterfeiting, forging, and horse stealing, was death without benefit of clergy.

As late as the year 1809 horse-stealing was punished, for the first offense, with thirty-nine lashes on the bare back, and three several days, and on each day a stand in the pillory of one hour, and in addition imprisonment for from twenty days to one month. For the second offense, the punishment was death, without benefit of clergy.[12]

Existing conditions call for the enactment of laws. It has, therefore, become trite to say that the history of a people may be written from an examination of its laws. Even if the historian had said nothing upon the subject, we would be able to draw a picture of the dangers and unrest of the population from the frequent laws for the regulation of the militia, establishment of powder magazines, and what appears on the subject of weapons. One-third of the time of our courts is today taken up in punishing men for carrying and using weapons. Time changes,—in 1766 it was enacted that "if any male person should attend church

without carrying with him a gun or a pair of pistols in good order and fit for service, with at least six charges of powder and ball, or shall fail to take such gun or pistol with him to his pew or seat, he shall be fined ten shillings." (Watkins, 157.)

Judging from the statutes, we would infer that bear-baiting and bull-baiting were not infrequent; that deer-hunting in the night was a euphuism for cattle-stealing (Colonial Acts of Ga., 258), and that the oppressor of the poor had already made his appearance, since it was necessary to make an assize of bread. The four-penny loaf was to weigh three pounds, if flour sold at ten shillings. If flour was twenty shillings, the loaf was to weigh one pound five ounces, and so on, the price varying both according to the price of flour and the quality of bread. The Act then elaborately provided methods to prevent the fraudulent adulteration of flour. It allowed a Justice of the Peace to enter a bake-shop, search for and weigh bread, and if he found any under assize to confiscate it to the use of the poor of the parish.

Oglethorpe had founded this colony in the interest of those who had not been able to pay their debts in England, but a change of climate does not seem to have effected a change of habit, or possibly it may have been with them as it is now—and was with the wicked servant who, discharged from liability himself, took his own debtor by the throat, saying, "pay me that thou owest." At any rate, the Digest (Watkins) bristles with Acts providing for the payment of small debts, for the support of those imprisoned for debt, and with others making it penal for the owners of ships to carry off debtors in their vessels. From the frequency with which this latter Act appears one would suppose that the poor debtor, having left England to escape those whom he owed there, no sooner landed in the new colony than he found it expedient to put back again to elude his American creditors.

There is one still more curious law on this subject of debts. In 1766 it was enacted that "if any person should

give credit to or trust any seaman for any sum exceeding five shillings, he, she or they so giving credit to or trusting such seamen shall for every offense lose the money or goods so credited or trusted." We do things better now, for we manage "to lose the money or goods so trusted" without the assistance of the Legislature.[3]

When we read of the horrors of the debtor's prison, we sicken at the thought that such things ever could have been. And yet there was a time when imprisonment for debt, with all its English rigor, prevailed in the colony of Georgia. In the year 1766, a measure of alleviation was adopted, when an act was passed for the relief of debtors who might be confined in jail and were unable to support themselves during their confinement. By it the debtor was allowed, on petition to the court and notice to creditors, to surrender whatever property he might have and take a prescribed oath. If the creditor insisted on his being detained, and agreed to pay a named sum for his support, the debtor was not discharged; if the creditor refused to make the agreement, the debtor was to be discharged. But the act did not apply if the debtor's trade or occupation could be carried on, and he could find employment, within the jail, by which to earn a subsistence.

By the act of 1762 all persons were compelled to attend divine worship, and the third division of the Penal Code of 1816, consisted of "Crimes against God." They were defined to be "Denying His existence, or a future state of rewards and punishments," and they were punished with being incapacitated to give testimony in a court of justice, or of serving in any office of honor, profit or trust in this State.

In the present Code there is no trace of the fetters that bound the minds of men for centuries; there is no trace of the pillory, the lash, the bare back; nor is there a place in it for mention of the debtor's prison. We have grown away from those darksome things and they exist now only as a burthen upon the memory.

It is only fair to remember that the cruel severity of these laws and customs was the high-water mark of the

condition of the people in all departments of thought and life. The doctors were tapping the fountain of life with leech and lancet; the theologians stood just behind them with a salvation chance fixed at about one-half of one per cent; the reaper and binder, the sewing-machine, and even the patent churn, were unheard of. As to the railroad, it seemed but a dream of the possible, as will appear by the following facts:

In the year 1800 the sole and exclusive right of running a line of stage-carriages for the conveyance of passenges and their baggage between the city of Savannah and the town of Augusta was vested by legislative grant in three persons. The right comprehended all the different routes, and the grantees were required to run the stage-carriages at least once every week between the two places.[12]

Of course, there were many laws on the subject of inspection of tobacco and indigo, but there is only a reference to "Cotton" until the year 1803, when a most curious statute was passed. There is a current saying that exclusive of its fiber cotton is worth cultivation for its by-products alone. The cotton-seed-oil was used for man, but the hulls and meal are now regarded as the very best food known for cattle, and with what was once a refuse the cattle on a thousand hills may be made seal fat. Yet, in 1803, the Legislature passed "An Act to compel the owners of cotton machines to enclose the same, and in Particular Situations, to remove the seeds therefrom." The "gin" was then generally called a "cotton machine," and it was provided that where such "cotton machines" were located in a town, the owner should enclose the seed in such manner as would effectually prevent all stock from eating thereof. The owner was also required to secure and keep the seed dry, and to remove them at least once a week, so as to prevent all unwholesome effects resulting therefrom, and from the stench and vapors arising from the seed in a putrid state, and further must enclose them in such a "manner as to prevent the neighbors' stock from feeding thereon." Speedy reme-

dies were provided for collecting the penalty, and the Justice of the Peace himself was subject to be fined if he neglected to enforce this law. This Act has never been repealed, except by the "Act of Dry Rot." But who can say how many millions upon millions have been lost and destroyed in the throwing away of the by-products of the cotton plant.[3]

THE BEGINNING OF THE CONFLICT

The formula of the American Revolution was that there should be no taxation without representation. In December, 1768, the Commons House of Assembly of the Province of Georgia passed a resolution expressing adherence to this theory of taxation in a resolution wherein they said:

"At the same time, with inexpressible concern, we much lament that by the imposition of internal taxes, we are deprived of the privileges, which, with humble deference, we apprehend to be our indubitable right, that of granting away our own property, and are thereby prevented from a ready compliance with any requisition which your Majesty may please to make, and which, to the utmost of our small abilities, we have hitherto most cheerfully obeyed."

In 1769, the colony of Georgia gave striking expression to this theory of the right of taxation by refusing to levy a tax upon the four parishes between the Altamaha and the St. Mary's acquired in consequence of the Treaty of Paris at the close of the French and Indian war, upon the ground that these parishes were without representation in the Colonial Assembly, resolving:

"That, under the circumstances, unless your Excellency coincides with us, we dare not impose a general tax, knowing with what abhorrence every member of our community holds the idea of a partial representation."[13]

How the subject of taxation has shaped the destiny of our Country, every student of history knows. Indeed "Taxation without representation," was one of the prime causes that brought about the American Revolution. The flame kindled by the Stamp Act of the British Pariament was soon fanned into that Revolution, which finally resulted in our

independence and the establishment of the Government of the United States.

A very interesting account of the arrival of the first stamps issued under that Act in Georgia is given by Mr. McElreath in his admirable work on the Constitution of Georgia, as follows:

"When the stamps arrived (at Savannah), there were in the port between sixty and seventy vessels, waiting for clearance, which could not be obtained on account of the refusal of the people of the colony to allow the use of the stamps necessary to give validity to their clearance papers. But the necessity for clearing the port seemed so urgent that the people finally consented to allow the use of the stamps for this purpose, but for none other. Their use, even for this purpose, was greatly resented by the people of South Carolina. Georgia was condemned as a 'Pensioned Government,' which had 'sold her birthright for a mess of pottage, and whose inhabitants should be treated as slaves without ceremony.' It was resolved that no provisions should be shipped to 'that infamous colony,' that every vessel trading there should be burnt; 'that whosoever should traffic with them should be put to death.' These inflammatory words were not an exaggeration of the feeling of the people of South Carolina, for two vessels, about to sail from Charleston to Savannah, were captured and taken back into port and destroyed with their cargoes."[14]

Benjamin Franklin, during the controversy over the Stamp Act and afterwards, was repeatedly elected by the Commons House of Assembly "to sollicit the affairs of this province in Great Britain." He was paid a salary of 100 pounds and as an expression of the appreciation of his services the State afterwards made him a grant to the land to which he refers in his will.

Just before the Revolution the Attorney-General of the Province applied for Writs of Assistance. The record is most interesting:

"At an adjournment day of April Court, holden at Savannah in the said Province, on Monday the 3d day of May, in the year of our Lord one thousand seven hundred and seventy-three, in the thirteenth year of his Majesty's reign.

"PRESENT

"The Chief Justice, Mr. Justice Jones, and Mr. Justice Butler.

"Mr. Attorney General on behalf of the Commissioners of the Customs in the British Colonies in America, applied to the Court for writs of Assistants to be granted to the Officers of the Customs for the ports of Savannah and Sunburry: there honors the Judges were of opinion as follows; *viz.* his honor Mr. Justice Butler, that as he apprehended there was not an occasion for them at present, he was of opinion that the same should not be granted, not until there was a necessity for them; Mr. Justice Jones alleged, that as he had not come prepared in the matter, not being apprized of such intended application, could not give any opinion thereupon; and his honor the Chief Justice (Stokes) was of opinion, that the said writs of Assistants should be granted."

While Chief Justice Stokes was presiding at Savannah, the Georgia Provincial Congress prohibited attorneys from proceeding in any civil action and Stokes announced that "if any lawyer should delay his client's cause under pretense of the said Resolution the Court would strike such attorney off the roll." This brought on a conflict of authority, in which the Congress threatened to take action against Stokes if he enforced the rule, to which, however, he adhered and ordered his decision to be published in the paper.[6]

In the proceedings of the Council of Safety just prior to the Revolution, appears a resolution reciting that it was rumored that all attorneys who sympathized with the proceedings of the late Congress had been stricken from the roll by the Chief Justice, and a committee was appointed to ascertain whether or not the rumor was well founded. Investiga-

tion demonstrated that the rumor was without foundation.[34]

Stokes was several times arrested by the Americans and at last obtained permission to leave the State with his family, bearing with him a letter signed by John Wereat, who himself subsequently held the office of Chief Justice of the State. It was indorsed by Gov. Archibald Bulloch and acted as a "safe conduct."

"I am sorry," he wrote, "that this Province is deprived of so upright a magistrate as our late Chief Justice and sincerely wish you health, peace and freedom; for the last of which America is contending and will contend at every hazard."

After Stokes' return to England he wrote

A
NARRATIVE
OF THE
OFFICIAL CONDUCT
OF
ANTHONY STOKES
OF THE
INNER TEMPLE, LONDON
BARRISTER AT LAW;
His Majesty's CHIEF JUSTICE, and one of his
COUNCIL OF GEORGIA:
and of the
DANGERS AND DISTRESSES
He underwent in the Cause of the Government
Some Copies of which are printed for the Information
of his Friends.
LONDON, 1784.

It gives the British view of the situation in Georgia, and also many side lights on legal affairs during the exciting years between the Stamp Act and the Revolution.

In that intermediate period between the repudiation of

British authority and the organization of the new Government, the exact legal status of Georgia was a matter of dispute. It was sometimes referred to as a Province and sometimes as a State, and there was a doubt as to whether Indictments should still run in the name of the King, as under the Trustees the question had been whether Bail Bonds should be to them or to the King. (4 C. R. 88.)

William Stephens had been elected as Attorney General, May 1, 1776, with a salary of 25 pounds (Rev. Rec. 119, 227), and Gov. Bulloch referred this question to him. As it is the first legal opinion of a Georgia lawyer, it may be stated that he gave it as his opinion that the following would be proper:

"The grand jurors of the body of the Province of Georgia, upon their oaths, present," etc., and concluding "against the peace of the Province and the welfare of the inhabitants thereof." (Charlton's Life of James Jackson 8.)[16]

THE CONSTITUTION OF 1777

Because even the boldest hesitated to cut the bonds, and set up a new government, the colonies, prior to the Declaration of Independence, were governed by temporary Assemblies, and Committees of Safety, born of the necessity of those troublesome times.

Indeed, in Georgia, the President and Council of Safety remained in power until the State organized under the Constitution of 1777.[16]

The first constitutional convention of Georgia met in Savannah on the first Tuesday in October, 1776. The constitution known as the Constitution of 1777, was finally adopted and promulgated on February 5, 1777.[17]

This convention of the people of Georgia was composed of delegates from thirteen parishes and the towns of Savannah and Sunbury. This was the first regular Constitution for the State of Georgia, for the form of government adopted by the Provincial Congress in the year preceding could not properly be called a Constitution—it was merely

a military government, improvised to meet the emergency of the times.[18]

This Constitution began with certain whereases which were followed with this statement: "We, therefore, the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State."[19]

There was no separate article embracing an enumeration of principles, called in modern Constitutions "the bill of rights." Four brief sections in it constitute the declaration of "fundamental principles." They are as follows:

"Excessive bail shall not be demanded, nor excessive fines imposed. The principles of the Habeas Corpus Act shall be a part of this Constitution. Freedom of the press and trial by jury shall forever remain inviolate. No clergyman of any denomination shall be allowed a seat in the legislature."[18]

The Constitution followed that of Virginia in adopting the new maxim of free government:

"The legislative, executive and judiciary departments shall be separate and distinct, so that neither shall exercise the power properly belonging to the other."

This great maxim of free government, a bulwark of human liberty, although clearly stated, was not closely followed in the Constitution itself.[16]

The General Assembly, called the "House of Assembly," was a single body, composed of members elected yearly from each county. From this single body was elected an Executive Council to aid the House of Assembly in reviewing legislation before its final passage, and proposing amendments to the same. While the Executive Council had no right to vote in the House of Assembly, it had the right, by a Committee from its body, to be present covered, (the members of the House, except the Speaker being uncoverd) and to discuss

in the House amendments to legislation proposed by the executive council.[18]

Article 7 provides that "The House of Assembly shall have power to make such laws and regulations as may be conducive to the good order and well-being of the State; provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in the Constitution." Thus in the beginning of constitutioal government, as now, the power of the legislature to enact laws was limited by the terms of the Constitution, and the power to make them was also limited to those specifically chosen for that purpose.[19]

The electors were restricted to "all male white inhabitants, of the age of 21 years, and possessed in his own right of property of ten pounds value, and liable to tax in the State or being of any mechanical trade."

Those eligibld as representatives should "be of the Protestant religion, and of the age of 21 years, and shall be possessed in their own right of two hundred and fifty acres of land, or some property of the amount of two hundred and fifty pounds."

The restriction as to the Protestant faith was unworthy of the men who framed the Constitution, and is inexplicable in the light of Sec 41.

"All persons whatever shall have the free exercise of their religion; provided it is not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher except those of their own profession."[16]

The Executive Department consisted of a Governor and Council, both elected annually by the House of Assembly. The Council was selected from the members of the House of Assembly. The power of the Governor was very limited; he could not pardon any offence, could simply grant reprieves; he could not veto any bill passed by the House.[18]

This instrument created a judicial system composed of a Superior Court, a Court of Conscience, and a Court Merchant.

The Superior Court was held twice a year in each county, and had jurisdiction of all causes whatsoever, unless otherwise provided in the Constitution, and consisted of the Chief Justice, and three or more Justices residing in the county. It had jurisdiction not only in cases at law and in equity, and criminal cases, but as well in all matters usually within the jurisdiction of a Probate Court or Court of Ordinary. (Watkins' Digest, p. 13)

The Court Merchant was brought over from the days of the Colony, having jurisdiction in cases between merchants, dealers, and others on the one hand, and shipmasters, super-cargoes, and other transients on the other, the jurisdiction being unlimited as to the amount, and the Court being held by the Chief Justice, or in his absence, one of the Justices of the county. The proceedings were summary, cases being tried after seven days' notice.[20]

In America, general jurisdiction was conferred upon the Justices of the Peace first in criminal cases. In the colony of Georgia in 1760, an act was passed for a more speedy recovery of small debts and damages, thus making Justices of the Peace Judges of "small debt courts," as well as conservators of the peace. The rule of decision in these courts was according to equity and good conscience and the courts were called "Courts of Conscience." In 1762 the Act of 1760 was explained and amended and the Constitution of 1777 declared "that the Court of Conscience shall be continued as heretofore practiced and that the jurisdiction thereof be extended to try cases not amounting to more than ten pounds."[21]

Jurors attended the Superior Court, from whose decisions in civil cases an appeal was allowed to a special jury. There was no other provision for a new trial than by this single appeal to a special jury.[18]

Jurors in all cases, both civil and criminal, were made "judges of law as well as of fact," and to secure to them the full and free exercise of this high prerogative, no special verdict was allowed to be brought in; but if all or any of

them had doubt concerning points of law, they were at liberty to apply to the Bench, then composed of the Chief Justice and three or more county Justices, each of whom, in rotation, was required to give his opinion. This Constitution provided for both petit and special juries. The former were sworn "to bring in a verdict" according to law, and the opinion they entertained of the evidence, "provided it was not repugnant to the rules and regulations contained in the Constitution," and the latter were sworn to return a verdict according to law, and the opinion they entertained of the evidence, provided it be not repugnant to justice, equity and conscience and the rules and regulations of the Constitution, of which they were to be the judges.[22]

The provisions of this Constitution as to the venue of civil and criminal cases have been followed in all of the Constitutions of the State. Defendants in civil cases were to be sued in the county of their residence. Contests respecting real estate were to be tried where the real estate was situated, and criminal offences in the county where committed.[18]

The Constitution of 1777 formed the twelve Parishes of the Province into the six oldest counties of the present State, the distribution being as follows:

Christ Church and St. Phillip's South of Canouchee, became Chatham county; St. Matthew's and the rest of St. Phillip's became Effingham; St. George's Parish became Burke; St. Paul's became Richmond; St. John's, St. Andrew's and St. James' became Liberty; St. David's and St. Patrick's became Glynn; St. Thomas' and St. Mary's became Camden, while the ceded lands North of Ogeechee formed the seventh county, Wilkes.[4]

The Constitution took from the courts the power of admitting or disbarring attorneys and provided that "no person shall be allowed to plead in the courts of law in this State, except those who are authorized so to do by the House of Assembly, and if any person so authorized shall be found guilty of malpractice, before the House of Assem-

bly, they shall have power to suspend them. This is not intended to exclude any person from that inherent privilege of every *Freeman*—the liberty to plead his own cause."

This was so strictly construed that when Gen. McIntosh employed noted and distinguished non-resident counsel it was thought they could not represent him without authority of the House of Assembly, which thereupon passed a resolution "granting leave for Charles Cottesworth Pinkney, Thomas Pinkney and Edward Rutledge, Esquires, to be admitted to plead at any Court of justice in this State, so far as relates to any cause General McIntosh may be engaged in or have occasion to commence." (3 Rev. Rec. 300)[16]

In this first Constitution no limitation was laid upon the exercise of the taxing power of the legislature, the only provision in the nature of a limitation being the directory provision that schools should be provided in each county and supported at the general expense of the State.[13]

The provision in reference to amendment in this constitution was as follows:

"No alteration shall be made in this constitution without petitions from a majority of the counties, and the petition from each county to be signed by a majority of the voters in each county within this State; at which time the Assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the Assembly by the majority of the counties as aforesaid."[17]

This provision is the first instance of the much discussed modern right of the initiative by the people in the constitution of any American State.[23]

No amendments were ever made to this Constitution.[17]

This first Constitution shows that it was made by a people recently released from the control of a strong government, wild with the spirit of freedom, confident in their capacity to make laws for themselves and determine their meaning and application, unrestricted by vetoes of Governors or opinions of Judges.[18]

Entails and primogeniture were abolished, yet the republicanism of these early constitutions was only skin deep. There was a strange medley of new democracy and respect for old forms. Voters were each required to be possessed of ten pounds in his own right, and were subject to a penalty not exceeding five pounds for a failure to vote. The representatives were to be of the Protestant religion, own 250 acres of land, or be possessed of 250 pounds of property, and be able to swear that they had obtained their election without fraud or bribery. While titles of nobility disqualified a person from holding any office until he should give up such distinction, when he should be entitled to vote and hold office and enjoy the benefits of a free citizen, still, the same Constitution was very particular to provide that the title of Governor should be "Honourable," and to arrange all of the details by which communication between the Honourable Governor and the House should take place through the intervention of an intermediary council.[3]

While the Constitution of 1777 was and has remained the foundation of Georgia's constitutional policy, nothing is known of the men who made it; its journal is lost, and the men who made it have been forgotten.

It was made in pursuance of the recommendation of the Continental Congress, as a step to throw off the oppression of Great Britain; and as an assertion of rights and privileges under the law of nature and reason.

It had its birth in a time of great trial, in the very presence of Tories and Royalists, with English sailors and soldiers on the one hand, and Indian savages on the other.

Georgia was the weakest of the Colonies; was largely an unexplored wilderness; with only seven counties, fringing the coast, and the bank of the Savannah River. It had not been half a century since Oglethorpe presided at her birth.

The adoption of this Constitution meant conflict between Georgia, the weakest of the Colonies, and the most powerful nation of the earth. It was an inspired acclamation of freedom, and a challenge to tyranny. Its makers,

although their names have been forgotten, were brave men. With tyranny seeking to throttle them, and with the hangman's noose ever in sight, they patiently worked out a system of local self-government that proclaimed a new and better freedom, and hastened the destruction of English power in the New World.

This was no task for the faint hearted. They were patient, courageous, iron-willed men, to whom we owe a debt of gratitude yet unpaid.[10]

By the General Assembly the Governor's salary was fixed at 500 pounds, and that of the Chief Justice at 300 pounds. In the distracted and impoverished condition of the feeble Commonwealth, then in the throes of a mighty revolution, it was contemplated that the salaries of these officers should be paid in sterling money or its equivalent. The purchasing power of good money, as contrasted with that of the paper currency issued upon the faith of the State, became, during the progress of the struggle, so great that one dollar of the former was reckoned as the equivalent of fifteen hundred of the latter. The Courts too were soon practically closed. *Silent leges inter arma.* Spasmodic and partial was the effort to collect taxes. The Government itself was peripatetic, and the proceedings of the Executive Council, charged with the administration of State affairs, consisted of little more than insignificant orders, brief communications, meager journals of convocations, deliberations, adjournments and removals, and scanty memoranda of efforts to promote the public safety.[11] So desperate was the situation at the close of the war, that Governor John Martin had to appeal to the Legislature to make special provision for his family to keep them from starving.[8]

THE REVOLUTION

The Bar Association historians have not attempted to write for us a connected history of the Revolution. This could not have been expected, but from the "thumb-nail" sketches of the lawyer-soldiers of the period we may get a

tolerable picture of the time, and some familiarity with the dominant figures of Eighteenth Century Georgia.

Mr. Justice Miller, in Garland's case, (4 Wall. 333) said that lawyers "are by the nature of their duties the moulders of public sentiment on questions of government." So it undoubtedly was in the days of the Revolution. To write the lives of Otis and Adams of Massachusetts, of Henry and Jefferson of Virginia, is to write the history of the period. And our own State's history, from the time when she made common cause with her sister colonies in resisting oppression till she took her place in the Union under the Constitution, may be best studied in the lives of Archibald Bulloch, George Walton and James Jackson, all members of the Georgia Bar.

It was Bulloch who planted the Liberty Pole, organized the Council of Safety, and headed the Liberty Boys; who was President of the first Provincial Congress which assembled at Tondee's Tavern; who led the party that burned every house on Tybee Island to prevent its use by the British seamen from the men-of-war anchored in the roads; who first read the Declaration of Independence to the assembled townspeople in Savannah; who became the first Provisional President of Georgia and commander-in-chief of the military forces; but who was cut off ere the conflict of arms had fairly begun. White in his "Statistics of Georgia" concludes his biography of Bulloch thus: "Georgians! Let the memory of Archibald Bulloch live in your breasts! Tell your children of him, and let their children tell another generation!" Right worthily have the descendants of the old patriot borne themselves. His son, Major Wm B. Bulloch, U. S. Senator, is mentioned in connection with the War of 1812. Two grandsons were officers in the Confederate Navy, one of them fitted out the "Alabama." His great-grandson, ex-President Roosevelt, was Lieutenant Colonel of the Rough Riders in the war with Spain, and Colonel Roosevelt's four sons were all officers engaged in active service in France. Lieutenant Quentin Roosevelt, of

the Aviation Corps, met death gloriously near the old French city of the same name. One of the first officers of the American Expeditionary Force, engaged in service overseas, wounded in defense of liberty, was Captain Archie Roosevelt, the namesake and lineal descendant of this sterling old patriot.

Walton, the Secretary of the Provincial Congress and one of the three immortals who signed the Declaration of Independence on behalf of Georgia, was a Lieutenant Colonel of the Continental Line. He was wounded and captured in the fighting around Savannah, where he served with conspicuous gallantry. After the war he filled with ability and most acceptably the high offices of Governor for two terms, United States Senator and Representative in six Congresses, was twice Chief Justice, and after that office was abolished by the new Constitution, was for fifteen years Judge of the Superior Court.

Georgia should have had four signers of the Declaration instead of three. But John Houston, son of Sir Patrick, who was a member of the Continental Congress was compelled to return to Georgia to combat the intrigue of the Rev. Dr. Zubly, who had turned royalist, and so was absent when the great charter of liberty was signed. He had been a conspicuous member of the first Provincial Congress. As Governor and commander-in-chief of the militia, Houston headed an expedition for the invasion of Florida, then owned by England and from which Georgia was constantly menaced. But disagreement arising among the officers, the enterprise was abandoned. He, too, became Chief Justice of Georgia, and afterward Judge of the Superior Court.

Two other lawyers were members of the first Provincial Congress, John Glen and William Ewen. Both were members of the Council of Safety, Ewen for some time its President, and active participants in the stirring events of the times. Glen was elected the first Chief Justice of the State and later became Judge of the Superior Court.

White, in his "Historical Collections," says of Ewen: "He was among the first of that immortal band who took up arms in defense of American liberty." But no record of active military service of either Ewen or Glen has been preserved.

One of the early escapades of the war was the breaking open of His Majesty's magazine and the seizure of the powder stored therein and so much needed by the patriots. Some of this powder was sent to the army, then encamped in the vicinity of Boston, and was used in the Battle of Bunker Hill. Two of the leading spirits in this adventure were young limbs of the law, William Gibbons and John Milledge. Gibbons, after the war, was rated by General Jackson as the foremost lawyer in the State, enjoying an income of three thousand pounds per annum.

John Milledge fought in defense of Savannah; when the city fell, fled with James Jackson into South Carolina, where they barely escaped being shot as Tory spies; returned to Georgia, and participated in the siege and assault upon Savannah, and in other campaigns. He became Governor of Georgia and presented to the State the campus upon which was erected the buildings of Franklin College, now the University.

Another of the powder magazine party was that staunch Scotch patriot, Edward Telfair, one of the Assistant Justices for the County of Burke. He was a Son of Liberty, a member of the Council of Safety, of the Continental Congress and of the Congress of the United States, and succeeded George Walton as Governor.

John Adam Treutlen, the first Governor of the State, and one of the most active of the early patriots, was also an Assistant Justice.

Captain Benjamin Taliaferro, of the Continental Line, who was engaged in the New Jersey campaign and afterward saw service under Morgan in the South, and was captured at Charleston, was elected to an office for which legal training is usually considered requisite. Though not

a lawyer, the Legislature, after the war, honored him with the commission of Judge of the Superior Courts of the Western Circuit, which position he seems to have filled with entire satisfaction. He was also a member of Congress.

Both of Georgia's delegates to the Constitutional Convention of 1787, whose names are appended to the Federal Constitution, were lawyers and both were soldiers. William Few, Jr., was a Lieutenant Colonel of Richmond County Militia, and participated in the almost daily skirmishes and forays about Augusta. His father, William Few, was a Colonel, and his brother, Ignatius, a Captain of the Continental Line. He was one of our first Senators, a member of Congress, and, like so many other of Georgia's great men, a Judge of the Superior Court.

Connecticut gave to Georgia two of the most illustrious citizens of this early time—Dr. Lyman Hall, a signer of the Declaration of Independence, and Abraham Baldwin, who, with Colonel Few, signed the Constitution of the United States on behalf of Georgia. Educated for the ministry, Baldwin was a Chaplain in the Continental Army. Moving to Georgia at the close of the war, he represented the State in the first four Congresses and afterwards as Senator. As the father of the University of Georgia, he is gratefully remembered by all Georgians.

From first to last, Georgia was represented in the Continental Congress by twenty-five delegates, of whom ten were lawyers and three Associate or Assistant Justices of the Superior Courts. When Governor Wright's Royalist Assembly met in Savannah in July, 1780, seventeen of these delegates were attainted for high treason and their estates forfeited. The number included six of the lawyers and all three of the Associate Justices. Of these lawyer delegates, mention has already been made of Baldwin, Bulloch, Few, Gibbons, John Houston and George Walton, and of Justice Telfair. The other two Justices were Benjamin Andrew, President of the Council of Safety, and grandfather of Bishop James O. Andrew, of the Methodist Church; and

Edward Longworthy, who wrote the first history of Georgia, the manuscript of which unfortunately was lost before it was printed.

The other lawyers were: James Gunn, a Captain of Dragoons during the war, and afterwards Brigadier General of Militia. He was one of Georgia's first Congressmen, and then United States Senator, but his name will ever be associated with the notorious "Yazoo Fraud:"

Lieutenant Colonel Samuel Stirk, who accompanied President Button Gwinnett on his ill-starred Florida expedition, was Clerk of the Executive Council under John Adam Treutlen, the first governor, and later served as Attorney General:

Richard Howley, who had the unique distinction of holding the two high offices of Governor and Congressman at the same time. As a side light on the times, it is interest to know that Georgia currency had depreciated to such an extent that the Governor's expenses to Philadelphia, where he went to take his seat in Congress, cost the State half a million dollars. Howley also served a term as Attorney General:

William Houston, a brother of John, who was twice elected to the Continental Congress, was also a delegate to the Constitutional Convention of 1787, but declined to sign the Constitution. Of only one military event in his life do we have an account. While a member of Congress, a delegate from Rhode Island made some remarks reflecting on the South. The next morning Houston appeared in Congress armed with a sword. Friends intervened, however, and a promising military career was cut short.

One of the greatest names in Georgia history was the soldier-lawyer, James Jackson. But nineteen when the war broke out, he was a volunteer for the very first military enterprise, the capture of the rice-laden ships in Tybee roads. As Lieutenant, Major, and Lieutenant Colonel, he was engaged in practically every battle fought on Georgia soil. He was wounded at Midway, where General Screven was

slain. He assisted in the defense of Savannah. He displayed the utmost gallantry at Kettle Creek. By General Greene's authority he raised a mixed legion of infantry and cavalry, which joined the French and American forces at the siege of Savannah, where his name will ever be linked with those of Pulaski, Jasper, Habersham, McIntosh and D'Estaing. When Georgia was completely overrun by the British and Tories, he crossed over into South Carolina, and at the Battle of Cowpens again distinguished himself for bravery and skill. He performed valiant service at the siege and capture of Augusta. He was with "Mad Anthony" Wayne operating before Savannah when the British at last evacuated the place, and in token of his distinguished services he was appointed to receive the keys of the city. After the war he became a Brigadier, then Major General of Militia. His military record, conspicuous and brilliant as it was, is lost sight of in the great service rendered his State in times of peace. As he fought in every battle, so he held every office in the gift of the people, Congressman, Governor,* Member of the Constitutional Convention of 1798, United States Senator, which last office he resigned to attack in the Georgia Legislature the iniquitous "Yazoo Fraud."

This record would not be complete without mention of the redoubtable Colonel John Dooly. His activities in upper Georgia at the time when the State was in complete control of the British did much to keep alive the fires of liberty and won for him the title of "The Terror of the Tories." While he did much to check the atrocities of the Tories, he at last fell a victim of their hatred, being foully murdered in his own home. Whether Colonel Dooly ever read law, the record does not disclose, but he was appointed Attorney General to represent the State at the first Court of "General Sessions or Oier and Terminer and General Goal Delivery," holden in and for the County of

*Shortly after the war General Jackson was elected Governor but declined to serve on account of his youth and inexperience. In later life he was again elected and this time accepted.

Wilkes, at the house of Jacob McLendon, August, 1779, and he made a record of which the most bloodthirsty solicitor might be proud, securing the conviction of nine prisoners for capital offenses. They were all duly and regularly hanged by the neck until their bodies were dead, dead, dead.[10]

Born amid the shock of arms, John McPherson Berrien first saw the light on the 23rd of August, 1781, at the residence of his paternal grandfather, near Princeton, New Jersey. That grandparent was one of the Justices of the Supreme Court of that infant Commonwealth, and a friend of Washington.

Major John Berrien, the father, was an officer in the Continental Army, and his mother, Margaret McPherson, was the sister of John McPherson, who as an aide-de-camp to General Montgomery, shared with him a soldier's death before the walls of Quebec.

Shortly after the evacuation of Savannah by General Alured Clarke and the King's forces in June, 1782, Major Berrien, who during the war of the Revolution had seen service in this State on the staff of Brigadier General Lachlan McIntosh, removed with his family from New Jersey and fixed his home in the commercial metropolis of Georgia. In the impoverished condition of the Commonwealth, and in the absence of suitable educational advantages at the South, anxious that his son should obtain the best instruction the country then afforded, Major Berrien sent him to school both in New York and in New Jersey. His collegiate studies were pursued at Nassau Hall, and from this institution he received his degree of Bachelor of Arts at the early age of fifteen.

Returning to Georgia, he entered the law office of Hon. Joseph Clay, son of a member of the Continental Congress and Deputy Paymaster-General in the Southern Department; himself an eloquent advocate, afterwards advanced to the bench of the United States Court for the District of

Georgia. At a later period, laying aside his judicial robes, Judge Clay entered the sacred ministry and became a famous American pulpit orator.

His eighteenth year was not completed when Mr. Berrien was called to the bar.[15] In Georgia history few names hold higher place than that of Judge Berrien, a most accomplished lawyer and Judge, Senator and Attorney-General of the United States.[10] By the country at large, he was saluted as the American Cicero, and of him, when responding in behalf of the Supreme Court of Georgia to the memorial submitted by the Savannah Bar, Chief Justice Lumpkin exclaimed, "As a lawyer and a citizen who will dispute with him the premiership?"[15] While his conspicuous public career belongs to a later period, he was a product of Eighteenth Century Georgia.

THE JUDICIARY 1777-1800.

Upon the recapture of Savannah by the British, Chief Justice Stokes returned with Governor Wright and again opened court, and there are numerous entries in the Narrative relating to legal matters during that period. James Robertson was the Attorney-General under the British. In the siege of Savannah, in 1779, by the French under Count D'Estaing, a shell destroyed Stokes' house, killed three and seriously wounded three others of his slaves. When the city was captured he escaped and returned to England (see letter to him from Joseph Clay, 8 Ga., Hist. Sec. 254), where his salary of 500 pounds was paid for a year or two and then he wrote his most cellebrated book, "Constitution of the British Colonies in America."

Stokes's Work contains a valuable chapter on the organization and practice of the courts of Georgia, both before and after the Revolution, and with that curious mixture of the unimportant with the important he gives (p. 190) the "Rules of Precedency for the Settlement of the Precedency of Men and Women in America."

When Stokes left Georgia, John Glen was elected first Chief Justice of the State, with a salary of 300 pounds. But as all of the Court records have been lost there is nothing in Georgia relating to his administration of the office. However, a copy of the record in John White *vs.* Peter Knight, tried by "The Honorable John Glen, Esquire, Judge of the Court of Admiralty of the State of Georgia." has been preserved, which is probably the oldest complete record of a judicial proceeding in the State. The case grew out of the capture and seizure of the sloop Polly, and involved the title to the boat and cargo. The finding was in favor of the libellant. The case was appealed to the Continental Congress and was referred to a Committee consisting of James Wilson, John Adams, Thomas Burke. They affirmed the judgment. Few of us realize that at one time the Superior Court of this State exercised Admiralty jurisdiction and that appeals were allowed to the Continental Congress. But that case is mentioned in books discussing the facts leading up to the organization of the Supreme Court of the United States.

Glen was succeeded by Stephens, and he by Wereat.[9]

Upon the recapture of Savannah, in 1782, although desolation brooded everywhere and poverty lay down at every door, the General Assembly, in again putting in motion the wheels of Government and providing for the reopening of the temples of justice,—the doors of which had been sealed for several years,—provided a salary of 500 pounds for the Chief Justice. It will be remembered that while there were then Associate Justices in each county, they were not salaried officers. Their positions were entirely honorary. The Chief Justice rode the circuit of the State, and, unless prevented by Providential cause, presided at all sessions of the Superior Court in each county. As early as 1804 the salary of the Judges of the Superior Courts was fixed at fourteen hundred dollars.[11]

When Wereat's term expired the Legislature not only elected a man who was not a candidate, but one who was

not a citizen. In August, 1782 (3 Rev. Rec. 187) it was "Resolved that the Governor be requested to write to the Hon. Aedanus Burke, Esq., of South Carolina, informing him that this House had elected him to the office of Chief Justice of this State with a salary of 500 pounds sterling." (3 Rev. Rec. 187, 188.)

He did not accept the Georgia appointment and Richard Howley was elected in his stead. (3 Rev. Rec. 380.)

All Court Records of the Revolutionary period appear to have been lost, except those in Wilkes, prior to 1779. The consequence is that we know nothing of the legal history of that time, except that we can gather from the incidental allusions in the Minutes of the Governor and Council. These give us the names of the Chief Justices (John Glen, 1776-1780; Williams Stephens, 1780; John Wereat, 1781; Aedanus Burke, 1782; Richard Howley, 1782; George Walton, 1783-1786; John Houstoun, 1786; William Stith, 1786-1787; Nathaniel Pendleton, 1787-1788; Henry Osborn, 1788-1789; Nathaniel Pendleton, 1789)—and the judges of the Superior Court of the State—George Walton, Henry Osborn, William Stith and John Houstoun —whose commission (2 Miller's Bench and Bar) is interesting in itself and by comparison with the brevity of those now used, when the State has two hundred times as many inhabitants.

When the State was divided into Circuits, the Eastern (Home) was in the southern part of the State; the Middle in the central part, and the Western in the northern part, from which it has been suggested they were named after the English circuits, and not with reference to their geographical position. (Watkins' Digest, 480, 620.) The judges, up to 1799, of the Eastern Circuit were William Stephens, John Glen, David Mitchell; Western, Thomas Carnes; Middle, George Walton and William Few, the latter of whom, while in the Legislature, introduced, but without securing its adoption, the first local option law ever offered

in Georgia, proposing that it should be left to the voters to determine whether the court house of Richmond County should be located at Kiokee, Brownsville, or Augusta. (3 Rev. Rec. 565.)[9]

The Circuit Judge in Georgia was a splendid figure in the epic era of our commonwealth, when unfettered by a code, unenlightened and befogged by a maze of decisions through which to search for the last one on the point at issue, he drew for judgment on the rich treasury of the common law, and listened to the rare eloquence of a royal race of advocates who came to the forum fresh from communion with nature in her wild, uncultured beauty. But of their labors little is left of record.[10]

To complete the list of the Eighteenth Century Bench, it is proper to call attention to the fact that for a time, as in some of the States prior to 1860, laymen presided in the Superior Court, as Assistants to the Chief Justice, when he was present, and by themselves when he was absent. This was an outgrowth of the English custom, followed during the Colonial time, of putting the Governor, Chief Justice, Assistant Justices, Attorney General, and leading men of each Parish in the Commission of the Peace. After the Revolution, these men were authorized to sit with the Chief Justice and in his absence to hold the Superior Court.[6]

These Assistant Judges were laymen, and nominated for their high standing and influence in the community, they claimed and received neither salaries nor emoluments.[11]

SOME EIGHTEENTH CENTURY JUDICIAL PROCEEDINGS

The very oldest judicial record in Georgia contains the minutes of a court held by three Assistant Judges in 1779. The record shows that:

"AGREEABLE To an Order of his Honor The President, and the Honorable The SUPREME Executive Council for the State aforesaid past the Council Chamber at Augusta the———day of August 1799—

A COURT OF GENERAL SESSIONS OR OIER AND TERMINER AND GENERAL GAOL DELIVERY,

"Begun and held at the house of Jacob McLendons on the twenty-sixth day of August 1779, Before the Honorable William Downs, Benjamin Catchings & Absalom Bedell, Esqrs., Assistant Judges for the county aforesaid."

Among other things the Grand Jury, Stephen Heard being Foreman, and Colonel Jno. Dooly acting as Attorney-General, returned an Indictment for High Treason, which is celebrated because it was only "as long as your finger." It charged Rials with "High Treason against this State in that he did act in conjunction with the Creek Indians when they were doing Murder on the Frontier of this County last March, it being contrary to all laws and good Government of the said State and to the bad example of others." Rials plead the General Issue not guilty and put himself "on God and his country for Tryall." He was found Guilty.

But the most remarkable proceeding at that term of the Court is the case of James Mobley, indicted for "High Treason against the State, in that he did steal and carry away a black horse of John Garnett some time last June, and that he did also steal, take and carry away 57 head of hoggs, the property of Robert Morgan some time in the month of December last." He too plead the general issue, Not Guilty, and demanded Tryall by God and his country. The jury brought in their verdict, "Not Guilty, and so say they all." There was no Bill of Rights and no provisions against double jeopardy, and so "The State's Attorney moved to the Honorable Court that James Mobley should be ordered to be sent to Augusta for further tryall. Not Granted." The Solicitor was persistent, however, and the minutes show that the next day "The Honorable Attorney in Behalf of the State Motioned to the Court that the tryall of James Mobley should be reheard, as he could produce More evidence in behalf of the State to support the charge brought against him. The Court granted the Request

—and "*ordered* That he should be brought to the Barr immediately." There was a new trial and conviction of the acquitted man. And here we have everything that the most exacting could require. An indictment one day. A trial the next day, and then Mobley and Rials and five others in one sweeping order were sentenced "to be taken to the guard and there kept until September 6, when they are to be hanged by the neck until their bodies are dead." (See also Gilmer's "Georgians," pp. 183-188)*

But notwithstanding this want of what many would regard as substance, they could not altogther get away from their regard for form, and the clerk having selected a silver quarter and scratched thereon the words, "Superior Court, Wilkes County," an order was passed by the court that the "device be authenticated as the seal of the court." July 17, 1790.

On the civil side of this court there are many interesting entries, showing the persistence of common law methods and forms. For example, in a case (Wilkes, 1791) of what we would call Trover for the recovery of slaves, the counsel were probably doubtful as to whether such an action would lie, and adopted the ancient common law procedure known as "Ravishment of Ward," a form resorted to by Guardians who sought to regain possession of kidnaped wards.

The Richmond County records go back to 1782 and contain many entries that are of interest, because of the old forms and customs they record. For example, a warrant of Hue and Cry, issued in Edgefield, S. C., backed in Georgia, and executed by a Georgia officer, is found on the Richmond County Minutes (Vol. IV, p. 238). The Warrant was issued to arrest the captor and to regain possession of a number of slaves that had been carried away. There is a swing about it not often found in a legal instrument. It is addressed to the Sheriff and all officers and "in the name

*A complete transcript of the minutes of this the first session of a Superior Court in Georgia which has been preserved is published as an appendix to "The Military Record of the Georgia Bar." (35 Ga. Bar Assn. Rep. 53.)

of the State command you and every one of you forthwith to raise the power of your precincts, and to make diligent search therein for the persons above mentioned, and also the property, and to make Fresh pursuit and Hugh and Cry after them, from town to town and from country to country, as well by horsemen as by footmen, and to give due notice hereof in writing describing in such notice the person and the offense aforesaid unto every next constable on every side until they shall come to the Sea Shore, or until the said malefactors and felons are apprehended and * * * that you do carry them forthwith before some of the Justices of the Peace in and for the County where he or they shall be apprehended, to be by such Justice examined and further dealt withal according to law. Hereof fail not Respectively upon the peril that shall insure thereon."

The records in the Ordinary's Office in Richmond County show that several old English customs had been transferred to that remote outpost. An Administrator credited himself with "Cash paid for reading funeral service: 1 pound 8." Another paid the expense of an oldfashioned Irish wake (1783, p. 1) and credited himself with "2 kegs of butter biscuit: 1 pound," and "For liquor supplied the Arbitrators: 1 pound 18s. 9d." And another credited himself with "Price paid for rum, at the day of sale." That as you know, being for the purpose of stimulating the bidding!

The Chatham records also contain interesting entries. Blackstone taught that where a foreigner was indicted for anything except treason, he was entitled to a trial by a jury *de mediatate linguae*. It has been held that this law was never in force in America, and yet (Chatham Min. 1792, p. 237, 239) when a Frenchman was indicted for a felony, he was tried by a jury of six Americans and six Frenchmen, the record reciting: "Defendant being a foreigner and not understanding the English language the Court ordered 6 persons of the same nation to be summoned to attend and *a venire de novo.*"

In one case, the verdict reads: "We find the prisoner not Guilty, and that his character has been greatly injured" (251). In another a sentence of Banishment was pronounced, it being ordered that the defendant should: "be remanded to jail there to be confined until an opportunity shall be had to transport him to some foreign and other territories than those belonging to the United States, and he is forbid to return to this state during the term of seven years on pain of suffering as the law directs." (60) In Bryant's case (404) for Horse (?) stealing there was a recurrence of the Pious Fraud resorted to to save the prisoner from being hung. The verdict being "Guilty on the third and last count at common law only to the value of two pence, half penny."

There is reference (1782, p. 3) to an indictment for "Uttering seditious words," and several instances in which the Superior Court of Chatham exercised the power of a Court of Admiralty and passed on the question whether captured ships carried the proper flag or were prizes of war. In one case the verdict was "Ship was a flag and the Belinda a prize."

It was not until 1817 that the benefit of clergy was abolished in Georgia. Prior to that time the English rule had prevailed, under which all who could read were treated as clericals and entitled to the Benefit of Clergy; and on being found guilty were generally branded with the letter M (Manslaughter), F (Forgery) or T (Theft), and were then supposed to be turned over to the ecclesiastical power for proper punishment. The ability to read stood a man in good stead; and so the record in Richmond Superior Court (1807, p. 220) recites "We of the jury, find the prisoner guilty of manslaughter. It is therefore demanded of the said Edwards, if he hath or knoweth anything to say wherefore this Court ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him, who saith that he is Clerk, and prayeth the Benefit of Clergy to be allowed him in this behalf. Whereupon, all

and singular, the premises being seen, and by the Court here fully understood, it is considered by the Court that the said Edwards be branded on his left hand, and immediately he is branded in his left hand and is delivered according to the form of the Statute."

The entry in Chatham County is in a little different language.

It appears (Chatham Minutes, 1793, p. 171) that on the trial of Huxford he was found guilty of manslaughter, and "the prisoner being brought to the bar to receive sentence upon his conviction, Mr. Woodruff in his behalf, prayed the benefit of clergy." Thereupon the court proceeded to pronounce sentence as follows: "That you, Ephriam Huxford, be impressed, burned and scorched with the letter M in the brawn of the left thumb now presently in open court, pay the fees of your prosecution and be discharged."[6]

Even a slave could not be murdered with impunity. For we find from the records of Liberty county that in August, 1792, Henry Johnson was convicted of the murder of a negro. The prisoner, being brought before the court, prayed the benefit of the clergy, which was allowed him, and he was directed to be burned in the hand according to law. This being done, the sentence of the court was that he pay to the owner of the slave the appraised value of the negro (the assessment of the fine payable to the owners, rather than to the State, being a relic of ancient law), and in the event of the failure to pay such amount in ten days, it was provided that he be sent to a frontier garrison for the space of seven years to serve in the militia.[31]

And the law was well administered in those early days. If you go to the records of Camden County, you will find two penal sentences there recorded and rendered by Judge George Jones, the one dated 1804 and reading as follows: "The State *v.* John Jones. Indictment for Cattle Stealing. Verdict of Guilty. Ordered that the prisoner be taken from the bar to the Common Gaol, there to remain and to be taken from thence tomorrow to the Pillory at the hour of Ten

O'clock and there stand in the pillory for the space of two hours, and immediately thereafter publickly to receive thirty-nine lashes on his bare back, and be branded with a hot iron on the right shoulder with the letter "R," and to receive thirty-nine lashes on the bare back at the same place on Saturday the 27th instant, between the hours of ten and twelve o'clock; and also to receive thirty-nine lashes on his bare back on Monday the 29th instant, between the same hours and at the same place, and to be imprisoned for ten days thereafter, and then discharged upon payment of fees;" and the other reading as follows: "The State vs. Samuel King. Indictment for Perjury, and Conviction thereon. The Prisoner being on motion of the Atty. General brought up to the bar to receive sentence, was asked by the Court if he had ought to say why sentence should not now be pronounced, and answering that he had nothing to say, the following sentence was pronounced by the Court: 'It is ordered that you, the said Samuel King, do pay a fine of Twenty Pounds, equal to Eighty-Eight Dollars and Eighty Cents, that you also be confined to the Common Prison of this County for the space of six months to commence from this day, to-wit, the seventh day of March in the year one thousand eight hundred and five: that you henceforth be infamous and incapable of giving your oath in any of the Courts of Record in this State, and if after the expiration of the said confinement you have not goods sufficient to satisfy the said fine of Twenty Pounds equal to Eighty-Eight dollars and Eighty Cents, it is ordered that you then be set in the Pillory in front of said Common Prison and thence to have both your ears nailed."

Lest some present day humanitarian should conclude that Judge Jones was of a cruel nature, bear in mind that those were the customary penalties—in fact the penalties established by law—for such felonies at that time. Georgia had no penitentiary until 1816, so that it was necessary that penalties be meted out quickly and gotten over with. The country was new, and as is always the case in new countries, crimes against property were punished more severely than any other class of crimes.[32]

Under the provision of the Constitution of 1777, already quoted, numerous special acts were passed authorizing persons to practice. (Watkins, 329, 378, 406.) But, of course, it was soon found that the Legislature had no creative power and could no more make a lawyer than a doctor by statute. The acts, therefore, generally provided that the applicant could be admitted when he produced to the court satisfactory evidence of his qualification. For example, the Minutes of Chatham (16) show that "on motion of Mr. Stirk the petition of Florence Sullivan was read, including a resolution of the House of Assembly, and it appearing to the court that Mr. Sullivan has regularly served his time, he was admitted and sworn as an attorney." This would indicate that the provisions of II Geo. II, Chap. 22, was treated as of force in Georgia. Indeed, as late as 1783 (8 Ga. Hist. Soc. 183; Memoirs of Judge Rich'd H. Clark, 121), Joseph Clay, in writing of his son's desire to be admitted to the Bar, complains of the requirement that he should be articled as a clerk for five years—"the term preposterously prescribed by law." But that was shorter than the seven-year term which had long been required in England of those who were admitted through the Inns of Court. But it was inevitable that the term and course of study in Georgia should be shorter than in England, and this was finally settled by the first Rules of Court, promulgated in 1790 (3 Min. 84) by Judge Osborne at a session of the Superior Court of Richmond County, re-adopted in Chatham (Minutes, 1792, 364) and in Wilkes (1790, p. 2.) These rules provided:

"The principle of admission of attorneys being a knowledge of the laws and the practice of the Courts, a liberal examination shall be had in these respects, but the mode of interrogation shall be varied, and no person shall be admitted until after twelve months residence."

This was the beginning of the custom of having oral examination in open court, which continued for more than a hundred years. We do not know what were the specific

requirements for admission in Georgia, but the custom in the other Colonies was to pay a fee of $100 to a member of the bar for the privilege of reading in his office for the required time.

The standard was unusually high. Trained lawyers were on the bench from the very beginning of Georgia's history as a Royal Colony—several members of the Bar had been students at the Inns of Court, and while the Litchfield Law School under Judges Reeve and Gould was in existence, a greater proportion of students attended from Georgia than any other State, population considered.

Judge Richard H. Clark in his Memoirs (p. 249) says that it was "the custom for the Judge to set aside some special day or days during a term for the examination of applicants, and to appoint the most eminent lawyers of the court on the Committee. No examination was had except what occurred in open court and that was as thorough as practicable."

Judge Andrews, in his interesting and most valuable "Recollections of an Old Georgia Lawyer," tells us that in those days of formality, the Sheriff wore a cocked hat and accompanied the Judge from one court to the next; and that the lawyers carried green bags, and were known as the gentlemen of the green bag. The rules promulgated by Judge Osborne in Augusta in 1790 republished in Chatham and in Wilkes, contained another instance of the formality of that time, in the proposal to make a distinctioin between attorneys and barristers, and the requirement that lawyers should be heard in the "Habit of a Black Robe." This rule provides:

"For the sake of a decent conformity to ancient custom and of a necessary distinction in the profession, the attorneys shall be heard in the causes of their clients in the habit of a Black Robe, but this rule shall not apply to those who shall not have provided themselves with such Habits until the second term. A future rule shall provide for the recognizing Barristers and establishing the necessary distinction." (Minutes Richmond, S. C. 1790, p. 54)

Mr. Dutcher, in the history of Augusta, (1890) says that for years after 1799 "'the Bar wore black silk robes."

The old English custom prevailed of taxing fees of "Solicitors in Chancery," "Proctors," "Attorneys of the Common Pleas," (7 C. R. 29,) as part of the costs.[6]

With judges and lawyers coming soon after Oglethorpe left, Circuit Riding along the coast began early in the history of the State, with Savannah furnishing the supply of Circuit Riders for all the coast section. Records of the counties to the south of Chatham all the way to Camden County teem with evidence of the activities of the Savannah brethren of those days. All the coast counties formed one circuit or district; the Eastern district it was called, and the judges for this district were without exception from Savannah.

We may picture the judges and the members of the Savannah bar setting forth on one of their semi-annual pilgrimages to the South. A gallant cavalcade it must have been, clattering along the Post-Road through Chatham to Hardwicke, the county seat of Bryan, thence to Walthourville in Liberty, then on to Darien in McIntosh, crossing the Altamaha to Brunswick in Glynn, crossing the Little Satilla River to get into Camden, then the Great Satilla to Jefferson, the county seat of Camden.

A goodly company and joyous one it was, entertained along the way at the hospitable homes of the planters, with parties of one sort and another at every home, and with evenings given over to quip and jest and merry-making. That was indeed the Golden Age of the Circuit Rider. The planters along the coast, hosts to the visitng lawyers, were educated, cultivated men, fond of good living, knowing how to live, and having all the necessaries of good living near at hand, all sorts of fish and shellfish at their front doors, and all sorts of game in their fields and forests. It was such company and such living as this that occasioned the late Judge Robert Falligant to make the declaration famous along the coast: "I would rather be a fiddler on the coast of Georgia than harpist in the Kingdom of Heaven."[33]

At the close of the Revolutionary War, there were barely 15,000 whites in the State. Indeed, the inhabitants were so few that the Constitution of 1777, in providing for the venue of suits, took into consideration the possibility that there might not be men enough in the county to form a jury, in which case the trial was to be in the adjoining county. This sparseness of population is most strikingly shown by the fact that there were only 551 voters in the District and, in the heated election for Congress between Gen. James Jackson and Gen. Anthony Wayne, the total vote was less than 500. But the State was great in potentiality, and between the Declaration of Independence and the ratification of the Constitution, exercised many powers, which now strike us as strange, because we have so long regarded them as National. She levied duties, made paper money legal tender, regulated captures on the high seas, prohibited the importation of slaves and laid a duty on those permitted to come in from other States, tried admiralty cases, passed a patent law, provided for the naturalization of aliens, made a treaty with South Carolina and many with the Indians. Indeed the fact that Georgia had made treaties with the Indians was used as an argument in the Constitutional Convention of 1787 and referred to as proof of the weakness of the Confederation.

Watkins (779) contains Treaties between the State and the Creeks and Cherokees made at Augusta in 1783 and at Shoulderbone in 1786 and also the Treaty with South Carolina concluded at Beaufort in 1787. As to this it may be said that the Committee were instructed to insist on a Boundary line "from the mouth of the River Savannah *along the north side of it*" (283), and the author of the Resolution either quoted it as a phrase then well known or anticipated the substance of what is now on the Georgia shield—the committee being instructed to "proceed with JUSTICE, MODERATION and CAUTION" (3 Rev. Rec. 284.)

Another, and hitherto unknown chapter in the Diplomatic History of Georgia has recently been found by Edmund C. Burnett, Esq., who, in an article in 25th American Historical Review (Oct., 1909, and Jan., 1910), publishes the Documents relating to Bourbon County, showing the appointment of twelve men as Justices of the Peace for the newly established County, embracing a vast extent of land on the Mississippi. Though they were Justices of the Peace, they were given instructions which were most unusual for judicial officers—among other things being authorized to accept and receive from any Spanish officers "full possession in the name and behalf of this State of all such Forts, Towns and Places as may fall within the limits and description of your said county."

By Act of February 1, 1788, she granted a patent on a steam engine to Isaac Briggs and William Longstreet, and it was probably with this engine that Longstreet, at Augusta, ran the steamboat he was building, and to which he refers in the letter of September 26, 1790, to Gov. Telfair, beginning "Sir: I make no doubt but you have often heard of my steamboat and as often heard it laughed at." (Gould's History of River Navigation, 36.)

Georgia passed her own copyright law, with the provision, however, that the copyright should be void if the author did not avail himself of it by publishing a certain number of his work.

Like all the other States, she had issued paper money, and in such quantities that it was "not worth a Continental," and at one time it took $14,000 of Georgia money to buy a dollar in gold, and McCall (303) says "the value of paper money was so much reduced that the Governor dealt it out by the quire for a night's lodging for his party; and if the fare was anything extraordinary, the landlord was compensated with two quires, for which the Treas. required a draft made out in due form and signed by the Governor." While most of the salaries were fixed on sterling basis, they were sometimes paid in scrip which could be used in the purchase

of confiscated properties sold by the State at public outcry. Sometimes the debt would be paid by the grant of a particular piece of land. Sometimes in salt, which was so valuable as again to illustrate how the word "Salary" came from the Latin "Sal,"—Salt.

Georgia had a tariff law and collected duties on imports, until at the request of the Continental Congress, she waived the right and authorized duties to be imposed and collected by the Continental Congress. She had her own Naturalization laws and admitted non-residents to citizenship. But while she admitted them here, she discouraged the attendance by her sons on foreign institutions and so passed an act that "If any person under 16 was sent and remained in foreign countries three years for the purpose of receiving education under any foreign power he shall for three years after his return be treated as an alien in so far as to be ineligible to hold any office." (Watkins, 303.)

The State also passed an act of Banishment and Confiscation against those who had taken part with the British. This and the other laws above mentioned, and of a kind which now Congress alone can pass, gave rise to litigation before the Georgia Courts of the Eighteenth Century. But the loss of original records and the absence of Reports has left us almost completely in the dark as to the results of the cases brought under these Acts. Indeed, the very existence of such laws has been almost completely overlooked, because of the fact that they are to be found only in rare volumes not in the practitioner's library.[6]

THE HEAD-RIGHT SYSTEM

Desirous of filling her borders with a thrifty population, on 7th June, in the same year (1777), the new Legislature, to invite immigration, inaugurated the head-right system by passing "An Act for opening a land office, and for the better settling and strengthening this State."

The "Head-right" system, as it is called, takes its name from the fact that its basis of granting lands was

founded on certain rights (per capita) given by the Acts establishing it. By the Act, every free white citizen or head of a family could locate a certain quantity of land, with an additional amount for every free white person or head in the family, and for every negro (head) owned; the entire grant not to exceed a certain number of acres. This land could be located anywhere inside of the counties formed, and subject to some ineffective checks, in any shape desired. There being no regular plan, and no comprehensive survey of the counties showing what was open and what taken, it can readily be seen that in a sparsely settled and densely wooded country, the system was well calculated to invite fraud, mistake and dire confusion.

It would be useless to enter minutely into the provisions of this Act; it was limited as to its time of duration, and expired before the close of the war brought that quiet which was necessary to its active operation.

Another Act, differing only in detail was passed in 1780. It, too, failed of its purpose. But the quiet of the State having become assured by the successful termination of the Revolutionary War, the Legislature again turned its attention to the work of settling its uninhabited territory and increasing its population.

The treaty of peace of 30th of November, 1782, between Great Britain and the United States, transferred by formal cession to Georgia those rights of ownership and jurisdiction over the soil within her limits as far West as the Mississippi, which she had before successfully asserted by the strong arm.

On 17th February, 1783, the Legislature passed "An Act for opening the land office, and for other purposes therein named." It is in it that the name "Head-right" first is met. It, with its amendment of 1st August, 1783, became the fundamental law under which all titles were thereafter issued up to the time of the adoption of the lottery system. Its importance will excuse a full statement of the provisions of these statutes.

By the Act, each master or head of a family was allowed as his own "Head-right" two hundred acres; for each head-right, white or black, in his family, fifty acres more, provided that the whole amount of land did not exceed one thousand acres. This was the limit in all of the head-right statutes, so far as we can find, and is important to be remembered. For these lands was charged, for the first one hundred acres, one shilling per acre, and six pence per acre for the excess.

All citizens of Georgia, or of the other States proposing to settle in Georgia, were allowed to take advantage of the Act. Persons who had received lands under former grants for the same head-right which they now presented, could not obtain lands. A twelve month's settlement and the improvement of three acres out of every hundred was a condition precedent to obtaining a grant or to the right of disposing of the lands, except by will. During the war, Georgia had granted many land bounties to her soldiery. These could be claimed under this "Head-right" law. The manner of obtaining the grant was as follows:

Every applicant for head-rights went before the Land Court for the county where the land lay which he desired to obtain. These Land Courts were curious features of this system—its foundation stones in fact. From them proceeded all warrants. They alone could put the machine in motion. They were at different times differently constituted. In the Act for laying out Washington and Franklin counties, the Governor or President of the Executive Council (a body then existing in Georgia), with certain members of the Council, constituted the Court, and met at Augusta. This, however, was temporary, and the Land Courts of these counties were made the same as throughout the rest of the State.

By the Act of 1783, a majority of the Justices of the Peace in each county were the Court, the oldest in commission presiding. By the amendment of 1st August, 1783, four Justices and an Associate Justice of the Superior Courts

constituted the Land Court. By an Act of 1789, three or more Justices of the Peace were the Court. This Court met at the county site at stated times to receive applications for land warrants. Before it the applicant went and took the oath prescribed by the Statutes, attesting his right and negativing the idea that he fell among the exceptions to those entitled. He also was required to produce a satisfactory certificate of good character.

If his case was made out, he received his warrant, which he presented to some one of the authorized surveyors to survey for him his lands. These were described as far as possible in the warrant. Any person having good ground of objection might file a caveat with the county surveyor, who gave thirty days' notice thereof, by advertisement, before its determination. It was tried by a jury of twelve freeholders drawn from the by-standers by the Land Court, and it proceeded at once to hear and determine the caveat. At first its verdict was final, but soon an appeal to the Governor and Council was allowed. If the caveat was overruled, the survey proceeded.

The State had her surveyor-general, each county its county surveyor; the officers were all elected by the Legislature. The county surveyor could appoint assistants. When a warrant was lodged in the hands of the county surveyor of the county where the land lay, or a deputy, he surveyed the lands and made a plat thereof. This survey and plat was ordered to be recorded in the county surveyor's office within two months from the date of the warrant. A copy survey and plat with the warrant was ordered sent within three months from the date of the warrant, to the surveyor-general. The applicant then paid the purchase money (if any) to the Treasurer, and upon production of a certificate of such payment from the Treasurer, the surveyor-general recorded the plat, and sent on the papers to the Secretary of State.

Here the grant was then drawn and presented to the Executive for signature. When signed it was returned to

the Secretary of State, sealed with the Great Seal, and registered. The grant was then sent to the county surveyor to be recorded in the county records and then delivered to the grantee.

Warrants heretofore issued under other laws passed since the Revolution were required to be brought in. If done within the time prescribed, they were protected; all bona fide settlers who had entered on these lands under the invitation of prior Acts and executive proclamations thereunder were likewise protected. The county surveyors were to send up to the surveyor-general the plats and surveys made at least once every two months and were also to send up monthly all caveats; these were to be laid before the Governor and Council for information in issuing the grants.

Grants, surveys, settlements or warrants on lands not ceded by the Indians, were, by all the land Acts, null and void, and prohibited under penalties.

The Act prescribed the form of grant to be used. By the Act of 1789 the Governor was authorized to alter this form. This he did by omitting therefrom, all mention of the Executive Council, which had been abolished. Except as then changed, the form of grant as therein provided, remained the same for head-right lands. That form recites the Act of 1783, as the authority for the grant; it conveys the land, with all of its appurtenances in fee simple, by allodial tenure, to the grantee.

Such was the head-right system of Georgia. When we look at the unsettled condition of the counties where it was to take effect, the nature of its land courts, the unlimited authority of the county surveyor to appoint assistants and the ease with which certain by-standers could always be on hand to be the jury to try caveats, it is evident that such a system afforded a tempting field for the unscrupulous land speculator.

By treaties made with the Creeks and Cherokees, in May and November, 1783, the Indian title was extinguished to that portion of the State lying within the present Southern boundary of Habersham county, and a line drawn from

the Western extremity thereof to Hog Mountain, in Gwinnett county, and thence down the Apalachee, Oconee and Altamaha Rivers to the then limits of the organized part of the State, with the organized counties, embracing every foot of land between these lines, the rivers named, the ocean and the Savannah river. This territory, by the Act of 1784, was organized into the counties of Washington and Franklin, and head-rights under the above system with but immaterial alterations offered.

Lands between the Oconee and Middle Rivers were, for twelve month, reserved for the soldiers and sailors and a few other immaterial provisions were made.

Citizens of other States had to acquire residence within twelve months, in Georgia. Forty thousand acres of land, twenty thousand in each county was set apart for the benefit of the University, to be founded and marks the beginning of the University of Georgia. By this Act all requirements for cultivating lands, granted or to be granted, are abolished. Grants could not exceed one thousand acres, nor could they issue but once for the same head-right. By the Act of 1785, the lands in Washington and Franklin were put on like footing with the lands in all the other counties, and the vacant lands in all the counties made subject to head-rights alike. The Act of 1783 was affirmed, except that for the lands acquired thereunder as far as the quantity of one thousand acres (the extreme limit) no purchase money was to be charged, but only office fees. A treble tax was required unless three acres per hundred was settled on and cultivated within three years.[4]

THE STATUS OF MARRIED WOMEN

In 1784 the Legislature of Georgia passed a law known as the Adopting Act. This statute adopted the common law and the statutes of England of force on the 14th day of May, 1776, so far as they were not contrary to the Constitution and laws of Georgia and the form of government established in this State.

Let us consider the civil status of married women as it existed under this Adopting Act, and under another Act of the Legislature of Georgia passed 1789, in reference to the estates of married women.

By the common law, the wife's chattels real and choses in action, on intermarriage and so soon as he reduced them to possession, vested absolutely in the husband. As to chattels personal or choses in possession which the wife had in her own right, such as ready money, jewels, household goods, and the like, the title to them on intermarriage, without further action, vested immediately in the husband, and the title thereto never again revested in the wife or her representatives.

The Act of 1789, referred to, provided that in all cases of intermarriage since the 22nd of February, 1785, the real and personal estate of the wife shall become vested in the husband. Real and personal property was by this Act placed on the same footing and both kinds of property descended and was distributed alike. So that by the common law and the Act of 1789, the husband became the absolute owner of the property of the wife, real and personal, owned by her at the time of marriage. As far as the law could make it, her legal existence was merged in his.

He was entitled to her earnings, to all moneys made by her by keeping a boarding-house, baking bread and cakes, and selling them, by sewing, and to the proceeds of her labor of every kind. (Wood *v.* Wilson Sewing Machine Co., 76 Ga., 104.)

She was required to keep house for him and to rear his children, and if her behavior did not conform to his views he had the right to chastise her provided he did not strike her with a stick larger than his thumb. Her jewels and personal ornaments vested absolutely in him on marriage. In return he became liable for her debts existing at the time of the marriage, and he was required to furnish her with necessaries, such as food and raiment.[24]

The Savannah River was formed by the confluence of the Keowee and Tugalo Rivers; the Tugalo was the bolder stream, and discharged the greater water, but the Keowee was the longer and reached a latitude farther north. It was the head source of the Keowee that Georgia claimed as the beginning of her northern boundary, the point at which her northern boundary began its westward stretch to the Mississippi River. This contention on the part of Georgia brought about the dispute with South Carolina, and at this point Georgia's boundary troubles began in earnest.

It would appear that when, according to the claim of South Carolina, the Province of Carolina was divided in 1732 into North and South Carolina, that South Carolina became possessed of, or rather claimed, a strip of land lying between North Carolina and Georgia from twelve to fourteen miles wide and about four hundred miles long. This claim upon her part was made in construing Georgia's charter from the Crown. She contended that Georgia's northern boundary began at the fork or confluence of the rivers Tugalo and Keowee and where those rivers lose their respective names and the river Savannah begins. Georgia's claim, as heretofore stated, was the head source of the most northern of these streams forming the Savannah River.

Under the 9th Article of the Confederation of the States was provided the manner in which one independent State could sue another, with reference to their boundary rights. Such suit should begin by petition in the name of the litigant State to Congress, and a federal court should be provided to hear the cause and determine the question in dispute. Under this 9th Article of Confederation, South Carolina, by and through her agents and representatives in Congress, filed suit against the State of Georgia in Congress on June 1st, 1785. (Jounrnal United States in Congress Assembled, Vol. 10, folios 189, 190, 191, 192,) Notice

of this suit was given to Georgia by the Secretary of Congress, and the second Monday in May following was set for Georgia to appear and answer, but it was not until September of that year that the answer to such suit was filed in Congress, and it was therein asserted and announced that South Carolina had proposed an amicable adjusment through commissioners to be appointed from both States. She, however, submitted herself to the will of Congress. The court to try the cause was named by Congress in the following manner: The names of three persons from each of the thirteen States were enrolled, and from the list thus composed each litigant alternately struck one name until thirteen were left. The names of these thirteen were then placed in a box and nine of them drawn out by lot. This nine composed the court to try the cause, and the third Monday in June, 1787, was fixed for the court to hear the case in New York.

As set forth in the answer of Georgia in Congress to the suit of South Carolina, the latter State had proposed a joint commission of the two States to amicably adjust their boundary limits, both on the north, east and south. The convention was agreed upon by both States, South Carolina naming as her commisioners Charles Cotesworth Pinckney, Andrew Pickens and Pierce Butler; Georgia named as her commissioners Lachland McIntoch, John Houston and John Habersham. In the archives of the Secretary of State's office will be found the very interesting correspondence between Georgia's then Governor, George Matthews, and her commissioners, and between the commissioners of the two States, arranging for the preliminaries of the convention, and the final report of their proceedings. The Georgia commissioners had full, plenary powers. By agreement the convention met at Beaufort, South Carolina, on April 24th, 1787. The commissioners of both States presented their credentials which, by each, were inspected and approved. Each State then presented its claim and conten-

tion, and these claims and contentions were discussed and warmly debated and considered on the 25th, 26th, 27th and 28th days of April, and finally on the latter date they came to an agreement, the same being concurred in by all three of the South Carolina commissioners and by two of the Georgia commissioners, John Houston, of Georgia, dissenting from the findings. Mr. Houston did not think that there was any question whatever as to Georgia's territorial limits, and did not desire to concede anything to South Carolina, even for the purpose of an amicable adjusment. His dissent, filed with the report in the Secretary of State's office, affords very interesting reading. Both States made concessions for the avowed purpose of bringing about cordial and friendly feelings between the two States. In the agreement, South Carolina ceded her claims on the south of Georgia—Mr. Houston claiming that South Carolina had none—and Georgia agreed to accept as her northern boundary the head or source of the river Tugalo and the most northern branch thereof. This river, while the shorter, was the bolder of the two streams forming the Savannah. South Carolina was to take the territory lying between these two rivers and was to be entitled to the free navigation of the Savannah River. This finding was reduced to writing, signed by all the commissioners save Houston, whose dissent accompanied the findings. The findings of this convention were reported to the respective Governors of the States and were afterwards adopted. The agreement as to the northern boundary, in exact language, was as follows: "The most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugalo and Keowee, and from thence the most northern branch or stream of the river Tugalo until it intersects the northern boundary line of South Carolina, if the said branch or stream of the Tugalo extends so far north, reserving all of the islands in the rivers Tugalo and Savannah to Georgia; but if the head spring or source of

any branch or stream of the said river Tugalo does not extends to the highest northern latitude, shall forever hereline to the Mississippi to be drawn from the head spring or source of the said branch or stream of Tugalo River which extend to the north boundary of South Carolina, then a west after form the separation limit and boundary between the States of South Carolina and Georgia."

It would naturally have been presumed that this would have terminated the controversy, but it was not so to be. It is true that the report and findings of the convention were not only reported to the respective States, but were likewise reported to Congress, and the suit of South Carolina against Georgia therein pending was abandoned, but it was a travesty on the good faith of South Carolina, the Hotspur State, that on the very day this report was filed in Congress, that State, through its delegates and representatives in Congress, by legislative authority, ceded to the Federal Government, and executed deed thereto, the identical territory that she claimed to have released, and did release, to Georgia in the convention held at Beaufort. The report, as stated, of the findings of the Beaufort convention was filed in Congress and there referred to a committee, and it was, so to speak, "pigeon-holed," being shelved by reference to a committee, and no action has ever been taken thereon, but the deed and cession of the territory was, on the day it was offered, accepted by Congress. So it would appear that Georgia had neither gained nor lost anything by the Beaufort convention, except that she apparently gained the ill-will of South Carolina, and the dispute was thus transferred from that State and was henceforth to be taken up with the Congress of the United States. It has been said that this action on the part of South Carolina was with the view of forcing Georgia to cede her territory west of the Chattahoochee to the Federal government, but it has likewise been charged to pique and ill-will. But in any event, it was not an exposition of, let us say, at least, good faith, and in this regard it

would likewise appear that the Federal government occupied no higher and no better position than that of South Carolina. The Federal government was, under the suit brought under the 9th of the Articles of Confederation, the court in which was to be determined the controversy between two sister States, yet the Court—the government—accepted the territory which was under dispute to the detriment of one of the litigants. It is charitable to say that it was very worldly, if not very just. It was not, however, an act that brought to her any good results. This cession of South Carolina, if her claim to the territory was valid, conveyed to the Federal government a strip of land twelve to fourteen miles wide by four hundred miles long, and became a block in the shape of a parallelogram between the States of Georgia and North Carolina. Thus matters stood for some time.

On February 17th, 1783, Georgia, through her legislature, passed an act offering to cede her western territory to the United States. This offer was, in 1788, declined by Congress because of the conditions imposed. Subsequently, and because of the Yazoo Frauds of 1789 and succeeding years, a bill was filed in Congress looking to and providing for the cession by Georgia of all of her territory west of the Chattahoochee to the Mississippi River. Commissioners were appointed by the United States and by the State of Georgia, who conferred as to the terms of the cession. In the proceedings of the Seventh Congress, (published in "American State Papers and Public Laws," Vol. 1, folio 125, for the years 1789 to 1809), will be found a communication from Thomas Jefferson, then president of the United States, to Congress under date of April 26th, 1802, transmitting the agreement entered into between the commissioners appointed upon the part of the United State and Georgia, as to the cession of lands by Georgia to the Federal government. In conformity with the terms of this agreement, Georgia subsequently ceded to the United States her territory west of the Chattahoochee, out of which has since been carved the States of Alabama and Mississippi.

And here is where Georgia "got even," so to speak, with the Federal government in accepting the cession from South Carolina. This western territory was flooded with the claims growing out of the Yazoo Frauds, and it became necessary for the Federal government to settle all of these disputes. Georgia was covered and quilted with Indian claims: it became necessary under this agreement for the United States to extinguish all Indian titles in Georgia's territory, and it became, in addition thereto, necessary for the United States government to pay Georgia one million and a quarter dollars, and to cede to Georgia "whatever claim, right or title they may have to the jurisdiction or soil of any land lying within the United States and out of the proper boundaries of any other State, and situated south of the southern boundaries of Tennessee, North Carolina and South Carolina, and east of the boundaries hereinbefore described." It was a very expensive cession of territory to the United States and Georgia was immensely benefited thereby.[9]

THE WESTERN BOUNDARY

There seems to have been an understanding that all the States would, after the Revolution, surrender to the general government their unoccupied lands, then called "back land," for the general welfare. (See 13 Howard, 398.) We were the seventh and last State to make such surrender. After much and long negotiation it was accomplished. In April, 1798, the United States began and in 1880 completed the legislation under which our compact of 1802 was perfected. By it our western boundary was the Chattahoochee River, "running along the western bank thereof, to the great bend thereof, next above the place where the Uchee river empties into said river; thence in a direct line to Nickojack on the Tennessee river," etc..

Dr. Miller once told an anecdote about that bend. When asked how it happened that so many places on the

other side of the Chattahoochee River are in Georgia whereas the Chattahoochee itself is generally understood to be the boundary, he said that the surveyors reported to the governor that if they commenced at what was commonly known as the "big bend," where the Uchee river comes in, it would leave a good deal of the Chattahoochee River in Alabama, because, running a straight line from that bend to Nickojack, everything had to conform to that line. The governor said: "We must have all the river. Go lower down and find another bend." And so they did, and so we got the land. This is repeated as history from Dr. Miller, a historian of the first water.

In consideration of that cession of lands by Georgia, the rights of our citizens to their lands in Bourbon county, at the fork of the Yazoo and the Mississippi, established in 1785 and by us repealed in 1788, were protected. The United States was also to extinguish the Indians title to the country of Tallassee (now part of South Georgia) and other specified lands; and the United States therein stipulated that the land ceded by Georgia should form "'a State and be admitted as such into the Union" when it acquired sixty thousand population. Georgia ratified this compact by act of June 16, 1802. The contract was that the ceded territory was to be made "a State" (one State), but of course when the South wished for four senators in Congress instead of two, we readily agreed to dividing the territory into two States.[5]

THE FEDERAL CONSTITUTION RATIFIED

Georgia ratified the Constitution of the United States on January 29, 1788. The people of this State may well take a proud satisfaction in the fact that Georgia was the fourth State to ratify the Constitution. While other States were holding back and bickering over the sacrifices, real or imaginary, which they were required to make for the common good, the Convention called by the Legislature of this State promptly and unanimously, "for themselves and

for the people of Georgia, fully and entirely assented to, ratified and adopted the proposed Constitution," hoping that their ready compliance would "tend to consolidate the Union" and "promote the happiness of the common country."[30]

THE CONSTITUTION OF 1789.

While the provision as to amendment contained in the Constitution of 1777 seems to be exclusive and exhaustive, the Assembly on January 30, 1788, provided by resolution for the assembling of a convention to consider alterations and amendments to the constitution, to convene so soon as official information was received that the Constitution of the United States had been ratified by nine states; and proceeded itself to select the delegates to such convention. The convention assembled in Augusta on November 4, 1788, adoptd a constitution, providing that it should not take effect until revised by another convention, created under a resolution of the Assembly, made up of delegates chosen by the people of the several counties. This second convention met in Augusta on January 4, 1789, and proposed certain alterations. These alterations being reported to the Assembly, a third convention was called to convene in Augusta on May 4, 1789, to consider the constitution and the proposed alterations. The third convention in a session of three days ratified the constitution as reported by the second convention. Thus came into existence the constitution known as the Constitution of 1789.[17]

This Constitution is the first which set forth in separate articles the different subjects of which it is composed, and contained in Article IV. the sections intended as a declaration of "fundamental principles." These sections are as follows:

"Freedom of the press and trial by jury shall remain inviolate. All persons shall be entitled to the benefit of the writ of habeas corpus. All persons shall have the free exercise of religion, without being obliged to contribute to

the support of any religious profession but their own. Estates shall not be entailed, and when a person dies intestate, leaving a wife and children, the wife shall have a child's share or her dower at her option; if there be no wife, the estate shall be equally divided among the children and their legal representatives in the first degree; the distribution of all other intestate estates may be regulated by the law."

The provision of the Constitution of 1777 as to clergymen is found in this Constitution also, but as a part of the legislative department.

The plan of a single body, composed of members elected yearly from each county, was abandoned after a trial of twelve years, and the "House of Assembly" was divided into two bodies called a Senate and House of Representatives. The members of the Senate were elected one from each county for a term of three years. The members of the House of Representatives were elected from each county annually.

It provided for the election of a Governor biennially in the following manner: the members of the House selected three persons from whom the Senate elected the Governor. His powers under this Constitution were greatly enlarged; he could respite in all cases except cases of impeachment; he could grant pardon in all cases after conviction, except those of treason and murder; he could veto legislation, his veto to be conclusive unless overcome by a legislative majority of two-thirds.

This Constitution provided that Superior Courts should be held twice yearly in each county, and should have jurisdiction of all cases, civil and criminal, except such as might be referred to inferior courts. The Judges of the Superior Court were elected by the General Assembly and their term of office fixed at three years. By this Constitution, judges were allowed to grant one new trial in all cases tried by them, and no more. The limitation on the power of the Legislature to increase or diminish the salary of the judges

of the Superior Court during their term of office (found in all of our Constitutions but the first) was a part of the Constitution of 1789.[16]

The electorate was greatly enlarged; there was no limitation as to representatives except as to citizenship, residence, age, and the payment of taxes for the year preceding the election; the words "or being of a mechanical trade" were omitted. No man could be a Senator unless he "should be possessed in his own right of two hundred and fifty acres of land, or some other property to the amount of two hundred and fifty pounds;" nor a member of the House of Representatives unless he should "be possessed in his own right of two hundred acres of land, or other property to the amount of two hundred and fifty pounds." The words of the Constitution of 1777 that these officers be of the Protestant religion were omitted.

Property qualifications were extended to the office of Governor. No one could be Governor who did not "possess five hundred acres of land in his own right within the State, and other specie of property to the amount of one thousand pounds sterling."

The Georgians of that day held that a man would perhaps make a better Governor who had in his own affairs shown evidence of energy, efficiency and thrift. The land and other property was to be in his own right, and not in the right of his wife.

The old limitations of power of the government were retained in the Constitution of 1789, and new restraints were added:

"All powers not delegated by the Constitution, as amended, are retained by the people."[16]

It was provided in this constitution that at the election for members of the Assembly in 1794 the electors in each county should elect three persons to represent them in a convention for the purpose of considering alterations to be made in the constitution, such convention to be held at such time and place as the General Assembly should appoint. There was no other method of amendment provided.[17]

McGILLIVARAY AND THE TREATY OF NEW YORK

Alexander McGillivaray was the son of a Scotch Indian-trader; his mother was a half-breed; her father was Capt. Marchand, of the French service, and her mother a woman of high rank in her tribe, so that he had within his veins the blood of the Scotchman, of the Indian and of the Frenchman. Out of that strange mixture, there grew a marvelous personality, who, in his diplomacy, more nearly resembles Talleyrand than does any other American-born character known to history. He obtained and held almost, if not entirely, to the end of his days, an enormous ascendency over the Creek Indians. These Indians were known as the "Upper" and the "Lower" Creeks. The "Upper" Creeks had for their seat a place near what is now Wetumpka, in the State of Alabama. The "Lower" Creeks extended far down into the peninsula of Florida.

McGillivaray held a commission as Colonel in the British Army; he held a commission from the Spanish Court; he finally held a commission as General from George Washington himself. While he received the pay and the emoluments of a British Colonel, he was active in having the Indians align themselves with the British, and incited them to all manner of depredations upon the settlers of these United States.

A treaty at Augusta was negotiated with the Creek Indians in November, 1783. Under this, lands were ceded to the Oconee River. McGillivaray never recognized that treaty; he said it was made by two chiefs who acted under duress. A further treaty was negotiated from the town of Louisville. General Elijah Clark took a forceful part in the negotiations which brought about this treaty.

Under the treaty of Galpinton, the Creeks ceded lands to extend from the forks of the Oconee in a southwestern direction to the source of the St. Mary's.

On November 3, 1786, the treaty of Shoulderbourne was negotiated. This took its name probably from the creek on which it was negotiated. There was no cession of

lands by this treaty, but it was one of amity and friendship. There was, however, no amity or friendship brought about by it.

President Washington, upon reports to him of many aggressions by the Indians, came near determining upon an Indian war, but he desired to make one more effort before doing this, and he sent an agent to the Indians, and especially to McGillivaray. McGillivaray felt greatly complimented that the President of these United States should have sent a special envoy to him in person. The result of this was that McGillivaray and twenty-three other chiefs, accompanied by a number of their warriors went to New York, and the treaty of New York was negotiated on August 13, 1790. It was supposed that this would make a lasting peace between the Indians and the Americans. The Americans, however, were incensed over it because it required them to recognize the Indians as owning on the west bank of the Oconee. The Indians were incensed over it, because it required them to recognize the cession of lands up to the Oconee, and also because it required them to make restitution of horses and property and negroes which they had stolen from the whites, and as well of prisoners taken by them. The result was, that this treaty which was looked forward to as the solution of the relations between the Indians and the Americans, proved to be another "bone of contention."[25]

GEORGIA *v.* BRAILSFORD

Georgia, in May, 1782, passed an act inflicting penalties and confiscating the estates of certain persons declared guilty of treason. There were a number of clauses to the act, specifying the different classes of persons upon whom it should operate and to what extent—the word *sequester* being at times used, and at other times the word *confiscate*. Brailsford, a British subject, and Hopton and Powell, citizens of South Carolina, owned a bond for over $35,000 against Spalding, a citizen of Georgia. They had instituted suit in the circuit court of the United States for the district

of Georgia on the bond and had recovered a judgment. Gov. Telfair claimed that this debt had been confiscated by the act aforesaid, and pending the suit of Brailsford, had directed the State's attorney-general to apply for a rule to the circuit court for the admission of the State as a party to defend its claim to the debt. The application was duly made, but refused. Whereupon the governor filed a bill of injunction in the Supreme Court, setting forth the foregoing facts, and charging a confederacy between the plaintiffs and defendant.

A majority of the justices, including Chief Justice Jay, maintained that Georgia had an adequate and complete remedy at law, and decided that the injunction should be dissolved and the bill dismissed, unless Georgia should bring her suit at law by the next term of the court. This she did, and an amicable issue was made up, as Iredell had suggested should be done in the equity cause, to ascertain whether Georgia or Brailsford was the owner of the debt. This issue was tried by a jury, being the first, and one of the very few cases, in which a jury was ever impaneled in the Supreme Court of the United States.

The charge to the jury, delivered by Chief Justice Jay, was the unanimous opinion of the court. They charged that the debts due Brailsford, a British subject, were not confiscated by the statutes of Georgia, but only sequestered, and that Brailsford's right to recover them revived at the peace; that sequestration did no divest property, and that Brailsford, during the war, was the real owner of the debt; that Georgia's legislative authority had merely prevented Brailsford from recovering his debts during the war, but that the restoration of peace, as well as the terms of the treaty revived the right of action, otherwise the sequestration would be a lawful impediment to the recovering of a bona fide debt in direct opposition to the fourth article of the treaty. The jury promptly returned a verdict for the defendants, and so Georgia lost her case, and with it fell all her confiscation statutes.[26]

Brailsford's case turned upon the construction of our treaty of 1783 with Great Britain, which Georgia's counsel contended, in that regard, provided only that as to subsisting debts "the remedy shall not be perplexed by installment laws, pine-barren laws, bull laws, paper money laws, etc." What these quaintly named laws were is a matter for the curious. They were like our "alleviating laws"—laws for prohibiting suits and staying fi. fas. against soldiers from 1812 to 1815, about which Wilde wrote a book and which acts Judge Berrien held void.[5]

CHISHOLM *v.* GEORGIA

The case of Chisholm, executor, *v.* the State of Georgia came on to be argued in the Supreme Court of the United States at the February term, 1793, the same term at which the motion to dissolve the injunction in the case of Georgia *v.* Brailsford was argued, the latter appearing to immediately follow the former on the docket. Georgia was represented in each by the same distinguished Philadelphia lawyers, Dallas and Ingersoll. But in the case of Chisholm, notwithstanding Georgia's opinion of the smartness of a Philadelphia lawyer, they were instructed simply to file a remonstrance and protest against the jurisdiction of the court, but to take no part in the argument of even this question. Chisholm was represented by Edmund Randolph, at that time the Attorney-General of the United States. Chisholm, executor, as had been his testator, was a citizen of South Carolina, and instituted his suit in the Supreme Court of the United States for the recovery of a debt which he claimed as executor against the State of Georgia. Copies of the writ and process were served early in July, 1792, by the marshal for the district of Georgia upon Telfair, the Governor, and upon Carnes, the Attorney-General of the State. At the August term, 1792, Georgia having ignored the suit, Mr. Randolph, as counsel for the plaintiff, made a motion, "That unless the State of Georgia, after reasonable previous notice of this motion, cause an appearance to be entered on behalf of the said State on the fourth

day of the next term, or shall then show cause to the contrary, judgment shall be entered against said State, and a writ of inquiry of damages shall be awarded." To avoid the appearance of precipitancy and to give the State time to deliberate, it was ordered by the court that the consideration of the motion should be postponed to the February term, 1793. On the motion of the Attorney-General, Chief Justice Jay delivered the opinion of the court. It was far the longest and most elaborate that fell from him while he presided as Chief Justice. Indeed, it was an able opinion, well argued and embodying those strong federal views which he had always entertained. Wilson, Cushing and Blair all wrote opinions coinciding with the Chief Justice. Iredell, the great North Carolina Justice, alone dissented. The court passed an order that the State should appear by the first day of the next term of the court, or show cause to the contrary, and in the event of failure to do so, judgment by default should be entered against her. Georgia still refusing to appear at the February term, judgment was rendered for Chisholm against the State and a writ of inquiry awarded. This writ, however, was not sued out and executed.[26]

The Governor was notified of the rendition of the judgment against the State in February, 1793. The Legislature met in November. The Governor reported the proceedings in this cause and on the 21st day of November, 1793, the lower house passed an act in part as follows:

"And be it further enacted, That any Federal marshal, attempting to levy on the territory of this State, or on the treasury, by virtue of an execution by the authority of the Supreme Court of the United States, for the recovery of any claim against the said State of Georgia, shall be guilty of felony, and shall suffer death without benefit of clergy, by being hanged."

This bill was sent to the Senate, but there is no record that it was there adopted. Already the Eleventh Amendment was under consideration in Congress. It was sent to

the States on March 5, 1794. Georgia seems to have been then willing to mark time.[27]

This amendment was ratified by Georgia at the first session of the Legislature after its submission. The act of ratification stated, as might have been expected, that "this legislature doth entirely concur therewith, deeming the same to be the only just and true construction of the said judicial power by which the rights and dignity of the several States can be effectually secured."[26]

CLARK'S INDEPENDENT STATE

A separate and Independent Government was once set up within the borders of this State, against its authority; it was dominated by a citizen of this State who was its creator and who had given to the State valiant services.

This "Separate and Independent Government" was of sufficient consequence to attract the most serious attention of Washington, Jefferson, Hamilton, and other national leaders, and was finally destroyed by military power.

Citizen Edmund Genet arrived in Charleston on the 8th day of April, 1793. He came to us as the Minister Plenipotentiary of the French Republic, which had just been inaugurated. England and France were at war.

We must take a survey of the status of this country at that time. The western limits were at the Mississippi. That great stretch of unknown country which we came to call "The Louisiana Territory," was then owned by Spain. France was then very desirous of retaking it, the granting of which it had always protested. Spain was the owner of the Floridas. It contended that their northern limits were much further north than the limits which we now know, and under this contention it claimed a large part of South Georgia. That means not only what we now know as South Georgia, but a strip extending from the Atlantic westward to the Mississippi River. The United States were at that moment in negotiation with the Spanish Court for the free navigation of the Mississippi River.

The inhabitants along the border were ripe for revolution against this country or for warfare against the Spanish government, which stood in their way in their demands for free navigation of "The Father of Waters."

Elijah Clark had made an enviable reputation as an Indian fighter and had great success in a number of battles. He had added further to his glory by an assiduous and successful service in the Revolutionary War, and stood out at that time as the most prominent man of rough-and-ready battle in the southern part of this country. He was the father of John Clark, who was to become the leader of the Clark faction of Georgia politics, was to be made the Governor of the State, and was to exert a stormy influence in the politics of the State long after his expatriation and death, even down to the beginning of the Civil War. It is for Elijah Clark that Clark County is named, and a monument to him stands on the streets of Athens.

The relations of the United States with the Indians at that time were particularly unfortunate. The Creeks were greatly incensed over the treaty of New York. So, Genet comes upon the scene with the Indians in this state of contention, with the French in hatred against the Spaniards, the Spaniards in hatred against the French and us, a large part of our Western people ready to revolt against their own government, and part ready to wage war against any government that kept them from navigation of the Mississippi River. General Clark was especially incensed, because the treaty which he had negotiated at Galpinton was, in a large measure, set aside by the treaty of New York.

Genet employed Clark, and advanced to him the sum of $10,000.00. Whether this was a salary or sum deposited with him for the purpose of meeting expenditures and the arming of men, is not made very clear, but he was certainly paid that sum of money, and proceeded to organize an expedition in favor of the French Republic against Spanish forces in North America.

Genet also procured the assistance of General George Rodgers Clark, who had done great service to the country in Western Virginia, and who was discontented at the treatment accorded him by the Government.

The record is not always clear as to which of these General Clarks is meant; they were not usually described by their initials by the Federal Government.

Genet's plans embraced an expedition to include those residing on the eastern bank of the Mississippi River, and also those living on its tributaries.

They were all to be mobilized at a rendezvous on the St. Mary's River in this State, and from thence were to attack the Floridas and Louisiana.

The first authoritative historical statement that we have of this is to be found in the correspondence laid before Congress by President Washington on the 20th day of May, 1794.

The United States at that time had its principal fort in the territory nearest the place which was to become General Clark's seat, at Fort Fidius, which was on the Oconee River, and, as nearly as can now be located, in Greene County.

On April 18, 1794, Constant Freeman, Agent for the War Department in Georgia, wrote the Secretary of War from Fort Fidius in part as follows:

"We have been for a long time held in suspense by the different reports which have circulated, relative to certain persons being employed in this State to recruit a corps of troops for the service of France. There cannot now be any doubts remaining on the subject. Officers have been appointed, and are now acting under the authority of the French Republic. Parties of recruits have already marched to the rendezvous appointed for them. Several men of this corps have crossed the Oconee and encamped opposite Greensborough. A small party was for some days opposite to the Rock Landing; they have since marched to Carr's Bluff, to join with those who had assembled at that place. The general rendevous, we are told, is to be on the river St. Mary. An agent is appointed to furnish the supplies;

and he has for that purpose, received ten thousand dollars. A person, who was formerly contractor's clerk at this post, is employed by him to purchase four thousand rations of provisions."

This letter shows that some of the forces were already encamped across the Oconee and that General Clark would cross over in ten days to take the command.

On April 13, 1794, Major Gaither, commanding the Federal troops in Georgia, informed the Secretary of War that:

"The French are going on with an expedition against the Floridas from St. Mary's, and appear to have many friends in this undertaking among the inhabitants of this State. There is now at anchor, within musketshot of my fort, the sloop of war, 'Las Cassas,' about eighteen guns, with two hundred men, most of them French, and one company of them infantry. They are last from Charleston. They say there are thirteen sail, equally large and well-manned, yet to come from different ports in the United States. There is a recruiting post at Temple, eighteen miles up the river from thence. The last account was they have eighty men and expect three hundred from the upper part of this State."

Clark is reported to have been on the Georgia side of the St. Mary's River with a few men in April; their number is estimated from one hundred and fifty to three hundred. On May 14th, the Secretary of War makes representation to the Governor of Georgia that:

"General Clark and others have organized themselves into a military corps within the limits of the United States and are thence about setting out on some military expedition against the dominions of Spain, with whom we are at peace."

The Secretary of War called upon the Governor of this State to put down this illegal conduct. The Governor had been previously apprised that settlements were being made on the western banks of the Oconee by General Clark, and those under his command, but supposed that the expedition and the settlements which were being made across the Oconee

was by adventurers who had embarked in the French interest and in a short time they would of themselves disperse. On the 20th of May, Governor Mathews ordered General Irwin to direct the settlers immediately to remove. The Governor was left under the impression that his order had been obeyed, but on July 14th, he was informed that General Elijah Clark, formerly a Major-General in the Militia of the State, with a party of men, had encamped on the southwest side of the Oconee opposite to Fort Fidius. Ten days later General Irwin sent two officers to demand that he move. This demand General Clark positively refused to obey. The Governor then directed his arrest and proceeded to strengthen his military post. Thereupon, the Governor, on the 28th day of July, issued a proclamation reciting that he had "received official information that Elijah Clark, Esq., late a Major-General of the militia of this State, has gone over the Oconee River with intent to establish a separate and independent government on the lands allotted to the Indians, and induced numbers of good citizens of said State to join with him in the said unlawful enterprise", and "warning and forbidding the citizens of said State from engaging in such unlawful proceedings."

When this proclamatioin was issued, General Clark proceeded into Wilkes County, surrendered himself to certain Justices of the Peace who considered his case immediately, and entered an order of discharge.

Thereupon his cause becomes popular, and many persons flock to his standard.

On July 30, 1794, the Governor instructs Captain Fauche to recruit an extra troop of horse, and especially directs that

"You will be particularly vigilant in preventing provisions, or parties of men, from being thrown into the posts which have been established, without authority, by Elijah Clark Esq., on the southwest side of the Oconee," etc.

Governor Gilmer states that the Indians believed that General Clark was establishing this settlement in their territory on their account, and they were surprised that George

Washington did not support him. They believed that under the treaty of New York, the General Government would do in reference to these lands whatever they wanted.

General Clark established two forts west of the Oconee, one called "Fort Advance," the other "Fort Defiance," which was six miles from Fort Fidius. Houses were erected within these forts; a town was laid off at Fort Advance; General Clark was chosen Major-General; members were elected to a General Committee, called A Committee of Safety, "and everything had the appearance of a permanent settlement."

The State of Georgia continued, however, to pursue its purpose of causing this government to be put down. George Walton, one of the signers of the Declaration of Independence, who was then a judge of the Superior Court, having jurisdiction in Richmond and other counties, charged the grand juries in his circuit, calling attention to the proclamation of the Governor, wherein it was charged that "divers persons have gone over the temporary boundary line between the white and Indian inhabitants of this State with intent to establish a separate and independent government on the lands allotted to the Indians for their hunting grounds."

He called upon the grand juries to put down this unlawful conduct. This did not stop the oganization of the new State. The Committee of Safety becomes its governing body and is governed by a Constitution. When we recolloct that the governing body of the French Republic in "The Reign of Terror" was called "The Committee of Public Safety," we realize what an ascendency the French influence had obtained over those who were engaged in this enterprise.

A "Board of Officers" was also elected, and E. Bradley was made president thereof.

General Clark addresses a letter to "The Committee of Safety" from Fort Advance, dated 5 September, 1794. He felicitates himself upon having met "with the unanimous voice of all the officers belonging to the different garrisons." He promises to "always endeavor to acquit myself worthy

of the command committed to my charge." He shows that he knows that the artillery at Augusta have been ordered to be in readiness to march against him, and that one-third of the militia are directed to be draughted. He does not believe that the troops will fight against him; he states that the troops of Richmond and Burke counties have refused to march against him; and believes that the people are with him. He states that he is "determinedly fixed to risk everything with my life, upon the issue, and for the success of the enterprise." He tells his men that if they are summoned to surrender the garrison, they "must refuse with a firmness ever accompanying the brave."

He also records the time of meeting of the "Board of Safety" as being 5th of October, that is, the first Monday of the month, saying:

"That is the day on which our Constitution requires them to meet."

He also states:

"It is entirely out of my power to appoint the 22nd of this month, or any other day, if it does not agree with the Constitution."

No trace of the contents of the Constitution can be found; but there thus existed every element of an organized state or government; a legislative body, a fundamental compact, an organization of officers. Of course, there was a militia established, for the whole thing was born in military establishment. A town was laid off, houses built, and two forts erected. These all had the appearance of a permanent settlement.

General Clark misinterpreted, however, the temper of the people. Generals Twiggs and Irwin went to him and sought to have him remove, but he declined. Major Adams was ordered by General Twiggs to cross the Oconee and endeavor, by persuasion, to remove the settlers from Fort Defiance. Major Adams' life was threatened. Thereupon Major Adams was ordered to proceed to Augusta and make a request upon the Governor for orders to dispossess the

persons at Fort Defiance. On the 26th day of September, General Irwin encamped on the banks of the Oconee opposite Fort Defiance. Colonels Merton and Lamar, Major Adams, and other officers of the militia crossed the Oconee the same day to cut off communications on the south side of the river, and negotiations were then had with General Clark, and it was promised if he would evacuate the posts, he and his men would be protected in their business and property.

The day following the forts were abandoned, and were set upon fire and destroyed, and thus, on the 28th day of September, 1794, was ended the existence of the Separate and Independent State within the borders of the State of Georgia.

Alexander Hamilton assured the Governor of Georgia of the pleasure the President had in knowing the steps which were being taken to put down this new settlement, and spoke of it as being essentially hostile to our republican form of government, in that it was proceeding upon the idea of a separate and independent government to be erected upon a military basis.

The motives which prompted General Clark in his first efforts were, no doubt, his desire to make war upon the Indians, and upon the Spanish, and to co-operate with the French and to earn the promised or expected rewards to be given by the French Government for the service. Georgians in general of that day disliked the Indians, had been at war with the Spaniards, were in dread of further war with them, and were friendly with the French.

That the public first were in favor of General Clark, is probably true, and that opinion is possibly reflected in the opinion of the Justices. But when they grew to realize that the settlement meant a "Separate and Independant Government" and that the sovereign power of both the State and Federal Governments was opposed, this opinion changed, the militia did march against the adventurers, and recruits ceased to come to them.[25]

THE CONSTITUTION OF 1795

On May 16, 1795, the convention (provided for in the Constitution of 1789) assembled at Louisville and adopted a number of amendments to the constitution.[20]

The amendments, or as they are sometimes called, the Constitution of 1795, made very few changes in the organic law. It did not change the organization of the Legislature as composed of two bodies, a Senate and House. It continued the division of the General Assembly and required annual elections of Senators and Representatives and annual sessions of the Legislature.

One change was in the mode of electing the Governor. This was an election by the General Assembly, the two bodies meeting together. His powers, as fixed by the Constitution of 1789 were not changed.

No change was made in the judicial department.[18]

THE YAZOO FRAUD

On January 7th, 1795, the Legislature of Georgia authorized the Governor to sell certain portions of its vacant lands to four companies, calling themselves "The Georgia Company," "The Georgia Mississippi Company," "The Upper Mississippi Company," and "The Tennessee Company." Under that act, the Governor granted to James Gunn, Mathew McCallister, George Walker, William Longstreet, Wade Hampton, and others, "The Georgia Company," certain of those lands for $50,000 cash and $200,000 to be paid November 1st, 1795, secured by mortgages on the lands.[5]

Letters patent under the great seal of the State and signature of Geo. Matthews, governor, were issued on the 13th day of January, 1795. This wanton dissipation of the property of the State, believed to be the result of corruption, aroused the people to fever heat. James Jackson, a name ever dear to Georgia, then a United States senator from the State, afterwards one of her governors, immediately resigned his seat in the Senate, and returning to the State

announced himself a candidate for the Legislature. He canvassed the State. A convention was called which sat in May, 1795. Petitions and remonstrances on the part of the people and presentments of grand juries were laid before it. The convention, Resolved, "that from the number, respectability and grounds of complaint stated in the petitions, that the subject required legislative deliberation, and ordered the petitions to be preserved by the secretary, and laid before the next legislature." The legislature thought this action on the part of the convention invested them with conventional powers, *quo ad hoc,* and gave additional validity to their legislative authority, if their powers over the act of a preceding legislature should be questioned. They proceeded to pass an act denouncing the act of sale as an usurpation of power, unconstitutional and rotten with corruption. They declared that the evidence showed that a majoriy of the members of the lower house were interested in the purchase; and in the senate, where the act was passed with one majority, they alleged that more than one member had been proven corrupt, and that one overwhelming evidence of corruption was its accepting $500,000 as the consideration of the sale, when the sum of $800,000, offered by persons of as large capital, of as much respectability, and on terms more advantageous to the State, was refused. They therefore declared said "usurped act" null and void. The grants were annulled and declared void, and the territory declared still the sole property of the State. They further enacted, "That within three days after the passage of the act, the different branches of the legislature shall assemble together, at which meeting the officers should attend with the records and deeds in the secretary's, surveyor-general's and other public offices, and which records and documents shall be then and there expunged from the face and indexes of the books of record of the State, and the enrolled law shall then be publicly burned, in order that no trace of so unconstitutional, vile and fraudulent a transaction, other than the infamy attached to it by this law, shall remain in the public offices thereof."

It was further enacted that the county officers of records should produce their books to the Superior Courts at the next session after the passage of the law, and the courts were directed to cause their clerks to obliterate the deeds conveying any portion of said territory therefrom, in their presence, and, in the event of the failure or refusal of the clerks to do so, they were to be ousted from their offices and disqualified from holding any office in the future. And if thereafter said officers should enter upon their records any transaction, conveyance, grant or contract relative to a purchase under said usurped act, they were to be rendered incapable of holding any office of trust, and be subject to a penalty of a thousand dollars. They further enacted that said usurped law should not, nor any grant or deed issued by virtue of it, be received as evidence in any court of law or equity in the State, to establish a right to said territory or any part thereof, but might be used for the recovery of any moneys paid or given as the consideration for the pretended sales of the original pretended purchasers or persons claiming under them. And the Governor was authorized to refund the moneys to the persons who had deposited in payment of the pretended purchased territory. A certain mortgage book in which were recorded certain mortgages given by some purchasers of portions of the territory, having by the indisposition, mistake or neglect of the Secretary of State not been produced at the former *auto da fe,* a supplementary act was passed the following year, assembling the two houses of the legislature, requiring this mortgage book brought before them and that certain pages from said book, containing the entries of certain pretended mortgages, "be carefully expunged from said book, and at or about the hour of 12 o'clock be burnt that no trace of so infamous a transaction should remain in the public offices of the state." Thus this "usurped act," as our fathers called it, and those records of conveyances under it were consumed, and contemporary history informs us that they were burnt by fire drawn from heaven, the Governor using a sun-glass for the purpose.[26]

The "Georgia Claim," as it was called, came up for decision by the Supreme Court in the great case of Fletcher *v.* Peck (6 Cranch, 37.) It went up from the Circuit Court of the District of Massachusetts. The decision, covering nineteen printed pages, gives a minute history of Georgia's charters and boundaries, her cession to the United States of land, her compact of 1802, etc. (Ib. 95 to 114.)

Peck had bought part of those lands of the Georgia Company from Fletcher, who held by a succession of deeds dated September 23, 1795, February 27, 1796, and December 8, 1800. Fletcher has covenanted in his deed that Georgia had title and seizin, that said authority to sell was good, and that said title so conveyed to Peck had been "in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the said State of Georgia." The case was argued by Martin for Fletcher, and by John Quincy Adams and R. G. Harper for Peck,—mainly as to the pleadings. A year later, after adjusting the pleadings, it was again argued, on its merits, that time Mr. Joseph Story taking the place of Harper, this being the only case which Mr. Story argued before that court whose bench as an Associate Justice he so long adorned. The Supreme Court affirmed the decision below. It held that, in 1795, Georgia had the right to dispose of the unappropriated lands within its limits, and that said first act was sufficient authority for the grant; that in a case between two individuals over a claim under a statute in due form of law, a court of law could not inquire into the question of corruption of the lawmakers, nor decide it void because of corrupt motives of those passing the same; that rights vested under a statute could not be divested by a repeal of that statute; that a sovereign State cannot pronounce its own deed invalid; and that a grant is a contract. It was there by Marshall said that States of this Union were forbidden by the United States Constitution from impairing the obligation of contracts, and that all attempts to do so were void, because of the prohibition of the Constitution or general principles of right.

The case is familiar to all lawyers. It *first* declared that Georgia was not a "single, sovereign power," but "a part of a large empire. She is a member of the American Union," and bound by the limitations of the Constitution of the United States (Ib. 136.)

This case has been cited oftener and on more subjects than any other decided by that high tribunal. The Supreme Court of the United States has adjudged about seventy-five cases on that question as to contracts, of which Georgia furnished about one-tenth. The case of Dartmouth College *v.* Woodward, (4 Whaton, 519-715,) decided in 1819, is generally quoted as the leading case in this country as to the nullity of State statutes impairing the obligation of contracts, because the learned, classical and brilliant arguments of Webster for the college and Wirt for the statute cast such an halo of glory over the subject. But the decision had already been practically made in Fletcher *v.* Peck, by Marshall C. J., who elaborated it in this New Hampshire case. (4 Wheaton, 656.)

But the case of Fletcher *v.* Peck involved far more than this contest over so small a body of lands. In February, 1796, Washington, by special message to Congress, spoke of the great grant called the "Yazoo Fraud" as of "exceeding magnitude, that might in its consequences affect the peace and welfare of the United States." In 1789, lands granted by Georgia under an act of that date covered more than fifteen millions of acres on the Tombigbee, Tennessee and Mississippi Rivers, and their tributaries, occupied by powerful tribes of Indians (Creeks, Cherokees, Choctaws and Chickasaws), with whom and with Spain, claiming parts of the lands, the United States might become involved in war on account of what might follow under that grant. Washington, as President of the United States, stopped occupancy of the lands by proclamation. The lands not being salable, so circumstanced, were of little value to the purchasers. They tendered the paper currency of Georgia for the balance of the purchase money, and upon its being

refused, they sued the State in the Supreme Court of the United States to enforce their rights.

In Howard *v.* Ingersoll, (13 Howard, 409,) is mentioned the case of Moultrie, *et al., v.* The State of Geogia, not reported, growing out of that act passed in 1789, conveying lands between the Mississippi and Tombigbee Rivers to the Virginia, South Carolina and Tennessee Yazoo companies. Those curious to see the case will find it as an exhibit to a petition of Moultrie and others to the Congress of the United States for indemnity because Georgia refused to make titles to the land claimed. It was a bill for specific performance. The conveyance called for five millions of acres, more or less. The survey showed in the named boundaries over ten millions of acres. The conveyance called for the payment of $66,964 in two years. The purchasers tendered Hillhouse's and Wereat's certificates, which were refused by Georgia's treasurer. Petitioners said that when the act was passed it was stated by members of the committees and others that "Rattlesnake money," which was worthless, was not to be paid, and that therefore no other Georgia paper ought to be refused, because *mentio unius est exclusio alterius.*" (Those curious to read the details of those suits are referred to vol. 1, State Papers, Public Lands,—in the library of the University of Georgia.) The Moultrie case was never tried. Why?

That "Yazoo sale," was a small affair compared to the "Yazoo Fraud," under which the Fletcher and Peck's case arose. Under that "Yazoo Fraud." for $500,000, one-fifth was to be cash and the remainder secured by mortgages on the lands granted. The Georgia Company was to pay $250,000, the Georgia Mississippi Company $155,000, the Upper Mississippi Company $35,000, and the Tennessee Company $50,000, and take the lands proportionately meted and bounded, making perhaps three times as many acres as were covered by the "Yazoo sale" of 1789. You know how high the political excitement ran, how every man who voted for the bill, however good was his character before, was denounced as a bribed scoundrel and ostracized.

You have often heard that our United States Senator Gunn (Senator in 1780-1790 and 1791-1801, re-elected just before the Yazoo act) was a ringleader in the affair. Albert Gallatin, one of Georgia's commissioners, said, and you have read it in Gilmer's Georgians, that every man who voted for it was bribed save one, which statement Col. Chappell's Reminiscences repeats, saying that that one was Robert Watkins.

The plea in Fletcher *v.* Peck on that point was, that members favoring the act "were to have a share of and be interested in all the lands which they, the said Gunn, McCallister and Walker and their associates, should purchase of said State by virtue of and under authority of the same law, and that divers of said members" voted therefor by and under that corrupt influence.

Even if Fletcher v. Peck was "a feigned case," as Johnson, J. said, in his separate opinion, he suspected, it seems strange that the corruption was not charged more broadly, if the facts were in that regard as Gallatin, Gilmer and Chappell wrote.

But surely James Jackson, who drew, and the legislature which passed the "rescinding act," stated the case as strongly as they felt that facts would justify, in the preamble to the rescinding act, which undertook to give page after page of reasons justifying its passage.

That preamble (already quoted in substance) shows how much of politics was there in the "grandstand-play" of the rescinding act. Had the purchasers of the "Yazoo sale" of 1789 paid for their fifteen millions of acres in cash, Georgia would have been happy. But for the credit amount they tendered at par our paper currency. Our act of 1783, February 11 (Marbury & Crawford's Digest, 185 *et seq.*), throws light on this matter. It fixed the value at which paper currency was to be taken in settling private contracts, instead of leaving a jury to decide each case on its "equities," as we did as to Confederate contracts. It fixed the values of Georgia paper for each day from January 1, 1777 to June 1, 1780, beginning with one hundred to one and ending with

sixteen thousand two hundred and twenty-nine to one; and the values of Continental currency were fixed for every day from January 1, 1779, when the value was seven hundred and ninety-eight to one, and ending June 1, 1780, when it was eight thousand one hundred and forty-four to one.

Besides, much of the land covered by the Yazoo fraud was claimed by Spain, and by the United States, and all of it was a waste howling wilderness, occupied by Indians, who, we admitted, had the right of occupancy at least until the United States and Georgia should devise and execute a plan for their removal, and it was all important to have these lands occupied by citizens to come from elsewhere.

We may well doubt whether, had the bid of $500,000 been rejected, and that of $800,000 been accepted and paid, we would have ever heard of "the Yazoo fraud." We may speculate whether it had not been better for Georgia to have large bodies of these lands colonized as was the Virginia reservation along Broad River, etc., than to cut them up into small parcels as required by our new Constitution of 1798 and subsequent legislation.

The decision in Fletcher *v.* Peck hurt the United States more than Georgia, by improving the market value of lands which the United States had agreed to free so that they might be owned and occupied by white citizens of Georgia. By act of March 31, 1814, Congress provided for scrip to pay "the Georgia claimants."

We are in the habit of bragging that Georgia gave two States to the Union. The truth is, we reluctantly and after long delay ceded the territory making almost all of Alabama and Mississippi, for a large and valuable consideration. We got in return the strip twelve miles wide along our whole northern border, and $1,250,000 out of the first proceeds of sales of our cession. The United States set apart a half million of acres to pay claims against the lands, agreed to extinguish the Indian title to other parts of the lands, paid $3,000,000 to settle the "Yazoo claims," and over $6,000,000 for "Yazoo scrip." Jefferson had

before the decision of Fletcher *v.* Peck offered $5,000,000 in settlement, and paid no more than that sum plus interest after that decision.

When, in 1824, the United States was trying to adjust accounts with Georgia, they claimed $7,735,243 to have been paid out on account of "Yazoo claims," etc. In reply, Governor Troup, in his message of that year, stated that the payments on account of "Yazoo claims" were but $4,284-151, and that Georgia ceded to the United States eighty million acres of land, worth $1.25 per acre at a low valuation, and that, therefore, we should charge for that land in settlement $92,264,757. And he then proceeded to tell the legislature of the hostility of the Union to our State, to warn them of the danger of "'consolidation" and the like, and closed his message with the hope for the States that "no baleful comet may, in its irregular course, strike one of them from its place, and, deranging the system, bring back chaos and confusion."[5]

THE PINE-BARREN SPECULATIONS

It had become evident by the year 1794 that the head-right system was not working as it should. By an Act of that year, upon complaint made, the Governor was authorized to suspend any survey, and after advertising for sixty days, hear evidence of its propriety, and also to inquire into and annul surveys already made. A practice, too, of transferring warrants and having the same re-issued to the transferree by the land court, seems to have sprung up, for the same Act prohibits the surveyors from surveying under any warrant unless the holder would swear the same was issued on his own head-rights or bounties; and the warrant must have issued since 10th of December, 1789.

The several head-right Acts hereinafter recited, it will be noticed, were designed to divide the land among those who should prove settlers, and not to sell them in immense tracts. Each Act limited the amount to be obtained on the head-rights of any one family to one thousand acres. Various requirements of settlement thereon, and improvement

thereof, were made. And yet these laws were all set at naught and thousands of acres found their way into the hands of single individuals. It is thought to be true that unscrupulous persons obtained these head-right warrants, and finding a market, sold them, before survey, to persons who thus acquired large tracts.

It is evident from the prohibition in the Act of 1794, that the land courts would re-issue new warrants in lieu of the old, to the purchaser in his own name. In this way much land would be granted to one name. Doubtless unscrupulous speculators procured these warrants to be issued to their creatures and transferred to themselves, in many instances, and it is doubtless true that a construction was put on the law in some cases, whereby hundreds of grants (speaking advisedly), of one thousand acres each were issued to the same person on the same day. The activity of the land office increased greatly, so much so that in the term of Governor Matthews, in 1794-'95, over twenty volumes of more than nine hundred grants per volume were registered by the Secretary of State. In some of these upwards of two hundred consecutive pages will contain grants to one individual. The books of the surveyor-general are also full of curious matter. In four books, containing between three and four thousand surveys, each of one thousand acres, one entire book, and part of another, contained the lands surveyed to one man, aggregating to one million two hundred and five thousand acres. Seventeen other names embrace the rest of these books. These grants vary from four hundred and seventy trousand acres, down. Many of the surveys are made by the grantee, or surveyor. Very few persons, other than one of the eighteen grantees, acted as surveyor. They exchanged compliments. By a report of the surveyor-general made in 1839, it can be seen that the amount of land granted in these head-right counties far exceeded the land actually within them. It is doubtless true that duplicate grants exist to much of this land.

A partial explanation to this state of affairs is to be found in the unsettled condition of the country and official

carelessness; a further explanation can be found in the rise and progress of the "pine barren speculations" of 1794-'95, which excited much indignation at the time; but into which no full inquiry was ever made.

By the Act of 1793 the lower part of Washington county had been cut off and formed into Montgomery. It, with a large part of Washington, was composed of barren lands covered only by dense pine forests. Here it was that this great fraud was perpetrated. The story is briefly this: In the year 1794, following the creation of Montgomery county, a band of unprincipled speculators combined to debauch the county officials to secure enormous grants of land to which they were not entitled; to have lands granted even beyond the quantities in the several counties; to have their land marks so described as to indicate rich soil; and to go into the far distant States and sell to unsuspecting purchasers.

The Hon. Absalom Chappell, in his "Miscellanies of Georgia," thus describes the working of this scheme of fraud:

"The plans of the miscreants were well laid and unflinchingly followed out. In the vast uninhabitable woods they planted or found at wide distances, the necessary accomplices and tools. First, men who were to act as magistrates and form one of those peculiar legal devices of that day called Land Courts; of which the function was to issue or rather to profess to issue the land warrants which were the initial step under the head-right system. Next, other men were planted or found, who as county surveyors were to make, or rather to profess to make, and return the locations and surveys contemplated by these warrants. And the pains were also taken to have all these official accomplices regularly elected and commissioned to the offices they were intended to abuse; their election to which was a thing not difficult to effect among the ignorant unsuspecting settlers scattered thinly over the immense wilderness, and it was this obvious facility of electing men

that could be used as tools, that undoubtedly stimulated and encouraged, if it did not originally suggest, the idea of the great pine barren speculation; the whole machinery of which stood on these basely designed elections. Here, too, moreover we see the reason why this fraud followed so quickly after the formation of Montgomery county, and had not been attempted or even conceived sooner. For as long as the territory remained a part of Washington county, the voters entitled to a voice in these elections, were altogether too numerous, intelligent and vigilant, to have permitted any hope of success in such a conspiracy.

"Not satisfied with seizing two or three millions of acres which existed, they trebled the number and went to the extent of issuing from the surveyor-general's office, land forgeries to the extent of six or seven millions of acres.

"Some genuine grants for good lands were artfully mingled with all of these grants and the character of soil in the pine barrens held up as fertile by describing the corners of the grant in hickory, dogwood, walnut, etc."

These grants were then carried North and reports of the rich new lands of Georgia, and the new lands on the Oconee River, which had reached there, enabled these swindlers, in many instances, to sell the lands called for by their grants. It is said that many a person would come to Georgia in expectation of settling the rich grant of land he had bought, only to learn that it was impossible to find it or its boundaries, and to see only the unbroken pine forest around him.

The utter insufficiency of the head-right system had by this time been demonstrated, and it had become evident that a new method would, of necessity, be adopted in the distribution of the new lands which the treaties with the Indians were bringing within the gift of the State. The old counties of the State were so cut up by grants heretofore made, that in them it was not deemed advisable to attempt a new system. But in the new territory acquired by the treaty of Fort Wilkinson in 1802, and in the lands subsequently

acquired from the Indians throughout the balance of the State, the Lottery System was adopted. The method, as tried the first time with the cession of 1802, was continued with but few alterations until the territory of Georgia had been distributed.[4]

THE CONSTITUTION OF 1798.

Among the amendments adopted by the convention of 1795 was an article declaring that at the general election in 1797 delegates should be chosen to assemble in convention at Louisville on the second Tuesday in May, 1798, to consider further alterations and amendments. The convention thus provided for assembled at the time and place fixed, and on May 13, 1798, adopted and declared of force the constitution known as the Constitution of 1798.[17]

The country was at peace, the people were looking to the future. The wisest and best of the two previous Constitutions was retained. The same form of government was preserved, with the same limitations. But much had been learned from experience. The powers of the government were more specifically defined, and the rights of the people were more securely safeguarded against the government.

The separation of the departments of the government was stated with even greater emphasis.[18]

This Constitution remained in force, except as altered by amendments adopted by the General Assembly, until 1861. It contained no separate article known as a "bill of rights," but in it we first find these fundamental principles:

"No holder of public money shall be eligible to office. No debtor, where there is not a strong presumption of fraud, shall be detained in prison after delivering up his real and personal estate for the benefit of his creditors. No slave shall be maliciously dismembered or deprived of life."

The organization, composition, election and sessions of the General Assembly provided by the Constitution of 1795 were adopted by the convention of 1798, and remained

of force until changed by a special amendment of that Constitution in 1840, when the sessions of the Legislature became biennial.[18]

Senators and Representatives were required to be solvent; they could not be the holders of public money unaccounted for; nor defaulters as to taxes or other government contributions.[16]

The Constitution fixed the qualifications of a Senator as not under twenty-five years of age and nine years citizenship in the United States, and three years an inhabitant of the State, with the further condition that he "is and shall have been possessed, in his own right of five hundred dollars, or taxable property to the amount of one thousand dollars, within the county, for one year preceding his election, and whose estate shall on a reasonable valuation, be fully competent to the discharge of his just debts over and above that sum." The qualifications of a Representative were the same save that the age limit was reduced to twenty-one years, citizenship in the United States to seven years, and the value of the freehold estate necessary to own to two hundred and fifty dollars or other taxable property to the value of five hundred dollars.[19]

The property qualification was removed by amendments of 1834 and 1835. They were free from arrest during the sittings of the Assembly, and ten days immediately before and after, except for felony, treason, or breach of the peace; and were required to take the following oath:

"That I have not obtained my election by bribery, threats, canvassing, or other undue or unlawful means used by myself or others by my desire or approbation for that purpose."[16]

This Constitution reads: "Every person shall be disqualified from serving as a Senator or Representative for the term for which he shall have been elected, who shall be convicted of having given or offered any bribe or treat, or canvassed for such election; and every candidate employing like means and not elected, shall on conviction, be ineligible

to hold a seat in either house, or to hold any office of honor or profit for the term of one year, and to such other disabilities and penalties as may be prescribed by law."

It is probable that these unusual and rigorous qualifications were due to the disclosures of the Yazoo Fraud. Many and serious were the charges of corruption, debauchery and bribery of members of the General Assembly in order to secure the passage of that objectionable Act. A Justice of the Supreme Court of the United States (Mr. Justice Wilson, who had rendered the country great service in the Constitutional Convention and who had gained wonderful fame as a lawyer of splendid power. His was the master mind which accomplished the passage of the Acts under which the Frauds were consumated.[27]), a District Judge of the United States and a United States Senator of Georgia were alleged to be implicated in the bribery of the Legislature, and it would seem that when the Constitution of 1798 was written, the people, profiting by their experience in this matter, thought they could insure themselves against a repetition of this fraud by these qualifications for membership in the General Assembly.[19]

The Governor was to be elected by the General Assembly; and, until the amendment of 1845-'47, he must have possessed, over and above just debts, five hundred acres of land, in his own right, within the State, and other property to the amount of five thousand dollars.[16]

The Executive Department was enlarged in 1798 by the creation of two new offices, those of the Treasurer and Surveyor-General.[18]

Originally, practically all the officers were elected or appointed by the General Assembly. From time to time amendments were adopted, providing for election by the people.

The plan of appointment, however, remained as to the Secretary of State, the Treasurer and Surveyor-General.

Official purity was assured by making all persons convicted of felony ineligible to any office or appointment of honor, profit or trust, within the State.[16]

The judicial powers were vested in a Superior Court and such inferior judicatures as the Legislature should establish.[20]

No higher court was authorized by any constitution of the State prior to 1843. The power to establish a court of review, with authority to set aside verdicts, was, no doubt, purposely withheld as inconsistent with that principle of government, then regarded as fundamental, that all power and authority resided in the people, and especially with the Anglo-Saxon conception of that principle, that the people were alike the source of authority and of justice. With that principle both the Legislative and the Judicial departments of the government were made to conform. Legislators and judges were alike given short terms and other limitations equally significant were prescribed. Every juror was made the judge of the law as well as of the facts of every case submitted to him, and the verdict of the jury was deemed to be the ultimate expression of justice. Upon the juries, therefore, was placed the responsibility for the protection of society and for the administration of justice. The seat of power was not on the Bench, but in the jury box. The fear of a concentration of power in a few officials was sufficiently strong to prevent a disregard of any of the limitations imposed upon the judicial systems, authorized by the Constitutions of 1777, 1789 and 1798. But gradually that fear subsided. The good behavior of the Judges, their considerate demeanor and wise discretion in the exercise of their limited functions evinced a purpose on their part to conform themselves and their administrations to popular ideals. Such was the condition when the bill to amend the Constitution, so as to authorize the establishment of a Supreme Court, was passed by the Legislatures of 1842 and 1843. By that amendment there was imbedded into the Constitution of 1798 the foundation of a temple, destined to become the chiefest glory of the State.[29]

The Superior Court was given exclusive jurisdiction in criminal cases, and in cases involving title to land, and was empowered to correct the errors of inferior judica-

tures. The Inferior Court was given jurisdiction in all other civil cases, but the Legislature was authorized to confer concurrent jurisdiction on the Superior Court.

The powers of a Court of Ordinary, or register of probate were vested in the Inferior Court, its decision being subject to the right of an appeal to the Superior Court.[20]

The Justices of the Peace were given "power to try all cases of a civil nature within their district where the debt or demand does not exceed thirty dollars."[21]

The Judges of the Superior Court were elected by the General Assembly for a term of three years. The Justices of the Inferior Court were elected by the General Assembly to hold during good behavior. The Justices of the Peace were appointed by the Justices of the Inferior Court of the county, two for each district, to hold during good behavior.

The Judges of the Superior Court and the Justices of the Inferior Court were removable by impeachment, or on the address of two-thirds of the General Assembly.

Justices of the Peace were removable by conviction for malpractice, felony, or infamous crime, or on the address of two-thirds of the General Assembly. (Watkins' Digest, pp. 39-40).[20]

This provision for the "recall of Judges" was carried forward into the amendment of 1834; was retained in the Constitutions of 1861, 1865, and 1868.[23]

In the Constitutions of 1789 and 1798, no limitations were laid upon legislative authority, either as to the raising or appropriation of the revenues.[13]

Our first legislature exercised the privilege of granting divorces on such grounds as they saw fit, having taken this over from Parliament. In 1798 the Constitution provided that divorces could not be granted by the legislature except upon two-thirds vote and after a jury in the Superior Court had authorized a divorce upon "legal principles." This prevailed until the amendment to the Constitution of 1835,

which provided that a divorce could be had by the concurrent verdicts of two juries, finding a divorce upon "legal principles."

Our Supreme Court first defined "legal principles" in 1846 holding that the Canon Law of England, as a part of the Common Law, was adopted by our Statute of 1784, and prescribed the grounds of divorce,—that total divorce could be granted only for adultery and cruel treatment.[35]

"It is an ill wind that blows nobody good," and so with all the charges against the celebrated Yazoo Act, it was the occasion of Georgia's devising a novel and radical restraint upon legislation, one which has made the courts more potent in arresting and setting aside laws than anything in the history of legislation, unless it be the decision in the Dartmouth College case; with this difference, however, that decision, whether it made for good or for evil, has largely spent its force, but this provision of the Constitution of 1798, with its twin principle of requiring singleness of subject-matter copied into most of the new Constitutions promises to make the courts yet more powerful in the future. Prior to the time of this constitutional requirement, Parliament and legislative bodies adopted their own methods of passing laws. The title was no more a part of an Act than the title of a volume is a part of the book. The Constitution of 1798 created a new rule and provided that "no law or ordinance shall pass containing any matter different from what is expressed in the title thereof." "The tradition being that it was inserted in the Constitution at the instance of Gen. James Jackson; its necessity being caused by the Yazoo Act, which is alleged to have been smuggled through the Legislature under the caption of 'An Act for the payment of the late State troops'," (4 Ga. 38.)

This is believed to be the first Constitution in which any such provision is to be found. The Constitution of the United States and the older Constitutions of the thirteen original Colonies contain no such restriction, although nearly all of the more recent Constitutions of the old as

well as the new States have the same or analogous provisions.[3]

Mr. McElreath in his recent admirable work on the Constitution of Georgia, says:

"It is an interesting fact that the Constitution of 1798 is the only constitution ever adopted by the people of Georgia at a time when there was not a virtual revolution of the government itself. The Constitution of 1777 was adopted in consequence of the casting off of the State's allegiance to Great Britain and of the necessity of setting up an independent government; that of 1789, on account of the abandonment of the Articles of Confederation, and the adoption of the Federal Constitution; that of 1861, on account of the secession of the State from the Federal Union; that of 1865, on account of the fall of the Confederacy, and the necessity of obtaining re-admission into the Union; that of 1868, on account of the refusal of the Federal Government to re-admit the State under the Constitution 1865, making the adoption of another Constitution a condition precedent; that of 1877, when the people of Georgia resumed control of their own affairs after the end of the reconstruction era. The Constitution of 1798, and the present Constitution are the only ones which represent a settled condition of the State's organic law; the others represent temporary conditions and transitional periods." (McElreath on the Constitution of Georgia, p. 114, Sec. 87.)[17]

The Constitution was to be amended only by two-thirds vote of each House at two consecutive sessions of the Assembly.

During its life of 63 years, it was amended 22 times, but while it was democratized by removing property qualification from representatives, and by the election of officers by the ballot of the people, there was, with the exception of the creation of the Supreme Court, no radical change in the spirit and form of the government and the limitations on its powers. How long this great instrument, but for the secession, would have survived, is beyond the ken of statesmen. Certain it is that in 1861 it showed no evidence of weakness or decay.[16]

In March, 1773, a petition from the inhabitants of Augusta was presented that all the laws the Legislature may think conducive to good government may be compiled and printed in one Code. (15 C. R. 421). Nathaniel Pendleton, in 1776, was elected Commissioner to codify the laws, but either because he declined to undertake the work or for other reasons, the statutes were not published, and several times the Grand Jury of Richmond County called attention to the serious consequences resulting from the failure to print the laws;—

"We present as a Grievance that the Justices have not been furnished with such Acts of Assembly as are now in force as well those passed before the Revolution or since, and recommend that a number of copies may be bound together and lodged at the Printing Office 'For Sale' that the citizen may at least by purchase have it in his power to know of the penal laws of this State." (Minutes 1783, 96, 46, 134, 202).[6]

In 1786 an Ordinance was adopted "to appoint some person therein named to digest and arrange all the laws passed in this State before or since the Revolution," but nothing was done under its provisions, and Georgia still remained without any accessible or printed records of its Statutes. It had existed for sixty-seven years; many laws had been passed, some had been lost, and from what is said in Watkins' Preface we may infer that the failure to publish was caused by some unknown but selfish interest. For it is there quaintly stated that the compilers "had determined, though, strange to relate, not without opposition, to encounter the task of compiling the whole of the State's laws into one view * * * * upon the credit of their own fortunes, and hazard its success upon their individual reputations * * * * Many laws have never been published; some are entirely lost or destroyed; others are in a tattered and mutilated condition, and the mass from

which this collection is made has hitherto been as much out of the reach of the public use as the laws of Caligula."[3]

Robert Watkins took a prominent part in the public affairs about this time (28 Ga. 338), and may have been the draftsman of that clause of the Constitution (1798) which provided that "within five years * * * * the body of our laws, civil and criminal, shall be digested and arranged under proper heads, promulgated in such manner as the Legislature may direct." At any rate, it is evident from the commendation of Geo. Walton and others, dated November 15th, 1798, that Watkins' Digest was in preparation before the adoption of this provision of the Constitution. The Assembly of 1799, when the Digest was actually in press, (note to preface to Watkins' Digest) passed a Resolution "that from a conviction that the Digest is a work of great labor, and must and will be of importance in forming a complete Digest agreeable to the 8th Section of the Constitution, * * * * George and Robert Watkins are entitled to generous retribution for their labor and exertion * * * * and that the sum of $1,500 be appropriated accordingly."

But because the Digest contained the Yazoo Act, Gov. Jackson disapproved the appropriation. Watkins insisted that other Acts, which were repealed, were also published in full, and he had, in the same way, inserted the Yazoo Act with the Act repealing it. The Governor replied that the rescinding Act had declared that the Yazoo Act never had been law. It, therefore, needed no repeal and consequently had never been entitled to a place in the Digest.

It has not often, if it ever before, happened that a law book caused the shedding of blood, but the correspondence and feeling between the author and the Governor became so acrimonius that it resulted in an old-time, dignified, courteous and bloody duel "which was conducted in the highest style of punctilio." While the seconds were arranging the terms of the combat, the principals conversed with great elegance and entire politeness on different matters." Then

the seconds notified the combatants of the terms agreed on. "You are to stand at a distance of ten paces; you are to fire at the words 'make ready, fire!' A snap or flash to be counted as a shot, etc., etc." At the first fire both pistols went off into the ground. The second was a blank. At the third Gov. Jackson fell, shot *secundem artem,* in the right hip. He insisted on another fire, but the surgeons claimed the right to first examine him, and on their report that the bullet might have entered the cavity, hostilities ceased. Mr. Watkins, with great civility, offered his services to bear the wounded man from the field, and on being carried off, the Governor most affably remarked: "D——n it, Watkins, I thought I could give you another shot." (History of Augusta, 1890, p.227.)

After ten years, the Supreme Court of the United States, in Fletcher v. Peck, 6 Cranch, 87, having decided that the Yazoo Act was not only constitutional, but could not be repealed to the injury of third persons, Watkins and his friends claimed the decision to be a more substantial vindication of his Digest than had been the precision of his aim in the duel.

Still, with a view of obviating all objection and to appease so influential an opponent, another edition was printed in 1801 from identically the same plates, but omitting the pages containing the Yazoo Act. This explains why the title-page is sometimes dated 1800 and sometimes 1801. The issue, however, had been made, and even this omission did not satisfy the Legislature. It is true that the Watkins brothers secured a small appropriation, but their book was not only never authorized, but in 1800 the Legislature passed a Resolution that "the appropriation of $2,000 in favor of Robert and George Watkins was solely intended as an advance to carry on a work, which they represented to be a collection of the laws now of force in Georgia; and by no means, nor in any shape, contemplated to establish the same as a Digest or Constitutional arrangement of said laws; nor to give any legislative sanction to the same as a

Code to be received in the Courts of Law and Equity; reserving the revision, expulsion, or sanctioning of the same or any law thereof to future sessions of the Legislature."

And further to emphasize the hostility to this famous Act, a resolution was adopted December, 1800, that "the Commissioners appointed to digest the laws, previous to entering on their duties, shall subscribe the following oath: "I solemnly swear that I will to the best of my power and ability, and agreeable to the Constitution, revise, digest and arrange under proper heads and subjects the Civil and Criminal laws of this State, and that I will in no wise or manner whatsoever insert in said Digest, a certain usurped Act, entitled "An Act for the appropriating a part of the unlocated territory for the payment of the State troops." (Marbury & Crawford, 190-191.)[3]

To carry into effect the provision of the Constitution, Horatio Marbury and Wm. H. Crawford, Esquires, under authority of the Legislature, prepared what was styled a "Digest of the Laws of the State from its Settlement as a British Province in 1755 to the Session of the General Assembly in 1800, inclusive." It was published in the year 1802. In it the laws of the State were brought together and bound in one volume. The entire acts, embracing captions, preambles, and all the signatures, were reprinted. They were arranged alphabetically according to subject-matter. The book was not a revision, nor was it a digest; it was a compilation, pure and simple.[12] It omitted many acts which had been repealed, and Watkins' Digest,—now out of print and very scarce and the most valuable of all our books for historical purposes—while giving in chronological order our known statutes, yet failed to print, except by title, many acts which had been repealed:—others because they were obsolete, or "repugnant to the form of our Government" (p. 54) —a round-about way of saying "unconstitutional". Still Watkins' contains the great body of Colonial and early statute law.[6]

THE JUDICIARY ACT OF 1799.

Under the authority conferred upon it in the Constitution of 1798, the General Assembly, by the Judiciary Act of 1799 (Cobb's Digest 1851, p. 1135), established the procedure in the Superior and Inferior Courts. The jurisdiction of and the procedure in the Justices' Court remained substantially as provided in the Act of 1797,[20] but it was provided that no Justice should "sustain or try any satisfaction in damages for any trespass on the person or property.[21]

It may be said with reasonable accuracy that this Act marks the real beginning of our present system.

It was a system which embraced three courts. The Superior Court with exclusive jurisdiction in criminal cases and land cases, and concurrent jurisdiction with the Inferior Court in all other civil cases. The Inferior Court with exclusive jurisdiction in matters of probate, and concurrent jurisdiction with the Superior Court in all civil cases except land cases. The Justices' Court with civil jurisdiction of suits on debts where the amount involved was thirty dollars or less, and with such jurisdiction in criminal matters as were derivable from the common law.

The Superior Court had the right to review the judgments of all the other courts. There was no court which had the right to review the judgments of the Superior Court.

In 1799 there were twenty-four counties in the State. These were grouped into three circuits, Eastern, Middle and Western, and there was a judge for each circuit.

The distinguishing defect in this system was the absence of a single court of last resort. There were three courts of last resort independent of each other, and whenever a new circuit was created a new independent court of last resort came into existence.[20]

Georgia alone of any American commonwealth had a judicial system without an Appellate Court. Georgia alone had no tribunal to correct errors affecting the rights of the private citizen, and Georgia alone of any Anglo-Saxon

State attempted for many years to conduct government without a supreme judicial tribunal necessary to preserve uniformity in the administration of justice. It was not accidental, but intentional, and in pursuance of a definite public policy. It furnishes a rare fact in history, worthy of study by the student of political affairs.

Immediately after the Declaration of Independence, twelve of the newly-created States had courts for the correction of errors. These Supreme Courts had begun to publish their opinions, and before the year 1800, as many as thirty volumes of these early reports had been printed.

But there was nothing like this in Georgia. Neither of our three early Constitutions said anything about a Supreme Court. The Constitution of 1798 authorized the Superior Court to correct errors in and to grant new trials; but the new trials were to be granted and the errors were to be corrected in the county in which the action originated. But there was no appeal to any other or higher tribunal.

The next year after the adoption of the Constitution the Legislature passed the Judiciary Act of 1799, a statute which has permanently affected and molded our whole system. It was the great work of great men. They endeavored to supply the deficiency in the Constitution by establishing a kind of Court for the correction of errors. The 59th section of the Act of 1799 provided that the Judges of the Superior Court should meet annually at the seat of government for the purpose of making rules and while they were thus in convention, the Judges were required to "determine upon such points as may be reserved for argument, and which may require a uniform decision."

This in effect would have been a Supreme Court composed of the Superior Court Judges sitting in banc—somewhat after the fashion of the one then in South Carolina, and not essentially different from the Court of King's Bench in England and the Supreme Court of the United States, where the Judges of the Appellate Court are also Judges of the Circuit Court.

But this provision of the Judiciary Act was never allowed to become operative. So much of the Act of 1799, as required the Judges to meet at the seat of govrnment to make rules of court was allowed to remain of force, but the provision that they should there "determine cases reserved for argument" was repealed by the Act of 1801, and—"all points reserved for argument, and now awaiting a decision at the seat of government are hereby directed to be sent back to the respective counties from whence they have been sent, to be there decided by the presiding judge."—Watkins' Digest 39 (1), 708 (59); Clayton's Digest 38 (3 and 4).

So that, what the wisdom of the authors of the Judiciary Act of 1799, had attempted in creating, at least, a statutory Supreme Court, was destroyed by the Legislature of 1801, and the State was led to a continuance of an experiment that, in the end, proved to be an admitted and pronounced failure.[33]

It evidently did not require very much to run the government, and taxes may have been of less importance than now; $1,000 of old public debt could be paid with one dollar, and judges only received a salary of $1,400, besides being required by the Judiciary Act of 1797 and that of 1799 to preside in each circuit alternately, "so that no two terms shall be held by the same judge in the same circuit successively," which practice is still followed in North and South Carolina. (Marbury & C. 272, 308, 60)

Strange to say, the author of the Judiciary Act is not certainly known. The credit for its preparation has been assigned by Col. Chas. C. Jones to Abraham Baldwin; by Judge Richard H. Clark to Robert Stith, one of the early judges of the Superior Court; while many others refer it to Arthur Fort. It is possible that all these claims may be well founded. There were several Judiciary Acts before that of 1799, and the latter is largely a revision of those which had previously been adopted. So that each of these reputed authors may have had part in one or the other of these Acts.[3]

David Dudley Field is justly regarded as the foremost law reformer of the age. He has received international recognition; and his fame is as assured as that of Kent or Story. His admirers are justly indignant that in many jurisdictions whole sections and titles from his Code of Civil Procedure have been copied, almost word for word, without any acknowledgment to him. But what shall we say of the injustice of fame, when even in our own state we do not know the name of that unheralded reformer, who, in 1799, in the legislature of the then sparsely settled state of Georgia, introduced and passed the Judiciary Act, which in form and substance accomplished exactly the same result wrought by Mr. Field by his Civil Code.

Abroad our jurisprudence has utterly failed to win recognition for the priority and success of this first and most vital of the law reforms.

Forerunner that she was, multitudes of well posted lawyers are ignorant that back in the eighteenth century, at a time when the system of special pleading was regarded as the very embodiment of perfection, Georgia, was first in condemning its evils, and was the pioneer in establishing the simple and wise method of procedure which England herself has substituted for the arbitrary, though logical, system of Coke and Littleton.

The very fact that Georgia so outran all others, and had had the new system in successful operation half a century before other states even began to discuss the question, seems to have resulted in her being absolutely ignored as the originator of the greatest of the modern law reforms.

The Act of 1799 in terms abolished special pleading; repealed all distinction between forms of action; in a sentence requiring the "cause of action to be fully, plainly and distinctly set forth," announced a principle governing pleadings which a century of actual experience has demonstrated to be both comprehensive and elastic enough to meet the requirments of the simplest or most complicated case.[28]

The curious customs of that day which Watkins' Digest

preserves have now more interest for the reader than the body of useful law which has survived. But we must not forget that it was these early Georgians who were the first law reformers and the first to endeavor to get rid of the encumbering technicalities of the English procedure. A number of these early statutes contain provisions permitting the defendant to plead the general issue, thereby getting rid of Replication, Rebutter, Sur-rebutter, Rejoinder and Sur-rejoinder, and many of the inconveniences of special pleading. But the great and abiding work of these men was the Judiciary Act of 1799, which is still the framework of our judicial system. They were familiar with the common law methods as administered in the Colony. They had seen the evil results of the radical changes to regulate the courts, made during the Revolution and in the light of their experience with what was too formal and what was too loose they adopted a happy medium—the Judiciary Act of 1799—which, with all of its admirable qualities, is still of force. Let us not forget that for the simplicity of our practice and the advantages of our procedure, we are indebted to the Georgia Bar of the 18th Century.[6]

APPENDIX

ADDRESSES AND PAPERS USED IN THIS COMPILATION

The Arabic numeral following a passage indicates that it is quoted, generally literally, from the address or paper indicated.

(1) Walter B. Hill—"Bar Associations," 5 G. B. A. (1889) 51.

(2) Walter B. Hill,—"The History, Objects and Achievements of the Georgia Bar Association," 19 G. B. A. (1902) 119.

(3) Joseph R. Lamar,—"Georgia Law Books," 15 G. B. A. (1898) 118.

(4) Alexander C. King,—"Sketch of the History of Land Titles in Georgia," 2 G. B. A. (1885) 126.

(5) N. J. Hammond,—"Georgia Driftwood," 13 G. B. A. (1896) 171.

(6) Joseph R. Lamar,—"The Bench and Bar of Georgia During the Eighteenth Century," 30 G. B. A. (1913) 52.

(7) Walter G. Charlton,—"A Lawyerless Court," 18 G. B. A. (1902) 261.

(8) Mrs. J. Render Terrill,—"The Georgia Lawyer as Viewed by a Woman," 18 G. B. A. (1901) 197.

(9) Charlton E. Battle,—"The Georgia-Tennessee Boundary Dispute," 19 G. B. A. (1902) 87.

(10) Orville A. Park,—"The Military Record of the Georgia Bar," 35 G. B. A. (1918) 53.

(11) Chas. C. Jones, Jr.,—"Compensation of the Judiciary," 1 G. B. A. (1884) 89.

(12) Jno. L. Hopkins,—"The Evolution of the Code," 16 G. B. A. (1899) 66

(13) Walter McElreath,—"The Provisions of the Constitution of 1877 Relating to Finance, Taxation and the Public Debt," 30 G. B. A. (1913) 162.

(14) Benj. E. Pierce,—"Taxation," 38 G. B. A. (1921).

(15) Chas. C. Jones, Jr.,—"Biographical Sketch of Jno. McPherson Berrien," 8 G. B. A. (1891) 92.

(16) Luther Z. Rosser,—"Some Old Saws Resharpened," 37 G. B. A. (1920) 85.

(17) Andrew J. Cobb,—"Report of Permanent Commission on the Revision of the Judicial System," 30 G. B. A. (1913) 199.

(18) William M. Reese,—"The Constitutions of Georgia," 2 G. B. A. (1885) 90.

(20) Andrew J. Cobb,—Report of Committee on Jurisprudence, Law Reform and Procedure, 27 G. B. A. (1910) 72.

(21) Walter McElreath,—"Justice Courts" 27 G. B. A. (1910) 152.

(22) Samuel Hall,—"The Jury System," 2 G. B. A. (1885) 111.

(23) Edgar Watkins,—"A Constitutional Convention Unnecessary," 30 G. B. A. (1913) 183.

(24) Joel Branham,—"The Emancipation of Woman in Georgia," 31 G. B. A. (1914) 184.

(25) Robert C. Alston,—"A State within the State of Georgia," 29 G. B. A. (1912) 137.

(26) John W. Park,—"Georgia as a Litigant in the Supreme Court of the United States," 13 G. B. A. (1896) 106.

(27) Robert C. Alston,—"Development of the Federal Constitution," 31 G. B. A. (1914) 100.

(28) Joseph R. Lamar,—"Georgia's Contribution to Law Reform," 9 G. B. A. (1892) 62.

(29) Z. D. Harrison,—"The Supreme Court of Georgia," 33 G. B. A. (1916) 122.

(30) William B. Hornblower,—"The Constitution in 1795 and in 1895." 12 G. B. A.,(1895) 55.

(31) William W. Gordon, Jr.,—"Defects in our Criminal Procedure," 23 G. B. A. (1906) 236.

(32) R. D. Meader,—"The Circuit Rider by the Sea," 31 G. B. A. (1914) 227.

(33) Joseph R. Lamar,—"History of the Establishment of the Supreme Court of Georgia," 24 G. B. A. (1907) 85.

(34) Andrew J. Cobb,—"Report of Committee on Legal Education and Admission to the Bar." 26 G. B. A. (1909) 76.

(35) Lamar C. Rucker,—"Marriage and Divorce in Georgia," 32 G. B. A. (1915) 196.

(36) John W. Akin,—"The Circuit Judge," 4 G. B. A. (1887) 84.