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## THE ESTABLISHMENT OF THE GEORGIA SUPREME COURT

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In November 1847, retiring Governor George W. Crawford highly praised the Georgia Supreme Court, then only two years old. According to Crawford, the new court was already eliminating "irregularities" of the old judicial system through the uniformity of its decisions.<sup>1</sup> The governor's remarks reflected public approbation of a judicial system which had been thwarted for over fifty years.

The historical background of the Georgia Supreme Court reveals a paradoxical spirit of apathy and commitment on the part of Georgians. Georgia was the only one of the thirteen original states not to adopt a judicial system with an appellate court, and for seventy years the state had no tribunal to correct errors from lower courts.<sup>2</sup>

The constitution of 1798 provided for a superior court empowered to grant new trials. However, if granted, the new trial had to be held in the county where the case originated and before the same trial court. From this court, there was no further recourse.<sup>3</sup> One should not be misled by the terminology of the constitution, for there was no single superior court. Rather, in 1798 Georgia was divided into three judicial districts, each having a superior court with final jurisdiction. By 1845 the number of superior courts had increased to eleven, with each court holding sessions twice a year for the counties in its jurisdiction. These superior courts had original jurisdiction in all criminal and land title cases and appellate jurisdiction in all others.<sup>4</sup>

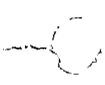
The state early recognized the need for uniformity in procedure and judgments among its superior court judges. Hence, in 1799 a Judiciary Act provided for an annual meeting or convention of these judges for this

1. JOUR. OF H.R. OF STATE OF GEORGIA (Milledgeville: State Printers, 1848) at 17.

2. Joseph R. Lamar, *History of the Establishment of the Supreme Court of Georgia*, REP. OF 24TH ANN. SESS. OF GA. BAR. ASS'N at 85.

3. Bond Almand, *The Supreme Court of Georgia: An Account of Its Delayed Birth*, 6 GA. B.J. 95; 24TH ANN. SESS., *supra* note 2, at 86.

4. ALBERT BERRY SAYE, *A CONSTITUTIONAL HISTORY OF GEORGIA, 1732-1968*, at 161.



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purpose.<sup>5</sup> Although this convention had no appellate jurisdiction, the fact of its limited review of district court decisions suggests an awareness of the need of a supreme court. But if such awareness existed, it produced no tangible result. On the contrary, in 1801 the General Assembly repealed that portion of the Judiciary Act which had invested the convention with limited review power.<sup>6</sup>

For the next forty-five years Georgia was without a supreme judicial tribunal.<sup>7</sup> But the superior court judges persisted in their desire to act as a review body. For example, following the War of 1812, the legislature passed an act suspending for three years the payment of private debts. Superior court Judge John M. Berrien, an ardent believer in the sanctity of contracts, was outraged over the alleviating law. When his colleagues met with him at the annual judicial convention in 1815, Berrien persuaded them to join him in declaring the law unconstitutional.<sup>8</sup> The General Assembly of 1815 angrily responded by censuring the judges for their "extra-judicial proceedings." The legislature contended that public opinion was against a court of errors and it directed the judges to obey that mandate in the future.<sup>9</sup>

Superior court judges were not alone in their desire for a review tribunal. Beginning in the 1820's practically every Georgia governor made reference to the urgency of a supreme court.<sup>10</sup> Its establishment would necessitate an amendment to the state constitution, a cumbersome process that required the approval of two-thirds of both legislative chambers at two consecutive sessions.<sup>11</sup> Not until the General Assembly sessions of 1835-36 was such a proposal adopted.<sup>12</sup>

Undoubtedly hostility toward the United States Supreme Court was in part responsible for the long delay in providing Georgians with a supreme court. The U.S. Supreme Court's decision in 1810 in *Fletcher v. Peck* kindled resentment among Georgians. Some succeeding decisions did not help the case for the establishment of a high court in

Georgia either, particularly *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832).<sup>13</sup>

Although the legislators by 1835 had seen fit to provide for a supreme court, dissensions over minor details prevented the act from being carried into effect by that session of the General Assembly.<sup>14</sup> Unfortunately, it would be ten years before the necessary enabling act would be passed. The arguments against a supreme court after 1835 were varied, but in general there were two main points of opposition. Unfamiliar with a supreme court, many Georgians feared that such a tribunal would increase the expense of litigations as well as delay the judicial process.<sup>15</sup>

The decade following the amendment's passage saw an enlarging population with increasing wealth and a diversity of interests. Such developments made the establishment of a supreme court practically mandatory. Yet, the legislature continually stifled efforts to do so. Governor William Schley made a strong plea to the General Assembly of 1836 to implement the act. Stressing the fact that Georgia's judicial system precluded uniformity, Governor Schley held that Georgia in fact had no laws! Stirred by Schley's remarks, the Senate sent a resolution to the House of Representatives requesting their concurrence in forming a joint committee to draft enabling legislation. The House, however, failed to act.<sup>16</sup>

The legislative election of 1837 saw the ascendancy of Whigs George W. Crawford of Richmond County and Robert Toombs of Wilkes County to the Georgia House of Representatives.<sup>17</sup> Close political and business colleagues, both were appointed to the House Judiciary Committee and became staunch advocates for the establishment of a supreme court.<sup>18</sup> Despite his plea before the Assembly of 1836, Governor Schley failed even to mention the much needed high tribunal in his legislative address of 1837. Nevertheless, the Senate adopted a bill for the establishment of a court and sent it to the House for approval. Upon being read in the House, a traditional but clever parliamentary maneuver was evoked to

5. Almand, *supra* note 3; ROBERT AND GEORGE WATKINS, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA at 708.

6. Almand, *supra* note 3.

7. 24th ANN. SESS., *supra* note 2.

8. C. JAY SMITH, JR., *John McPherson Berrien*, in GEORGIANS IN PROFILE: HISTORICAL ESSAYS IN HONOR OF ELLIS MERTON COULTER at 170.

9. *Ibid.*; Almand, *supra* note 3, at 96-97; ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA (1815) at 133.

10. Almand, *supra* note 3, at 98-99.

11. *Ibid.*; 24th ANN. SESS., *supra* note 2; WALTER McELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA at 266-67.

12. *Ibid.*

13. MILTON SIDNEY HEATH, CONSTRUCTIVE LIBERALISM: THE ROLE OF THE STATE IN ECONOMIC DEVELOPMENT IN GEORGIA TO 1860, at 110-11; McELREATH, *supra* note 11, at 375; 5 Peters 1 (1831); 6 Peters 515 (1832); Almand, *supra* note 3, at 98.

14. Milledgeville Federal Union, December 25, 1835, at 2.

15. *Ibid.*, December 4, 1835, at 2.

16. GEORGIA HOUSE JOURNAL (1836), at 24-25, 42-43.

17. Augusta Chronicle, October 6, 1837, at 2; WILLIAM Y. THOMPSON, ROBERT TOOMBS OF GEORGIA at 17; U.B. PHILLIPS, THE LIFE OF ROBERT TOOMBS at 19.

18. GEORGIA HOUSE JOURNAL (1837) at 56. For information on Toombs' and Crawford's business dealings, see THOMPSON, ROBERT TOOMBS at 93 and Derrell C. Roberts, *Toombs' Texas Lands*, GA. HIST. QUAR. LV (Winter, 1971) at 540-42.

kill it. Motion was made to postpone consideration until the General Assembly would not be in session. By a majority of seven votes the motion passed, with Crawford and Toombs voting in opposition.<sup>19</sup>

When the General Assembly met for its sessions in 1838, newly elected Governor George R. Gilmer devoted the major portion of his legislative address to Cherokee Indian affairs. Like Governor Schley before him, he too failed to mention the supreme court question.<sup>20</sup> House proponents of the court nevertheless introduced an enabling bill. Unfortunately, legislative bickering caused the bill to be lost by fourteen votes. Again, George W. Crawford and his colleague Toombs lent their support to the measure.<sup>21</sup>

Governor Gilmer was not keenly interested in the establishment of a court. In his message to the legislature in 1839, he barely referred to it. For the third consecutive session, Crawford served on the House Judiciary Committee. He and his close associates of the committee, Toombs and Alexander H. Stephens, were disgusted when no action was taken on another House proposal to establish a supreme court. Despite this failure, Crawford was busy with judicial concerns during the remainder of the session. He aided in drawing up a report on stays of executions in Georgia, and sponsored a bill on procedure for trials in citizenship cases.<sup>22</sup>

The legislative session of 1840 passed without a proposal for the establishment of a supreme court from either branch of the General Assembly. Democratic Governor Charles J. McDonald had placed very little emphasis on the court issue in his legislative address, obviously feeling that the legislators would take up the matter.<sup>23</sup>

Disturbed by the failure of the General Assembly to consider the court issue during the session of 1840, Governor McDonald sought to make his position clear on it at the beginning of the legislative session of 1841. He severely criticized the existing judicial system under which the circuit judges had "absolute and appalling" power. Critics of a supreme court had charged that a tribunal of judges would be just as likely to err as a single judge. Thus it would be no more effective than the present system. To McDonald such logic was "anti-republican." If the court's critics applied the same reasoning to the legislature, the law-making power would be concentrated in the hands of a single individual! McDonald concluded that a supreme court would not only bring uni-

formity to judicial decisions, but its published reports would afford everyone the opportunity to understand the judicial interpretations of the laws. In spite of Governor McDonald's insistence, the legislative session passed with no action being taken on the court.<sup>24</sup>

In accordance with a resolution adopted by the General Assembly in 1841, a popular referendum was held prior to the next legislative session on the question of establishing a supreme court.<sup>25</sup> Voting was light, but the final returns showed that the voters disapproved the court's establishment by a decisive majority of 6,000 votes.<sup>26</sup> Using rather questionable logic, Governor McDonald announced in his legislative message of 1842 that the general apathy displayed over the referendum was evidence that the public desired the establishment of a supreme court!<sup>27</sup>

Crawford was appointed to the House Finance Committee in 1842, where he displayed an intense interest in liquidating the state operated Central Bank of Georgia. Nevertheless, he and his colleague Toombs continued to push for the establishment of a state supreme court. Despite their opposition, a motion to pass the necessary enabling act was tabled for the remainder of the session.<sup>28</sup>

The legislative session of 1843 revealed a significant change in the attitude of the legislators toward the supreme court idea. For the first time a bill to establish a court passed the House.<sup>29</sup> Despite its narrow defeat in the Senate, it had become apparent that the measure would soon be adopted. Following the session, Toombs confidently wrote to his friend Stephens, now a member of the United States House of Representatives, that the bill would soon pass. Toombs contended that the

24. GEORGIA HOUSE JOURNAL (1841) at 18-19, 452-54. Neither Toombs nor Crawford sought election to the 1841 session.

25. JOURN. OF THE SENATE OF THE STATE OF GEORGIA (Milledgeville; State Printers, 1841) at 250.

26. Milledgeville Southern Recorder, October 18, 1842, at 3; Almand, *supra* note 3, at 103.

27. GEORGIA HOUSE JOURNAL (1842) at 26. The total vote count for the referendum was 33,717, while that of the 1841 gubernatorial election had been 71,550. See SAYE, *supra* note 4, at 209n. The apathy displayed over the referendum could have been due, to a great extent, to the obvious lack of coverage given it by the major newspapers. For example, see Milledgeville Federal Union and Milledgeville Southern Recorder, June-October, 1842. McDonald's concern over the judiciary later earned him an appointment to the state supreme court. See WARREN GRICE AND E. MERTON COULTER, GEORGIA THROUGH TWO CENTURIES at 445.

28. GEORGIA HOUSE JOURNAL (1842) at 46, 446-48; 263.

29. Almand, *supra* note 3, at 104.

19. GEORGIA HOUSE JOURNAL (1837) at 12-29, 153, 181-82.

20. GEORGIA HOUSE JOURNAL (1838) at 8-23.

21. *Ibid.* at 24, 116-17.

22. GEORGIA HOUSE JOURNAL (1839) at 23, 39, 29, 111-13; 132-34, 168, 267.

23. GEORGIA HOUSE JOURNAL (1840) at 9-21.

"general regret" expressed by the public over the loss of the bill was evidence of the popularity of a supreme court.<sup>30</sup>

Constitutional amendments passed in 1843 reduced the size of the legislature and also provided for biennial meetings. Hence there was no session in 1844.<sup>31</sup> Meanwhile, in 1843 the Whig party had succeeded in electing their candidate, George W. Crawford, as governor. His popularity brought his reelection in 1845.<sup>32</sup>

Traditionally, governors relegated the court issue to the latter portion of their annual legislative addresses. When the General Assembly convened in 1845, Governor Crawford departed from this practice by giving the question primary consideration. He eloquently contended that a court was not only a constitutional requirement but a "social necessity." He pointed out that the expanding railroad system of the state passed through eight of the eleven judicial districts. The merchandise carried over the rails now totalled nearly six million dollars annually. This property should be under the protection of uniform laws in its transit from one district to another. He further contended that uniformity of laws would bring more commercial interests into Georgia.<sup>33</sup>

Shortly after the session convened, a long letter with strong arguments for a supreme court and directed to the legislators appeared in the Milledgeville *Southern Recorder*.<sup>34</sup> Though signed merely "L.Q.C.," it is probable that the writer was young Lucius Quintus Cincinnatus Lamar, Jr. who later became a United States Supreme Court justice.<sup>35</sup> He contended that the reduced size of the legislature afforded a good opportunity for the passage of the enabling act. Due to biennial sessions, failure to provide for the court would mean two more years of nonuniformity. To allay any fears as to the proposed court's jurisdiction, the writer pointed out that it was to have no original jurisdiction. Its discretion would be limited to the correction of lower courts' errors.<sup>36</sup>

Perhaps stirred by such remarks and by Crawford's plea, the House and Senate almost simultaneously proposed the immediate establishment of the court.<sup>37</sup> The Senate approved a bill and sent it to the House on November 17.<sup>38</sup> Speaker of the House, Charles Jenkins, Crawford's

close political and personal friend, strongly pushed for the passage of the bill.<sup>39</sup> After several minor changes failed, the bill passed the House on December 4. Governor Crawford approved the measure the following day.<sup>40</sup>

Ten years after the constitution had been amended to provide for a high court, Georgia thus established its long overdue supreme court. The new court was to consist of three judges elected by the legislature for terms of six, four, and two years. Each judge was to be a lawyer licensed in the state for at least ten years prior to his election. The court, however, represented a compromise between Georgia's old judicial system of circuit courts and a modern supreme court. The court was to sit not at the state capital, but instead was to be a circuit court, sitting twice each year in each of five newly created judicial districts. This stipulation was an immense hardship on the judges. To travel to all five circuits twice would necessitate over 1,000 miles of travel at their own expense with only about 300 miles served by railroads. Moreover, all cases had to be determined during the court term for which they were scheduled. A case could not be carried over to another docket but was dismissed if it was not heard. Unfortunately, these inconveniences hampered the court's activities until amended after the Civil War.<sup>41</sup>

State newspapers immediately reflected the general public approbation of the establishment of the court.<sup>42</sup> The court's effectiveness, however, would depend on its operation. After its first year, the court reported forty-four trial court reversals and twenty-eight affirmations.<sup>43</sup> Hence, it appears that Governor Crawford was justified in stating in his legislative message of 1847 that the court's "usefulness" had proven its "necessity." Indeed, the new supreme court was bringing uniformity to judicial decisions.<sup>44</sup>

The establishment of the Georgia Supreme Court may be attributed to numerous factors. The increasing population, the growth of corporate interests, and the increase of commerce throughout the state certainly made uniformity of judicial decisions and law mandatory. Regardless of the urgency of the times, it must be conceded that without the strong and persistent leadership from capable political and legal minds, the court might have been delayed indefinitely. Certainly George W. Crawford had helped to provide such leadership.

30. Letter, *Toombs to Stephens*, January 1, 1844, in U.B. Phillips, ed., *THE CORRESPONDENCE OF ROBERT TOOMBS, ALEXANDER H. STEPHENS, AND HOWELL COBB* at 53.

31. Almand, *supra* note 3, at 104.

32. PAUL MURRAY, *THE WHIG PARTY IN GEORGIA, 1825-1853*, at 116, 121.

33. *GEORGIA HOUSE JOURNAL* (1845) at 11-12.

34. *Milledgeville Southern Recorder*, November 14, 1845, at 2.

35. Southern Historical Association, *I MEMOIRS OF GEORGIA*, at 360-61.

36. *Milledgeville Southern Reporter*, November 14, 1845, at 2.

37. *GEORGIA HOUSE JOURNAL* (1845) at 42.

38. *Ibid.* at 65.

39. *Milledgeville Southern Recorder*, December 12, 1845, at 3. Later, Jenkins served on the state supreme court. See John B. Harris, ed., *A HISTORY OF THE SUPREME COURT OF GEORGIA: A CENTENNIAL VOLUME* at 89.

40. *GEORGIA HOUSE JOURNAL* (1845) at 210.

41. *ACTS OF THE GENERAL ASSEMBLY* (1845) at 18-24; SAYE, *supra* note 4, at 186.

42. See, for example, *Milledgeville Southern Reporter*, January 6, 1846, at 3.

43. Almand, *supra* note 3, at 109.

44. *GEORGIA HOUSE JOURNAL* (1847) at 17.