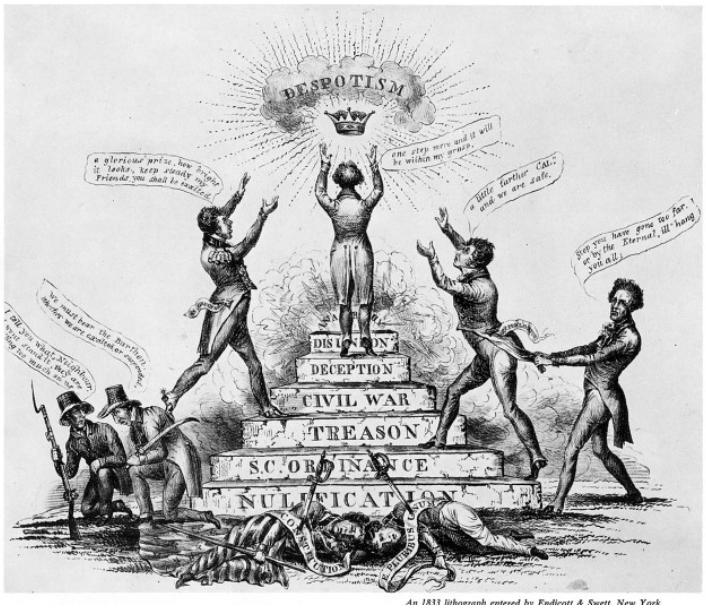
State ex rel. M'Cready v. Hunt:
Battle Between the Sovereigns[1]

By Alexander M. Sanders, Jr.[2] and C. Mitchell Brown[3]

In the early nineteenth century, South Carolinians began to demand reform of the state's appellate court system. In 1813, Governor Joseph Alston reported to the General Assembly that crowded appellate dockets were seriously delaying the rendering of justice. South Carolinians also complained that common law rights were being denied for the sake of expediency, and many expressed fear that the courts were creating a government of men, not laws, for the state.[4]

In 1824, the legislature responded by creating the first South Carolina Court of Appeals to review decisions of both law and equity courts. This court was an especially eminent one. Men who represented the finest legal minds in South Carolina sat on it during an era of first-rate legal thinking in this state. Their names are revered today by judges, lawyers, and legal historians alike.[5]



1833 Political Cartoon Regarding the Nullification Crisis

However, this Court would be created and begin its life during the beginnings of what would become the "nullification crisis." This crisis in many ways began with effects on South Carolinians from the Tariffs of 1828 and 1832, and resulted in South Carolina's 1832 "Ordinance of Nullification."[6] "Nullification" essentially represented a movement, principally emanating from South Carolina, in which those believing in "States' rights" attempted to flex their sovereign muscles against the competing sovereign—the federal government. While this crisis passed in 1833 when a new tariff compromise bill was passed, the crisis did not lack in drama and nearly led to civil war. On December 10, 1832, President Andrew Jackson issued a "Proclamation to the People of South Carolina," in which he stated his belief that "the power to annul a law of the United States, assumed by one State, [is] incompatible with the existence of the Union . . . ."[7]

The "nullifier" mentality and the States' rights movement would ultimately cross paths with this newly created Cout of Appeals, with dire results. But first, the members of the Court deserve an introduction for the accomplished jurists they were.

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[2]Alex Sanders is the former Chief Judge of the South Carolina Court of Appeals and former President of the College of Charleston.

[3]C. Mitchell Brown is a partner at Nelson Mullins Riley & Scarborough and current President of the South Carolina Supreme Court Historical Society.

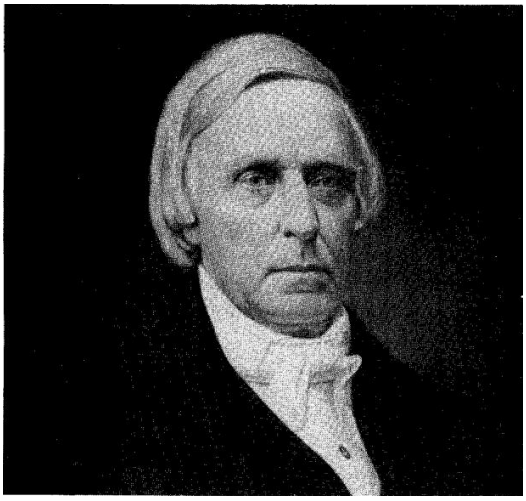
[4]A. Sanders, "The South Carolina Court of Appeals: *Not* Like a Mule," *Carolina Lawyer* Vol. IV (1984) at 3.

[5]*Id.*

[6]Walter Edgar, *South Carolina: A History*, 331-36 (1998).

[7]*Id.* at 336.

Judge Abraham Knott served as the first chief judge of the court and was joined on its bench by Judges C. J. Colcock and David Johnson, who was later elected governor. Judge Colcock later resigned and was succeeded by Judge William Harper, formerly a United States senator and a distinguished chancellor of the equity court. When Judge Knott died, he was replaced by Judge John Belton O'Neall, one of the greatest jurists ever produced in South Carolina. O'Neall's life is worthy of examination in some detail. [8]



John Belton O'Neall

Judge O'Neall was born in 1793 in a South Carolina Quaker community, Newberry District. He was raised as a Quaker and exposed during his youth to the Quakers' growing aversion to slavery.[9] In 1800, a celebrated Quaker preacher came to South Carolina and warned his brethren to "come out from slavery." Reputed to have the gift of prophesy, he warned that "doom was overtaking the slave owners." His preaching caused a great panic in the Quaker community and led many Quakers to move from the South to Ohio. O'Neall, however, stayed in Newberry and joined the Baptist Church, where he remained a consistent devoted member. He attended Newberry Academy and, from there, entered the junior class of South Carolina College, graduating in 1812. From 1817 until he passed away, he served for all but two years as a trustee of the college.[10]

In 1813, O'Neall returned to Newberry Academy as a teacher. The following year, he was called into active service as a captain in the militia, rising eventually to the rank of major general. Later that year, he was admitted to practice in the law and equity courts of South Carolina. In 1816, O'Neall was elected to the South Carolina House of Representatives from Newberry District. Two years later, he was defeated for reelection. But in 1822, voters returned him to the House, where he served continuously until 1828. O'Neall's colleagues elected him as Speaker of the House in 1824 and 1826. [11]

In 1828, O'Neall was again defeated for reelection. He was, nevertheless, elected as a judge of the Court of Common Pleas and General Sessions shortly after his term in the House expired. Two years later, he was elected to replace Judge Knott as chief judge of the Court of Appeals. Shortly after assuming the leadership of the court, Judge O'Neall radically transformed his personal life. He unalterably repudiated alcoholic beverages, became a leader in the cause of temperance, and insofar as is known, remained for the rest of his life "sober as a judge."[12]

By all accounts, the Court of Appeals functioned superbly under the leadership of Judge O'Neall. Without question, it helped reinforce the noble common law traditions that serve citizens of South Carolina today. In 1834, the court passed from the scene to the extent that even the fact of its existence is virtually unknown. How this could have happened is difficult to understand."[13]

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[8]A. Sanders, "The South Carolina Court of Appeals: *Not* Like a Mule," *Carolina Lawyer* Vol. IV (1984) at 3.

[9]T. Pope, *The History of Newberry County, South Carolina* (1973).

[10]*Id.*

[11]*Id.*

[12]*Id.*

[13]Sanders, *supra*, note 3.

The cause of the court's demise, like the reasons for its creation, can be found in the history of the times. The dark clouds of political and social turmoil, which ultimately led to the Civil War, already hung over the state like a shroud, and the "nullification crisis" was in full bloom. In this context, the legislature chose to enact a statute requiring officers of the militia to take an oath swearing supreme loyalty to the state over the disfavored federal government.

The statute seems preposterous today. Yet it was not so when enacted. The relationship between the states and the federal government had not been worked out, and legitimate questions existed about the degree, if any, of federal supremacy. Moreover, as a purely practical matter, if the legislators envisioned even the possibility of a civil war, it would certainly be a good idea for them to have the army on their side.[14]

Shortly after the statute requiring the oath of supreme loyalty to the state was enacted, a would-be officer in the militia named Edward M'Cready refused to take the prescribed oath. In 1834, ten years after the Court of Appeals was first created, the question of the constitutionality of the oath came up in a case named *State ex rel. M'Cready v. Hunt*.[15]

Thomas Smith Grimké and James Louis Petigru, leading lawyers of the day, argued that the oath was unconstitutional. Their arguments took a wide range, covering both the question of the state or federal supremacy and the meaning of allegiance. Their discussion of the latter was most exhaustive and illuminating.[16] To support the argument that the state must remain a part of the federal system, Petigru reputedly said, "South Carolina is too small to be an independent republic and too large to be an insane asylum."[17]

In a startling decision, the court declared the statute unconstitutional. Chief Judge O'Neall rendered the decision of the court, with Judge Johnson concurring in a separate opinion and Judge Harper dissenting."[18] The decision was extremely controversial.[19]

Nullificationists immediately accused the court of disloyalty and abolitionist tendencies. Judges O'Neall and Johnson were, in fact, well-known supporters of the Union, while Judge Harper was a nullificationist. Consistent with the inclination to simplify history, people today tend to think that substantially all South Carolinians were nullificationists and "states' righters," but such was by no means the case.[20] The Union party in South Carolina, although a minority party, was a viable force in the state and counted within its membership many prominent South Carolinians. Judge O'Neall was an active member of the Union party, which might explain the difficulties he experienced in getting elected from Newberry District. After all, this district had been represented in Congress by none other than John C. Calhoun, "the great nullifier."[21]

On July 7, 1834, only three months after the court's opinion, a committee of the States Rights and Free Trade party, the Union party's opposition, delivered its report to the legislature. It concluded as follows:

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[14] *Id.*

[15] State ex rel. M'Cready v. Hunt, 20 S.C.L. (2 Hill) 1 (1834).

[16] A. Sanders, "Chief Judge John Belton O'Neall and the South Carolina Court of Appeal, 1824-1834" (Paper delivered at the Kosmos Club, Columbia, South Carolina, September 20, 1988), 8.

[17] W. Grayson, *James Louis Petigru, A Biographical Sketch* (1866).

[18] State ex rel. M'Cready, 20 S.C.L. (2 Hill) 1.

[19] Sanders, *supra* note 3.

[20] *Id.*

[21] Pope, *supra* note 6.

> As it is evident, from the opinions of a majority of the Court of Appeals, that no oath requiring exclusive allegiance to the state will be enforced by [the Court of Appeals] it would be nugatory to amend the Constitution, without also remodeling the Court, so as to secure the full and effectual execution of the will of the People. The Committee regard it, therefore, as absolutely necessary that that should be done in such a manner as to the legislature may seem best.[22]

Judge O'Neall's views about slavery and race were highly suspect and might have been of even greater concern. O'Neall owned slaves and was by no means an abolitionist, but certain views he expressed led people to conclude that he was not committed to the institution of slavery.[23]

As a matter of law, slaves were regarded as personal property at that time. The state annually levied a "head" or "capitation" tax on slaves, amounting to about sixty cents per slave. Until 1820, slave-holders could set slaves free by either deed or will. A few years earlier, the grand jury report from a term of the General Sessions Court at Newberry deplored the large number of free blacks in the district and recommended that each one be required to choose a master within a short period of time or be sold into slavery.[24]

In 1820, a statute passed by the legislature eliminated the right of a slaveholder to free his slaves by deed or will and declared that, henceforth, only the legislature had the right to free slaves. Slaveowners who wished to free their slaves were required to either petition the legislature for a private act or take their slaves to a free state and free them there. When the latter practice threatened to become widespread, the legislature enacted a statute making it unlawful to send or transport slaves beyond the borders of South Carolina for the purpose of freeing them.[25]

Judge O'Neall roundly condemned both statutes:

> In a slave country, the good [slave) should be especially rewarded. Who are to judge of this, but the master? Give him the power of emancipation under well regulated guards, and he can dispense the only reward, which either he, or his slave appreciates.
>
> In the present state of the world, it is especially our duty, and that of slave owners, to be just and merciful. . . .
>
> Let me, however, assure my countrymen, that unjust laws, or unmerciful management of slaves, fall upon us, and our institutions, with more withering effect than anything else. I would see South Carolina, the kind mother, and mistress of all her people, free and slave. To all, extending justice and mercy.[26]

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[22]Sanders, *supra* note 13, at 9.

[23]Pope, *supra* note 6.

[24]Sanders, *supra* note 13, at 10.

[25]*Id.*

[26]*Id.* at 11, quoting Grayson, *supra* note 14.

Judge O'Neall further condemned a third statute passed by the General Assembly, which prohibited slaves from being taught to read and write. He characterized the law as "cowardly" and expressed "horror" at the thoughts that slaves, as Christians, should not be permitted to read the Bible.[27]

The wise counsel of Judge O'Neall on the subject of slavery was largely ignored. The punishment for murdering a slave in Newberry District was a fine of five hundred dollars and imprisonment for up to six months. Even that minimal punishment was not always exacted. According to court records of the October 1822 term of the General Sessions Court at Newberry, one Morris O'Hern, upon being convicted of killing a slave and sentenced as provided by law, was promptly pardoned by the governor, with his fine remitted.[28]

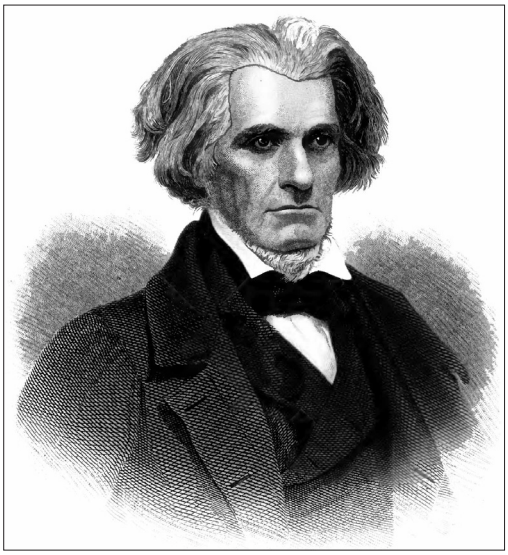
In contrast, slaves and free blacks, mulattoes, or mestizos (offspring of a black and an Indian) who were charged with crimes, could be tried only in a court of a magistrate and five freeholders. If convicted of an offense, the punishment was nothing less than hanging, whipping, confinement in the stocks, or torture on the treadmill.

Judge O'Neall's attempt to put his views in practice in the case of *State v. Nathan* might be even more significant than the sentiments he expressed in ab¬stract. In that case, a young slave had been previously tried for assault and battery with intent to ravish. Surprisingly, the jury had acquitted him of this charge. The state, however, was determined to gain a conviction for a capital offense and reindicted the defendant for a robbery which allegedly had occurred at the same time.[29]

The slave was convicted at the second trial and was sentenced to be hanged. Judge O'Neall dissented from the decision of the court affirming his conviction, asking pointedly, "If the prisoner was a white man and not a [N]egro, could such a course receive the countenance of anyone?"[30] Radical sentiments, indeed, for the times.

This occurred thirty-five years before the Fourteenth Amendment granted citizenship to all Americans and recognized the right of all citizens to equal protection of the law. Indeed, if the principle of law implicit in Judge O'Neall's rhetorical question—that the law should make no distinction between a white man and a Negro—had been adopted throughout the nation, the Fourteenth Amendment arguably would not have been needed, nor for that matter, the Thirteenth Amendment abolishing slavery and hence, no need for the Civil War.

During these times, the high ideals embodied in our Declaration of Independence and Constitution had begun to give way to the unrelenting pursuit of profits and the embrace of the so-called "laws of wealth." In the South, at least, the laws of slavery were an integral and necessary part of this pursuit.



John C. Calhoun

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[27]*Id.*

[28]Sanders, *supra* note 13, at 12.

[29]State v. Nathan, 39 S.C.L. (5 Rich.) 219 (1851).

[30]*Id*. at 232.

After Judge O'Neall's opinion in *M'Cready v. Hunt,* the legislature moved swiftly and predictably to abolish the Court of Appeals and thereby remove him from the appellate bench. According to a biographer of Calhoun, once the court was abolished, Calhoun's victory was complete, and his opponents were crushed almost to the point of annihilation. Grimké died the same year in Ohio, and Petigru made no further appearance in the political arena, devoting himself thereafter to the more mundane aspects of the legal practice. Calhoun and his philosophy reigned supreme.[31]

With the elimination of the court, crowded appellate dockets returned in South Carolina during the next two decades, and demands for speedy justice were again heard throughout the state. In 1847, Governor Johnson informed the legislature that the litigant whose case was settled in five years should consider himself lucky because normal resolution usually took twice that long.[32]

As every schoolchild knows, South Carolina started the Civil War.[33] It took this ultimate struggle between Americans to determine the winner in the battle of the sovereigns. Perhaps it would be preposterous to suggest that this catastrophe could have been avoided if only Judge O'Neall had been beyond the reach of the legislature. Still, one may wonder.

One final irony: On August 19, 1988, a portrait of Judge O'Neall was presented to the contemporary South Carolina Court of Appeals. His portrait was hung outside the courtroom on the top floor of the oldest state office building in South Carolina, which was restored as a courthouse for the South Carolina Court of Appeals: the John C. Calhoun building.

SOURCES

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[31]G. Hunt, *John C. Calhoun* (1848).

[32]Sanders, *supra* note 3.

[33]C. Cauthen, *South Carolina Goes to War*, 1860-65 (1950).