

1972

Building the Pyramid: The Growth and Development of the State Court System in Antebellum South Carolina, 1800-1860

Donald Sense
Radford College

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Donald Sense, Building the Pyramid: The Growth and Development of the State Court System in Antebellum South Carolina, 1800-1860, 24 S. C. L. Rev. 357 (1972).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

BUILDING THE PYRAMID: THE GROWTH AND DEVELOPMENT OF THE STATE COURT SYSTEM IN ANTEBELLUM SOUTH CAROLINA, 1800-1860

Dr. Donald Senese*

"It does not appear to me that the same reasons exist in this country for giving such astonishing powers to the Judges as in England."¹

Governor Charles Pinckney transmitted this note of caution to the state legislature in South Carolina in discussing the extent and nature of the powers to be granted to the judiciary in the state. South Carolina, like the other English colonies, had accepted and adopted the English common law system by legislative enactment in 1712 and the basic court structure of the British Isles was adopted as the essence of its own legal system.

Regular courts functioned only in the coastal area of Charleston in the early years of the colony. The circuit court system became established in 1769 and, after 1772, courts were held at Orangeburg, Ninety-Six, Cheraw, Georgetown, Beaufort, as well as in Charleston; a county court system came into existence in 1785 but due to various problems (e.g., the lack of sufficient legal training of the county court judges), the system lasted only fourteen years before it was completely abandoned. Although the American Revolution had severed the political ties between England and the American colony, the common law remained as a lasting memento that the tie had once existed. The state operated with a temporary constitution in 1776 and 1778. The Constitution of 1790, attempting to put the judiciary on a solid foundation, established the Constitutional Court, a meeting of the law judges, first in Columbia and then in Charleston, to hear appeals from the common law courts, motions for new trials, and points of law. While the law courts had this system of appeals, the decisions of the court of equity were final without any appeal.² The problem

*Associate Professor of History, Radford College, Radford, Virginia.

1. Governor Charles Pinckney, Message dated November 28, 1798, South Carolina Archives (hereafter referred to as SCA).

2. R. W. Gibbs, *Early History of the Judiciary*, in J. B. O'NEAL, BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA, I, pp. ix-xi (1859).

of adjusting the court system to the needs of the state became the focus of Governor Pinckney's 1798 message to the legislature.

The message of the governor came eight years after the state had adopted a stable and fixed (until 1865) constitution providing for a defined role for the executive, legislature, and judiciary and in the exact same year the Alien and Sedition Acts were adopted on the national level, an attempt by the Federalists to use the law and especially the federal courts to silence political opposition. The South Carolina judiciary, Governor Pinckney pointed out, operated similar to the judiciary in England especially in granting certain discretionary power to the judges, e.g., judges in some cases could fine and imprison offenders without the benefit of a jury; judges might also determine the extent of punishment in cases where the jury returned a guilty verdict but the law remained vague on the extent of punishment. Reflecting on the proposition that judges required more power in a monarchy because they had to protect the great prerogatives of the king, he questioned the wisdom of granting judges in the American system the same extensive role; the American system since it was a government of delegated powers lacked such prerogatives and therefore questions dealing with a person's life, liberty, and property could be safely entrusted to a jury.³

This suspicion of placing too much authority in the hands of the state judges became evident in the governor's opposition to allowing a single judge determining punishment for a number of offenses; he urged the legislature to adopt laws more precise and definite fixing the punishment for each crime specified.⁴

This issue which confronted the United State Supreme Court in *Marbury v. Madison* in 1803 had its ramifications on the state level: the power of the courts to decide on the constitutionality of the laws of the legislature. Pinckney feared that although the members of the legislature might have extensively debated an issue before passing a bill by a large majority, two or three judges in ruling a law unconstitutional would in effect substitute their will for the judgment of the legislature: "If the judges should be considered as constitutionally possessing this authority it must be at once seen they

3. Governor Charles Pinckney, Message dated November 28, 1798, SCA.

4. *Id.*

were paramount to the Legislature on every occasion which involves a constitutional question or where such by the most forced construction may be made to exist.”⁵ The question which reached to the root of the matter was simply: what institutional structure was the safest repository of this particular power—the legislature or the judiciary? Distrusting executive power, Governor Pinckney believed prudence demanded that this substantial power should reside with the legislature, a body elected by the people every two years, rather than resting with three or four judges who were not elected by the people and could not be removed except for the most serious offenses of misconduct or corruption. It might even be necessary, he counseled, to adopt a constitutional amendment which would prevent judicial interference in the acts of the legislature.⁶

The new role thrust upon South Carolina as a state in a full fledged national union emphasized the need to restructure the court system for efficiency and effectiveness and in 1800 the state legislature brought about this alteration. Circuit courts, similar to the courts under the system adopted in 1769, were established while the county courts which had been established and functioning throughout the state were put aside. The state was divided into twenty-eight districts and these were further arranged into circuits with a judge from the state’s highest court authorized to ride one of the circuits holding court in each area twice a year. The decisions of the circuit could be appealed to the highest court, the Constitutional Court of Appeals, which consisted of all the common law judges after they had returned from completing their circuit duties, with the court sitting in Columbia to hear appeals from the upper part of the state and adjourning to Charleston to hear the appeals from the lower part. The burden was great on the individual judge who had to not only ride the circuit hearing cases but also to function in two different areas as an appeals judge. The legislature added two additional judges establishing the high court at six members.⁷

This court system had as its model the English system of judicature. The traveling judges were analogous to the

5. *Id.*

6. *Id.*

7. ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA, 238-249 (1800); 2 Bay 235-236 (S. C. 1800).

nisi prius judges in England who traveled the circuit and the gathering of all the judges to hear cases as a court of appeals (in Columbia and in Charleston) was a reflection of the gathering of the British judges at Westminster Hall.⁸

Time and experience soon made it evident that the judicial system of South Carolina suffered from the defect of not having a separate court of appeals since the same judges functioned on the circuit courts and the appeals court. A remedy was proposed in 1807 by Governor Charles Pinckney, serving another term as governor. Coupled with his plea for a separate court of appeals for law decisions, he especially urged the necessity of such a court for equity decisions.

The South Carolina judicial system did not provide an appeals system for equity decisions. The equity court consisted of only three judges with any two judges constituting a quorum. Any two equity judges, without a jury or a system of appeals, had the power to decide major questions dealing with property in the state (e.g., the equity court had jurisdiction over cases dealing with property rights of children in their minority and married women, questions of a breach of trust, issues involving penalties and forfeitures, and matters dealing with financial accounts and business dealings which might have been closed issues for years). The possibility existed of the rendering of a faulty decision due to error, inexperience on the issue under consideration, or just plain misinformation. In such an event, the decree of the equity judges could not be changed or the matter even reheard again unless by the consent of the same equity judges who had rendered the original decision and, as a matter of pride, these judges hesitated to admit their mistakes or to overturn their own rulings.⁹

However, a greater danger than even this lack of an appeals system remained the great potential and real power of the equity court which by its own initiative could seize on certain issues and in effect could even invade the field of the common law by considering the intention rather than the exact words of the law in such a case under consideration. A hypothetical case illustrates the problem. A certain case might have been heard and decided by a judge and jury on a circuit and with an appeal made to the Constitutional Court with all parties assuming the matter had been settled. Yet this whole

8. *Id.*

9. Governor Charles Pinckney, Message No. 1, 1807, SCA.

issue could be revived again by the means of an injunction with the question brought before the equity court for a decision; two of the three judges on the equity court had the power to render a completely different and binding decision from that of the common law courts with no possibility of appeal. Reform became mandatory to eliminate the confusion and to avoid instability in the law and the infringement on jurisdiction.¹⁰

Concerned with this problem, Governor Pinckney advocated two reforms to secure the safety and certainty of property in the state: the establishment of a distinct and separate court of appeals for equity decisions as well as for law decisions and the placement of a time limit beyond which a court would be prohibited from examining accounts, claims, and demands.¹¹ The suggested reforms did not meet acceptance.

In 1808, the South Carolina legislature acted to establish a system of appeals for equity decisions paralleling the one established for the appeal of law decisions. Three circuits were established¹² and after the equity judges returned from hearing cases on the circuit they sat as an appeals court at the courthouse in Columbia to hear appeals from the northern and western circuits and at the courthouse in Charleston to hear those from the southern circuit. The legislature created an additional two positions on the equity courts.¹³

Despite this action toward remedying the iniquities of the court system, a separate and distinct court of appeals was still lacking for handling both law and equity appeals. The defects of the existing system became more and more obvious with the passage of time: judges sitting on both courts of original jurisdiction and the courts of appellate jurisdiction hesitated to overrule their own decisions or those of judicial colleagues; the judges who assembled for the respective court

10. *Id.*

11. *Id.*

12. VII S. C. STAT AT LARGE 304-308. The equity circuits included the Southern (Charleston, Colleton, and Beaufort), the Northern (Georgetown, Horry, Marion, Williamburgh, Darlington, Marlborough, Chesterfield, Lancaster, Kershaw, Sumter, Fairfield, Lexington, and Richland), and the Western (Orangeburg, Barnwell, Edgefield, Abbeville, Pendleton, Greenville, Spartanburg, Union, York, Chester, Laurens, and Newberry).

13. *Id.*

of appeals were unable to devote the proper amount of deliberation and investigation to the cases under consideration because the meeting took place so soon after completing their circuit duties; the increase in cases required more time than could be spared from the circuit courts. Citing these difficulties, Governor Joseph Alston called for a new and separate appeals court, a Court of Errors and Appeals, to be composed of judges separate from the circuit judges.¹⁴ Governors John Geddes in 1819, Thomas Bennett in 1821, and John Lyde Wilson in 1824 also echoed the call for reform by advocating the establishment of a separate appeals court.¹⁵

A major impetus for judicial reform grew out of the increasing hostility toward the operation of the court of equity. From the very beginning of legal institutions in America, the establishment of the equity branch of law created a deep division within the American legal profession with some lawyers advocating the need for two separate systems (common law and equity law) while others just as strenuously maintained that the malleability of the common law was of such a nature that it could be molded and remodeled to meet all the legal problems and emergencies bound to arise without the creation of a separate equity code. Objections raised to equity jurisdiction generally centered on the lack of juries, the procedure in which equity witnesses were put under oath and directly questioned by the judge, and the distrust implicit in allowing the equity judge to deliver an opinion, unchecked by a jury, based on his own views of the rightness or wrongness of an issue. Critics concerned with American democracy and suspicious of judicial discretion tended to equate the chancery courts with the infamous Star Chamber or High Commission courts utilized by despotic rulers in English history.¹⁶

Another major problem concerned the scarcity of viable equity precedents. And in the standard textbook of the American lawyer, Blackstone's *Commentaries on the Laws of England* (1765-1769), the author, Sir William Blackstone, as-

14. Governor Joseph Alston, Message No. 1, November 23, 1813, SCA.

15. See the following messages of the named governors: Governor John Geddes, Message No. 1, November 22, 1819; Governor Thomas Bennett, Message No. 1, November 27, 1821; and Governor John Lyde Wilson, Message No. 1, November 22, 1824.

16. P. MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR*, p. 172 (1965).

sumed a critical view of judging cases by the rules of equity since this would lead judges to act as legislators and bring about uncertainty and confusion into the law. Overall, equity had not been completely developed as a system even by the time of the American independence movement and thus English as well as American judges exercised a certain amount of legal creativity and judicial discretion in their area of jurisprudence.¹⁷

When South Carolina adopted the English common law in 1712, the colony also accepted English chancery law. The South Carolina chancery court, consisting of the governor and the council, experienced difficulties throughout the colonial period, e.g., the court had difficulty getting a quorum together so that it could function and its members generally were not trained in law.¹⁸ The equity issue was a dormant one. It was only after the new nation was established that a serious problem arose in connection with equity jurisdiction, specifically in the early part of the nineteenth century. In South Carolina, for example, the equity judges recognized their creative potential in the field of law and seized the initiative. In the year 1804 the equity courts in the state outside of the city of Charleston remained nominal and the two chancellors who presided rarely held sessions. However, with the reorganization of the equity court system in 1808 and the election of the able and distinguished Chancellor Henry William DeSaussure as a judge for the equity court in the same year, the equity system received new life and DeSaussure's leadership became responsible for spreading the influence of equity law throughout the state. The addition of equity circuits and two additional chancellors notably aided the strengthening of equity law. It was the man DeSaussure who made the equity system viable in the state. Judge John Belton O'Neill praised DeSaussure for being responsible for the shape, form, and existence of equity law in the state and compared his accomplishment for South Carolina as analogous to that of Chancellor James Kent for New York.¹⁹

17. *Id.* at 171; R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1950).

18. A. K. GREGORIE, *RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA, 1671-1779*, 3-19, 29-30 (1950). See especially James Nelson Frierson's essay entitled "Legal Introduction," pp. 20-54.

19. J. B. O'NEAL, *BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA*, I, pp. 244-249, (1859). After nineteen years of rendering

During the first quarter of the nineteenth century, the equity courts in South Carolina suffered opposition because of their tendency to make new law and to overrule the decisions of the common law decisions of the state's court of appeals.²⁰ The value of equity seriously divided the legal profession in South Carolina. Thomas Cooper—the President of South Carolina College 1821-1834, jurist, lawyer, educator—had been educated in the common law tradition and was also acquainted with the civil law; he criticized the combination of equity courts with common law courts in the same system noting that the result was having a set of “court for quibbles, and another one for common sense.”²¹ Governor John Lyde Wilson, a leader of the legal codification movement in the state in the 1820's, considered such a dual court system, with a lack of sufficient safeguards on the authority of the equity courts, as an anomaly in the science of legislation.²² On the other hand, the attorney James L. Petigru considered the chancery or equity jurisdiction as the best part of the English legal system.²³

The effectiveness of the criticism of the equity system was revealed in the court reform and reorganization program adopted by the state legislature in 1824. Governor John Lyde Wilson in his message of that year proposed two necessary legal reforms: codification of the state's laws and the reorganization of the state's judiciary. In discussing the latter proposal, his hostility to equity jurisdiction became clearly evident: “The Courts of Equity go on to legislate at will, and

equity decisions, Chancellor DeSaussure's decrees constituted forty per cent or two-fifths of all decisions made. In 1830, it was estimated that out of more than two thousand decrees and opinions delivered on equity matters during the proceeding twenty years, DeSaussure made roughly one half of these, 923 out of 2,173. In the Charleston Court of Appeals, he had delivered 185 out of 320 decisions. The cases reported in the standard works (3rd and 4th Equity Reports, Harper's Equity Reports, and in the 1st and 2nd Equity Reports) the Chancellor had delivered 163 out of 233 decisions with only 17 reversals.

20. D. D. WALLACE, *SOUTH CAROLINA: A SHORT HISTORY, 1520-1948*, 412 (1951).

21. T. Cooper, *Bentham's Judicial Evidence*, V *SOUTHERN REVIEW* 422 (May, 1830).

22. Governor John Lyde Wilson, Message No. 1, November 25, 1823, SCA.

23. J. L. Petigru, *Court of Chancery*, III *SOUTHERN REVIEW*, 63 (February, 1829).

the citizen is wholly unable to say by what tenure he holds anything that is his.”²⁴

Governor Wilson compared the equity court to the famed French Directory, a five-headed monster which needed to be destroyed or it would grievously harm the state. Although he refrained from critical commentary on the ability or sincerity of the judges on the equity court, he recognized, nevertheless, that they were ambitious of power and the vague limits of equity jurisdiction aided this ambition. The division of responsibility among the judges became a farce and in actuality each of the judges received a license to do as he pleased. Furthermore, the chief executive noted that in his opinion eighty per cent of the cases heard by the court could be decided on the local district level by the commissioners of the several districts with only a chancellor necessary to hear appeals from the rulings of these commissioners.²⁵

The South Carolina legislature in 1824 abolished the parallel appeals structure seeking unity and efficiency in the legal system by establishing a completely separate court of appeals—a three judge court, elected by joint ballot of the state legislature, and being granted the power to act in all appeals whether in law or equity as well as the authority to establish additional courts. This separate court of appeals would sit twice yearly at Columbia and twice at Charleston. The courts of law would continue as before trying all civil and criminal cases in their districts with a continuance of the law judges riding circuit.²⁶

Responding to the plea to limit the unrestricted and unregulated power in the equity field of jurisprudence, the leg-

24. Governor John Lyde Wilson, Message No. 1, November 22, 1824, SCA. Wilson had earlier expressed his criticism of the equity jurisdiction in the state. He criticized Chancellor DeSaussure's view that the duties of the equity courts in America should correspond to the high court of chancery in England, opposed equity jurisdiction when a clear and adequate remedy existed at common law, and opposed the intervention of the equity courts in deciding questions of land titles when this matter should reside with the court of common pleas. John Lyde Wilson, "A Review of the Court of Equity," Georgetown, South Carolina: 1822, (No title page), printed, pp. 25-27.

25. *Id.* Wilson's indictment of the equity courts included the following statement in his 1824 message: "Their Prerogatives cannot be defined by any one. They decide the same case, according to different rules, and no precedent governs them, when they chose to be untrammelled. One of the great evils that leads to this, is the want of sufficient responsibility."

26. VII S. C. STAT. AT LARGE 325-328.

islature reduced the number of equity judges. Two individuals, chosen from the judges of law or of equity, would thereafter be known as chancellors exercising all the authority of court of equity. A regular court of equity would be held once a year in every equity district (except two courts held annually in Charleston). The state was divided into four equity districts and the chancellors were assigned to ride the circuits alternately to try all the equity cases. The court situated at Charleston handled all the appeals from the districts of Beaufort, Colleton, Charleston, Georgetown, Williamsburg, and Horry while the court at Columbia handled the appeals from other districts.²⁷ The basic reorganization notably curtailed the power of the equity courts and severely limited the authority of the unchartered prerogatives of the chancellors.

This reorganized system appeared satisfactory and Governor Stephen D. Miller in 1829 complimented the wisdom of the legislature for their action in bringing about a beneficial reform of the judiciary, especially in limiting the chancery jurisdiction. He suggested only minor additions: two courts of equity should be held each year accomplished through enlarging the size of the districts and urged that the power of the commissioners in equity be expanded so that they might take testimony in writing for the chancellors adding to the efficiency of the system.²⁸

The legislature in 1833 recognizing the need to adjust the court terms in accord with the amount of business transacted proceeded to regulate more carefully the terms of holding the court of equity for certain districts. Changes adopted included the following: the court of equity would meet for six days in the Edgefield and Spartanburg districts, two days in the Pickens district, and on a day to day basis until business was finished for the Newberry and Lancaster districts. Tentative dates were set for court business in each district but in order to secure the required flexibility for efficiency, it was provided that the equity court did not have to keep the fixed

27. *Id.* The first circuit included the district courts of Edgefield, Abbeville, Pendleton, Greenville, Laurens, and Newberry; the second circuit took in the courts of Spartanburg, Union, York, Chester, Lancaster, Fairfield, and Kershaw; the third circuit encompassed the courts of Orangeburg, Colleton, Beaufort Barnwell, Richland and Lexington; the fourth circuit handled the courts held at Charleston, Georgetown, Cheraw, and Sumter. *Id.* at pp. 326-327.

28. Governor Stephen D. Miller, Message No. 1, November 24, 1829, SCA.

length if it could dispose of business sooner.²⁹ Overall, despite minor problems which occurred from time to time, South Carolina appeared to have reached a rational and satisfactory organization of its judiciary system by the reform of 1824, a reform which had established a separate appeals court while at the same time limiting the power of the equity court.

The nullification controversy of the late 1820's and the early 1830's plunged the politics of the state into turmoil and confusion bringing about the legal crisis of 1835. The crisis emerged as a direct result of the nullification debate. The Nullification Convention in South Carolina had declared the tariffs of 1828 and 1832 null and void in the state and authorized the state legislature to pass any enactments necessary to carry out the full effect of the nullification ordinance. In response, the legislature passed a test oath, which contained a pledge of loyalty to the state, the ordinance, and any legislation adopted to sustain the ordinance. In effect, it substituted a loyalty oath to the state in direct contradiction to the loyalty owed to the federal union. Its most immediate effect in the state was to bar Union supporters from holding public office in South Carolina.³⁰

A test case soon arose to challenge the constitutionality of the oath. Edward McCrady, elected as a lieutenant of the Washington Light Infantry, a military corps in the city of Charleston, had applied for his commission but his commanding officer, Colonel B.F. Hunt refused to give it to him unless he submitted to the test oath. McCrady declined to do so and then submitted a petition to Judge Elihu Bay for a writ of mandamus requiring Colonel Hunt to issue the commission to him. Judge Bay immediately dismissed the case. McCrady, undeterred by this rebuff, took his case to the court of appeals requesting that they reverse the lower court's decision and grant him his commission. The case had important implications since it involved a head on collision between the conflicting loyalties owed to the state government (under the test oath requirement) and the allegiance owed to the national government. Two of the ablest lawyers in the state, James L. Petigru and Thomas Smith Grimke, supported McCrady. Petigru argued that the test oath lacked validity since it directly con-

29. VII S. C. STAT. AT LARGE 333-334.

30. W. H. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836*, 263 (1966).

tradicted the allegiance owed to the United States Constitution. Robert Barnwell Rhett, arguing the case for the state as attorney general, upheld the validity of the test oath as a legitimate exercise of the sovereign powers of the state.³¹

The Court of Appeals, consisting of Judges John Belton O'Neill, David Johnson, and William Harper, heard the case and by a two-to-one vote (O'Neill and Johnson in the majority with Harper dissenting) ruled the test oath unconstitutional and upheld the right of McCrady to his commission.³²

The reaction was both swift and hostile to a decision which struck a severe blow at the doctrine of state sovereignty in a period of crisis for South Carolina. A treason bill was introduced in the legislature but was dropped when the passion of the moment had receded; the house of representatives barely voted down a resolution declaring that the state had the right to define allegiance of its citizens. However, the sentiment to seek revenge on the court was growing stronger in the legislature. A bill of 1834, designed to punish the judges on the court of appeals for this decision by putting into effect a court reorganization which abolished their offices, failed of adoption.

In 1835, the Court of Appeals further angered the states right's party in the state by upholding an act of Congress allowing state courts the jurisdiction to punish anyone taking letters from post offices. Critics charged that this decision limited state sovereignty by subordinating state authority to federal authority. This time the legislature acted with a vengeance. An 1835 enactment of the legislature completely abolished the separate court of appeals redistributing the three judges to other courts (e.g., two were assigned the duties of chancellors and the remaining one would go on the law court); this piece of legislation in effect re-established the system in existence prior to 1824, with the law and equity judges hearing cases on their respective circuits and then assembling together to hear appeals as a court of last resort.³³ The legisla-

31. The preliminary decision, major arguments, and final decision may be found in *THE BOOK OF ALLEGIANCE OR A REPORT OF THE ARGUMENTS OF COUNSEL AND THE OPINIONS OF THE COURT OF APPEALS OF SOUTH CAROLINA ON THE OATH OF ALLEGIANCE, DETERMINED ON THE 24TH OF MAY, 1834* (1834).

32. *Id.*

33. *ACTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF SOUTH CAROLINA*, 11-14 (1835).

ture obviously believed that this action would curb the independence of the court on matters of federal and state relations, and in the place of the separate appeals court they re-established a trusted and proven system.

After re-establishing this parallel system of appellate jurisdiction in 1835, the legislature tended to confuse the structure even more by adding a Court of Errors, consisting of a combination of all the law judges and all the equity judges sitting together. This jerry-built structure would be called into session on "all constitutional questions arising out of the constitution of this State, or of the United States," when the judges of either the law courts or equity courts were divided, and when two judges of either court requested that the case be heard again.³⁴

Within a decade, the South Carolina judiciary experienced more problems under the new system than ever before. The matter became so serious that Governor David Johnson in 1847 devoted a large part of his message to the legislature in urging a complete reform of the judicial system. Business had accumulated so much over the intervening years that the existing court system could not handle matters with efficiency or give the required attention needed. The courts were in session most of the year and even with the establishment of special courts of law and equity to handle the cases in areas where legal business had notably increased, the cases were not handled efficiently nor effectively. Some of the cases in the most populous districts were carried over from one session to the next session due to lack of time; this carryover resulted in delays, increased cost of litigation, and brought inconvenience to the parties and witnesses involved. The governor suggested that the state should be divided into seven rather than six circuits with the appointment of an additional law judge, and the scheduling of a week for the regular session of each court plus an additional week to be set aside for each circuit in which a large amount of business had accumulated.³⁵

Again the court of equity presented another great problem for the state because of the length of time it took equity cases to travel through the courts. One equity case might have as many issues of law and fact involved as a court of common

34. ACTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF SOUTH CAROLINA, 38-41 (1836).

35. Governor David Johnson, Message No. 4, December 3, 1847, SCA.

pleas might dispose of in a week.³⁶ A suitor whose case was settled within five years should consider himself fortunate since the normal span was usually ten years. The governor rejected the suggestion that the law and chancery jurisdiction should be combined and handled by the same judge; the more practical remedy appeared to be the elimination of the equity circuits and the concentration of equity business at a few specific locations in the state, sessions to be held at least twice a year.³⁷

Governor Johnson did find one bright spot to praise in this confused court system: he paid tribute to the Court of Errors for securing uniformity in the decisions of the courts of law and equity.³⁸ Despite the very obvious need for reform, the legislature hesitated to act.

Three years later, the *Southern Quarterly Review* devoted its pages to an essay pointing out the deficiencies in the South Carolina judiciary, difficulties which it noted might well exist in other states as well. Cognizant of Governor David Johnson's 1847 message, it pointed out that public attention had been focused on the question of judicial reform with even judges and lawyers agreeing on the essential need for reform. It added that immediate reform of the system was needed to prevent the judiciary from falling into the contempt of the public.³⁹

The chief drawback of the existing court system remained the excessive work required of the judges—a requirement which exhausted them physically as well as mentally and seriously hampered them in discharging the duties of their office.

36. *Id.* Governor Johnson cited one case from Abbeville which had thirty-six well founded and serious questions of controversy and another case from Newberry which contained seventy-five exceptions to the Commissioner's report. Whether these exceptions were substantial or trivial, the equity chancellor had the duty to carefully examine all of them.

37. *Id.* The problem of the equity courts was quite basic; regular terms had been assigned to each circuit and sometimes these terms, falling far short of the time necessary for the business of the court, resulted in surplus and wasted time on the circuit. For example, the third circuit had a term of five weeks assigned to it; the last chancellor riding this circuit wound up all the outstanding business in twelve days and had eighteen out of thirty days unoccupied.

38. *Id.*

39. *The Judiciary System of South Carolina*, II SOUTHERN QUARTERLY REVIEW. 464 (November, 1850).

The article clearly indicted the system, rather than the judges:

We actually deny our men in ermine the amount of time essential for the prosecution of their studies. We keep them at a sort of mill-horse progress, round and round, through incessant circuits, leaving them but little of the necessary leisure for research, by which alone, they can be enabled to keep pace with the progress of the profession.⁴⁰

This system became especially detrimental for the functioning of the Court of Appeals. After traveling their respective circuits for five weeks, the judges, "still covered with the dust of a late progress from court to court, with minds harassed and limbs wearied," assembled to hear cases as the court of appeals. The pace remained frantic. They would tackle an average of five cases a day for each day averaging twenty-five cases each week. Having heard these cases in the morning, an afternoon assembly was necessary to review the arguments they had heard, examine the quoted law, confer with each other, engage in deliberation, and then render a decision. This work load combined with the limitation of time prevented the individual judge from reviewing the judgments of his colleagues as a whole before the court rendered a final decision:

It follows that, if any doctrine shall be laid down by the judge reading, in which his brethren are not prepared to acquiesce, they have no longer the opportunity to utter their dissent; and that which may not be the judgment of the court, is yet read as its deliberate opinion!⁴¹

The effect of such a system became obvious: speed sacrificed for careful deliberation brought illogical deductions, violations of grammar, blatant violations of good literary taste, and would in the long run damage the reputation of the judge who pronounced the decision as well as diminish the respect of the public for the judiciary. The magazine opined that in many cases the appellate judgment even fell below the standard of the original case, and thus the organization and operation of the existing judicial system in South Carolina defeated the very purpose of an appellate judgment, ideally a model of profound reasoning, elaborate research, and respectable literary ability.⁴²

40. *Id.* at 465.

41. *Id.* at 466-467.

42. *Id.* at 467.

The article suggested two areas where reform would remedy the worst evils in the equity system and the court of appeals. Similar to Governor Johnson's proposal, efficiency required the abolition of the equity circuits and their replacement by two resident chancellors, chosen on alternating basis from the bench of law judges, with one sitting in Columbia and the other one in Charleston. Attention was then focused on the structure of the equity system in the state: the ordinary, the masters in chancery, and the court of chancery, with the right of appeal to the court of appeals. The office of the ordinary should be abolished with its power transferred to the masters in chancery; the masters in chancery should also be given the power held by the chancellor to hear and determine a cause and to hold a regular court in the district. This streamlined proposal upgrading the power of the masters in chancery would eliminate one area of extensive litigation, the ordinary court, which usually had its own system of rules and conduct and generally was presided over by a man not a lawyer; this change if adopted would also relieve the chancellors of much extra work.⁴³

Such a thoroughgoing reform would undoubtedly benefit the entire court system: it would allow all eight (not just six) judges to travel the circuit; the number of circuits could be increased and apportioned to the amount of business for each area; the necessity of establishing extra courts or postponing court business would be eliminated; the haste which usually produced error in rendering a decision would be avoided; judges would have more time for public and private affairs; and suitors and lawyers would benefit from the convenience of such a reformed system. A judicial system which would allow a thorough investigation of each case before a decision had been rendered could only result in justice being given and certainty in the law as well as a reduction in the number of appeals.⁴⁴

Turning to the incongruous appeals system, the journal article urged the legislature to recognize the failure of the existing court of appeals and to take action to abolish it. Instead, a separate appeals court consisting of four judges (two chancellors and two law judges), hearing appeals in law and in equity, should replace the existing system. The proposed

43. *Id.* at 476-477.

44. *Id.* at 477.

reform, if adopted, would allow each judge a turn to act as chancellor, law judge, and appeals judge; the entire judiciary would be placed on an equal footing eliminating two evils from the existing system: jealousy between the courts and the overworking of certain judges.⁴⁵

Would the legislature of South Carolina bring about this reform of its judiciary? Pessimism remained the order of the day. After all, the South Carolina legislature was "one of the most conservative in the Union" and represented "a people, among whom as greater degree of veneration prevails" than in any other state in the Union:

No people are more proud of the past, or more tenacious of its lessons. The very idea of change revolts them, and they recoil from all tempering with the existing state of things, the Constitution and the laws as if they were quite too sacred for common handling.⁴⁶

Recognizing the soundness of a cautious approach when dealing with such a fundamental proposition as the law of society, the magazine article, nevertheless, warned against the twin extremes—"against the impatient recklessness of a blind reform, and a slavish subservience to ancient error."⁴⁷ Suffering from stagnation when the world was moving became as bad as suffering from too rapid a change. It became better to "invite the storm which purifies, than become stifled with the fetid inspiration of a stagnation atmosphere."⁴⁸ The legislators did not undertake this reform, the people might take matters into their own hands and "tumble the whole rickety establishment into irreparable ruin."⁴⁹

Finally, the legislature took action in 1859 to correct the deficiency in the appeals set up. A separate court of appeals consisting of three judges was once again established and the title of Chief Justice, dormant since the beginning of the nineteenth century, was revived and conferred on Judge John Belton O'Neill. The Court of Errors, consisting of all law judges, chancellors, and appeals judges sitting together, became the highest court in the state. This court could be convened by the presiding judge of the appeals court to render judgement on cases of constitutional law or if a conflict be-

45. *Id.* at 478-479.

46. *Id.* at 469-470.

47. *Id.* at 470.

48. *Id.*

49. *Id.* at 471.

tween the United State Constitution (or laws of the United States) and the laws of the state developed; any other question could be brought before this court at the request of any two judges on the court of appeals.⁵⁰

It is necessary to proceed one step further beyond the antebellum period when a more fixed and permanent settlement was made. The events of the next few years completely occupied the state as the Civil War raged from 1860 to 1865 and the state sought to become a part of a new confederation. Although a constitution was adopted by South Carolina in 1865, the Constitution of 1868 became the instrument of a major legal change.

The 1868 document vested the judicial power of the state in a single supreme court which had "appellate jurisdiction only in cases of Chancery, and shall constitute a Court for the correction of errors at law" and two circuit courts. The Supreme Court could issue writs of injunction, remedial writs, and could exercise a general supervisory control over other courts. The personnel include a Chief Justice plus two associate justices, any two constituting a quorum; they were elected by the general assembly for a term of six years with one term expiring for one of the judges every two years.⁵¹

Two circuit courts were established including a Court of Common Pleas possessing civil jurisdiction and a Court of General Sessions with jurisdiction in criminal cases only. The state was divided into circuits with a judge elected by a joint ballot of the legislature for each circuit, the judge serving a term of four years. Probate courts and justices of the peace were included in the new judicial system and the state legislature had the authority to establish such municipal and inferior courts as might be necessary.⁵²

The new constitution also dealt with the troublesome matter of equity jurisdiction. The Court of Common Pleas, which would sit in each judicial district at least twice each year, had jurisdiction in all matters of equity. Equity courts were allowed to continue to exist until January 1, 1869, in order to dispose of all pending causes. The state legislature provided

50. ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA, 757-760 (1859).

51. S. C. CONSTITUTION of 1868.

52. *Id.*

for the preservation of the records of the courts of equity and to transfer to the Court of Common Pleas and the probate courts for final decision all the matters which still remained undetermined. A court of probate, established in each county, had jurisdiction in matters of administration dealing with such cases as minors and the allotment of dower in cases of idiocy, lunacy, or persons generally not mentally competent. The judges for these courts would be elected by the voters in each county for a two year term.⁵³

In order to make the administration of justice uniform without distinction between law and equity, all distinct forms of action were abolished. It was further provided that an individual be appointed "to revise, simplify and abridge the rules, practices, pleadings, and forms of the courts now in use in the State."⁵⁴

As a final culmination to the movement for legal reform reaching back at least to Governor John Lyde Wilson's plea in 1824, the Constitution contained a provision to revise, digest, and arrange under proper headings the whole body of laws, civil and criminal, and to establish a penal code. The revision and digest would be repeated at regular ten year periods.⁵⁵ The publication of the *Revised Statutes of South Carolina* brought this objective to reality in 1872.⁵⁶

Overall, the 1868 constitutional reform eliminated two major causes of previous agitation and dissatisfaction with the judiciary system. The Court of Errors, established in 1859 and consisting of all the law judges, chancellors, and appeal judges, was eliminated from the judicial system. A less elaborate and less cumbersome Supreme Court replaced it with its own elected judges. The equity system was completely revamped with the elimination of the separate equity courts and the placing of the law and equity jurisdictions in the hands of the same judges.

After over a century of serious experimentation, South Carolina had finally reached a reasonable and efficient system of judicial organization.

53. *Id.*

54. *Id.*

55. *Id.*

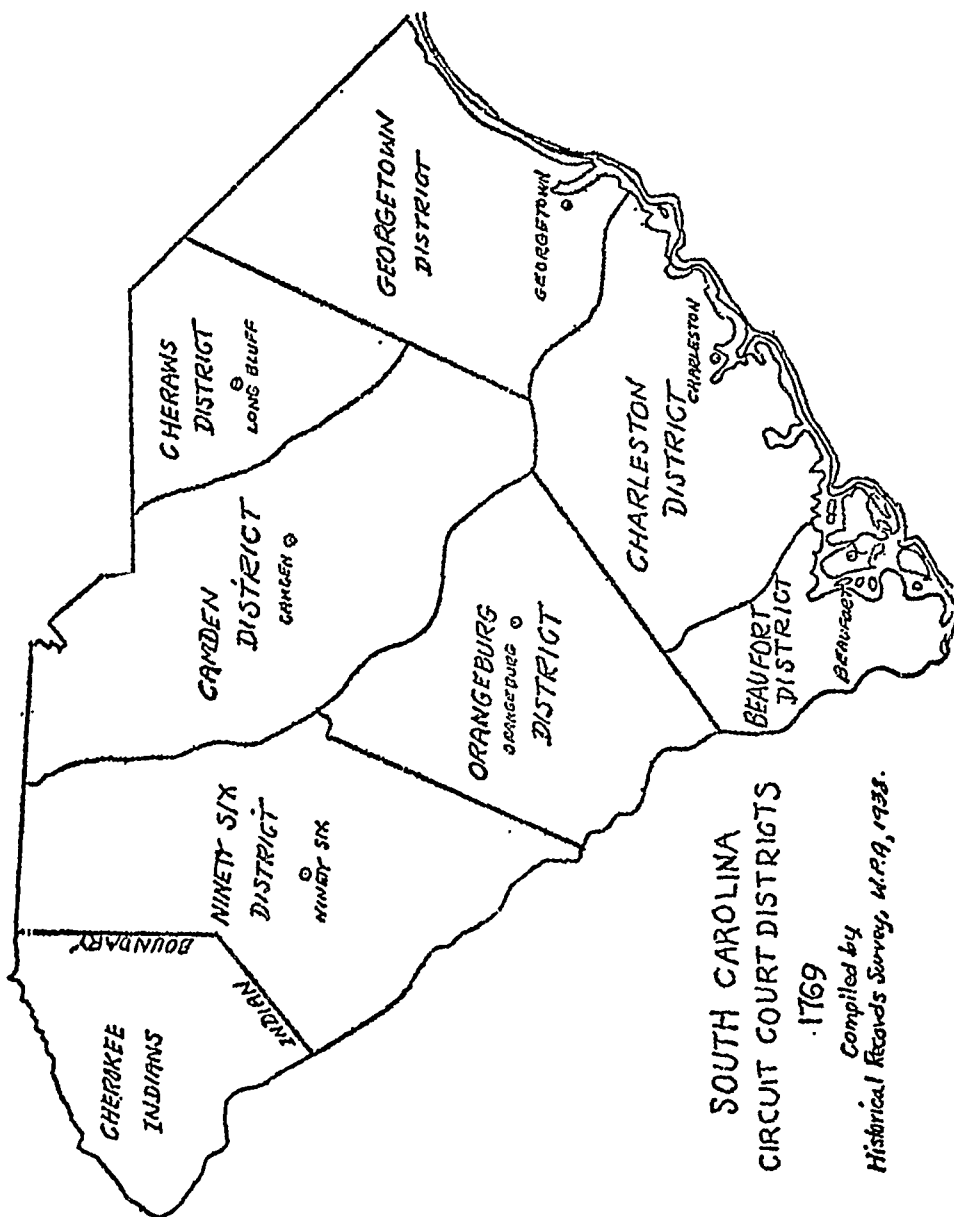
56. D. D. WALLACE, *SOUTH CAROLINA: A SHORT HISTORY, 1520-1948*, 417 (1951); *REVISED STATUTES OF SOUTH CAROLINA*, 1873, pp. 3-5.

Maps of South Carolina Court Districts

From the "Guide Maps to Development of S. C. Parishes, Districts, and Counties."

Compiled by the S. C. Department of Archives and History from Maps in S. C. County Inventories made by the WPA Historical Records Survey."

DONALD J. SENESE



1769

Compiled by
Historical Records Survey, W.P.A., 1938.

