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The Development of Trial by Jury Judge Blanton Fortson
Appellate Court Briefs and Arguments John M. Graham
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The Lawyers and the Courts

BY GEO. F. GOBER

If we practice law today we must practice it as it is—as it is now enforced. We must learn and unlearn and lay aside pre-conceived opinions that are no longer tenable just as we throw aside our old clothes when they are no longer of service. If we would succeed we must keep in touch with the new developments, the change of statutes, the decisions of the higher courts, and the application of principles. The lawyer may feel that some of these are wrong but what difference to him? The rule is against him in the present case but it may be to his interest to invoke it in his favor in the next.

There is a small class of lawyers that always grumble and complain. A case is lost and the result is charged to the Court; upon it is laid ignorance, bias and prejudice. Courts sometimes rule wrong but a lawyer has his remedy; he can have the case reviewed. Lawyers have often just complaints against judges but complaints, personal animosity and want of charitable consideration of the work of a Judge are the strongest evidence of the small caliber of the lawyer. A lawyer like a prize fighter should train himself to take and receive punishment; but like the prize fighter he should by his art ward off as much of this as possible. There is no more disgusting exhibition than a lawyer going to a judge and complaining of personal treatment.

Judge and Lawyer each know or ought to know their place and relations; the law outlines and fixes these. The lawyer acting properly in his place, with proper respect for the Court should be independent, know his rights and maintain them; it should always be a pleasure of a judge to be courteous, fair and considerate. A lawyer should never be a coward and ask for quarter, but this does not mean that a Court should temporize with self-serving exhibitions. The author once heard an antideluvian practitioner when he was shown a decision of the Supreme Court in point against the contention of his argument meet it with the reply: "Well, they are the only three men that ever had any such ideas." The trouble with some grumblers is that they do not know what their clients are entitled to nor when they get what is coming to them. Grumblers as a rule stand on archaic platitudes and misapprehension of the Law.

The judiciary of Georgia is elected by the people. There has been much said for and against this mode of selecting judges. There is no way of selecting the judges but which is open to criticism and ob-
jections. One thing must be conceded; the present plan has given the State a good judiciary; our present judges will compare favorably with those at any time in our history. The objection urged mainly is that it puts the judges in politics; that the best lawyers are not selected. The first question here is what is politics? If by it is meant popular appreciation, a warm heart and hearty handshake; an ability to appreciate and feel the needs and necessities of the people—the grind of poverty and the struggles of the poor—and an earnest endeavor to administer the law to humans in a humanely way—then the more politics the better. If by politics is meant only political advancement for the candidate; the getting of the office by every art known to dirty politics; the avowal of some special interest to be favored in order to get votes; a regard for religion that the candidate never exhibited until he entered the campaign, then the less of such the better. We have had candidates for the office of judge who were cold and phlegmatic by nature, but learned in the law; who lived within themselves in the world but not of it; who prided themselves on their professional ability and studied only law and not the people; with no close friends, selfish and calculating and whose make up would not respond to an electric current and when they offered themselves as candidates with a royal pose such men were not elected. The English judiciary from the earliest times was filled from the standpoint of politics. John Marshal, Chief Justice of the United States, appointed by John Adams, was schooled as a politician; the present Chief Justice, a great man, was President of the United States, was defeated for re-election and afterwards appointed to his high office; Chief Justice Taft is a great example of an able, high toned, outstanding patriotic American but these grumblers would call him a politician. Consider other appointments to that high Court; Chief Justice Taney served an apprenticeship under Andrew Jackson as a politician.

The writer does not know any ideal plan to select the Judiciary: he was elected a Superior Court judge three times by Legislature without opposition and twice by the people with opposition and quit of his own motion. Judges are now elected by the people and it would be better for the grumblers to go to the polls and make their ideas concrete rather than to attack the present system.

A court is made up of its officers, judge, attorneys, clerks, sheriff and jurors. In the proper disposition of business each of these must function properly. There is little complaint of the failure of the clerks and sheriffs; as a rule they are good officers and discharge their duties. Comparatively few verdicts are set aside as improper verdicts. While sitting in the Supreme Court, I wrote in the case of Allison v. Richmond Railroad Co., 89 Ga. Page 572:

"Whoever has had any experience with juries must concede that they endeavor to do right. They take questions of fact in a practical way, unimpeaded by the legal fetters that restrain a professional mind. They may not find sometimes as a court would find. The reply is, the law has left this work to them. If they do their work fairly under the rules, courts ought not to disturb their verdicts. In "Trial by Jury," by Forsyth, he says: "It was said
of Socrates that he first drew philosophy from the clouds, and made it walk upon the earth. And of the civil jury it may be also said that it is an institution which draws down the knowledge of the laws to the level of popular comprehension." From this standpoint, in a practical way, by practical men, verdicts are made.

Juries are changing bodies and not often do the same jurors sit in different cases. The work of juries is characterized by an obligation to duty and an endeavor to find proper verdicts. The greater number of cases are reversed on the charges and rulings of the judges and for these in most instances the lawyers are responsible. Lawyers are loyal to their clients and often on doubtful questions their contentions are not sustained. The Higher Courts must lay down general rules applicable to the instant cases which makes a precedent to be afterwards followed. It would be unfortunate if this were otherwise for then there would be no certainty in the subsequent trial of cases.

There are lawyers and lawyers. They have been the butt of many a story. Dickens tells us of Sergeant Buzfuz who gained his case over his opponent by open hypocrisy and diaphanous pretensions which have long since been overworked and placed in the discard. Buzfuz won a verdict in a case that was fabricated from start to finish. The legal profession in current literature is lambasted by half-baked writers about fictitious cases drawn from their imaginations as to all the proceedings; their helpless dummies do their allotted parts and their manikins perform to order and complete satisfaction. The writers manufacture their stuff to sell—it has to be something out of the usual—something that in the minds of the publishers will attract and pander to a certain morbid stratum of the public eager for something to sustain their preconceived opinions. Lawyers let such stuff pass; their shoulders are broad and they can bear it. Let one of these critics get his shins skinned or toes mashed by a railroad or if he sees a long shot to get some money out of the estate of a distant relative he hunts up a lawyer. While the writer was upon the Superior Court bench he overheard a certain self esteemed Socrates discoursing against electing a lawyer to the legislature. He prided himself on being an American citizen, that he had no use for courts nor lawyers; that he never had a lawsuit but attended to his own business; that courts and lawyers were a useless burden upon the people. A few weeks later he came with a lawyer to my office hungry and athirst for an injunction. It seems he had found himself in another latitude. The writer knows of no business nor profession where every one following it is a saint and fit to be transcribed; at least this could not be insisted on for the lawyers. Lawyers could be divided into three classes: There is the older and more experienced class that have been longest at the bar. The men that started with them—those that belonged to the third stratum—the guerilla class—have long since been eliminated and weeded out. This older class has been tried out; it has always practiced law as a profession; it has regarded its traditions and ethics. They have the confidence of the public and are full of business. No class or profession can claim a greater percentage of honorable, patriotic men;
they have the confidence of everybody and do the greater part of the important work of the courts. There is another stratum that is separate from the third class and will not mix with it. These are the young men that have entered the profession to practice law and observe the ethics that obtain among all true lawyers. They have studied hard in their preparation; they work, are courteous and have an ambition to fully and fairly discharge their duties to the court and their obligation to their clients. They leave their clients satisfied and are respected by their fellow members. These young fellows are the coming men; honorable and high-toned, they condemn a man that would act otherwise. The third class base their claims upon the fact that they have been admitted to the Bar and have licenses to practice. Measuring them by their knowledge of the law and there work there is presented an inscrutable proposition as to how they ever achieved any such result. They do not know what their clients are entitled to nor when they have gotten what is coming to them. They glory in being distinguished by the appointment of the judge to defend some colored brother that has been caught in another's hen roost or has slaughtered a hog that did not belong to him. This class is strong on oratory—of the loud, rancous and strident kind that makes the welkin ring. It matters not what the evidence is one of these stresses the presumption of innocence—the reasonable doubt—but greatest of all the defendant's statement. When the jury brings in a verdict of guilty he is satisfied fully that he has made a great effort but cannot understand and is at loss as to why the jury could find against his speech. Some of this class will tell anybody with any kind of a case that they can gain it; that there is no trouble about it. They infest the jails; they chase ambulances; they solicit cases. Such men are not lawyers; they are guerillas; they live off of the ignorance and have lofty ideas to fees—they grab everything in their reach.

We have a world of law books; the publishers continuously grind them out; new editions; new text books with a rehash of old principles. The State Reports and Federal Reports contain little beyond the application of old rules. We have new laws that must be construed. The courts and the legal profession are charged with a lack of progress. Our attention is called to the industrial world with its standardized mass production; to the invention of the radio, the development of electricity, the automobile, the great strides in transportation and to the advancements made in the art of killing people in war. We are asked why the enforcement of the law does not keep step with all this progress? The answer is we have the laws and they are easily applied if the courts could get the facts before them. We must go to the scene of the murder to get the witnesses; to the place of the hold up which was planned by shrewd men as to time and place to prevent identification and rely on evidence unforeseen by them to convict them. Much of the evidence in such cases must come from their companions in crime who do not hesitate at perjury. In such cases we cannot choose our witnesses. Good citizens have no part in the commission of crime; they cannot be witnesses because they are not there. We must ordinarily get the witnesses from the
criminal class and depend on them for the evidence upon which to try the criminals. In the Courts perjury runs riot. There are few indictments for perjury; it is present almost every day in all the courts. Some witnesses who think they are honest fall far short when their evidence is properly weighed. Some psychologists insist that there is no one who has no prejudice or bias. I will not discuss this; there is too much to be said. I am reminded of a story: A good church member—a pillar of the community and who was pointed out to the young as an examplar of everything that an upright man should be was put upon his voir dire as a juror in a murder case. He answered all the questions to qualify him. He was asked if he had any conscientious scruples against capital punishment. He answered: "Not in this case." The rich and the poor, vice and virtue, good men and bad men go upon the witness stand. From much lying, perjury, in conflict with honest evidence courts must endeavor to discover the truth. The Lord failed to get the truth from Adam and Eve in the garden of Eden. Human nature has always been the same. The human heart is desperately wicked and deceitful above all things. If the courts are to make progress they must have the facts to which to apply the law. This must come from a regeneration of the human; he must be brought to a realization of his obligations and responsibilities. As to how it is to be done the writer does not know. In the middle ages torture was used. Psychiatrists have lately lent a hand but have not succeeded.

The Bar owes courtesy to the Judge. This should be reciprocal. The lawyer is bound to give it to the Judge, not so much to the man that holds the office. Lawyers are ready to credit the Judge with all the good that is in him. This does not mean the adulation of the sycophant on the part of the lawyer nor the hollow meaningless compliments on the part of the Judge. Courtesy is as cheap and easy as the breathing of the air. It should betray no effort and be as a matter of course. A Judge should expect it and never be driven to demand it from the men who appear before him. The inherent power of a court over the Bar should sleep like the lightning and strike only to hurt. Like the electric chair, it should be kept out of sight and used only when needed. A Judge should not talk too much. The stories of his forensic triumphs, the history of his legal conquests, the annals of his family, though they may be cherished memories with him, do not interest the public. It may endure them, but it does not follow that they are appreciated.

Men have come and gone; it is useless for a man to make himself out a prodigy. No Judge should glory in the idea of trying to present himself as a terror; his breathings and threatenings should be left off. Such things are not necessary to the assertion of his office. It has been said that we know nothing of a man until we give him power; but no Judge should offer himself as an illustration of this saying. Every Judge ought to be a Christian, but it is dangerous for him to claim too much religion.

A Judge of the Superior Court has more power as such Judge than any other officer of the State. This power affects the rights and liberties of the people; the laws that protect these are adminis-
tered by him. To properly discharge the function of this high office, it is not only necessary that a Judge should endeavor to do right, but also that he should bring to the discharge of his duties a knowledge of the law and understanding of the construction of the laws as passed upon by the Court of Appeals and the Supreme Court, along with these great qualities of head and heart.

He offers himself as such officer upon the undertaking to execute the laws as they are written, and to exercise the judicial function as delegated to him by the people.

A Judge is in the limelight; his reasons are weighed; his motives are considered. He is given the discretion in many matters, and this should never be looked upon by him as simply the power to carry out without restraint his preconceived ideas. The people of the circuit and the lawyers that represent them have a right to assume that such discretion will be exercised in a legitimate way and within the limits conferred by law. He should not regard the matter of discretion as arbitrary and a carte blanche unlimited and unrestrained. The discretion should never be exercised under the same circumstances one way at one time and a different way at another time; it should be based upon some rule of reason that can be understood by the bar and the people. A Judge should never throw away his discretion. It is given to the Judge and not to the man; it is not given to be controlled and exercised, by prejudices or individual ideas. If such be true, the exercise of discretion would be given to the man. The greatest tyrant in the world is the one that writes his laws so high that they cannot be read or when the law is enforced from a standpoint of caprice that cannot be anticipated.

To undertake to define egoism from either a metaphysical or ethical standpoint would lead one far a field. The phase of it discussed here makes such a consideration unnecessary. It has been defined in philosophy as "A term applied to any view that was supposed to make the individual self the only reality knowable." As considered here, it is applicable in a few instances to that characteristic development of a few judges and lawyers that labor under the delusion that it is necessary to put themselves too much in evidence on any and all occasions.

Few judges are afflicted with it, some lawyers suffer from it, and the public helplessly endure it. In a Judge, its existence is manifested by much talk; by a continual assertion of his power and authority as if his commission were contested; by finding fault unnecessarily; by criticising the work and pleadings of lawyers and endeavoring to leave a presumptive inference of their sloth and ignorance. The use of lung power at a high pressure is one of its symptoms.

An acute attack sometimes deprives a Judge of all ideas of courtesy, or at least he shows none, and displays displeasures at everybody and everything. There is but one effectual remedy for a Judge that has a chronic case of egoism and that is to apply the proper treatment at the polls. It is unfortunate for a lawyer to suffer from egoism. It might be defined when applied to him as a continual assertion of the possession of extraordinary ability and know-
ledge where it is not conceded; he deals in trite fundamentals and broad platitudes as controlling and which are handed out in a patronizing way as only the odds and ends of his common stock; these by ponderous assertion he insists are applicable in every proposition presented; opposing counsel to his mind can do nothing right; with a round voice he wears a pleasing smile and beams upon every one who does things to suit him; he divides humanity into two classes, fools and rascals. The fools are those that oppose him and do not agree with him; the rascals are those that do not assent to anything and everything that he wants; he has a liberal supply of adjectives. In his opinion, shadowed forth by his activities, he is a great man and a wonder. Suppose for a moment that we should have a Judge on the Bench laboring under egoism and a Bar, each member of which was down with the disease, just think of such a spectacle. Everybody knowing everything—no one knowing anything,—everybody talking, nobody listening; it would be a panegyric to call such a Court a pandemonium.

A lawyer with an incipient case of egoism is usually benefitted, if not entirely cured, by the atmosphere of a Bar that properly appreciates such claims and performances. Occasionally it happens that by a happy prod from opposing counsel through the armor joints of his self importance he is brought to a realization of the fact that lawyers are practical and take such pretensions at their true worth. Whilst egoism is prevalent, it is by no means epidemic and sometimes one case has the happy effect of leading all others to take proper precautions to ward off the disease.

One of the greatest obstacles to the dispatch of business and the enforcement of the law is the flood of eloquence that overwhelms the courts. It knows no bounds and has no limits. It makes no difference as to the character of the case or the amount of evidence; it is part of the regular bill of fare and must be endured. Under the rules the judge is helpless whether it is logical or illogical. Much of it is far fetched inferences drawn from the imagination. The evidence shows one case and quite another is argued; in fact the idea in some places is abroad that the determination of issues of fact depends entirely on the concluding speech, often made up of garbled evidence and reckless assertion. Those who indulge this way ought to have a regeneration and become imbued with the spirit of the law and the relation that an Attorney bears to the court. Much of this could be controlled if the judge would enforce the rules; the opposing counsel dare not object before a judge who is lax in their enforcement. The object of all legal investigation is the discovery of the truth; in some places this is disregarded and instead the object is to gain cases, by any means fair or foul.

Code Section 4965 provides:—

It is the duty of attorneys at law—To employ, for the purpose of maintaining the causes confided to them, such means only as are consistent with truth, and never to seek to mislead the judges or juries by any artifice or false statement of the law.

To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or a witness,
unless required by the justice of the cause with which they are charged. These duties set out in the Code seems to have been forgotten by some lawyers; at least they are disregarded.

Again Code Sections 6261 and 6262 are as follows:—

Arguments of counsel shall be confined to the law and the facts involved in the case then before the court, on pain of being considered in contempt; and in all civil cases questions of law shall be argued exclusively to the court, and questions of fact to the jury. Code Sec. 6261.

No attorney shall be permitted to interrupt another, while addressing the court or jury, except to correct him in a misstatement of evidence, or misrepresentation of the position of counsel, upon pain of being considered in contempt; and such interruption, when made, shall always be addressed to the court, and never under any circumstances to the counsel. Code Sec. 6262.

The following is part of an opinion written by Chief Justice Richard B. Russell, now of the Supreme Court of Georgia, who wrote it in the case of Pelham & Havana R. Co. v. Elliott, 11 App. 630. At that time Judge Russell was one of the Judges of the Court of Appeals. This opinion presents the subject of argument in a pointed and incisive way and presents the matter clearly.

"The rule is, that it is contrary to law for counsel to comment upon facts not proven. He represents his client—he is the substitute of his client; whatever the client may do in the conduct of his cause, therefore, his counsel may do. In relation to his liberty of speech, the largest and most liberal freedom is allowed, and the law protects him in it. The right of discussing the merits of his cause, both as to the law and the facts, is indispensable to every party; the same right appertains to his counsel. The range of discussion is very wide. He is entitled to be heard in argument upon every question of law that may arise in the cause; in his addresses to the jury it is his right to descant upon the facts proven or admitted in the pleadings; to arraign the conduct of parties, impugn, excuse, justify, or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses, when that is impeached by direct evidence, or by the inconsistency or incoherence of his testimony, his manner of testifying, his appearance, or by circumstances. His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination. To his freedom of speech, however, there are some limitations. . . . It has been found difficult to prescribe a legal limitation to the lawyer's liberty of speech in the performance of his duties in a cause. That the discussions should be free is perfectly obvious; and even abuses should be tolerated, rather than a privilege so valuable should be abridged. We feel the delicacy of the ground upon which we tread, and are solicitous of being understood as carrying our present ruling no farther than to cover the precise question made in the assignment. . . . Statements of facts not proven, and comments thereon, are outside of a cause; they stand legally irrelevant to the matter in question, and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel. . . . Trial by jury! How imperfect a privilege would that be, if the forms of law were abandoned—if the rules of evidence were disregarded! An essential element in the trial by jury is that their verdict shall be rendered according to the facts of the case, legally produced to them. They are sworn to give their verdicts according to evidence, and if they find without evidence, or against evidence, a new trial will be granted. They cannot even render a verdict upon knowledge within their own breasts; but if a juryman has knowledge of facts pertinent to the issue, he may be sworn. The law, with great carefulness, prescribes rules by which facts are to be submitted to the jury. Testimony must be relevant—the best evidence the nature of the case admits must be produced; hearsay is
consequences, mould convert the stern, inflexible law and order of a court of honor, they cannot be confided to those few to be gently and to know thoroughly, in order that they may secure the determination, any point of law, which properly springs out of the case, and which they may think important for the interest of their clients. It is therefore, the duty of counsel to present to the Court the points which verdicts are to be rendered. The law to be administered may depend upon the facts proven. Ex facto oritur jus. 'And if the fact,' writes Blackstone, 'is perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial; and in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of probation or trial, which the law of the country has ordained for a criterion of truth and falsehood.' 3 Black Com. 330. When counsel are permitted to state facts in argument and to comment upon them, the usage of the courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied. It may be said in answer to these views, that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they are sworn to render a verdict only according to the evidence. Whilst all this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in any degree influence the finding, the law is violated, and the purity and impartiality of the trial are tarnished and weakened. If not evidence, then without doubt the jury have nothing to do with them, and the lawyer no right to make them. And jury can rest. It is not at all reasonable to believe that the jury will disregard them. They may struggle to disregard them; they may think that they do disregard them, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of counsel, his skill and adroitness in argument, and the naturalness with which the statements stand connected with other facts and circumstances in the case. To an extent not definable, yet to a dangerous extent, they are evidence, not given under oath—without cross-examination, and irrespective of all those precautionary rules by which competency is tested.

"In this case the statement and comments had reference to the character and credibility of the witness. I know of no rule of law which authorizes the credibility of a witness to be impeached or fortified thus. The manner of attacking or defending the character of a witness is fixed by law; and fixed, among other things, that he may not be subject to irregular and irresponsible assaults upon his veracity and fairness. He, as well as parties and counsel, has rights, which it is the duty of the court to protect. It were a cruel injustice to permit his character to be driven to and fro like the shuttlecock, by outside statements of counsel. Where shall the license stop? If allowed against the credibility of a witness, then with equal reason they are to be allowed as touching the merits of the issue. If crimination is granted, recrimination cannot be refused. If statements on one side are permitted, counter-statements on the other cannot be denied. If allowed to me of the highest honor, I deny those few to be found in all professions injurious to the character of counsel. The concession, carried out in its legitimate consequences, would convert the stern, inflexible law and order of a court of justice, into confusion, uncertainty and injustice."

In the 10 Ga. 410 the Supreme Court said:—

It is not necessary to speak of the rights and obligations of counsel, so far as concerns their relation to their clients; except to say, that it is unquestionably the right and duty of counsel to bring to the view of the Court, for its determination, any point of law, which properly springs out of the case, and which they may think important for the interest of their clients. They are in Court for that purpose; they are bound to observe closely, to labor diligently and to know thoroughly, in order that they may secure the determination of the rights of their client, according to law. The beautiful theory of a trial is this: Both sides are represented by counsel, that their rights may be settled, not by art or chicane, or the tricks of the orator, but according to the law. It is therefore, the duty of counsel to present to the Court the points which he conceives are in favor of his client; and it is his right to be heard in argument to sustain them; and when presented, it is the duty of the Court to pass upon them, if they grow out of the case, but not otherwise; and of that
he is to judge. If he declines to pass upon a principle thus moved, and it springs out of the case, such declining is error, and if an appellate tribunal finds it in favor of the party moving it, a new trial will be awarded. As officers of the Court, the duties of counsel are not in conflict with those which devolve upon him as the representative of a party. They are the friends of the Court, enlisted with him in the sublime work of discovering truth, and dealing out justice between man and man. It is not the duty of counsel to suggest points of law which are against his client; but it is his duty to insist upon no point which he knows to be contrary to law. Whilst judgment belongs alone to the Judge—enlightenment is the province of the lawyer, and I apprehend that no Judge can be found so presumptuously vain, or so flagrantly unjust, as not to recognize, and that too with grateful emotions, the aid which he derives, in the discharge of duties more solemn than belongs to any other functionary, from an able bar.

From 10 Ga. 521p:—

I would be the last man living to seek to abridge freedom of speech, and no one witnesses with more unfelted pride and pleasure than myself, the effusions of forensic eloquence, daily exhibited in our Courts of Justice. For the display of intellectual power, our bar speeches are equalled by few, surpassed by none. Why, then, resort to such a subterfuge? Does not history, ancient and modern—nature, art, science and philosophy—the moral, political, financial, commercial and legal—all open to counsel, their rich and inexhaustible treasures, for illustration?

Here, under the fullest inspiration of excited genius, they may give vent to their glowing conceptions, in thoughts that breathe and words that burn. Nay more, giving reins to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time—extra flammans moenia mundi. But let nothing tempt them to pervert the testimony, or surreptitiously array before the Jury, facts which, whether true or not, have not been proven.

We have from 27 Ga. 210:—

We do not know that more need be said, as to the proper conduct of counsel in arguing causes. We find it difficult to confine them to the record in this Court, and it is more difficult we doubt, to in the Court below. For there, it is not always agreed as to what has or has not been proven; there may be an honest mistake as to that, while here it is a matter of record, about which there need be no misapprehension. To depart from the testimony, much more, voluntarily to pervert or misrepresent or add to it, is a great wrong; and to say nothing worse, it leads to those unseemly altercations which so seriously disturb the decorum and dignity of Courts. For myself, I envy not the success of those who achieve their triumphs in this way. I intend this as a general remark, and not for the counsel in this case.

There obtains a divergence of ideas in the argument of cases. The difference is especially noticeable in comparing the practice in one circuit with that of another. Often one would imagine that all rules had been abrogated or that he had gotten in a foreign jurisdiction. Some time ago the writer found himself in a Superior Court where the case of the State vs. Sam Hill charged with chicken stealing was on trial. Col. Josiah Singer represented the defendant.

Col. Josiah Singer boasted that he never looked inside of a college; that he was a self made man; that he and the Lord alone were responsible for the making; and that in so as he was concerned he was satisfied with the job. The speech was so unique; its piercing periods made a lasting impression on my memory. I found myself taking notes; that night I filled them out as best I could and next day I submitted them to the Colonel. With a few amendations he approved them. I am not willing that this piece of eloquence should
be lost to posterity and for this reason I have inserted it as illustrating one school of oratory in the court room. I pride myself on the fact that I have been able to save this classic from oblivion. While Col. Josiah Stringer has not been consulted as to this publication I feel sure from his good nature, and love of notoriety he will not object as the annals of the courts would be incomplete without it. The Col. considers this one of his greatest efforts. More than this Col. Josiah Stringer now has his eyes turned heavenward, gazing at the stars and reading from them a great political future. It is to be regretted that the future career of this great patriot is to depend upon the uncertain shuffle of the cards in the political game. He has the best wishes of many admiring friends who hope that luck and Providence will be kind to him.

Col. Singer sat in his office. He was through with his work for the day. He threw his feet upon his desk and meditated. Many things presented themselves for consideration and first of all his exchequer was low and had to be replenished. He concluded, after much thought, he had not been assertive and did not put himself sufficiently in evidence. He knew he had great ability and circumstances had been such that he had not been able to show it. He concluded that it had been his fault and with a fixed determination to place himself at the head of the Bar in Center City he arose, closed the door and betook himself to his lodgings.

Bright and early the next morning Col. Josiah Singer went down to the jail to see the Sheriff. The Col. used few words but these were to the point and there was an agreement by which the sheriff was to have the inmates of the jail to employ the Col. and in return the Col. was to give the Sheriff one-half of his fees. The compact having been made the Sheriff carried Col. Josiah Singer to the cell door of Sam Hill a colored citizen who was awaiting a trial for chicken stealing. There was a proper introduction and the Sheriff told what a great lawyer Col. Josiah Singer was and what he could do. Sam at once relieved the situation by offering Col. Josiah ten dollars of the first money he got after he "put him on the ground." The Col. was inquisitive and asked Sam how much cash he had and what he could pay down. Sam in a mournful voice prompted doubtless by the complex of his indigence and condition told the Col. that he did not have a nickel—not even a cent. The Col. had a big heart—and an abundance of human sympathy and he told Sam that he would accept the employment, that his oath of office required him never to reject for a consideration personal to himself the cause of the defenseless and oppressed. Sam said he was certainly "pressed" and was glad de Lord had sent him a friend. Mr. Jones 'cuses' me of takin his chickens—just two little pullets and an old rooster and I'll tell you Kurnel fore God if I was at de roost dat night I was sure walkin in my sleep.

Now Sam stick to the truth as you have told me and I will sure put you on the ground, said Col. Josiah Singer in a tone of assurance.

Court came. The Sheriff brought in Sam Hill: The Judge called the case before Sam was seated. No answer: the Judge asked Sam if he was the defendant. Sam replied—Nor Sir, Judge I's not
the defendant; I's de gentlemen what stole de chicken. Col. Josiah was attracted and coming to the front informed the court that the defendant was ignorant and what he meant was that he was accused of stealing the chickens.

The jury was stricken and the Solicitor General introduced his evidence. On the night in question Mr. Wade Smith swore he had the toothache; was awake about one o'clock and heard a dog bark and a chicken squall. He got his flashlight went to the hen roost where he flashed his light and found the defendant Sam Hill with two pullets in one hand and a rooster in the other; ready to travel. Had Sam put chickens back on the roost; carried Sam down to jail.

Col. Josiah Singer now embraced his opportunity to give the witness a thorough cross-examination, and to sift the witness:

How many chickens did you have? I had up to a few weeks ago forty-seven but Sam Hill or some one else has stolen them all but the three Sam had.

Do you know Sam got the other chickens?

All I know I ran a nigger off from the hen roost about three weeks before this with a bag and from his build and size as he ran under the electric light in my opinion it was Sam; I found next morning four chickens missing. How old were your chickens?

I would say the pullets were about four months old and it was an old rooster.

Are you sure it was the defendant the night you swear he had the three chickens?

Sure I do; I have known him a long while.

Tell the jury how you have come to know him.

I was on a jury in this court last year that convicted him of stealing a hog from Jim Rhodes.

Is it not a fact that if you saw the defendant that night he was walking in his sleep, when you caught him and carried him down to jail?

Sam was wide awake as he is now and talked to me as I carried him to jail.

What did he say to you as a part of the res gestae?

He told me in the hen house that he hoped I would "Scuse" him as the preacher was at his house and he wanted the chickens for his breakfast.

Sam made his statement. He said if he was at dat hen roost dat night it was sure while he was walking in his sleep and he never woke up until he was in jail.

Col. Josiah Singer not having introduced evidence was entitled to the conclusion. The Solicitor made a short statement and stopped. He told the jury they were intelligent men and he would leave the case with them. Col. Josiah arose with a majestic air; his dress was perfectly appropriate. He wore a long black coat that he buttoned up and adjusted his red cravat. He felt his responsibility. His art was all his own. He began in dulcet tones; soon it was a crescendo attended with physical manifestations. He said:—

Gentlemen of the jury. It is with trepidation on account of the great responsibility that I come before you to argue in behalf of
the liberty of this American citizen who at this time on account of 
this malicious prosecution is now in durance vile. My appearance 
here is in response to a call of duty to which the good Lord helping 
me I will always respond.

I meet you as a jury in this case whom the jury commissioners 
of this county have selected as upright and intelligent men. From 
your attention and alertness they have made no mistake. The Lord 
always writes the good heart and intelligence of a man on his face. 
You bear his handwriting; he has stamped it on your brows. I have 
practiced law in many States; I have appeared before many juries in 
my extended practice and I never stood before a jury with greater 
confidence than now. I am fully persuaded that you will do your 
duty though the heavens fall, and remove from his character these 
aspersions that this American citizen stole two little pullets and an 
ancient rooster.

The Superior Court is a great court; it has general jurisdiction; 
it has great powers; you men pay taxes to support it for its legiti-
mate purposes—to try murder cases—rape cases—hold-up cases, 
burglaries and like cases. Has it come to pass in Center City, the 
home of wealth and intelligence, of churches and schools, of happy 
homes and great industrial enterprises that your Solicitor General 
would degrade its powers and take the time and attention of this 
court at a cost of one hundred dollars a day and clog the wheels of 
justice with such a case as this; to prosecute an American citizen on 
perjured evidence for stealing two little pullets and an ancient roost-
er; to jeopardize the liberty of an American citizen with such a case 
is a damnable, diabolical shame. I have read all of the U. S. Reports, 
your State Reports and I defy the Solicitor General to show me 
a case where any Solicitor General heretofore has brought an indict-
ment against an American Citizen for stealing two little pullets 
and an ancient rooster.

I have told you of my readings and of my efforts to know the law. 
I found a case decided by John Marshal, Chief Justice of the Supreme 
Court of the United States. He was the boss of the law and he de-
cided: "De minimis lex non curat." As some of you may not be 
Latin scholars, as I am, I will translate it for you—"The law does 
not bother about trifles." If John Marshal were here, and I am sorry 
he is not, he would tell this prosecutor, this Solicitor General, "to hell 
with your case about two little pullets and an ancient rooster." They 
would hide their faces and slink out of this Court House in disgrace 
and shame. Yes, if Old John Marshal was here today he would drive 
them out of this temple of Justice just like Jesus Christ drove the 
money changers out of the temple at Jerusalem.

The Solicitor General made no speech. He did not dare to at-
tempt to argue the case. He just told you that you were intelligent 
men and he would leave the case with you. Gentlemen think of such 
a speech. He told you that you were intelligent men. You knew 
that; everybody within the sound of my voice knew it; the judge on 
the bench knew it and the Solicitor General is trying to raise an issue 
as to your intelligence. Gentlemen of the jury I measure my words 
and Col. Josiah Singer is responsible here or anywhere else for what
he says. I say here and now that a more atrocious insult was never flung in the face of a jury; these are my sentiments.

Again he says that he will leave the case with you. This is a wonderful statement. He seems to have been hesitating whether he would toat it off or leave you the bag to hold. I do not blame him for leaving it with you; he wanted to get rid of it. He wanted to make you responsible for his prostitution of the law in this case where he has brought a free, liberty loving, American Citizen before this great court on the flimsy charge of stealing two pullets and an ancient rooster. He leaves it with you, of course he does and is glad to wash his dirty hands of such a case.

The Legislature in its wisdom passed an act which provides that every American Citizen upon the trial of a criminal case has a right to make to the court and jury such statement as he deems proper in his own defense not under oath and to which the jury can give such force as they deem proper and the jury can believe it in preference to the sworn testimony of the States witnesses.

Gentlemen this is the Magna Charta of liberty; it was made for just such a case as this. It says the jury can believe it in preference to the testimony of the States witnesses—any number of State's witnesses. Here there is only one State's witness. Yes you can believe it in preference. The idea of liberty is the foundation of our laws; the pearl of great price. You are given the liberty to believe it and liberty that carries with it the burden of responsibility. It is your duty to believe it over the evidence of the trumped up yarn of this perjured prosecutor, which sounds like the midnight ravings of some distempered hash-eater suffering with pains in his stomach. Of course you will believe it and turn this American Citizen loose.

In this case there was a special interposition of Providence. The Lord took care of this defendant. He was walking in his sleep. He told you, this in his statement. This prosecutor did not dare to go back on the stand and deny it.

The Lord looked after him. Down at the end of the street that passes the house of this prosecutor is the river swift and deep. If this defendant was in that chicken house that night somnambulisit and walking in his sleep he was there by a special interposition of Providence for the Lord directed him there. If this had not happened he would have walked on down that street and tumbled in the river and been drowned. I repeat again that this American citizen ought to thank the Lord for this special Providence and protection. This perjured prosecutor says he found him in the chicken house. I ask did he hurt the chicken house; he didn't tear down any door or break any window; he didn't steal any chickens because he says he made him hang them back upon the roost. There never was a more malicious, damnable, diabolic persecution instituted against an American citizen and all for two little pullets and one ancient rooster. God save the mark. Gentlemen of the jury there is a time when duty calls; when it will not down. You may squeal and resist it but your consciences will upbraid you and you will be indicted on that great day of judgment when the ruler of Heaven and earth presides on the great white throne.
In the World War 2,000,000 of our young men went across to far off France at the call of duty to fight for liberty and to make the world safe for democracy. Our great grey war ships loaded down with men and cannon scoured the seas at the call of duty to help in the battle for liberty. Julius Caesar marched to the Rubicon and those Roman Morons dared him to cross but in the face of duty he jumped in with his clothes on. At the battle of Trafalgar Nelson commanded the English fleet against that of the French. Nelson hung at his masthead the signal, "England expects every man to do his duty." The sailors were inspired; for duty they fought like tigers and wiped the French fleet off the ocean.

Now George Washington was not a saint; when it was necessary he would cuss a little. When he started to fight the battle and capture the Hessians at Trenton, as history tells us, he came to the Delaware River which was full of ice and it was a cold and snowy night. Some of his generals thought the night too bad and did not come. Some of his staff advised him to give it up as the weather and ice were too rough. George gave the order: "Get across," damn the weather and the ice." They went and gained the battle of Trenton. He acted from a sense of duty. When George cut his father's cherry tree he owned it to his face from a sense of duty. Many a father would have spanked him but from a sense of duty he didn't. Speaking to a jury as intelligent men as you are, I have no idea I am telling you what you do not know, but I am simply calling your attention to these examples of duty we get from history. As you know, history teaches by example.

Now, Gentlemen of the Jury, from all these examples I ask you, I beseech you, to do your duty. Give this American citizen a safe deliverance from this infamous and malicious charge of stealing these pullets and an anchient rooster by returning a verdict of not guilty.

While Col. Josiah Singer was delivering this great speech he intoned and controlled his voice in a most remarkable way. At one time he used it like the plaint of a song bird bereaved of her lost mate. Again it was raucous and strident as if he defied everything and everybody; then it reached the sublime like the rolling thunder; it was a great effort.

At this point Col. Josiah Singer stopped and seemed to pull himself together. He straightened himself up; made sure his coat was buttoned and adjusted his red cravat. You could have heard a pin drop in the court room, it was a tense moment; there was an air if expectancy. It foreboded something was coming. Then Col. Josiah Sanger began:

Rome rose on the ruins of Greece to waive her scepter over the subjected world. The mighty Hannibal raised his arm against her and she crushed it. The captured flags of the conquered nations waived from her walls as emblems of her asserted power. It was then that Virgil strung his lyre to sing of the fame of Aenæs; Cicero shook the forum with the thunders of his eloquence and struck terror into the hearts of the tyrants. Caesaer then lived and

At this juncture the judge who for some time had been sitting uneasily called out and said:— Col. Josiah Stringer your time is up;
when and whereupon the Col. turning to the court said:— I am not half through. The judge remarked again—Your time is up. Col. Josiah Singer sat down and after having run his fingers through his long black hair he mopped his face.

His collar was wilted by perspiration from his physical eloquence and he took a pose of supreme satisfaction while the judge charged the jury. They retired and after time to write the verdict they came into court with a verdict of guilty. At once the Judge told Sam Hill to stand up. Col. Josiah Singer stood up also and addressing the court said he hoped the court would be light on the defendant; that he had been convicted of stealing two pullets and an ancient rooster and besides, said Col. Josiah Singer, he is a poor man. He paid me one hundred dollars in cash for defending him as this was all he had. I would have charged him more if he had it. You know your Honor under my oath of office I cannot refuse a case of the poor for any consideration personal to myself.

The judge promptly sentenced Sam to twelve months in the chain gang. When this fact became a mental concept with Sam he turned to Col. Josiah Singer and blurted out: "God er mighty Kernel you said you would put me on de ground." Col. Josiah became heated his face blushed and he replied: You rascal you do not appreciate what I have done for you. I have by my professional ability put you on the ground; you have the privilege of digging and shoveling dirt on the roads for the next twelve months. If it had not been for me you would have been hanged.

One embryo pettifogger congratulated Col. Josiah Singer on his speech as being wonderful. Col. Josiah Singer said himself that it was a great speech but he did not see how in the world that jury ever ran over it and found the defendant guilty. He seemed mortified at the disrespect shown him in not taking longer time to consider the verdict.

It may be urged that such a trial is exceptional and that such an exhibition does not often happen. This is conceded but there are parts of it that appear in many cases. Note the cross-examination which was in disregard of all rules and without any object or purpose; its only effect was to make sure the case of the prosecution. He ignored the evidence; he vituperated the witness without any reason; his assurance and self-exploitation availed nothing; the chances are that he will stay in his rut and learn nothing from experience. The lawyer must be practical; he must practise law inside of the law and its rules. If Col. Josiah had been practical he would have filed a plea of guilty for his client and bade him good bye for the chain gang.

M. Boucher, a French writer, wrote:—

"A Lawyer ought to present himself with an honest assurance and plead with firmness, but with modesty in his language and demeanor. He should avoid affectation or fetching things too far and should not wander from his subject. It he demands a favorable hearing, let him do it with dignity and not in any rampant tone. He ought neither to exhaust himself too much or humble himself too much, and the less he can manage to talk about himself the better."
The Development of Trial by Jury

By Blanton Fortson

A distinguished bacteriologist when asked for a brief account of the first appearance of harmful germs in the human system, remarked simply: "Adam had 'em."

Unfortunately the origin of the jury cannot so briefly be told. Nor, popular opinion to the contrary notwithstanding, is this mode of trial of great antiquity. It is true that all of the civilized races of the earth have at certain stages of their development evolved a method of deciding controversies somewhat related to it. I refer to those ancient tribunals which were composed of all the free men of a community—or certain selected freemen—such as the body that tried and condemned Socrates, or the old popular courts of the Teutons and Scandanavians. But they were not juries, they were courts.

"If we are seeking for a court," say Pollock and Maitland in their work on Early English Law, "In which at the bidding of its president, or some national or royal officer, earldorman or reeve, the inhabitants of a district, or some group . . ., deemed the dooms, shall pronounce judgment, we shall have no difficulty in discovering the origin of trial by jury. Everywhere we might find such courts, for during the earlier middle ages it is the exception rather than the rule that the judgment be made by the lord or president of the court, or by a group of professional justices. But what the jurors or recognitors of our Twelfth Century deliver is no judgment; they come to recognize, to disclose the truth; their duty is not iudicin facere, but recognoscere veritam." And they reach the conclusion, now generally accepted by antiquaries, that the system was derived from the Norman inquest.

It must be borne in mind that the jury as established in England and as still maintained there and in the British commonwealths, is not a court, but simply an adjunct of a court. It is a group of laymen unskilled in the law and sworn to declare, not what is just, not what is equitable, but simply what is the truth—the true facts in the case. They have nothing to do with the effect of their findings. They are not concerned with the judgment to be pronounced. They are merely the means whereby the judges are furnished the facts upon which to predicate the judgments.

I emphasize this simple historic province of the jury because many Americans assume that the numerous functions now performed by juries in this country (such, for example, as determining punishment in felony cases and rendering general verdicts in intricate equity causes) have either always been exercised by juries or constitute merely the restoration of pristine prerogatives. Confusion may be avoided by keeping in mind that the American tendency to make of the jury something in the nature of the primitive community tribunal is entirely unwarranted by English precedent.

When trial by jury was established in England it was under Norman rule, the old "popular" courts had long been discarded and
the prevailing mode of trial was by compurgation, ordeal, combat and decree of the king’s justiciars.

The conquerors had brought with them to England an institution known as the inquest or recognition which was employed first by William in compiling *Doomsday Book*. Its procedure was to call together the leading men of a community who knew the facts and have them to answer under oath such questions as might be asked them concerning the ownership or value of lands for taxes, or other matters in which the ruler had an interest. It had long been used by the Frankish kings in Gaul to settle controversies over royal properties, and was in vogue when Normandy was first invaded. When we first find record of it in France it seems to have been conducted in an informal way between the king’s representatives and the people of the community. Later, only the most prominent and upright men of the district were summoned. They were witnesses as well as jurors and no man who professed ignorance of the matter was allowed to serve. The number, naturally, was of wide variation. There are records of 66, 53, 41, 20, 17, 7, etc., having been employed. Presumably all the “good men” who knew the facts were used.

Historians are not agreed as to the origin of the inquest nor from whom the Franks acquired it. Some maintain that it was brought from Asia by returning crusaders; others that it came to France from Germany where it had been borrowed by the Angles and Saxons from their Slavonic neighbors in Northern Europe; still others declare it was of Scandinavian origin. Stubbs in his *Constitutional History of England*, says, “it may have been adopted (by the Franks) from the fiscal regulations of the Theodosian Code and thus own some distant relationship with Roman jurisprudence.”

At any rate we can say with historic certitude that it was used by the Frankish kings in the ninth century. “We see it,” say Pollock and Maitland, “in the Neustria which the Normans are invading. Then the darkness settles down. When it lifts we see in the new states that have formed themselves no central power capable of wielding the old prerogatives. For a long time to come the sworn inquest of neighbors will not be an utterly unknown thing in France, it will only be overwhelmed by the spread of the *romano-canonical* procedure; even in Germany it will appear from time to time; yet on the whole we may say that but for the conquest of England it would have perished and long ago become a matter for the antiquary.”

The prevailing opinion is that it was unknown to Anglo-Saxon England although there is a law of Ethelred the Unready, of about the year 997, which cannot be entirely rejected as evidence of its use in Danish England before the Conqueror arrived. It must be remembered however, that this law refers to the accusing jury, not to the trial jury. It provides that a *moot* must be held in every *Wapentake*, and the twelve eldest thanes are to go out with the reeve and to swear upon the relic which he puts into their hands that they will accuse no innocent and conceal no guilty man. It is argued by some scholars that a form of accusing inquest which was used by Frankish churchmen to collect charges of sin as their royal contemporaries used it to collect charges of crime, may have been borrowed by
English churchmen, and the plan in turn again appropriated, in England, by the temporal power. But of this no direct evidence has been found. Certainly it cannot be said that the Danes or other Scandanavian peoples did not themselves evolve a system very similar to the inquest, although on this too the evidence is lacking, due largely to the comparatively modern date of their books. But however that may be, and whether or not the Danes brought such a system to England there is no indication that the inquest was used anywhere in England as a mode of trial, nor indeed that it was used as an accusing jury outside of Danish territory, or, in short, that it became an English institution until William the Conqueror brought it with him as his ducal prerogative. It has been suggested that the readiness with which the English fell into its use in the compiling of Doomsday Book is an evidence of their familiarity with it. And there are certain Scandanavian scholars who still maintain that jury trials were had in England long before the Conqueror arrived. Most Englishmen, however, are agreed that what was used in early England was the community court in which the doomsmen not only determined guilt but pronounced the judgment.

Aside from employing the inquest in fiscal matters, the indications are that very little use was made of it during the first century of Norman rule. There has been preserved, however, a record of a trial in which the Conquerer directed his justiciars to summon the moots of several shires to one place there to hear a plea between the Abbot of Ely and divers other persons, and certain men of the neighborhood were required to declare upon oath what lands were held by the church of Ely on the day of the Confessor's death. But such instances were few and in each case the parties were merely permitted (for a substantial fee to the crown) to exercise this royal privilege. It was not until well into the reign of Henry II towards the end of the twelfth century that litigants were given the right to demand a trial by inquest, and then only in actions for land.

And these ordinances of the second Henry, usually referred to as the Assizes of Clarendon, undoubtedly mark the beginning of the English jury system. First there was granted in 1166, the action known as the assize of novel disseisin, over which Bracton tells us were spent many wakeful nights. It provided that if any person be dispossessed of his free tenement unjustly and without judgment he is to have the right to demand a trial by inquest. At about this time there was also instituted the Grand Assize and the petty assizes. These assizes were merely the prescribing of definite rules of procedure for empanelling inquests, or (as they were later called) juries. As we have seen, in the early days the number of recognitors—or jurors—was not certain. Now it was rather definitely fixed at twelve, although for several centuries afterwards we know that variations from this number were permitted.

The manner of assembling the Grand Assize is thus described in an early report: “Four knights were called who came to the bar girt with swords and were charged to choose twelve knights girt with swords from themselves and others,” and these armed knights thus selected from among those who were assumed to know the facts, were sworn to answer truly the questions propounded to them. If the
twelve could not agree this fact was made known to the court and new knights were added until there were secured twelve who could agree. In the petty assizes twelve jurors were selected by the sheriff, who were not required to be knights. In certain of the important actions the right was given litigants to be tried by the Grand Assize, in others the petty assizes were used.

At this time the knowledge upon which jurors acted was their own, and long after the practice was established in later years of permitting witnesses to testify before the jury they had the right to disregard such testimony entirely and rely upon their own knowledge of the facts. But modern investigators also believe that even from the first the recognitors were not restricted to their own personal knowledge. It was not necessary that they be eye-witnesses; when they were summoned they were told of the nature of the controversy and were expected to fully inform themselves concerning it.

As the number of jurors were at first not invariably fixed at twelve, so too was the rule requiring unanimity unknown. Brunner says that only in the second half of the fourteenth century did this principle become established. (And even today in England the parties may and frequently do agree to a majority verdict in civil cases.) But after the rule became fixed the judges used the harshest measures to bring about an agreement. In 1334 it is recorded that "because one jury man had delayed his companions a day and a night without agreeing with them, and this without reason, it was awarded that he stay in the Fleet."

Jurors were not allowed food or drink, water excepted, nor heat while they deliberated. And if they continued deadlocked to the end of the term of court, they were carted, in the wake of the judges, to the edge of the county and there dumped into a ditch.

Why the number twelve was hit upon is thus explained by a writer in 1665:

"This number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, and Solomon's officers were twelve. Therefore not only matters of fact were tried by twelve, but of ancient times twelve judges were to try matters in law in the Exchequer Chamber, and there were twelve counsellors of state for matters of state; and he that wageth his law must have eleven others with him who believe he says true. And the law is so precise in the number of twelve that if the trial be by more or less, it is a mistrial."

From the beginning with novel disseisin the number of causes that the parties were permitted to try by inquest rapidly increased until before the end of the next century we find (in the three years 1256, 1269 and 1279) that out of a list of 103 civil cases all but two were disposed of by this method, and when the ordeal was abolished in 1219, the inquest was used in criminal cases.

When, however, we recall the modes of trial the inquest supplanted, it is easy to believe the remark of Bracton that the decision to grant it occasioned many wakeful nights, and (it may be added) sleepless knights. Probably a typical indication of how the new mode of trial was received is given by a writer of the 13th century who complains in the Mirror that it is an abuse that one should not be
allowed to try his case by battle or ordeal but must submit to what a set of strangers might say, mere witnesses selected by a public officer. It will be recalled that at that time the belief was almost universal that justice was divine, and that the ordeal and battle were but human agencies through which the will of God might be made manifest.

Of course no criminal caught red-handed was given a trial of any sort. When a felony was committed the law required that there be raised at once the *hue and cry*. If one chanced upon a dead body, for instance, and failed to raise the hue, besides putting himself under the gravest suspicion he was liable to be amerced. The proper thing for him to do was to cry "Out, out," whereupon all within hearing were required to turn out with their bows, arrows and knives, and with much clamor and blowing of horns the hue was carried from vill to vill. If the culprit was taken and had still about him signs of the crime he was given short shrift. If he resisted he was slain. If he submitted to capture his doom was already sealed. He was immediately taken to court and without being permitted to say a word for himself was promptly beheaded or thrown over a cliff, the person aggrieved most probably acting as executioner. Nor were such summary methods confined to crimes of violence or theft. If a litigant in a civil suit produced a forged writ he was as promptly hanged unless he could name a warrantor.

But it was one thing to dispatch a culprit known to be guilty or shown to be so by unmistakable signs from Heaven, while quite another to dispose of him merely upon the verdict of human beings. And the judges found much difficulty, after the abolition of the ordeal, in adjusting the new mode of trial to criminal cases. In the *Leges Henrici* the author flatly declares, "No one is to be convicted of a capital crime by testimony." In 1219 when the first eyre of Henry III was in progress instructions were sent to the judges from the Kings Council to the effect that persons charged with the gravest crimes were to be kept in prison for safe custody, but the imprisonment must not endanger life or health. If the crimes were less serious and the accused under the old law would have gone to the ordeal they might be allowed to abjure the realm. If the crimes were light they might give pledges to keep the peace. Nothing is said about compelling any of them to submit to a trial by inquest. Something was required to meet the situation and the judges finally hit upon this way out of the difficulty: while they believed that no man should be tried by jury without his consent they had no scruples in forcing that consent, and the felons were subjected to the severest hardships. They were "ironed," they were forced to lie on the ground in the foulest spots in the prison and allowed only a little bread one day and a little water the next. And soon the horrible practice of *peine forte et dure* was developed, which consisted in placing upon a prisoner more iron than he could bear.

Thus was consent obtained and trial by jury incorporated into the body of English criminal law.

The change from the old inquest of recognitors in full possession of the facts to a jury without knowledge of the matter was very
gradual; at first only witnesses to deeds were allowed to appear to attest the authenticity of these documents, but with the increased use of the system, witnesses were relied upon more and more. In the reign of Henry IV we find the judges declaring that the jurors after they have been sworn must not be permitted to see or take with them into the jury room any evidence other than that offered in the court, although the personal knowledge of the jury was not then considered as outside of the evidence, and stress was still laid upon securing jurors only from the neighborhood. At length, however, we find the judges ruling that if a man has any knowledge of the cause, especially if he has formed a decided opinion, he cannot qualify as a juror.

Space will not permit any lengthy discussion of the grand jury. It has already been remarked that in the time of Ethelred the Unready in that part of England which had been conquered by the Danes, such a system was used. But there is no record of its having been used elsewhere in England prior to 1166 when Henry the second issued his famous assizes of Clarendon. It is therefore not too much to say that the Grand Assize, which was employed as an accusing jury as well as a trial jury, was the beginning of the grand jury system in England.

In course of time it came to be recognized that the accusing jury should not serve as a trial jury, and the two were made separate and distinct, and from the more or less perfunctory agency of helping men to the gallows in the early days we find that trial jurors during the 14th century had developed such leniency that many of the judges felt constrained to use coercive means to induce them to convict. But that phase too, passed, and it was recognized that jurors should not be coerced in any way.

I cannot, for want of space, detail the further development in England of this system which has been so woven into the web and woof of the English constitution as to be not the least of its distinguishing characteristics. Suffice it to say that except for having been made liable to punishment for making unwarranted verdicts and later having such liability removed, the modern jury there is almost identical with those last described. In civil causes only such questions of disputed fact are submitted to the jury as the judge certifies to be material. Many causes are disposed of without the aid of juries.

Nor will space permit more than a brief reference to some of the pronounced American modifications of the system, which were largely wrought during the past hundred years.

Many of the States have declared by statute that in criminal trials the jury are the judges of both the law and the facts, although jurors are not allowed to carry law books with them into the jury room; and in some of the States jurors are required to fix the punishment of felons whose criminal record they are not permitted to learn. Judges have been forbidden in most of the States to express or intimate any opinion as to the weight of the evidence or the credibility of witnesses. The practice of rendering general verdicts in civil causes of every nature, which enables the jury to apply their own
construction of the law of the case, prevails in practically all of the State courts in the Union.

It is difficult to say whether or not this trend in America towards vesting in the jury the powers and duties of the old tribal courts has reached its limit. Chief Justice Taft and many other distinguished jurists advocate confining the province of the jury to its original function of finding the facts. This view, added to a growing feeling that all is not well with the machinery of administering justice in America, coupled with the frequent comparisons (to our disadvantage) of courts in this country with those of England, may bring about a reaction. But that of course concerns the future, which is beyond the scope of this article.
Appellate Court Briefs and Arguments

JOHN M. GRAHAM

Address Delivered before the Georgia Bar Association, 1927.

There has been great change in the method of presenting cases to appellate courts since the organization of the Supreme Court of this State. No time limit of argument was fixed by the original rules of that court; reading of authorities to the court, which now is discouraged, was formerly required; and it was provided that "no cause shall be urged by brief alone." In a decision rendered in 1852 (Thornton v. Lane, 11 Ga. 489) Judge Lumpkin said: "We have listened patiently at least, if not with unmixed pleasure, to eight elaborate arguments, occupying more than as many days." He added that these arguments (which were by the most eminent lawyers in the State) were "on questions some of which have never been disputed, and most of them heretofore solemnly adjudicated in this court." After a case in the United States Supreme Court had been argued for eight days, Judge Story wrote that probably it would occupy five more; one lawyer spoke three days. We are told that Chief Justice Marshall "encouraged extended arguments, often demanded them." (Beveridge's Marshall, vol. 4, p. 96.) What was said by Judge Lumpkin in the fifty-page opinion mentioned, as to long arguments, may in part explain why he said, in a year in which only 138 cases were decided by his court, that there was imposed on that court "an amount of labor . . . . without a parallel in any other appellate tribunal in the world."

Eventually brevity in argument became necessary, to enable the court to decide all the cases in the time prescribed by the constitution; and the entire time for argument on one side was limited, first to two hours, and later to one hour. A half hour is the limit in the Court of Appeals in civil cases involving not more than $1000 and misdemeanor cases. In some States a half-hour rule applies to all cases; but (as in this State) more time may be granted on request made before argument.

In a large proportion of the cases in the appellate courts of this State there is no oral argument. Lawyers often remark that it is not worth while to make such an argument; that the briefs suffice; but a fact that they may overlook is that an oral argument reaches judges who without it would know nothing of the case except from the statement of the judge who writes the decision; for it is not practicable for all the judges to read the record and the briefs in all the cases in which they join in the decision. The value of an oral argument depends much on the time that passes before the judges consider the case, but even when there has been long delay before consideration, a judge is likely to recall at least the impression made on his mind at the time of argument; and if that impression does not accord with the view of the judge who has prepared an opinion for the court, it may cause further consideration of the case. In many cases a conclusion as to how the case should be decided is reached by judges at the time of the oral argument. If counsel on one side
argues the case orally, it is to the interest of his adversary to have an opportunity to reply and to make corrections. A great jurist (Judge Dillon) said: "As a means of enabling the court to understand the exact case, . . . there is no substitute for oral argument."

But an oral argument is of little or no value if it is not clear or does not leave a distinct impression on the minds of the judges. If a lawyer thinks it worth while to go to the appellate court for argument, he should consider it worth while to give careful thought to what he shall say. Men often travel a long distance and waste time and expense to make an argument from which the hearer learns little of the case, or of which, to repeat a common remark, it is impossible to make head or tail. Many waste time in details which the judges, with minds crowded with other cases, can not be expected to remember, or in discussing the weight or credibility of testimony which, when the jury and the trial judge have accepted it as true, the appellate court must treat as true.

Much that may properly be included in a written argument should be omitted from oral argument. Reading at length to the court from the record or from anything else is discouraged. "The true function" of oral argument, said the head of a court which had adopted the half-hour limit, is that of "briefly introducing the case to the court and affording the judges who are to decide it an opportunity to make inquiry of counsel, and the latter to enlighten the court, on points that may suggest themselves in course of presentation." Most cases, however, can be thoroughly argued in the time allowed by the rules in this State.

There is no rule in this State as to what a brief shall contain. Formerly a rule of the Supreme Court required that briefs "be confined to a statement of the points insisted upon, and a citation of authorities;" and it was added that "if counsel desire to furnish a written summary or narrative of the facts, or to make a written argument, this must be done in a separate document, and not by expanding or overloading the brief." A good practice is to include these features under one cover, beginning with the short brief, and following it with a development of the case and presenting the argument in the order in which the points are stated in the preliminary brief. Points omitted will not be considered.

The rule of the United States Supreme Court as to briefs is long and need not be stated here; its first requirement is that the brief shall contain "a concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised." A simple and helpful requirement is that the brief shall refer to pages of the record. An index in front is useful when a brief is long. Grounds of a motion for a new trial are often dealt with in a decision in the order in which they appear in the motion; and this method is used in most briefs. This is convenient, but is not always the best method. Grounds which can be discussed together may be grouped in the brief. Short headings indicating the matter of the grounds, or of other points discussed, are helpful. Good examples of briefs are to be found in the United States Supreme Court Reports and in the earliest reports of our State Supreme Court.
In this State the reporter now is not allowed to give more of the briefs than their points and citations.

Often from one page to three or four pages suffice for brief and argument; and where no greater space is used the method of arrangement is not important. If the record is short, nothing is gained by repeating much of it in the brief. If there is much amendment of pleadings, the court may be aided by showing briefly the effect of the amendments. The brief may aid the court in elimination. The elimination should extend to trivial and hopeless exceptions.

Cases differ so widely that there is no system suited to all briefs. They may well vary in arrangement, just as judicial opinions do. System is useful only as a means to an end. When you have in hand the material for your brief, the first question to consider is, how can you most quickly and clearly put your case into the minds of the judges.

I offer a few short practical suggestions in the form of a dozen points or paragraphs:

Brevity is the first rule of briefing; clearness the cardinal virtue of a brief.

Begin by mentally putting yourself in the place of the judge; try to find the shortest road to the mind uninformed as to your case.

A judge wishes to know first the question he is to decide. Give it; show how it arose.

Give as briefly as possible the facts the judge needs to know. Do not require him to charge his mind with useless things to get at your case. If there is no good reason for giving names, places, dates, figures, or other details, omit them.

Ficts usually should be stated in order of time, or grouped to support points. Often they may be stated in such a way as in effect to argue the case.

Come promptly to the strongest points, just as you would in trying to sell to a busy man. Attention to an oral argument usually is best at the beginning; weak points may weaken it. Don't waste time on "pointees."

Citations not in point are worse than useless; they cause waste of the court's time, and may cause distrust of your judgment or of your fairness. Examine each case cited.

Long quotations are to be avoided; short ones are often a good way of both stating a point and supporting it.

Assume that the judges know the A-B-Cs of the law, and that argument is not needed to convince them on well-settled points.

Avoid jury arguments to a court that can not consider them.

Personalities forbidden by the rules get you nowhere but in contempt of court.

"Honesty is the best policy;" it is a great mistake to lose the confidence of the court by unfairness or misleading statements. Don't go outside the record.

Important is the statement of a former Justice of the Supreme
Court of the United States, Judge Clarke, in addressing the New York Bar Association, that "there can be no doubt whatever that many a meritorious case has been lost in an over expanded statement of evidence or in the wilderness of inappropriate citations in which it has been submerged beyond the hope of resurrection in a treatise styled a brief." If briefs were responsible for wrong decisions by the great court of which Judge Clarke was a member, what are we to expect from courts in general when similar briefs are presented to them? And how important it is to know what to omit from a brief.

Frequently, in the Supreme Court of the United States, judges interrupt argument by saying, "State your question." A rule of the Supreme Court of Pennsylvania, that briefs shall begin with a statement of the questions involved, says, that the rule "is designed to enable the court to obtain an immediate view of the controversy. It must state the question or questions in the briefest and most general terms, without names, dates, amounts, or particulars of any kind whatsoever. It should not ordinarily exceed fifteen lines, and must not under any circumstances exceed a page." Nothing else is allowed on that page. "For any violation of this rule . . . the appeal (will be) non-prossed. This rule is to be regarded as in the highest degree mandatory and admitting of no exception." The penalty stated, the court has said, may be inflicted "even in murder cases."

This rule and a half-hour limit for argument on each side "materially aided one of our busiest appellate tribunals in bringing its work up to date," said Chief Justice von Moschzisker. He added: "When the rule is efficiently followed, as it is in the great majority of cases, the court can, at a glance, perceive, at least in a general way, the points for determination, and, with this accomplished, the judicial mind can better concentrate on the argument." "Often appellant's statement is so satisfactory that the court, in writing its opinion, takes up the questions involved just as they are stated and follows that order throughout." (34 Yale Law Journal, 287.) Incidentally it may be said that sometimes briefs have been adopted by judges as opinions. Sometimes a judge's way of making a case clear in an opinion is a good model for a brief.

Much space in briefs can be saved by omitting what may be implied. For example, your case would not be on the docket if certain preliminary steps had not been taken; why detail them at length? If a brief insists on a ground of a motion for a new trial, the court need not be told first that such a motion was filed, "and duly came on to be heard," that "the court, after hearing the same, passed an order overruling said motion," and that "movant thereupon filed in due time his bill of exceptions to this court, assigning error on said judgment," etc. You can leave some things to the record.

Verbosity tempts to skimming. Nothing is gained by using long and stilted forms of expression instead of the simple language of ordinary speech and of the best writers. Why, for instance, should the ten words, "prior to the time of the filing of the action," be preferred to the two words, "before suit"?

It is not my purpose to depart so far from more practical matters as to dwell upon niceties of expression. Though, as was said by
Judge Bleckley, “in school the composition would not pass, . . . it may be tolerated in the court-house.” That great lawyer, Sir Frederick Pollock, chief editor of the English law reports, however, in an address to the American Bar Association (1903), thought it worth while to condemn, as a “pest of the law reports,” so small a thing as what he termed “the slovenly misuse of ‘such’ as a demonstrative,” a use peculiar to lawyers.

Reading is not made easier by saids, sames, and certain other legal-document words. Writers of law-books and of judicial opinions make their meaning clear without a superfluity of such expressions, and the framers of the Federal constitution avoided them.

Form, of course, is secondary to substance, but it is important so far as it is an aid to substance; and great judges have taken great pains to be not only correct, but clear and concise, in their opinions. Judge Bleckley, who could be luminous, said: “I reconsider, revise, scrutinize, revise the scrutiny, and scrutinize the revision.”

I do not go so far as one writer does who lays down the rule, “Never dictate a brief;” but as to dictated briefs I suggest, as a general rule, revise; or brief the brief.

Don’t annoy the court with excessive noise. Habits formed in addressing juries cling to many lawyers in the appellate courts, and some not only use jury arguments, but shout their cases at the court. It may be that such seeming earnestness accounts for the statement that “it was earnestly contended,” found in judicial opinions, but this statement is made only where the argument failed to convince.

I have dealt only with the manner of presenting a case. Before briefing, of course, there should be thorough knowledge of the facts of the case and careful search and examination of the law and decisions that may be applicable.

After so much has been said about brevity, I must not myself ignore, further than I have already done, the advice given on that subject.
Liens and Assignments of Bankrupt Exemption Property Under Georgia Practice and Decisions

Stephen C. Upson

The right to sell or otherwise dispose of property claimed by a bankrupt as exemption is settled in Georgia by a number of direct rulings on the point. (1)

It is equally as well settled that a note containing a clause that assigned the exemption property to the holder of a note and directed the trustee to deliver over to the holder a sufficient amount of property or money claimed as exempt to pay the note, although executed prior to the filing of a petition in bankruptcy, had the legal effect of a valid assignment of the bankrupt's exemption after it was set apart to him and being older than an exemption assignment made by him after his adjudication, was entitled to priority of payment over the junior one. (2)

The principle ruled in cases in which it was held that an insolvent debtor in Georgia could prefer one creditor over another by a bona fide transfer of property, under provisions of Code section 3230, as was held in Fletcher case, supra and earlier cases cited therein, was relied upon by practitioners in bankruptcy matters, when the debtor desired to favor a local bank or other creditor to whom he would assign his exemption usually while in contemplation of filing or shortly after he filed his bankruptcy petition or an involuntary petition was filed against him.

The effect of the holding that notes containing a clause of assignment of the exemption given by a person when he was not contemplating bankruptcy, would operate as a valid assignment of exemption should the maker by thereafter adjudged a bankrupt, giving to the oldest dated note containing such an assignment clause priority of payment because senior in point of date, according to the equitable maxim qui prior in tempore potior est jure, was to give to the holder of such an assignment clause a preference that the debtor would not have given had he "contemplated bankruptcy" when he signed the note.

Two efforts to give preferences to creditors by the creation of a mortgage lien in one case and by a deed of conveyance in the other, were held to be fruitless since both transfers were junior in date to the notes containing assignment clauses held by contesting creditors. (3)

If the debtor desires to prefer a creditor under Code section 3230, probably he might be able to do so notwithstanding the fact

1 Felker vs. Crane 70 Ga. 484, Strickland vs. Fletcher 152 Ga. 445.
3 Comer Bank Case, supra and Bank of Donaldsonville case, 159 Ga. 846.
that he may have given notes containing an assignment clause, if the principle ruled in Coker vs. Utter, 152 Ga. 158 and McBride vs. Gibbs, 148 Ga. 380, should be applied to a transfer given in contemplation of bankruptcy but recorded as a mortgage lien securing a waiver note prior to the filing of the bankruptcy petition.

In the Coker case it was held that judgments and other liens given by an insolvent within four months of the filing of a bankruptcy petition were not avoided thereby if the lien was on exemption property since the trustee did not take title to it.

In the McBride case, it was held that liens on property existing prior to bankruptcy followed the property into the court of bankruptcy and would attach to such part of the proceeds as were set apart therein as a bankrupt's exemption.

Seemingly it would follow that if a debtor owned a small farm, having a market value of sixteen hundred dollars, and desired to favor a local bank or other creditor by a transfer of his exemption after his adjudication as a bankrupt, that he might prior to the filing of his bankruptcy petition, give to such a creditor a mortgage to secure a waiver note, creating a lien on the property, which the creditor would have recorded in county clerk's office prior to the filing of the bankrupt's petition.

After his adjudication, the bankrupt would list in his schedule the farm, as his exemption, and under the McBride case, supra, the lien would follow the property into the court of bankruptcy and would not be divested by the adjudication.

The holder of the notes containing an assignment of the exemption could only subject the right and title that the bankrupt would have in the property at the date of the filing of the petition in bankruptcy, which on that date was subject to the mortgage lien. Apparently the contest would not be one of priority of date of the contesting instruments but priority of vested rights.

The mortgage creditors lien vested in him before bankruptcy while the holder of the assignment of exemption, held a contingent right that only became a vested right when the maker of the note was adjudged a bankrupt and as such claimed the property as his exemption, but in so claiming it, did he not do so subject to existing valid liens against it and would it not be set apart to him cum onere and if so, the recorded mortgage lien would have a valid preference. The trustee would not be affected by the mortgage lien under ruling in Coker case, supra, as it affects only exemption property.
Marshall and Taney: A Parallel

(BY A. W. COZART OF THE COLUMBUS, GEORGIA, BAR)

The correct official title of the judge who presides over the Supreme Court of the United States is Chief Justice of the United States and not Chief Justice of the Supreme Court of the United States.

The most famous Chief Justices of that Court were John Marshall and Roger Brooke Taney.

They were both blessed by distinguished ancestry for generations back. Both of them were well educated. Marshall received instruction under private tutors and some lectures in natural philosophy at William and Mary, and a short course of law lectures under Chancellor Wythe at the same College. Taney was graduated from Dickinson College in Pennsylvania, and studied law in the office of Judge J. T. Chase.

Both loved the law and politics, and they were successful at the bar and in politics from the first. Marshall had one hundred and fourteen cases before the Appellate Court of Virginia and won fifty of them. Taney had a large and varied practice in the State and Federal courts and he was the best equipped lawyer who ever became Chief Justice of the United States. Marshall was a member of Virginia's General Assembly and Taney was a member of Maryland's Legislature and was the Attorney-General of his State.

Both were members of Presidents Cabinets and the Presidents were grateful and wise in making the appointments.

John Adams appointed Marshall Secretary of State in his Cabinet and Andrew Jackson appointed Taney Attorney-General, then Secretary of the Treasury, then Associate Justice of the Supreme Court and then Chief Justice. His appointments to the Secretaryship of the Treasury and Associate-Juicesthips were not confirmed by the Senate.

Clay and Webster opposed these appointments in the Senate but they soon recognized their error in so far as the opposition related to the Chief Justiceship and Clay graciously apologized to Taney.

When Marshall was Secretary of State, he was accused of being the "tool" of Adams because he had signed the commissions of the "mid-night" judges. When Taney was Secretary of the Treasury he was charged with being the "pliant instrument" of Jackson because he signed the order preventing further deposits from being made in the National Bank.

They were both happily married. Marshall lived with his wife for more than fifty years and Taney lived with his wife for more than forty-seven years.

Marshall was neither religious nor irreligious. He was non-religious. He was a member of the Episcopal Church. Taney was a devout Roman Catholic.

Marshall was convivial. Taney was abstemious.

Marshall's style was clear and his reasoning was cogent, but he was redundant and prolix. In four of his very greatest opinions he
cited not a single authority. Taney's style was as lucid as it was precise and as convincing as it was perspicuous.

Marshall died in his eightieth year after having been Chief Justice for thirty-four years. Taney died in his eighty-eighth year after having been Chief Justice for twenty-eight years and after having administered the oath of office to seven Presidents of the United States.

FAMOUS OPINIONS.

(a) The greatest condemnation visited upon Marshall as well as upon Taney was the result of certain obiter dicta contained in two of their most famous opinions.

In the opinion by Marshall in the case of Marbury v. Madison, 1 Cranch 137 (1803), he went out of the record entirely to hold that An Act of Congress repugnant to the Constitution is void. Other State Supreme Courts had previously held that laws passed by legislatures in violation of the constitution of their States were void, but Marshall did not cite any of these cases. It might have been more prudent, if not wiser, for Marshall to have decided the case simply upon the jurisdictional question, and, in that event, he would not have incurred the displeasure and censure of Jefferson and Jefferson's Party.

Taney's great blunder was in not disposing of the Dred Scott case upon the jurisdictional question and in not refraining from setting out in his opinion certain obiter dicta on the slavery question, which obiter dicta brought about unexpected and most horrible political consequences. The decision did much to cause the War between the States. Taney's judgment was not as sound touching this matter as his motives were pure.

(b) Marshall's opinion in the Dartmouth College case is his most famous opinion. This case has been called, "An Amendment to the Constitution," but it has been limited for the better by the "police-power" cases and it has been modified and limited for the best by Taney's very great and his first opinion in a constitutional question in the Charles River Bridge case, 11 Peters 420 (1837), though Taney, in his opinion, did not even mention the Dartmouth College case. Daniel Webster lost his first case before that Court involving a constitution question, when he lost the Charles River Bridge case. Taney ruled in this case that public grants should be construed strictly and that nothing passed by implication.

In this connection it should be observed that the Dartmouth College case has been cited more times than any other case that has ever been decided by any American court. In the book entitled "Webster Centennial at Dartmouth College," page 285, it is said that this case has been cited in the American Reports 970 times. This book was published several years ago and this case has been cited since that time many times more.

(c) In 1842, Marshall, in what, I consider, his greatest opinion, in the case of Gibbons v. Ogden, 9 Wheaton 1, held that Congress has the power to regulate interstate commerce, and the judgment of the New York Court of Errors was reversed. The opinion in the case when decided by the New York court was written by Kent and Kent's
opinion upheld the law of the State of New York which conflicted with the United States Constitution. The decision by the Supreme Court of the United States put interstate commerce on a sound basis and liberated the 200 navigable rivers of the United States.

Taney, in 1851, in the case of "The Genesee Chief," in a masterly opinion, held that the United States Courts had exclusive admiralty jurisdiction over all inland navigable waters. The opinion in this case compares favorably with the opinion of Marshall in the case of Gibbons v Ogden. It construed the admiralty clause of the Constitution. Marshall's opinion construed the interstate clause.

(d) In McCulloch v Maryland, 4 Wheaton 423, Marshall, rendering the opinion, held that Congress had the implied power to create the Bank of the United States and that Maryland had no power to tax the Bank, as "the power to tax implied the power to destroy." This was the first case to construe the "implied-powers" clause of the Federal Constitution. The arguments made in the case before the Supreme Court were, perhaps, the greatest ever made in any court. Webster, Wirt and Pinkney argued for the Government and Martin, Hopkins and Jones for Maryland.

(e) In Cohens v Virginia, 6 Wheaton 264 (1821), Marshall wrote the opinion in which the jurisdiction of the Supreme Court over a State was established and a revisory appellate power of that Court over the judgments of State courts was established, that is, in cases where a Federal question is involved. This decision had great nationalizing influence and consequences.

In the case of Ableman v. Booth, 21 Howard 506 (1858), Taney wrote the opinion which was so clear and logical and his conclusions so preeminently just and righteous that even his bitterest enemies have most heartily concurred in the opinion. He, himself, most modestly said that the opinion was "satisfactory."

An effort was made by the United States Government to enforce the Fugitive Slave Law and the Supreme Court of Wisconsin pronounced the Act of Congress void, and resisted the administration and enforcement of the law by the Federal authorities. Taney's opinion reversed the judgment of the Wisconsin Supreme Court.

In a letter which the writer received from Hon. Charles Warren of Washington, D.C., dated Dec. 9, 1925, he said: "My private opinion is that Taney's opinion in the Booth case was greater than that in The Genesee Chief case, and that it did quite as much to preserve the Union as anything which appeared in Marshall's opinions."

Warren is the highest authority on the history of the Supreme Court of the United States. He won the $2000.00 Pulitzer Prize for the best work in history a few years ago with his, "The Supreme Court is United States History."

The decision in Ableman v Booth had as great a nationalizing effect as the opinion in Cohens v Virginia.

(f) In the case of Worcester v Georgia, 6 Peters 315, (1832), Marshall rendered an opinion in which he decided against Georgia, and President Andrew Jackson is reported to have said, "Marshall has made the decision, now let him execute it."

Taney rendered a decision in the Merryman case, 1 Campbell
In this case the question involved was whether President Lincoln had illegally suspended the writ of habeas corpus. Taney held that he had illegally suspended the writ and he sent Lincoln a copy of the opinion, but Lincoln utterly ignored the decision and refused to enforce the judgment.

In these two cases both Presidents were wrong and both Chief Justices were right.

THEIR WORK ON THE BENCH COMPARED

While Marshall was presiding over the Supreme Court, 1106 cases were decided and he wrote the opinions in 519 of them. In 62 of those cases constitutional questions were involved and he wrote the opinions in 36 of them.

During Taney's incumbency the Court rendered a far greater number of decisions, but it was Taney's courteous policy to permit the Associate Justices to share the honor with him in the preparation and delivery of the opinions of the Court in important cases.

Marshall believed in a liberal construction of the Constitution and he was very loose, careless, and informal when it came to questions of practice and procedure in the Supreme Court.

Taney was a strict constructionist and he insisted upon the court being conducted in an orderly manner and he did more to establish rules of practice and procedure than any other judge who has been a member of that Court.

PERSONAL APPEARANCE

In personal appearance both were ugly to hideousness. Marshall did not have but one good feature—his brilliant black eyes. Taney did not have but one good feature—his well-shaped forehead.

I shall conclude this parallel by quoting two remarkable pen-portraits and two exquisite tributes paid by them to their wives:

"Marshall, when appointed chief justice, was 45 years old, and William Wirt thus describes him:

"The chief justice of the United States is in his person tall, meagre, emaciated; his muscles are so relaxed as not only to disqualify him apparently for any vigorous exertion of the body, but to destroy everything like harmony in his whole appearance and demeanor, dress, attitude, gesture; sitting, standing or walking, he is as far removed from the idealized graces of Lord Chesterfield as any other gentleman on earth. His head and face are small in proportion to his height; his complexion swarthy; the muscles of his face being relaxed, make him appear to be fifty years of age—not can he be much younger. His countenance has a faithful expression of good humor and hilarity, while his dark eyes, that unerring index, possesses an irradiating spirit, which proclaims the imperial powers of the mind that sits enthroned within."

"John H. B. Lathrobe described Taney, when Taney was attorney general in 1832, thus:

"When Mr. Taney rose to speak, you saw a tall, square-shouldered man, flat breasted in a degree to be remarked upon, with a stoop that made his shoulders even more prominent, a face without one good feature, a mouth unusually large, in which were discolored and irregular teeth, the gums of which were visible when he smiled, dressed always in black, his clothes sitting ill upon him, his hand spare with projecting veins—in a word, a gaunt, ungainly man."

Tributes to Their Wives

On December 25, 1832, Marshall wrote:

"On the 3rd of January, 1873, I was united by the holiest bonds to the
woman I adored. From the moment of our union to that of our separation, I never ceased to thank Heaven for this, its best gift. Not a moment passed in which I did not consider her as a blessing from which the chief happiness of my life was derived. This never-dying sentiment, originating in love, was cherished by long and close observation of as amiable and estimable qualities as ever adorned the female bosom."

Taney wrote his wife, on January 7, 1852:

"I cannot, my dearest wife, suppose the 7th day of January to pass without renewing to you the pledges of love which I made to you on the 7th of January, forty-six years ago, and, although I am sensible that in that long period I have done many things which I ought not to have done, and have left undone many things which I ought to have done, yet in constant affection to you I have never wavered, never being insensible how much I owe you, and now pledge to you again a love as true and sincere as that I offered on the 7th of January, 1806."

Note: Taney married Miss Key, a Protestant, the sister of Francis Scott Key, the author of the "Star Spangled Banner." She died of yellow fever in 1855 at Old Point Comfort. Taney died October 12, 1864.

Marshall married Miss Amber, of Williamsburg. She died December 25, 1831.
"Money reserved as interest at highest lawful rate at time of making loan is usury."

It is a common custom among some financing institutions to loan money and at the time of making the loan to take out the interest. This has been held by our courts to be usury. For instance where a person borrows $100.00 and stipulates in the contract payment of interest at 8 per cent for a period of three months, and the bank reserves at the time of making the loan $2.00 interest and delivers to the borrower $98.00. The object of interest is compensation for the use of money. The borrower does not receive all of the principal stated in his obligation, because of the reservation of enough to pay the interest. The real principal of his obligation is the amount which he actually receives, namely $98.00. When he pays the principal as stated in his obligation, from which the maximum rate of interest was deducted in advance he pays a sum in excess of that which he received and interest on it.

The legal rate of interest in this State is 7% per annum but the parties may stipulate in writing for a higher rate, not to exceed 8% per annum. Our Statute defines usury as 'reserving and taking or contracting to reserve and take either directly or by indirection a
greater sum for the use of money than the lawful interest (1). The Code further declares—It shall not be lawful for any person, company, or corporation to reserve, charge or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than 8% per annum, either directly or indirectly by way of commissions for advances, discount, exchange, or by any contract or contrivance or device whatever! (2) All laws respecting the rate of interest charged for the loan of money by individuals are applicable to banks. (3)

It apparently was held to be the rule in cases of short time loans not to be usurious where interest was taken out in advance, by a number of authorities. Namely: McKenzie v. Flannery, 90 Ga. 591 (5); Union Savings Bank v. Dottenheim, 107 Ga. 606; McCall v. Herring, 116 Ga. 235. But the Supreme Court held in Patton v. Bank of LaFayette, 124 Ga. 695 that these decisions were obiter dictum, and later in the case of Logansville Banking Co. v. Forrester, 143 Ga. 303 the rule was laid down that it was usury. If we follow the words of the statute there can be no legitimate differentiation of short term from long term loans. And in the latter case it had never been doubted that it was usury to reserve in advance interest for loans in the excess of the highest legal rate for a period extending over a year.

The outside authorities are almost unanimous however, that in short term loans it is not usurious to reserve the interest in advance. This rule of decision is followed by the United States courts in the case of Evans v. National Bank of Savannah, 250 U. S. 111.

**Proximate Cause---Intervention of Criminal Cause**

Can plaintiff recover damages for injury resulting from negligence of dependent, when an independent criminal act intervenes between such negligence and the damage to the plaintiff?

In order to recover, the negligence complained of must have been the Proximate Cause of the injury. 1

"Proximate cause is that which in a natural and continuous sequence unbroken by any new cause produces an event and without which the event would not have occurred."2

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1 Code Georgia, 3427
2 Code Georgia, 3436
3 Civil Code Georgia 1910, 2836

1 Perry v. Central Railway. 66 Ga. 176
2 Western, etc. Ry. Co. vs. Bailey, 105 Ga. 100
3 Perry v. Central Railway. 66 Ga. 176
4 Macon vs. Dykes, 103 Ga. 847
5 31 S. E. 448
The injury must be the natural and probable consequence of
the negligence, such a consequence as under the surrounding circumstances of
the case might and ought to have been foreseen by the wrong doer as likely
to flow from the act.\textsuperscript{3}

However, if a criminal cause intervenes between the negligence
and the damage, such negligence is held not to be the proximate
cause of the damage.

The evidence showed that Andrews & Company rented a store-
house from Kinsel who also owned the adjoining storehouse. In
making repairs Kinsel's servants partly removed partition between
the warehouses in making repairs, and when quitting work at night
negligently left open windows in rear of empty warehouse. Where-
upon a burglar entered these windows passed into plaintiff's ware-
house through the partition and removed a quantity of the plaintiff's
goods. Andrews then sued Kinsel for $500.00 damages and the latter
demurred. This demurrer was overruled but the Supreme Court
held on appeal:

"In a suit for damages, where it appears on the fact of the plaintiff's
petition that there intervened between the alleged negligence of the dependent
and the damage sustained by the plaintiff, the independent criminal act of a
third person, which was the direct and proximate cause of the damage, the
petition should be dismissed on general demurrer."\textsuperscript{4}

Where the Court said:

"...if it appears that there intervened between the alleged negli-
gence of the dependent and the damage sustained by the plaintiff the independ-
ent criminal act of a third person which was the direct and proximate cause
of the damage, the plaintiff cannot recover."\textsuperscript{5}

In this case the plaintiff's husband, a fireman, was killed when
a switch, negligently left unlocked by the railroad, was turned by a
trespasser on the right of way. Under the above rule she was not
allowed to recover.

This doctrine has also been followed in other cases, towit:

Where the plaintiff was assaulted and knocked against an elevator door
which the company had negligently allowed to become insecure so that he
fell into the shaft and was hurt, he could not recover.\textsuperscript{6}

Where the lessee of a Stae Convict negligently allowed him to escape so
that he committed rape, the injured party could not recover from the lessee.

Where a barkeeper unlawfully sold liquor to a person who thereafter quar-
reled with and killed plaintiff's husband, she could not recover from barkeeper.\textsuperscript{7}

\textsuperscript{3}Southern Ry. Co. vs. Webb. 116 Ga. 156
42 S. E. 395
\textsuperscript{4}Andrews & Company vs. Kinsel. 114 Ga. 390
40 S. E. 300
73 S. E. 677
\textsuperscript{6}Harper v. Fulton Bag & Cotton Mills 21 Ga. App. 322
49 S. E. 286
\textsuperscript{7}Henderson vs. Dade Coal Co. et al 100 Ga. 568
28 S. E. 251
\textsuperscript{8}Belding v. Johnson 86 Ga. 177
12 S. E. 304
NOTES

Taxation of Shares of Stock

Judge Cooly in his work on taxation says; "A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation when no contract relation forbid." The shares owned by the stockholders are the individual property of the stockholders, and are liabilities of the corporation and not assets.

The fundamental object sought to be accomplished under the provisions of our law in relation to taxation is equality, and that the rich man, the poor man, the corporation, the association shall alike contribute to the support of the Government on the basis of the value of the property owned, and that all taxation imposed in this State, shall be on this equitable plan; and any method of taxation which is not uniform and ad valorem is illegal and contrary to the plain mandates of the law. ¹

The act of 1885 declared that personal property for the purpose of taxation shall be construed to include "all stocks and securities, whether in corporations within the State, or in other States, owned by the citizens of this State, unless exempt by the laws of the United States or of this State." This act in so far as it relates to the taxation of foreign stock is still in force. Their situs for taxation is within limits subject to legislative declaration. "The Legislature may have the right, under our Constitution to declare that the situs for taxation of shares of foreign stock held by a resident of Georgia is not in Georgia, but they clearly have the power to declare that shares of such stock have a situs for taxation in this State." The General Assembly has so declared, and residents of this State who own this class of property must bear the same burden as is required of owners of other kind of property. ²

Shares of stock are property in the hands of the shareholder, still they have no inherent value, and derive their sole value from the tangible or other property owned by the corporation. The taxation of both the property of a corporation in the hands of a corporation, and the value of the shares in the hands of the shareholders, is an instance where the same property is taxed twice. It is double taxation in a sense, but not that species of double taxation which would be void, it is permissible, but not compulsory. ³

The classification of the stocks of a corporation by the laws of this State, whereby the shares of corporations of this State are exempt and the shares of corporations of other States are liable for taxation, when owned in this State, is not an unlawful classification, nor is it in violation of the Constitution of this State, neither is such classification in violation of the 14th amendment to the Federal Constitution. ⁴ The location of the assets of the corporation is not a material fact in determining the liability of the shares of such corporation for taxation.

¹ Athens City Waterworks Co. v. Athens, 74 Georgia 413.
² Georgia Rail Road Co. v. Wright, 125 Georgia 689.
³ Coca Cola Co. et al v. City of Atlanta, 152 Georgia 558.
Automobile Law in Criminal Aspect; Issue as to Negligence of Driver and of Injured Person

Deaths and serious injuries from being run over by automobiles are of most frequent occurrence, the newspapers being constantly filled with these tragic results of human negligence and disregard for the rights of others.

A speeding or recklessly driven automobile strikes a pedestrian in the street. Immediately two questions arise: 1. Is the driver responsible criminally? and 2. In a civil action by the injured, more often by his representative, what measure of care must be shown by pedestrian or driver in order to prevail, when there is an issue as to the relative negligence of each?

As to the first question, the case of Dennard v State gives a very good idea of the driver's responsibility criminally. This was a case where, on a trial for assault with intent to murder, committed by running an automobile against and over a person, though the evidence showed no ill will on the part of accused, it showed that he was an expert operator of an automobile, and that there was no evidence that the machine became unmanageable or skidded, and no explanation of his conduct was apparent, unless he was actuated by a reckless disregard for human life, the driver was convicted on the charge, the Court holding that "the presumption of malice may arise from a reckless disregard for human life, without regard for the instrumentalities employed to effect a personal injury to another."

In another case the driver of a car was convicted of assault and battery. He was subject to frequent attacks of vertigo which rendered him unable to steer an automobile at such times. In upholding the conviction in the lower court the Court of Appeals held that the defendant's act in undertaking to drive in such a manner, knowing that he was subject to attacks which rendered him unable to control a car, was such a disregard of probable consequences as amounted to criminal negligence as to one who was injured by the defendant's inability to steer his machine.

As to the question of the relative negligence of the driver and of the party killed or injured, in a civil action for damages, the case of O'dowd v Newnham affords considerable light. In brief, it brings out the following points:

1. That a pedestrian's right on the public highway or street is equal to that of an operator of an automobile, and 2. That both are bound to use reasonable care and to anticipate the presence on the streets of others. Of course, what will amount to this degree of care is a matter for the jury to determine. In this case it was held that it is not by reasonable care on the part of the pedestrian required that he run to escape injury by an automobile, nor is he required to be constantly listening and looking to ascertain if cars are approach-

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114 Ga. App. 501 (81 S. E. 378)
217 Ga. App. 663
313 Ga. App. 220 (80 S. E. 36)
Code Ga. 1910 Para. 4406
ing. On the other hand, however, reasonable care on the part of the operator of an automobile when driving on crowded streets was defined by the Court as “exceeding carefulness,” as thoughtless inattention is the essence of negligence.

It has been held erroneous, however, to charge that “the degree of diligence which must be exercised in a particular exigency is such as is necessary to prevent injuring others,” this being a greater degree of care than is imposed by law. 4

Certain duties, such as to sounding horns when passing vehicles and as to speed and etc., are imposed by law on drivers of machines, and failure to observe these requirements raises the presumption of negligence. 5

4Giles v. Volles, 144 Ga. 853
5Code Ga. 828 (a) thru 828 (n).

Torts--Parties Plaintiff In Action for Death By Wrongful Act

At Common Law in a civil court the death of a human being could not be complained of as an injury. 1 In 1846 Lord Campbell’s Act was passed changing the law of England in this respect and in 1850 Georgia made it possible for the widow or if no widow then the child or children of one unlawfully killed, to recover damages.

In 1887 an Act was passed providing that “the husband may recover for the homicide of his wife and if she leave children (or child) surviving, said husband shall sue jointly and not separately.” The same Act 2 provides that “a mother or if no mother a father may recover for the homicide of a child, minor or sui juris, upon whom she or he is dependent or who contributes to his or her support.” All of these provisions are now included in Section 4424 of the Civil Code 1910. The Supreme Court holds that the “or” in the last sentence quoted above should be “and.” 3 A parent who establishes partial dependence upon child’s labor accompanied by substantial contribution therefrom to his maintenance, may recover. 4 A father is not dependent whose earnings are sufficient to support himself though insufficient to support himself and others dependent upon him. 5 If the earnings of a mother and child living together are necessary for the support of both, she is dependent. 6 Where a parent entitled to bring an action to tort for the homicide of a son dies without having instituted suit the right of action does not survive to the administrator of such parent. 7 The mother of an illegitimate child has no right of action for his homicide. 8 One standing in loco parentis may

2Acts of 1887 p 43.
3Clay v. Central R. R. Co. 84 Ga. 345 (1)
5Ga. R. R. Co. v. Spinks 111 Ga. 571
6Atlantic Coast Line Rwy. Co. v. McDonald 135 Ga. 635.
7Frazier v. Ga. R. R. Co. 101 Ga. 77
8Robinson v. Georgia R. R. Co. 117 Ga. 163
recover for the unlawful homicide of a minor but this right depends on the common law not on the statute. 9

The right to sue for the homicide of the husband vests in the widow at the death of her husband and is not divested by the subsequent marriage of the widow; 10 and a widow may recover although she was separated from her husband at the time of the homicide. 11

The wording of the Code leaves room for considerable doubt as to whether a child may sue for the homicide of its mother. The Supreme Court has held however that the child will have such a cause of action provided the father is dead. 12

The General Assembly has recently made two important additions to Section 4424. The Courts had held that an adult child could not maintain an action for the homicide of its parent; 13 and further that children adults at the time of the homicide were not entitled to share in the proceeds of a judgment obtained by the widow. 14 An Act 15 of 1924 amends Section 4424 so that “a child or children, minor or sui juris,” may recover. A quite recent case 16 holds that under this amendment dependency is not essential to recovery by a child whether minor or sui juris. The same Act of the General Assembly adds the following to the section under discussion: “In cases where there is no person entitled to sue under the foregoing provisions of this section the administrator of the deceased person may sue for and recover for the benefit of the next of kin if dependent upon the deceased or to whose support the deceased contributed.

10Georgia R. R. and Banking Co. v. Garr 57 Ga. 277
11Central Rwy. Co. v. Bond 111 Ga. 14
12Atlanta etc. R. R. Co. v. Venable 65 Ga. 55
13Mott v. Central R. R. Co. 70 Ga. 680
14Coleman v. Hyer 113 Ga. 420
15Laws 1924 p 60
Recent Decisions

Conveyances—Reservation in Deed as to Minerals.

Grant vs. Haymes. Supreme Court of Georgia, June 22, 1927. 128 South Eastern Reporter page 892.

Where the owner of a described tract of land made a Contract of sale, and executed to the buyer his bond for title, in which he made this provision: "There is a sand bank on the property to be conveyed, and the right is reserved to remove all of the said sand in said bank, and to remove timber growing over said sand bank, so as to better enable him to get the sand." He later died, the executrix and sole legatee of the grantor, pursuant to his bond, conveyed said land to the grantee, with the same reservation of said sand as that contained in the bond for title.

Deeds—Mines and Minerals. Owner may convey fee and lesser right to sand in bank on land, "reservation" reserves to grantor some new thing issuing out of thing granted, not in being, it differs from an "exception," which in part of thing granted; common law distinction between "exception" and "reservation" are immaterial where intention is controlling consideration. Reservation in grantor of sand on land conveyed held not revoked by grantor's death reservation in grantor of sand on land conveyed reserved fee in sand, though containing no words of inheritance, reservation in grantor of sand on land conveyed if treated as "exception" reserved fee in sand passing to grantor's heirs or devisees. Civil Code 1910 section 3659.

We do not think that this reservation is a mere personal privilege or license, as a term of real estate law, as an authority to do a particular act or series of acts upon another's land without possessing any estate therein. Augusta & Savannah R. R. Co. vs Augusta Southern R. R. Co. 96 Georgia page 562.

It is competent for one to convey the fee in land to another and reserve the right to sand in a sand bank thereon. See Holmes vs Martin, 10 Georgia page 503, 506.

While we hold that under this reservation or exception the title to this sand remained in the grantor under his bond for title passing to his heirs if he died intestate, or to his devisees if he died testate we do not mean that the grantor his heirs, or devisees had an unlimited time in which to remove this sand in the sand bank, the language in which this reservation is couched clearly indicates that the grantor was to remove all of the sand bank. In these circumstances we think the sand should be removed within a reasonable time, and that upon the failure of the grantor or those claiming under him to remove it within a reasonable time, the right or title to the sand would be divested. See Morgan vs. Perkins, 94 Georgia page 553, 565, 21 South Eastern reporter 574, 575 a similar circumstance.

Where a deed conveys the timber on land and makes no mention of the time within which to remove it, the vendee has a reasonable time within which to remove the timber. McRae vs Stillwell 111 Georgia, page 65, 38 South Eastern reporter 604.

Standing timber is not personalty but realty, and that a sale of growing trees is a sale of an interest in land. Coody vs Gress Lumber Co. 82 Georgia, page 793. 10 South Eastern reporter, page 218.

Supreme Court held, that it is competent for the owner of land to convey the fee thereto to another and reserve the right to the sand in sand bank thereon. Such reservation did not terminate at death of grantor, being a fee in the sand. If the sand was not removed in a reasonable time by grantor, his heirs of devisees, or those claiming under him, the right or title to the sand would be divested. Judgment reversed.

Common Carriers, Action for Damages.

Central of Georgia Railway Co. vs. Council Brothers. Court of Appeals of Georgia, March Term 1927.

This was an action to recover Damages, occasioned by a Common Carrier where it failed to divert a shipment beyond its own lines, although no notice of the requested diversion was given to the initial carrier.
Where by the terms of its bill of lading the initial carrier agreed to transport a car of peaches from a point in this State to a point in another State, the transportation to be made over its own lines and those of connecting carriers, the shipper if the owner, had the right as an incident to the contract of carriage, before the shipment reached the point of destination named in the bill of lading to direct the terminal connecting carrier to divert the shipment to another place upon its lines; and if such terminal carrier failed to divert the shipment as directed by the shipper, in consequence of which the peaches were damaged, the initial carrier would be liable to the shipper for such damages, although no notice of the requested diversion was given to the initial carrier.

Under the Carmack amendment to the Interstate Commerce act, as amended by the Cummins Act, any common carrier subject to the provisions of said act, receiving goods for transportation from a point in this state to a point in another state, is required to issue a receipt or bill of lading therefore, and is liable to the lawful holder thereof for any damage to such property caused by it or by any common carrier to which such property may be delivered or over whose line, or lines it may pass within the U. S. when transported on a through bill of lading, and no contract, receipt, rule, regulations or other limitation of any character whatsoever shall exempt such initial carrier from such liability.

A rule of the initial carrier, which stipulated that it would not be liable for a failure to divert any shipment, where the shipment has passed beyond its own lines of railway, unless such failure was caused by the negligence of its own employees, was void and illegal under the said Carmack amendment, notwithstanding its approval by the Interstate Commerce Commission." Central of Georgia Railway Co. vs. Council Brothers 163 Georgia page 494, 136 South Eastern reporter page 48, decided by the Supreme Court in answer to a certified question by this court.

A common carrier is bound to use extraordinary diligence in transporting goods accepted by it. In case of loss or damage of such goods, the presumption of law is against the carrier, and no excuse will avail it unless the loss or damage was caused by the Act of God or the public enemies of the State. Civil Code (910), section 2212. The Act of God means any act produced by physical causes which are inevitable in other words, unavoidable accidents are the same as the Acts of God. Fish vs. Chapman 2 Georgia page 349.

In the instant case the plaintiff proved damage to the shipments, and the defendant carrier failed to show that the damage was occasioned by the Act of God or by the public enemies of the State.

Judgment Affirmed.

Landlord and Tenant, Sublease.

Garbutt & Donovan vs. Barksdale Pruitt Junk Co Court of Appeals of Georgia, Division No. 2. September 12, 1927.

A lease was made for five years, the tenant made a sublease without the permission of the landlord to the defendant partnership, and it never appeared that the landlord had ever recognized the defendant partnership as his tenant.

A lease of real estate for a term less than five years passes no estate out of the landlord, the tenant has only a usufruct, and he can neither sublet the premises, convey his usufructuary interest, nor assign his lease without the landlord's consent. Sealy vs. Kuttner, 41 Georgia, page 584; Hooper vs. Dwinell, 48 Georgia, page 442, 445; Hudson vs. Stewart, 110 Georgia, page 37, 35 South Eastern, page 175; De Foer vs. Stephens, 133 Georgia, page 617, 619, 66 South Eastern page 786.

If with the consent of the landlord, the tenant subrents the rented premises, the subtenant becomes the tenant of the original tenant, who is entitled to proceed against him for rent under the agreement made between them parties (Boyd vs. Kinsey, 137 Georgia, page 358, 56 South Eastern 420); but the status of the original tenant with the owner remains the same, and the original contract between them remains unimpaired. In such a case the subtenant does not become the tenant of the owner, and the owner cannot proceed against him for rent, although in the case of agricultural lands he would have a special lien on the crops raised by the subtenant. Hudson vs. Stewart, supra; McConnell vs. East Point Land Co. 109 Georgia, page 129, 134, 28 South Eastern page 86.
RECENT DECISIONS

If without the consent of the landlord, the tenant should undertake to sublet the premises, the landlord, not being bound thereby, may ignore such unauthorized agreement without in any wise affecting his rights under his contract with the original tenant, or he may refuse to recognize the right of possession in the subtenant and proceed to expel him from the rented premises as a mere intruder; or he may, at his option, affirmatively elect to treat such unauthorized subtenant occupying his premises as his own tenant instead of the original tenant, in which case the relationship of landlord and tenant between the owner and the original tenant ceases. Such an election on the part of the landlord owner whereby the new unauthorized subtenant in substituted as tenant for the original tenant may be effected by an expressed recognition by the owner of the subtenant as his tenant, or it may be implied from such affirmative acts and conduct as will clearly indicate an intention on the part of the landlord to effect such a substitution. 

The theory of party wall is based on the principle that adjoining landowners owe to each other lateral support of the soil in its natural state. Civil Code 1910, sec 3619. The parties did not derive title to the respective lots under a common grantor. The claim of Goode is restricted to the rights acquired under 20 years' possession, open, adverse, notorious, under a claim of right. What was that occupancy? Uncontested evidence, it was to the support of the connecting walls and the other portions of the store. "A division wall between two buildings, having for the period of limitations been used for the support of both buildings, becomes in effect a party..."
wall, whether or not originally constructed as such, and without any express agreement by the owners of the buildings." Weadock v. Champe, 169 N. W. 544. This principle applies generally where the entire wall has been jointly possessed by both parties for the required length of time. One could not acquire prescriptive title to an easement in a wall several hundred feet high or long, by joining or attaching to such wall a structure 20 or 30 feet high or long. These figures are used for illustration only. The qualified rule has been well stated in Barry v. Edlavitch, 84 Md. 96, as follows: "1. The extent of an easement to use a wall of an adjoining owner for the support of a building, which is acquired by prescription, is the enjoyment of the use of the wall for the support of the house as it existed during the period of prescription. 2. The owner of a wall which is subject to an easement by prescription for the support of the building of an adjoining owner has the right, on raising the wall higher, to the sole use thereof unaffected by any easement for the use of the new part to support a new story of the house to which the easement belongs.

The facts in the Barry case, just cited, were quite similar to the facts of this case, and it ruled on the precise question here raised. Following the line of reasoning in that case, we find that, under the facts, these conclusions are required. The wall stands on the land of Levinson. The use of the wall by Goode and his predecessors was of no benefit to the owners of the wall, and hence it was a mere burden upon the property, open, adverse, and acquiesced in. The law implies the grant to do the things that have been done for so long a time that a lawful right has been acquired. It cannot be presumed that either party intended that the wall should be a party wall except for the purpose of supporting the other wall to the extent that it had been supported. That was, therefore, the extent of the prescriptive right; namely, to enjoy the use of the wall for the support of the prescribers' house as it then existed. The owner of the wall can do with it as he chooses, provided he does nothing of detriment to the other's right. It follows, necessarily, that Goode had no right in or to that part of the wall which is above the height of his own store, and which is not required for the support of the timbers of his house, and in placing window openings in the second story portion of the wall, there was no invasion of the rights of Goode by Levinson. For these reasons the verdict was unsupported by the evidence, and the court erred in refusing to grant a new trial.


Hutchins filed suit against J. C. Flanigan on a promissory note; said case being for trial on Dec. 5, 1923. Two days prior to said date Flanigan executed to his wife a deed conveying property to which he had legal title. Judgment on the note was obtained at the March, 1924 term of the court by Hutchins. A fl. fa. issuing on said judgment was levied on said property, and Mrs. Flanigan filed a claim which she later withdrew. The land was advertised for sale; whereupon Mrs. Flanigan filed a petition making Hutchins and McGee, sheriff, defendants, seeking to enjoin the sale. The petition alleged that the land was originally bought by the husband with the funds of the wife; that at all times she was the equitable owner thereof; that, upon ascertaining that the husband had taken title in the deeds, she insisted that he execute the title to her, which he did; that Hutchins, after obtaining judgment against the husband, instituted an equitable suit for the cancellation of the deed from the husband to her; that plaintiff employed an attorney, and instructed him to file a defense to the suit of Hutchins for cancellation, upon grounds stated, but that the answer prepared by counsel was sent to her in a distant part of the state for verification; that, after said verification, she placed the papers in the U. S. mail, addressed to the attorney at Winder, Ga.; that the same were lost, and for this reason were never filed in the court; that, when the suit filed by Hutchins for cancellation came to be heard, there being no answer thereto, the court directed a verdict for the plaintiff, cancelling the deeds, without the introduction of any evidence, and that such verdict and judgment were due to her present petition she prays that the named judgment and verdict be set aside, to the end that the case for cancellation may be tried, and the issue thereof submitted to a jury for determination.
and that the court enjoin the sale. The exception is to that judgment. Held: 1.
The facts alleged and shown do not constitute equitable cause for setting aside.
the judgment. The court was authorized to find that the defendant could
have filed an answer and obtained a hearing by the exercise of ordinary dili-
gence. Where one has not exercised ordinary diligence, equity will not in-
tervene to set aside the judgment. (a)

2. "In all cases, except actions for unliquidated damages and suits on
unconditional contracts in writing, in the several courts of this state, where
the writ of process has been served, as the law directs, on the defendant, and
there is no defense made by the party sued, either in person or by attorney, at
the time the case is submitted for trial, the case shall be considered in default,
and the plaintiff shall be permitted to take a verdict as if each and every
item and paragraph were proven by testimony." (b)

3. Apply the foregoing principles, the judgment refusing an injunction
was not erroneous.

(a) Mullins v. Christopher, 36 Ga. 584; Berry v. Burghard, 111 Ga. 117;
(b) Civil Code 1910, sec. 5662; Brown v. Hammond, 160 Ga. 446; Glenn-

Insurance—Overdue Premiums. Life Insurance Co. v. Bartlett. Court of
Appeals of Georgia. June 14, 1927. 138 S. E. 589.

Suit was brought against the Life Insurance Co. of Virginia upon two pol-
cies of life insurance issued to the wife of the plaintiff. Under the ruling of
Pate v. Life Insurance Co. of Virginia, 19 Ga. App. 597, and the facts of the
instant case, the petition was not subject to general demurrer because it show-
ed that no beneficiary was named in the policies declared upon, and that the
plaintiff was neither the executor nor the administrator of his deceased wife's
estate. The request of counsel for the plaintiff in error that the decision in
the Pate case, supra, be reviewed and overruled is denied.

"Where the insurer, by his custom and course of dealing with the insur-
ed, in accepting overdue, premiums or assessments past due, when he could have insisted upon a forfeiture has induced the belief on the part of
the insured premiums or assessments can be paid within a reasonable time af-
ther they mature, the insurer cannot claim a forfeiture because, at the time of
the death of the insured, premiums or assessments were due by him which,
had he lived, it is reasonable to suppose it would have been accepted upon the
same terms as those upon which other deferred payments had been re-
cieved." (a)


Under this ruling and the facts of the instant case, the insurer cannot
claim forfeiture of the policies because of the failure of the insured to pay one
of the premiums within the times specified in the policies. This is true al-
though each of the policies contained the following stipulations: "It (the pol-
cy) shall be void if any premium shall not be paid according to the terms
thereof; and it is agreed that this provision, which avoids the policy in case
any premium shall be overdue, shall not be considered in any respect waived
by any act of grace by the company in the accept of overdue premiums upon
this or any other policy."

According to the terms of the policies, they became void upon the failure
of the insured to pay any premium within four weeks from the date on which
it was due. However, the petition showed that payments of many premiums
on the policies more than four weeks in arrears, had been accepted by the
insurer in full satisfaction of such premiums, and that the only payment not
so accepted was made at the office of the district manager of the defendant
company in Macon, Ga., on June 21, 1926, for the premium due on May 17,
1926, and that this payment was made one or two days before the death of the
insured. The petition is silent as to the state of health of the insured on
June 21, 1926.

Under the above-stated rulings, the court did not err in overruling the
demurrer to the amended petition.

Judgment affirmed.
Municipal Corporations—Ordinances fixing wages for public work.

A municipal corporation, though not required by the charter to let contracts for a public work to the lowest bidders, and though clothed as to such matters with the broadest discretionary powers, has no authority to adopt an ordinance prescribing a fixed scale of wages that shall be paid for all public work of the city. Such an ordinance of the city of Atlanta is ultra vires and illegal, because it tends to encourage monopoly and defeat competition, and also tends to put a heavier burden upon the taxpayers than they would have to bear of free competition were allowed; and all contracts made in pursuance thereof are void. Wilson vs. City of Atlanta. No. 5762 Supreme Court of Georgia. 139 Southeastern Reporter 148.

The ordinance in question above was enacted by the mayor and council of the City of Atlanta on August 16, 1926. The preamble of the ordinance providing for a standard or fixing of process to be paid as wages for skilled laborers in the employ of the city or parties making contracts with the city, where such contracts provide for work or the erection of public buildings and bridges or repair thereof; and also providing that eight hours will constitute a day’s work for said laborers described as skilled laborers."

Applying the principle stated above, the ordinance seeking to fix the scale of wages of skilled laborers and also to fix the number of hours constituting a day’s work and made by the mayor and council of the city of Atlanta was held ultra vires and illegal.

The controlling facts in the above cited case are very similar to those in the case of City of Atlanta vs. Stein. In the case of City of Atlanta vs. Stein it was held that a municipal corporation has no authority to adopt an ordinance prescribing that all work of a designated nature shall be given exclusively to persons of a specified class. In this instance, the City of Atlanta, by means of an ordinance had sought to place all contracts for the printing required by the city, in the hands of union laborers. The ordinance eliminated all companies using non-union laborers from taking part in the bidding for such printing contracts.

The similarity is immediately seen, and like in the first case cited, the reason for such ordinances being held ultra vires and illegal was because they tended to encourage monopoly and defeat competition.

Motor Vehicles—Contributory Negligence—Fact For Jury.

Where the driver of a motor truck, traveling on a street in the city of Atlanta, attempted to turn to his right into an intersecting street without extending his arm at an angle above the horizontal as a signal of his intention to turn, he was guilty of a violation of an ordinance of the city; and where the driver of an automobile, traveling behind the truck and in the same direction, attempted to pass the truck on the right, in violation of another ordinance of the city, just as the truck began to turn to its right into the intersecting street, and the driver of he following automobile was thereby forced to drive upon the adjacent sidewalk, and his automobile struck and injured a person upon the sidewalk, in a suit brought by the injured person for damages against both drivers it was not error for the court to overrule the general demurrer interposed by the drive of the truck to the petition, since it was a question of fact for the jury whether the negligence of the driver of the truck contributed concurrently and directly with the negligence of the driver of the automobile in causing the injuries sued for. No. 18151 Court of Appeals of Georgia. 139 Southeastern Reporter 155.

In further support of this decision we cite the case of the Georgia Railway and Power Company vs. Ryan. 24 Ga. App. 285. The determination of questions as to negligence lies peculiarly within the province of the jury, and in the exercise of this function the question as to what constitutes the proximate cause of an injury complained of may be directly involved as one of the essential elements and disputed issues in the ascertainment of what negligence, as well as whose negligence, the injury is properly attributable to.
Homicide—Specific Intent As Essential Element.

A well settled rule was brought out recently in the case of Springer vs. the State, and Battle vs. Same. No. 18243 Court of Appeals of Georgia. 139 Southeastern Reporter 159.

It was held in this case that an essential ingredient of offense of assault with intent to murder is specific intent to kill.

In prosecution for assault with intent to murder, where there was no evidence, direct or circumstantial, tending to show specific intent to kill, and no evidence authorizing finding that defendants intentionally committed assault charged, conviction unauthorized.

The court held: Under repeated rulings of the Supreme Court and this court, an essential ingredient of the offense of assault with intent to murder is the specific intent to kill. In neither of the instant cases was there any evidence, direct or circumstantial, showing or tending to show such an intent on the part of the accused. Furthermore there was no evidence authorizing even a finding that either of the defendants intentionally committed the assault with which they were charged.

It follows that the verdict in each case for assault with intent to murder was unauthorized, and that the court erred in each case in refusing the grant of a new trial.
Handbook of Roman Law

BY MAX RADIN, LLB. PH. D.
Prof. of Law, University of California

Mr. Radin on his excellent treaty on Roman Law primarily arranged the book for the study by lawyers and law students, but it is written in such a way that even those that have studied neither Law nor Latin can understand his treatment of this comprehensive subject-matter.

The book itself is an elementary glance over the great system which has successfully disputed the domination of the modern world with the law of England. Mr. Radin stresses the fact that if one wishes to make any degree of headway, they must first acquire the language of the men who shaped the Roman Law and enlarge it to fulfill its superb destiny.

Only several instances are presented, of the many that might illustrate the points involved. Perhaps the reasons for selecting these instances was an attempt to avoid those situations of Roman social organization which have no real counter-part at the present day, the situations, that is, created by the domestic relations of patria potestas, of guardianship and of slavery. Inevitably only a distorted picture can be gained, if we push into the background, what was in the foreground of Roman consciousness; but there may perhaps be some advantage in moving for the post part among relations familiar to us.

Mr. Radkin takes for granted that his readers are familiar with Anglo-American Law, and has illustrated Roman concepts by references to the common law more frequently than is generally done in most books, or than would be advisable if a general audience were chiefly in view. However, he has made an effort to use only parallels which are self explanatory, and does not insist upon them unduly.

The modern method of citation is used in quoting Corpus Juris, which discards Roman numerals altogether, and gives the book, title, fragment, and section in that order.

American Law has a connection with Roman Law more intimate and direct than that derived from our English inheritance. At the time when the political severance took place, American lawyers and publicists were not disinclined to look for a broader basis for their Institutions than the historical fact of their recent membership in a policy they had rejected. Upon subjects relating to personal contracts and private rights, the Roman law seemed of outstanding excellence. So we may comprehend the valuable qualities and principles that can be garnered from the study of this broad field of Law. Particularly is the law field indebted to Mr. Radkin for his discourse and able treaty of this comprehensive subject.
BOOK REVIEW

American Constitutional Law

BY HENRY CAMPBELL BLACK, L. L. D.

Author of Black's Law Dictionary, and of Treatises on Judgments, Bankruptcy, Recision of Contracts, Interpretation of Laws, Judicial Precidents, etc. West Publishing Company.

As it is stated in the preface this latest revised edition of Dr. Black's Handbook of American Constitutional Law was made necessary by the enormous expansion of Constitutional Law in recent years.

The book is one of the Hornbook Series and has the advantages of the books of that series. The chapters are divided into numbered paragraphed; at the head of which there is a clear resume of the leading principles in black letter type which is followed by explanatory matter. The paragraphs are quite complete and are written in a style that is very easy for the student to understand. Dr. Black, in explaining the principles of our National Constitution and of the various State Constitutions, has given very full notes indicating the authorities for his statements.

The book falls into four general divisions although each of these parts has some things in it that applies to the other divisions.

The first division contains the first four chapters. The chapters consider definitions, the nature of and the relations between the United States and the States, "The Establishment and Amendment of Constitutions," and the fourth chapter deals with the constructions and interpretation of Constitutions.

The Second division gives a description of the plan of the Federal Government. Following this plan of the government there are three chapters, one devoted to each of the three great departments of the government. Then there are two more chapters, one dealing with the "Interstate Law as Determined by the Constitution," and the other with "The Establishment of Republican Government."

The third division considers the State Constitutions as to the powers of the Executive, Judicial, and Legislative Departments as granted by the State Constitutions and limited by the Federal Constitutions, and the Acts of Congress.

The last division of the book consists of eleven miscellaneous chapters, and is the part that is least susceptible to classification. Some parts of each of these chapters refer to the Federal Constitution and Government, while others refer to the State Constitutions. These chapters are on: "The Police Power," "The Power of Taxation," "The Right of Eminent Domain," "Municipal Corporations", "Civil Rights and Their Protection by the Constitutions", "Equal Protection of the Laws", "Due Process of Law", "Political and Public Rights", "Constitutional Guaranties in Criminal Cases", "Laws Impairing the Obligation of Contracts", and "Retroactive Laws". In this division are the two subjects of Constitutional Law that are the hardest for the student to grasp: "The Police Power" and what "Due Process of Law" means. Dr. Black gives a masterly treatment of both of them but especially so of "due process of law". He shows what "due process of law" is under various circumstances, and renders the idea of it very plain to the student.
The Author, Dean McBaine, realized that most of our more important devices, employed to conduct a trial, are of English origin. So, this book, which is one of the American Case Book Series, is a compilation of English as well as American cases and decisions. The cases have been limited to major steps that are most frequently taken in the trial of a cause, and to steps that are common to nearly all American jurisdictions.

The book includes 368 cases on almost every possible phase of trial practice. It begins with cases on the jurisdiction and venue, terminating with those on rendition, entry and sufficiency of judgments. The cases are introduced in a most logical order—first, dealing with the Jurisdiction in which suit is brought; next Process, Default Judgments, Judgments without trial of Facts, Change of Venue, Continuance, The Jury, Sufficiency of Evidence, Opening Statements, Instructions by the Judge to the Jury, Argument of Counsel, The Verdict, Trial by Court—without Jury, New Trials, Exceptions, and the Renditions, Entry and Sufficiency of Judgments. In the order that a point might present itself—in that order the case on that point was included. Citations of cases were made to show various applications of the rule found in the cases printed.

The student of the subject, as well as the practitioner will find this book of considerable practical value.

The selection of cases is, on the whole, commendable. The author has gone through the entire field of his subject, citing modern, as well as older leading cases, and always making the points, sought to be brought out, clear. All in all, Dean McBaine has given us an admirable compilation.
Gober's Georgia Evidence

This work will be published in January, 1928. It is written by Geo. F. Gober who wrote The Georgia Form Book and Procedure. It is an endeavor to present the subject of evidence from the Code and the decisions of the Supreme Court and Court of Appeals. The volume will contain about one thousand pages. A distinguished jurist who has examined the manuscript said it would be the best and most helpful book to the Lawyer that had been printed in the State. Many orders have been received for it. There will be only a limited edition.