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THE SUPREME COURT OF ALABAMA— ITS CAHABA BEGINNING, 1820–1825

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The Supreme Court of Alabama opened its first term on May 8, 1820 at Cahaba, the site designated as the new state’s first seat of government. The court was born then and there, but it had been conceived the previous year in Huntsville, then the territorial capital.¹

I. PROCEEDINGS IN HUNTSVILLE, 1819

The movement toward statehood in the Alabama Territory, created in 1817 when Mississippi was admitted as a state, formally began in March 1819 with congressional passage of the Enabling Act. That Act authorized the people of the territory to adopt a constitution and enact laws providing for a state government. Pursuant to that Act, a convention of forty-four elected delegates from throughout the territory convened in Huntsville in July to draft a state constitution.² Huntsville, located in the Tennessee Val-

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1. WILLIAM H. BRANTLEY, *THREE CAPITALS: A BOOK ABOUT THE FIRST THREE CAPITALS OF ALABAMA* 48 (1947).

2. Paul M. Pruitt, Jr. & David I. Durham, *Sources of Law in the Alabama Territory and the State of Alabama: A Narrative Bibliography, 1798–1832*, in 1 *PRESTATEHOOD LEGAL MATERIALS: A FIFTY STATE RESEARCH GUIDE* 1, 14 (Michael Chiorazzi & Marguerite Most eds., 2005).

ley, was the largest town in the territory with over 3,000 inhabitants at the time.

That group of forty-four delegates included eighteen lawyers.³ Nine of the members had served in legislative or judicial positions in the states from which they had come. Almost all had roots in Virginia, the Carolinas, or Georgia.⁴ From this group came much of the state's future leadership: six governors, six U.S. Senators, six of the early Supreme Court judges, the first attorney general, and the author of the first digest of Alabama laws. A committee of fifteen drafted the constitution and, remarkably, the convention adopted it within one month.⁵ The building where they met has been reconstructed on the site and is known as Constitution Hall.

That 1819 constitution was modeled on the Federal Constitution and embodied the concept of separation of powers; it established executive, legislative, and judicial branches of the state government.⁶ Article V provided for the judicial branch. Section 1, patterned after Article III of the United States Constitution, read: "The judicial power of this State shall be vested in one Supreme Court, Circuit Courts to be held in each county in the State, and such inferior courts of law and equity . . . as the General Assembly may, from time to time, direct, ordain, and establish."⁷ Article V went on to specify that the Supreme Court should have appellate jurisdiction only, that the court should consist of all the circuit judges of the state (the major trial judges), that the court "shall be holden at the seat of Government," and that the state be organized into circuits consisting of at least three but not more than six counties each and that there be a circuit judge for each circuit.⁸

Under Article V, all judges were to be elected by a joint vote of both houses of the General Assembly (as the legislature was then called), they were to hold office during "good behavior," their compensation could not be diminished, they could be removed by the governor on an address by a two-thirds vote of both houses of the General Assembly, and no judge could hold office after the age of seventy.⁹

The judges' tenure and salary protections came from the Federal Constitution, with the salutary addition of a mandatory retirement age. Copied from other states, such as Georgia, and from England, was the concept of a court of last resort with no judges of its own but consisting of trial

3. *Id.*

4. See MALCOLM COOK McMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM 31-32 (Reprint Co. 1978) (1955).

5. *Id.* at 32, 34, 45.

6. See BRANTLEY, *supra* note 1, at 77.

7. ALA. CONST. of 1819, art. V, § 1.

8. *Id.* § 3-5.

9. *Id.* §§ 13-14. In eight of the thirteen original states, judges were elected by the legislature; they still are in Virginia and South Carolina.

judges coming together from time to time to act in an appellate capacity.¹⁰ Indeed, in 1819 courts that were solely appellate with judges of their own were rare. The procedure for removing judges by an address of the legislature originated in the English Parliament. All in all, those framers of Article V drew on the best practices in the federal, state, and English realms to lay a basis for a sound, independent judicial branch.

The practice of not subjecting judges to popular elections survived the antebellum excesses of Jacksonian Democracy that afflicted the judiciary in many states. But in 1868 the constitution was changed to provide for judges to be elected by the people.¹¹ That change increasingly haunts the Alabama judiciary in the twenty-first century, underscoring the wisdom of those 1819 constitutional framers.

Meeting in Huntsville in the fall of 1819, the Alabama territorial legislature undertook to flesh out those constitutional provisions concerning the judiciary. It enacted statutes providing in detail for judicial process and procedure. It established five judicial circuits, allocating each of the twenty-seven counties to one of the circuits. The legislature also elected a judge for each of the circuits. The circuit courts were to have original jurisdiction over criminal prosecutions and civil cases, in both law and equity.¹²

That fall, a public election for governor resulted in the selection of William Wyatt Bibb. He had been appointed territorial governor by President James Monroe in 1817. He was born in 1781 in Prince Edward County, Virginia and attended the College of William and Mary and the University of Pennsylvania where he earned an M.D. degree. He moved to Georgia where he practiced medicine and served in both houses of the legislature. He then served in the U.S. House of Representatives for eight years and then in the U.S. Senate for three years. He moved to the Alabama territory when he was appointed governor.¹³

The culminating step on the road to statehood came on December 14, 1819, when President Monroe signed the bill admitting Alabama to the Union as the twenty-second state.¹⁴ Thereafter, action shifted from the territorial capitol of Huntsville to Cahaba, the newly designated state capital. There, the machinery of state government would be activated, and the Supreme Court would convene for the first time.

10. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 140 (2d ed. 1985).

11. MCMILLAN, *supra* note 4, at 142.

12. 1820 Ala. Acts. 1.

13. Daniel S. Dupree, *William Wyatt Bibb, 1819–1820, and Thomas Bibb 1820–21*, in *ALABAMA GOVERNORS: A POLITICAL HISTORY OF THE STATE* 13, 13–16 (Samuel L. Webb & Margaret E. Armbruster eds., 2001).

14. Pruitt & Durham, *supra* note 2, at 16.

II. THE FIRST SEAT OF STATE GOVERNMENT—CAHABA

Selection of this site for the permanent seat of state government had been one of the most important and contentious tasks confronting Alabama politicians during 1818 and 1819. The sectional interests evident throughout much of Alabama's political history were in play. There was pull and haul between the northern part, centered along the Tennessee River, and the southern part, principally the Black Belt, St. Stephens, and Mobile. In addition, there were the divergent interests of the two major river systems—the Cahaba-Alabama and the Tombigbee-Black Warrior.¹⁵

On the question of the capital site, Territorial Governor Bibb, an Autauga County plantation owner, was aligned with the southern and Cahaba-Alabama River interests. He in effect preempted the legislature by obtaining federal land grants totaling 1,620 acres for a capital site at the confluence of the Cahaba and Alabama Rivers.¹⁶ It is easy to imagine that, with his decade in Congress, Bibb knew how to engineer such grants from the federal authorities. Under his influence the legislature followed his lead and designated this as the capital site. In choosing an uninhabited wilderness as the state's capital, the Alabama authorities acted as had the Congress in choosing for the nation's capital a similar stretch of uninhabited Maryland land bordering the Potomac. The place was called Cahawba.¹⁷ Indians had been there ages ago, but there was nothing there at the time.

The town, modeled after Philadelphia, was laid out on a grid and extended fourteen blocks from south to north and six blocks from east to west. As in Philadelphia, the north-south streets were named for trees. From a central east-west Capital Street, the other east-west streets were numbered—1st North, 2nd North, up to 7th North, and 1st South, 2nd South up to 7th South. This grid formed two-acre blocks, each of which was divided into four lots of a half-acre each. Vine Street, close to and paralleling the Alabama River, was the main commercial and governmental street. Arch Street swept down the bluff from Vine to the Alabama River landing.¹⁸

Water was abundant in Cahawba. The Alabama River ran along the east side. The Cahaba River came in on the west side, and looped around the north and east where it joined the Alabama.¹⁹ On the west side, Clear Creek also flowed into the Cahaba. Thus Cahaba was in effect a peninsula—an expanse of land surrounded on three sides by water, a circumstance

15. See BRANTLEY, *supra* note 1, at 45–47.

16. *Id.* at 61.

17. The “w” was dropped in the 1850s.

18. See BRANTLEY, *supra* note 1, at 64–65.

19. *Id.*

fateful in the history of the place. Eventually there were dozens of free-flowing artesian wells, spouting cool water from 900 feet down.

The lots were put up for public auction, and they sold rapidly. Residences began to be established along with businesses. There was excitement in the air over the prospect of creating a wholly new city that would be the seat of a government exercising dominion over a territory from the Gulf of Mexico north to the Tennessee border and from the Chattahoochee westward to beyond the Tombigbee. In that extensive territory, there were only 128,000 people.²⁰

Construction began in the spring of 1820 on the two-story brick capital, on the southwest corner of Vine and Capital Streets. The senate chamber was on the ground floor and the house of representatives was upstairs.²¹ The new General Assembly would contain twenty-two senators and fifty-two representatives. Rooms were provided for executive offices, but apparently no provision was made for a courtroom for the Supreme Court. The building was completed in the early fall of 1820, in time for the first meeting of the legislature.²²

Governor Bibb, who more than any other man was responsible for choosing Cahaba for the seat of government, did not live to see his dream come to fruition. He died from injuries sustained in a riding accident in July 1820.²³ He was followed by three governors who presided over the affairs of state in Cahaba.

On his death, his brother, Thomas Bibb of Limestone County, assumed the governorship. Being president of the Senate, he was, under the constitution, first in the line of succession to the top office. The office of lieutenant governor did not then exist. Like his brother, Thomas Bibb was born in Prince Edward County, Virginia, and moved with his family to Georgia. In 1811, he moved to the Tennessee Valley. He was a member of the 1819 constitutional convention. He held the governorship only to the expiration of his brother's term in November 1821, choosing then not to run for a full term.²⁴

Israel Pickens was then elected governor and served from 1821 to 1825. He was born in 1780 near Concord, North Carolina. He graduated from Jefferson College in Pennsylvania. After serving in the North Carolina Senate, he was in the U.S. House of Representatives from 1811 to 1817. He moved to St. Stephens, first capital of the Alabama territory, and was a member of the 1819 constitutional convention.²⁵

20. See Pruitt & Durham, *supra* note 2, at 17.

21. See BRANTLEY, *supra* note 1, at 66, 83 n.1.

22. *Id.* at 70–71.

23. *Id.*

24. Dupree, *supra* note 13, at 16–17.

25. Daniel S. Dupree, *Israel Pickens, 1821–1825*, in ALABAMA GOVERNORS: A POLITICAL HISTORY OF THE STATE 17, 17–18 (Samuel L. Webb & Margaret E. Armbruster eds., 2001).

Pickens was succeeded as governor by John Murphy, who took office in November 1825. Born in North Carolina in 1785, he attended South Carolina College (later renamed University of South Carolina) and read law in South Carolina. He served as a trustee of the college for several years, and in 1818 he moved to Monroe County. He was a member of the 1819 constitutional convention and then served in the Alabama House and Senate.²⁶ The last governor to serve in Cahaba, he presided over the relocation of the capital to Tuscaloosa, effective February 1, 1826.²⁷

III. THE SUPREME COURT JUDGES IN THE CAHABA YEARS, 1820–1825

One of the territorial legislature's 1819 acts specified that sessions of the Supreme Court be held twice a year in Cahaba, beginning on the second Monday in May and the second Monday in November. Pursuant to that Act, four of the five circuit judges convened in Cahaba on May 8, 1820, for the first sitting of the Supreme Court of Alabama. As the General Assembly did not meet until the following November, and Governor Bibb was ill, this court session was the first official governmental activity in the new state capital.²⁸

The conditions those judges found in Cahaba must have been primitive.²⁹ The place had emerged from an uninhabited forest less than a year earlier.³⁰ Having no courtroom, the judges met in a private home, perhaps a log house.³¹ It is assumed that this was the residence of one William Pye, as the legislature, when it met in the fall, appropriated \$20 to reimburse him for the court's use of his premises.³²

Below are the five circuit judges who initially constituted the Supreme Court of Alabama, along with the counties included in the circuit of each.³³ The amount of information about each varies, and in some instances is sketchy and difficult to verify.

Abner Smith Lipscomb, First Circuit (Counties of Baldwin, Washington, Clarke, Monroe, Conecuh). Born in 1789 in Abbeville, South Carolina, Lipscomb read law there and then in 1811 settled in St. Stephens where he entered law practice. He served in the Alabama territorial legislature in 1818. In 1832, when the General Assembly created a separate

26. Hugh C. Bailey, *John Murphy, 1825–1829*, in ALABAMA GOVERNORS: A POLITICAL HISTORY OF THE STATE 21, 21–22 (Samuel L. Webb & Margaret E. Armbruster eds., 2001).

27. BRANTLEY, *supra* note 1, at 205.

28. 2 THOMAS MCADORY OWEN, HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 815, 869 (1921).

29. *See, e.g.*, 1 THOMAS MCADORY OWEN, HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 188–89 (1921).

30. *Id.* at 187.

31. *See* BRANTLEY, *supra* note 1, at 70.

32. *Id.*

33. 2 OWEN, *supra* note 28.

Supreme Court, he left the circuit court to become chief justice of the new court. He resigned from that position in 1835 and moved to Texas, becoming its secretary of state and then a judge on the Texas Supreme Court.³⁴ Lipscomb County, Texas, is named for him.³⁵

Reuben Saffold, Second Circuit (Counties of Henry, Butler, Wilcox, Dallas, Autauga, Montgomery). Born in 1788 in Wilkes County, Georgia, Saffold read law in Georgia and was admitted to the bar. In 1813, he moved to Jackson in Clarke County and entered the practice of law. He took part in the Creek War and participated in the Battle of Burnt Corn. He was a colonel in the territorial militia. He was a member of the 1819 constitutional convention. Thereafter, he moved to Cahaba. When a separate Supreme Court was established in 1832, he left the circuit court to become one of its three justices. He succeeded Lipscomb as chief justice in 1835 but then resigned in 1836 to enter law practice in Dallas County.³⁶

Henry Young Webb, Third Circuit (Counties of Marengo, Greene, Perry, Cahawba (later renamed Bibb), Tuscaloosa, Jefferson). Born in Granville, North Carolina (date unknown), Webb attended the University of North Carolina and served in the North Carolina legislature. He was appointed an Alabama territorial judge in 1818. He died in September 1823.³⁷

Richard Ellis, Fourth Circuit (Counties of Limestone, Lauderdale, Franklin, Lawrence, Marion). Born in Virginia (place and date unknown), Ellis studied law and came to Huntsville in 1817. He was a member of the 1819 constitutional convention.³⁸ In later years, he went to Texas and presided over the convention that issued the Texas Declaration of Independence.³⁹

Clement Comer Clay, Fifth Circuit (Counties of Shelby, St. Clair, Jackson, Madison, Cotaco (renamed Morgan)). Born in 1789 in Halifax County, Virginia, Clay moved to Tennessee where he attended East Tennessee College and was admitted to the bar in 1809.⁴⁰ He moved to Huntsville in 1811. He fought in the Creek War and served in the territorial legislature from 1817 to 1819. He was a member of the 1819 constitutional convention and chaired the fifteen-member committee that actually

34. DE WITT CLINTON BAKER, *A TEXAS SCRAPBOOK: MADE UP OF THE HISTORY, BIOGRAPHY, AND MISCELLANY OF TEXAS AND ITS PEOPLE* 300 (1875).

35. 3 WALTER PRESCOTT WEBB, *THE HANDBOOK OF TEXAS* 62 (1976).

36. 9 JOHN HOWARD BROWN, *THE TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS* (Rossiter Johnson ed., Univ. of Mich. Press 2008) (1904).

37. 4 THOMAS MCADORY OWEN, *HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY* 1738 (1921).

38. JAMES EDMONDS SAUNDERS, *EARLY SETTLERS OF ALABAMA* 53–54 (1899).

39. HOMER S. THRALL, *A PICTORIAL HISTORY OF TEXAS* 690 (Harvard Univ. Press 2008) (1883).

40. 10 *THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY* 427 (Harvard Univ. Press 2008) [hereinafter *THE NATIONAL CYCLOPAEDIA*] (1900).

drafted the document. In later years, he was a member of the U.S. House of Representatives, Governor of Alabama, and a U.S. senator.⁴¹

An 1819 statute provided that the judges should appoint one of their number to be chief justice, so when they gathered in Cahaba in May 1820 for their initial session, they chose Clement C. Clay. He thus became Alabama's first chief justice.⁴² At thirty-one, he was the youngest of the five.⁴³ Abner S. Lipscomb was absent at that opening session.⁴⁴

In 1821, the General Assembly created a Sixth Circuit consisting of the counties of Covington, Henry, Pike, Montgomery, Conecuh, and Butler.⁴⁵ The counties of Butler, Henry, and Montgomery were transferred from the Second Circuit.⁴⁶ Conecuh came from the First Circuit. Covington and Pike were new counties.⁴⁷

To fill the judgeship on this new circuit, the General Assembly elected Anderson Crenshaw, thus bringing him on to the Supreme Court as its sixth member.⁴⁸ Crenshaw was born in 1786 in South Carolina.⁴⁹ He had the distinction of being the first graduate of South Carolina College, receiving the A.B. degree in 1806. He read law, practiced in the Newberry District, and served in the General Assembly. He moved to Cahaba in 1819, but in 1822 he relocated to Butler County. He served on the circuit court until 1839.⁵⁰ Crenshaw County is named for him.⁵¹

Chief Justice Clay resigned from his judgeship in 1823.⁵² The remaining judges chose Abner S. Lipscomb to be the second chief justice of Alabama.⁵³ Governor Pickens appointed Henry Minor to replace Clay as judge for the Fifth Circuit, thereby bringing him on to the Supreme Court.⁵⁴

Born in 1783 in Dinwiddie County, Virginia, Henry Minor read law in Fredericksburg, Virginia.⁵⁵ He moved to Huntsville in 1816. He was a member of the 1819 constitutional convention. He was appointed reporter of the Supreme Court's decisions upon the formation of the court and produced the first volume of *Alabama Reports*, known as *Minor's Reports*.

41. *Id.* at 427–28.

42. 2 OWEN, *supra* note 28.

43. THE NATIONAL CYCLOPAEDIA, *supra* note 40.

44. 2 OWEN, *supra* note 28.

45. BRANTLEY, *supra* note 1, at 106.

46. 1 OWEN, *supra* note 29, at 181, 429, 686; *see also* 2 OWEN, *supra* note 32.

47. 1 OWEN, *supra* note 29, at 181.

48. 2 OWEN, *supra* note 28.

49. *See* 4 TRANSACTIONS OF THE ALABAMA HISTORICAL SOCIETY: 1899–1903 301 (Thomas McAdory Owen ed.) (1904).

50. *Id.* at 304.

51. 1 OWEN, *supra* note 29, at 436.

52. THE NATIONAL CYCLOPAEDIA, *supra* note 40.

53. *See* 4 OWEN, *supra* note 37, at 1052.

54. 1 WILLIAM R. SMITH, SR., REMINISCENCES OF A LONG LIFE: HISTORICAL, POLITICAL, PERSONAL AND LITERARY 86 (1889).

55. 4 OWEN, *supra* note 37, at 1211.

Under Alabama law, his gubernatorial appointment to the judgeship was subject to legislative election. In December 1825, when the legislature elected another in his place, he went off the Supreme Court after only two years, but he was later made clerk of the court.⁵⁶

Another change took place in the Supreme Court's membership in 1823 when Henry Y. Webb died in September.⁵⁷ The General Assembly elected John Gayle to take his place as judge of the Third Circuit.⁵⁸

John Gayle was born in Sumter, South Carolina, in 1792. He received the A.B. degree from South Carolina College in 1813. He moved to Monroe County, Alabama, read law, and was licensed to practice in 1818. He served in the Alabama territorial legislature and in the state legislature in 1822–1823 and was then elected to the bench. In later years, he served as governor of Alabama and in the U.S. House of Representatives.⁵⁹

Thus, when the Supreme Court met in Cahaba in the spring of 1824, the makeup of the court had significantly changed. Of its original members, Clay and Webb were gone.⁶⁰ Abner S. Lipscomb was now chief justice.⁶¹ The other members were Saffold, Gayle, Ellis, Minor, and Crenshaw. The court was to remain unchanged for the rest of its time in Cahaba.

To recap, those eight judges on the Supreme Court during its Cahaba years, 1820–1825, like other men in Alabama's founding generation, had come from elsewhere. None had been born in the Alabama or Mississippi territories. Three were born in Virginia, three in South Carolina, one in North Carolina, and one in Georgia. They were all born in the decade following the American Revolution, ranging in age from thirty-one to thirty-seven when they took their seats on the bench. Only half had the advantage of a college education, not then widespread: two at South Carolina College, one at the University of North Carolina, and one at East Tennessee College. Six "read law" in the states from which they came, one in Tennessee, and one in the Alabama Territory. That process of studying law under the tutelage of a seasoned lawyer was the only path to the bar in those days; university law schools were far in the future.⁶² Half of these judges had been members of the 1819 constitutional convention, where they had a hand in designing the judiciary over which they presided. The group included two future governors of Alabama, a future United States senator, and a future judge on the Texas Supreme Court.

56. *Id.*

57. *Id.* at 1738.

58. 3 THOMAS MCADORY OWEN, HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 646 (1921).

59. *Id.*

60. See THE NATIONAL CYCLOPAEDIA, *supra* note 40; 3 OWEN, *supra* note 58, at 646.

61. 4 OWEN, *supra* note 37, at 1052.

62. See FRIEDMAN, *supra* note 10, at 238–39.

Of the eight, Clement C. Clay had the most illustrious public career, beginning with his chairmanship of the committee that drafted the 1819 constitution, then service as Alabama's first chief justice, governor of the state, and United States Senator.⁶³ He has to be counted as one of Alabama's major founding fathers. He was the father of Clement Claiborne Clay, U.S. Senator from Alabama from 1853 to 1861.⁶⁴

IV. THE SUPREME COURT'S BUSINESS IN THE CAHABA YEARS

During the six years the Supreme Court of Alabama sat in Cahaba, it met for a total of eleven terms. Each term lasted no more than a few weeks. Those judges must have been extraordinarily busy because, in addition to those Cahaba sittings, they were obligated to hold circuit court in each county in their circuits twice a year. Added to the burden of those many court sessions, most of them away from home and some at considerable distances, were the onerous and time-consuming travel conditions.⁶⁵ Transportation was only by horseback or wagon over primitive roads or by river boat.⁶⁶ The first steamboat coming up the Alabama River from Mobile reached Cahaba in October 1821.⁶⁷

Where the court met after its initial meeting at the residence of William Pye is not known. It never had a courtroom of its own. The legislature was never in session in the spring, so the court could have held its hearings in the capitol, in either the Senate or House chamber.⁶⁸ But in the fall that option may not have been available because the legislative session at least partly overlapped with the court's term.⁶⁹

After its initial Cahaba session in May 1820, the court's spring term was in June for the next four years. But the June term was abolished by the legislature in 1824. Thus, during the year 1825, the court met only in December—its last session in Cahaba.⁷⁰

During its six years in Cahaba the court decided a total of 214 reported cases, all contained in *Minor's Reports* (the first volume of Alabama Supreme Court Reports).⁷¹ It decided nine in its first term. The lowest number—four—was at the June term of 1821. The highest number—

63. THE NATIONAL CYCLOPAEDIA, *supra* note 40.

64. *Id.* at 428.

65. FRIEDMAN, *supra* note 10, at 92.

66. 1 OWEN, *supra* note 29.

67. 2 OWEN, *supra* note 28, at 1270.

68. BRANTLEY, *supra* note 1, at 73.

69. *Id.*

70. 1824 Ala. Acts 7.

71. HENRY MINOR, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF ALABAMA (2d ed., West Pub. Co. 1911) (1829).

sixty-five—came in the December term of 1824. In only three terms did the court decide twenty or more reported cases.⁷²

When the court began its work in 1820, it started with a clean slate. It, of course, had no precedents of its own on which to rely. But six of its judges had studied law in one of the original thirteen states, whose legal systems were direct descendants of the English common law and equity. That was the system those judges knew—and they likely knew no other—so it was natural that they carry it forward in procedure and substance. The only directly controlling authority to which the court was subject were the federal and state constitutions, acts of the legislatures of the Mississippi Territory and the Alabama Territory, acts of Congress, and decisions of the U.S. Supreme Court. On common law questions—those questions unguided by any constitutional or statutory provisions—the court could write its own ticket. Being trained in the process of reasoning from prior decisions in the common law tradition, the judges naturally looked to prior decisions in the only places where they existed—in the courts of other states, the U.S. Supreme Court, and the English courts.

Twenty-one states had been admitted to the Union before Alabama,⁷³ but by 1820, only nine of those had published reports of the decisions of their highest courts. Among those courts with reported decisions, New York was the most cited by the Alabama Supreme Court in its Cahaba years. Next in frequency of citation was Virginia.⁷⁴ The influence of English authorities can be seen in the court's citations to decisions of the Court of King's Bench and two important English texts: *Bacon's Abridgment* and *Blackstone's Commentaries*.⁷⁵ By the time the court left Cahaba it had built up enough decisions of its own that it could begin to cite them.

An interesting and unanswered question concerns the sources available to those judges. There was no public law library or court library. Each judge functioned in his own circuit and must have been dependent on his own books.⁷⁶ It would not be surprising to find that each judge owned a copy of *Blackstone's Commentaries* as that work was a staple of law study in that time.⁷⁷ The frequent citation of New York and Virginia cases and cases from other jurisdictions suggest that the judges had access to those reports as well as to the texts they cited. But how and where is a mystery.

72. *Id.*

73. MABEL B. CASNER & RALPH H. GABRIEL, *EXPLORING AMERICAN HISTORY* 798 (1989).

74. *See* MINOR, *supra* note 71.

75. *See* Logwood v. Huntsville Bank, Minor 23 (1820) (citing *Bacon's Abridgment*); Smith v. Crockett, Minor 277, 277 (1824) (discussing *Blackstone's Commentaries*).

76. 1 MICHAEL O'BRIEN, *CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810–1860*, at 479 (2004).

77. DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES* 4 (Univ. of Chi. Press 1996) (1941).

Many of the decisions included in *Minor's Reports*, covering the court's Cahaba years, deal with procedure and pleading.⁷⁸ The court had obviously adopted common law pleading in full force. The opinions abound with the resolution of technical questions concerning demurrers, pleas, and so on.⁷⁹ Such decisions apparently disturbed Governor Israel Pickens to the extent that he informed the General Assembly that it should require the court to decide cases on their merits.⁸⁰ Nothing came of that, but the incident reveals the Governor to have been far ahead of his time. His idea did not come to fruition in the Alabama courts until well into the second half of the twentieth century.⁸¹

The Supreme Court's work was largely confined to civil cases. Commercial transactions were often involved.⁸² It held in *Humphrey v. State* that under its governing statute it had no jurisdiction to entertain appeals in criminal cases.⁸³ Non-appealability of criminal convictions was not unusual in the 19th century—it was the situation for years in the federal courts.⁸⁴ However, by statute the court was authorized to decide questions of law in criminal cases that were referred to it by a circuit judge.⁸⁵

Later in *State v. Reece*,⁸⁶ such a question was referred to the court by the circuit judge before he himself had decided it. A majority of the court, in an opinion by Chief Justice Lipscomb, held that it had no jurisdiction because its jurisdiction was appellate only and extended only to final decisions of the circuit courts.⁸⁷ As the circuit court in this instance had not decided the question, there was no final decision to review. Judge Crenshaw dissented, arguing that the whole idea of authorizing the court to decide referred questions was to provide the court below with a decision on the question while the case was pending.⁸⁸ His position makes sense. One can suspect that the majority's position reflected a dislike for dealing with criminal matters.

As noted above, many of the court's opinions were concerned with technical common law pleading points, and the judges showed themselves to be well-versed in that lore.⁸⁹ In *State ex rel. Mead v. Dunn*,⁹⁰ an action

78. See, e.g., *Bender v. Graham*, Minor 269 (1824); *Craig v. Orton*, Minor 111 (1823).

79. *Id.*

80. See BRANTLEY, *supra* note 1, at 138.

81. See ALA. R. CIV. P. 8.

82. See, e.g., *Bennett v. Hubbard*, Minor 270 (1824); *Wesson v. Carroll*, Minor 251 (1824); *Cabiness v. Brown*, Minor 41 (1821).

83. Minor 64 (1822).

84. Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 503-04 (1992).

85. Writs of Error Act of 1820, § 5; 1820 Ala. Acts 8, 9.

86. Minor 266 (1824).

87. *Id.* at 266.

88. *Id.* at 267-68 (Crenshaw, J., dissenting).

89. *Supra* note 78.

90. Minor 46 (1821).

of mandamus, a writ inherited from England, was brought against a county court judge, challenging the lawfulness of his election by the legislature. The court analyzed at length whether mandamus brought against the contested judge was the appropriate means of raising this question, relying, as usual, on common law precedents. It concluded that it was not, but on application by the State, it held that the election could be challenged by a writ of quo warranto—another English writ. It went on to address the merits, holding that the election was lawful.⁹¹

At that time the English common law “forms of action” held considerable sway in America and no less so in the Alabama Supreme Court. In *White v. Saint Guirons*,⁹² the plaintiff brought an action of trespass to recover possession of land. He claimed a right to possession under an act of Congress granting land to the French Napoleonic refugees forming the Vine and Olive Association on the banks of the Tombigbee. The question before the court was whether possession of land and damages associated with an unlawful ouster could be recovered in an action of trespass, or whether an action of ejectment was the only available remedy.⁹³ The court concluded that a statute had made trespass a proper remedy to recover possession of land, free of the fictions that had encrusted ejectment—formerly the remedy in a case such as this.⁹⁴

A case with a contemporary ring was *Brahan v. Ragland*.⁹⁵ The question there was whether “reasonableness” in the giving of notice to an indorser was a question of fact for the jury or one of law for the court. The court determined that the answer depended on whether custom in the community had established a settled practice as to what was “reasonable.”⁹⁶ On examining English authorities, the court found that in London, custom had settled the matter and the question was for the court. However, in Alabama—a recently settled and sparsely inhabited country—no such custom had been established, and thus, the question was one of fact for the jury.⁹⁷ These law-fact distinctions come up often in American courts today; therefore, the analysis in that 1822 Alabama opinion is still useful.

Many of the court’s reported decisions are shown as being “by the court” without identification of author.⁹⁸ But many do have identified authors. During those Cahaba years, Crenshaw wrote the most majority opinions—48 in all. Saffold was next with 42, then Lipscomb with 38, Minor

91. *Id.* at 48.

92. Minor 331 (1824).

93. *Id.* at 332, 337.

94. *Id.* at 352.

95. Minor 85 (1822).

96. *Id.* at 86.

97. *Id.* at 87, 88.

98. *See, e.g.*, J & J Read v. Carson, Minor 17 (1820); Henry v. Gamble, Minor 6 (1820); Ward v. Gifford, Minor 5 (1820).

28, Clay 25, Gayle 9, Ellis 8, and Webb 1. Crenshaw, with 7 dissenting opinions, was also the leading dissenter. The only other dissenters were Clay, Minor, and Webb, with one dissenting opinion each. With three concurring opinions, Crenshaw also led in that regard. Ellis, Lipscomb, and Gayle wrote one concurring opinion each. In one case, *Henry v. Thompson*, every judge wrote separately; there was no majority opinion.⁹⁹

From this record, it is clear that Crenshaw was the most prolific opinion writer, even though he did not come on the court until a year and a half after its beginning.¹⁰⁰ His dissenting and concurring opinions also show him to be the most independent minded of the judges, not infrequently taking a different view of the legal issues. If Clay had remained on the bench he might have rivaled Crenshaw, judging from his rate of production during his two and a half years on the court. Ellis is a puzzle. He was on the court throughout its six years in Cahaba, yet he wrote only eight majority opinions and one dissent. Webb is even more puzzling. During his two and a half years on the bench, he wrote only one majority and one dissenting opinion. Minor was a real producer, with his twenty-eight majority opinions during only two years on the court.

In summary, based on the opinions in *Minor's Reports*, major credit for establishing Alabama's caselaw goes to Crenshaw, Lipscomb, and Saffold. Clay and Minor are also due recognition. Minor is noteworthy not only for his opinions but also because he collected the court's decisions during its Cahaba years and published them as the first volume of *Alabama Reports*, thus making them available to lawyers and judges throughout the state.

Though not on the Supreme Court, two other men are due large credit for their contributions to Alabama law in those formative years. One was Harry Toulmin. Born in England, he became a Unitarian minister and was involved in theological controversies of the day.¹⁰¹ He migrated to Kentucky where he served for a short while as president of Transylvania College and then as secretary of state. He produced the first compilation of Kentucky laws. In 1807, President Thomas Jefferson appointed him judge in the Mississippi Territory, and he moved to St. Stephens.¹⁰² He was a member of the 1819 constitutional convention. Obviously a scholarly type, he compiled a digest of all governing Alabama laws, territorial and state, pursuant to authority of the legislature. *Toulmin's Digest*, a work of more than a thousand pages, published in 1823, must have been of inestimable

99. Minor 209 (1824).

100. 2 OWEN, *supra* note 28.

101. Paul M. Pruitt, Jr., *A Frontier Justinian: An Introduction to the Life and Writings of Harry Toulmin, Territorial Judge of Mississippi and Alabama*, in 14 NEWSL. LEGAL HIST. & RARE BOOKS SPECIAL INTEREST SEC. AM. ASS'N. L. LIBR. 4, 4 (Winter 2008).

102. *Id.* at 5-6.

help to the bench and bar as there was no other single source of Alabama law.¹⁰³

The other important legal figure was Henry Hitchcock, Alabama's first attorney general, elected by the legislature in accordance with Article V of the 1819 constitution.¹⁰⁴ Vermont born, a grandson of Ethan Allen, and a University of Vermont graduate, he was admitted to the Vermont bar and practiced there for several years.¹⁰⁵ (His father was Vermont's first attorney general.)¹⁰⁶ In 1816, he moved to St. Stephens. He was a member of the 1819 constitutional convention.¹⁰⁷ He appears to have lived in Cahaba throughout his term. It was he who officially greeted Lafayette on behalf of the state when that French hero of the American Revolution arrived in Cahaba in 1825.¹⁰⁸ He made a significant contribution to Alabama law with the publication in 1822 of *The Alabama Justice of the Peace*—a compilation of the laws dealing with that subject.¹⁰⁹ In 1826, he was appointed a U.S. Attorney, and he moved to Mobile.¹¹⁰ In 1835 he was elected to the Alabama Supreme Court, becoming chief justice in 1836.¹¹¹ As with *Toulmin's Digest*, Hitchcock's book was the only readily available source on its subject. Those two books and *Minor's Reports* are the foundational publications dealing with Alabama law.¹¹²

V. CONCLUSION

In December 1825, the General Assembly reconsidered the question of a location for the permanent seat of state government.¹¹³ It was required to do so at that time by a provision in the 1819 constitution.¹¹⁴ As noted ear-

103. *Id.* at 10–11.

104. See BAR ASS'N OF ST. LOUIS, MEMORIAL. HENRY HITCHCOCK 13 (1902) (discussing the younger Henry Hitchcock's father, also named Henry Hitchcock).

105. See WILLIAM T. HAMILTON, A FUNERAL DISCOURSE, DELIVERED IN THE GOVERNMENT STREET CHURCH, MOBILE, ON SABBATH, AUGUST 18TH, 1839, IN MEMORY OF JUDGE HENRY HITCHCOCK 4–5 (1839).

106. See Past Vermont Attorneys General, <http://www.atg.state.vt.us/office-organization-information/about-the-attorney-general/past-vermont-attorneys-general.php> (last visited Mar. 1, 2010).

107. See HAMILTON, *supra* note 105, at 5, 25.

108. See BRANTLEY, *supra* note 1, at 152.

109. BENJAMIN BUFORD WILLIAMS, A LITERARY HISTORY OF ALABAMA: THE NINETEENTH CENTURY 24 (1979).

110. See HAMILTON, *supra* note 105, at 6.

111. See BAR ASS'N OF ST. LOUIS, *supra* note 104.

112. Two of Henry Hitchcock's sons had unusual careers far from Alabama. Ethan Allen Hitchcock was U.S. Minister to Russia in the administration of President William McKinley and was later Secretary of the Interior under McKinley and President Theodore Roosevelt. *Taft at Funeral Services*, N.Y. TIMES, Apr. 11, 1909, at 7. Henry Hitchcock, Jr., a lawyer, was a judge advocate in the Union Army and was with Gen. William T. Sherman on the famous (or infamous) March to the Sea in 1864. Later, he became a prominent St. Louis attorney. *Hitchcock, Henry*, in ALABAMA BIOGRAPHICAL DICTIONARY 170, 170–72 (1998).

113. BRANTLEY, *supra* note 1, at 167.

114. ALA. CONST. of 1819, art. III, § 29.

lier, location of the state government was a highly contentious issue in 1818 and 1819 as preparations for statehood were underway. The influence of Gov. William Wyatt Bibb in promoting Cahaba then carried the day over the opposition of North Alabama and Tombigbee-Black Warrior interests. But with Bibb gone and Cahaba suffering from floods and yellow fever outbreaks, those interests finally prevailed. Both houses of the legislature concurred in designating Tuscaloosa as the permanent site.¹¹⁵ Under the constitutional provision, the governor's approval was not required.¹¹⁶ The move took effect on February 1, 1826.

The Supreme Court of Alabama met in Cahaba for the last time in December 1825.¹¹⁷ When the judges reconvened for the court's next term, they did so in Tuscaloosa and would do so for the next two decades until the capital was finally fixed at Montgomery.¹¹⁸

Cahaba remains the birthplace and cradle of Alabama law and government, but Huntsville was the place of conception. In Huntsville, the blueprints were drawn. In Cahaba, life was breathed into the design and the machinery of government set in motion. Those judges who assembled in Cahaba as the Supreme Court, functioning under primitive conditions and travel hardships, met well the challenge they faced in developing from scratch a body of caselaw. As revealed by *Minor's Reports*, they were heirs of the English legal order that was transplanted to American shores in the 18th century, and they carried forward into Alabama law that system of common law and equity.

Where those judges sat through the first six years of statehood is now an abandoned, deserted, and forlorn place. Still surrounded by the Cahaba and Alabama Rivers, it is today as quiet and bereft of human life as it was for centuries before 1819. Only remnants of streets—Vine, Capital, Oak, 2nd North, and a few others—hint that a town ever existed. Nothing except *Minor's Reports* remains to show that the Supreme Court was ever there and little remains to suggest that it was once the capital of Alabama. Kipling's lines come to mind:

The Captains and the Kings depart . . .
 Lord God of Hosts, be with us yet,
 Lest we forget . . .¹¹⁹

115. BRANTLEY, *supra* note 1, at 174, 183–85.

116. ALA. CONST. of 1819, art. III, § 29.

117. See BRANTLEY, *supra* note 1, at 201.

118. BRANTLEY, *supra* note 1, at 207.

119. RUDYARD KIPLING, RECESSIONAL (1897).