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CHAPTERS IN THE HISTORY OF THE SUPREME COURT OF TEXAS: RECONSTRUCTION AND "REDEMPTION" (1866–1882)

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INTRODUCTION

This chapter covers the period from the restoration of civil government after the Civil War to the formalization of legal education by the establishment of the law department of The University of Texas. The published decisions of the Supreme Court of Texas in those sixteen years are reported in volumes 28–58 of the *Texas Reports*. It seems justified, however, to speak of no less than four successive and distinct supreme courts in that sixteen-year period: the Presidential Reconstruction Court (1866–1867) (volumes 28–30), the Military Court (1867–1870) (volumes 30–33), the "Semicolon" Court (1870–1873) (volumes 33–39), and the Roberts-Gould Court (1874–1882) (volumes 40–58).

As suggested most strongly by the first two of these designations, but as readily apparent through the latter two as

well, the distinguishing mark is loyalty to the Union or (to the extent constitutionally permissible) to the "Lost Cause." To illustrate the latter qualification, not even the Roberts-Gould Court could (or perhaps would want to) enforce debts arising out of contracts to supply the Confederate armed forces with ammunition. In contrast to the Military and Semicolon Courts, however, it could (and did) enforce debts denominated in Confederate currency, at least at a retroactively estimated rate of conversion.[1]

The Constitution of the Republic of Texas (TEX. CONST. of 1836), as well as the state constitutions of 1861, 1866, and 1869 (TEX. CONSTS. of 1861, 1866 & 1869), is conveniently reproduced in Volume 3 of *Vernon's Annotated Constitution of the State of Texas* on pages 482–622. That of 1876 as originally adopted (TEX. CONST. of 1876) is found in Volume 8 of H.P.N. Gammel's *The Laws of Texas 1822–1897* on pages 779–834. Ordinances of constitutional conventions not found in *Vernon's Annotated Constitution*, constitutional amendments proposed or adopted, and state legislative enactments as well as proclamations and the like are cited to Gammel's *Laws of Texas* by volume and page, following Gammel's pagination. Cadwell Walton Raines's book, *Analytical Index to the Laws of Texas, 1823–1905* has been found to be an invaluable guide to Gammel's *Laws of Texas*.

1. *See* Act of Aug. 19, 1861, Pub. Laws, Provisional Cong., 3d Sess., ch. 23, § 1, *reprinted in* THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 177 (James M. Matthews ed., 1864) (enacting, under authority of the congress of the Confederate States of America, a law allowing the printing of Confederate currency that would be payable six months after the signing of a peace treaty between the Confederate States and the United States); Thorington v. Smith, 75 U.S. (8 Wall.) 1, 11–14 (1869) (explaining that a contract for the payment of Confederate money can be enforced if it concerns the sale of property in the ordinary course of business and does not aid the rebellion; however, recovery is limited to the value of such money in actual dollars at the time the contract is made); Mathews v. Rucker, 41 Tex. 636, 637–38 (1874) (acknowledging that a promise to pay Confederate money will be enforced at the value of the Confederate notes at the time of contract); Cundiff v. Campbell, 40 Tex. 142, 143, 146–47 (1874) (holding a contract enforceable when defendant promised to pay for horses in dollars regardless of parol evidence that payment was to be made in Confederate currency); Grant v. Ryan, 37 Tex. 37, 39–42 (1872–1873) (expanding language in *Thorington* and holding that plaintiff could not recover the value of his cattle that he sold for Confederate money unless he was of unsound mind or fraudulently induced into the sale); Ritchie v. Sweet, 32 Tex. 333, 335, 338 (1869) (stating that in the absence of duress, plaintiff cannot recover the value of his note and interest by later claiming that the money paid by the defendant was illegal Confederate money); Donley v. Tindall, 32 Tex. 43, 53–58 (1869) (asserting that the defendant is not compelled to pay for land he purchased when payment was promised in Confederate currency because the consideration was illegal); Van der Hoven v. Nette, 32 Tex. 183, 184–85 (1869) (holding that plaintiff cannot recover the interest paid in Confederate money by claiming that such payments were made under duress because a general duress suffered by all is not actionable by an individual); Reavis v. Blackshear, 30 Tex. 753, 754 & n.1 (1868) (dismissing the case and pointing out the precedent for rendering contracts based on payment of Confederate money illegal). The court in *Donley* also discussed a legislative

Such ideologically affected *revirements de jurisprudence* have been viewed, in the not-too-distant past, as welcome repudiations of reconstruction or perhaps more pointedly, of carpetbagger misrule. That, however, would ignore at least three considerations supporting a different perspective. First, as is now generally acknowledged and as will be seen below, the judicial personnel of the Military and Semicolon Courts, with one notable exception, were about as indigenously "Texan" as, say, the Secession Convention or the judiciary of the other two periods here discussed.[2] Secondly (but not secondarily), in a two-tier judicial hierarchy with law books available only haphazardly to trial judges and appeals at least in theory unlimited, the task even of the lone "carpetbagger" on the court was mainly, in case after case, to see that courts below decided routine legal issues uniformly and correctly. And last but not least, even in those days, loyalty to the Union was hardly a vice.

The legacies of the Civil War cannot, however, be our sole perspective, if only because Texas did not stand alone in that respect. The Lone Star State is, nevertheless, unique in another regard. Two decades before the point of departure of the present survey, the Republic of Texas had joined the United States ("of the North," in then-current Texas parlance) through an international agreement which confirmed the State of Texas in the ownership of the public domain of the Republic—including, as it turned out, its mineral wealth even under private lands.[3] Title to the latter had its roots in three different sovereigns: Spain, Mexico, and the Republic of Texas. Even after the flag with the (then)

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ordinance which authorized litigants to plead the payment of Confederate money as consideration in order to limit recovery to the value of current dollars. *Donley*, 32 Tex. at 56.

2. No member of that convention was born in Texas. Two members were genuine "Yankees," born in Massachusetts and Connecticut, respectively; one was born in New York. No fewer than four Secession Convention members were of German birth; one was from Ireland. TEX. LIBRARY & HISTORICAL COMM'N, JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, at 405–07 (Ernest William Winkler ed., 1912); *see also* Ralph A. Wooster, *An Analysis of the Membership of the Texas Secession Convention*, 62 SW. HIST. Q. 322, 323–24 (1959) (supplying further details about convention members' birthplaces).

3. *See* Cowan v. Hardeman, 26 Tex. 217, 222–23 (1862) (explaining that the Republic and the State of Texas followed the "civil law" rule that land grants do not, as such, carry mineral rights); *see also* TEX. CONST. of 1866, art. VII, § 39 (providing the subsequent history of the civil law rule). For a classic study on the subject, see WALACE HAWKINS, EL SAL DEL REY (1947).

twenty-eight stars replaced the one with the single star, Texas public land law remained unique in the United States west of the Mississippi: a *state* legal system for the administration and disposal of public lands which was in effect precisely where United States public land law was not.

As will be seen, the heritage of three prior sovereigns and of a failed rebellion weighed heavily on the Texas judiciary in the period here under discussion, requiring not only adjudications under other laws in another language, but also the resolution of difficult and delicate issues of state secession and recently enumerated national borders.[4] Chief among the latter was a test case on secession itself, which was, however, litigated in another forum, and receives mention also because of the involvement of one of the most prominent Texas lawyers of the time.[5] Land title litigation, on the other hand, produced adjudications worth reporting mostly where land—acres and acres of it, from the Sabine to El Paso, from Brownsville to the Panhandle—was worth the effort. Here, the key to wealth was accessibility to the market by rail. Railroads gave rise to what was a new phenomenon in Texas law: leaders of the bar whose eminence was due to specialization.

It is hoped that the above survey suffices to justify the points of emphasis here selected and, more importantly, the omission or the cursory treatment of much else. As already indicated, the legal consequences of state succession from Confederate to United

4. *See* Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922, 926 (solidifying, in the Treaty of Guadalupe Hidalgo, where the boundary lines between the two republics were situated); State v. Bustamente, 47 Tex. 320, 322 (1877) (deciding that a land grant by a governor of Tamaulipas in Mexico is invalid because it took place after the land became part of Texas territory); State v. Sais, 47 Tex. 307, 318 (1877) (ruling that the laws of Tamaulipas must be considered in deciding the title dispute before the court); State v. Cardinas, 47 Tex. 250, 252–72 (1877) (examining the complex history of land-ownership under prior sovereigns in order to resolve a land dispute involving the State of Texas and plaintiffs claiming title). See DAVID M. PLETCHER, THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR 553–92 (1973), for historical background on the evolution of the state under Mexican rule.

5. *See* Texas v. White, 74 U.S. (7 Wall.) 700, 717, 734–37 (1868) (deciding the issue of whether Texas, as a state of the Union, could prevent the holders of bonds issued by the state during the period of secession from receiving payment from the United States), *overruled on other grounds by* Morgan v. United States, 113 U.S. 476 (1885); James P. Hart, *George W. Paschal*, 28 TEX. L. REV. 23, 32–33, 33 n.52 (1949) (discussing the importance of Paschal's work in codifying early Texas law).

States statehood, the ascertainment of Spanish and Mexican land titles especially in the "Nueces Strip," the development of railroad law, and the emergence of leading land grant as well as railroad lawyers will receive special attention. So will, for obvious reasons, the constitutional controversy from which the Semicolon Court received its name. Before, however, proceeding to these subjects, an attempt will be made to trace the institutional development of the Supreme Court of Texas through its four distinctive phases between 1866 and 1882. Since these phases mirror stages of the legal as well as the ideological battle between Reconstruction and "Redemption," this survey will include an attempt at individual and collective judicial biography with, inescapably, some emphasis on political orientation for or against these two polar positions.

I. THE INSTITUTIONAL FRAMEWORK

A. *Courts and Constitutions*

The separation of the legislative, executive, and judicial powers has always figured, in so many words, as a key principle in Texas constitutional law. In consequence, a standard feature of Texas state constitutions has been a separate article on the judicial department; and in the nature of things, that article sets out the key features of the court (or courts) of last resort and of inferior "constitutional" tribunals.[6] Such key features, for present purposes, include the number as well as the process of selection or election of supreme court justices, their terms of office, the delimitation of the jurisdiction of the court, and the times and places of its sessions. Additionally, the judiciary articles of Texas state constitutions have also contained, at times here material, provisions on supreme court judicial salaries.

For present purposes, the pertinent texts are article IV of the Constitution of 1866, article V of the Constitution of 1869, the amendment of that article in 1874,[7] and article V of the

6. All constitutions of Texas have had a judicial provision. TEX. CONST. art. V; TEX. CONST. of 1869, art. V; TEX. CONST. of 1866, art. IV; TEX. CONST. of 1845, art. IV; REPUB. TEX. CONST. of 1836, art. IV, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1073, 1073–74 (Austin, Gammel Book Co. 1898).

7. Tex. J. Res. 1, 14th Leg., 1st R.S., 1874 Tex. Gen. Laws 233, 233–35, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 235, 235–37 (Austin, Gammel Book Co. 1898).

Constitution of 1876. To start with number of judges, method of selection, and terms of office: The Constitution of 1866 provided for a court composed of five justices, elected for terms of ten years. The chief justice was to be elected by the court from among its members. Under the 1869 constitution, the membership of the court was reduced to three, appointed by the governor, subject to confirmation by the senate. The term of office under that constitution was nine years, but the original three appointments were to be staggered by lot so that the term of one of them expired at the end of every three years, the one with the soonest expiry period being the presiding justice. The 1874 constitutional amendment increased the number of justices to five, to be appointed by the governor, subject to confirmation by the senate, for periods of nine years. These terms were not staggered, and the chief justice, too, was appointed by the governor. The Constitution of 1876, finally, reduced the number of justices to three, elected for terms of six years. The office of chief justice, as such, became elective, as it has been since that time.

The Constitutions of 1866 and 1876 authorized sessions of the supreme court at the capital (i.e., in Austin) and at "no more than two other places in the State"—a synonym for annual sessions in Galveston and Tyler as well. The Constitution of 1869, alone in this respect, provided for supreme court decisions only in the capital, but the "two other places" option, and sessions in Galveston and Tyler assured once more, returned with the 1874 amendment. Regarding remuneration, the Constitutions of 1866 and 1869 provided for salaries of "at least" $4,500, but this was reduced to "no more than" $3,550 by the Constitution of 1876. The 1874 amendment made no provision in that respect, thus continuing the $4,500 minimum.

Supreme court jurisdiction, as constitutionally defined, underwent several changes in the period here discussed, culminating in the bifurcation of courts of last resort in 1876. The Constitution of 1866 followed Texas constitutional tradition in circumscribing the appellate jurisdiction of the supreme court as "coextensive with the limits of the State," but then proceeded to authorize legislative "exceptions" with respect to appeals in non-felony criminal cases and from interlocutory decisions. It also gave the supreme court power to ascertain matters necessary for the proper exercise of its jurisdiction. This latter power passed into

Texas constitutional tradition, reappearing in the Constitutions of 1869 and 1876. Supreme court appellate jurisdiction in criminal matters, however, was further limited by the Constitution of 1869 and eliminated by that of 1876. Although now defunct, the limitation placed upon appeals in criminal matters by the Constitution of 1869 would appear to merit further study. That constitution, which in this respect continued to be effective until 1874, *prohibited* appeals to the supreme court in criminal cases "unless some judge thereof shall, upon inspecting a transcript of the record, believe that some error of law has been committed by the judge before whom the cause was tried . . . ."[8]

In 1876, supreme court appellate jurisdiction in criminal cases was abolished altogether through the creation of a court of appeals with exclusive appellate jurisdiction in criminal cases.[9] That bifurcation of ultimate appellate jurisdiction in Texas is still with us, but the sister institution of the state supreme court is now called the Texas Court of Criminal Appeals. The reason for that change in terminology (which lies outside the temporal scope of this chapter) is that the court of appeals created in 1876 also had appellate jurisdiction in civil cases originating in the county courts. This (short-lived) bifurcation of ultimate appellate jurisdiction in civil cases, however, did not stem the tide of supreme court appeals. Towards the end of the period here covered, in 1879 and again in 1881, the legislature resorted to the device of establishing commissions of appeals in order to clear the appellate docket—first by (supposedly) voluntary agreement of the parties to resort to quasi-arbitration and, then through discretionary reference by the court itself.[10]

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8. TEX. CONST. of 1869, art. V, § 3.

9. TEX. CONST. of 1876, art. V, §§ 1, 5, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 800–01 (Austin, Gammel Book Co. 1898); *see also* TEX. CONST. of 1876, art. V, §§ 1, 5–6, 8, 16, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 800–02, 804–05 (Austin, Gammel Book Co. 1898) (discussing the jurisdiction of the supreme court, the court of appeals, and the district and county courts). *See generally* TEX. CONST. of 1876, art. V, § 6, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 801 (Austin, Gammel Book Co. 1898) (stating that in civil cases, the opinions of the court of appeals "shall not be published unless the publication of such opinions be required by law").

10. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, 1881 Tex. Gen. Laws 4, 4–5, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96–97 (Austin, Gammel Book Co. 1898); Act approved July 9, 1879, 16th Leg., 1st C.S., ch. 34, §§ 1–2, 1879 Tex. Gen. Laws 30, 30–31, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS

Thus, the period of Texas Supreme Court history here discussed closed with a legislative amendment of the court's constitutionally-defined appellate jurisdiction. This para-constitutional act of relief from the pressure of the (by then, solely civil) appellate docket barely passed muster by the court itself.[11] It pales into insignificance, however, in the face of an extra-constitutional event not as yet referred to: the removal of the five sitting justices of the Supreme Court of Texas by military order on September 10, 1867, "on account of their known hostility to the general government," and their replacement by what were, in the judgment of the occupying power, sound Union men.[12]

To put this startling event into historical perspective: following the defeat of the Confederacy, Texas was occupied by the United States Armed Forces from June 1865, to April 16, 1870. One of the first acts of the occupying power was the abolition of slavery ("Juneteenth," or June 19, 1865). Although this is not the place for even a summary account of Reconstruction in Texas, the history of the state supreme court in the sixteen years that followed cannot be described without reference to the main political events of that period as mirrored in the constitutional instruments already mentioned. This seems all the more appropriate because many of the leading figures in the judicial reconstruction of the state were prominent participants in the Constitutional Conventions of 1866, 1868, and 1875.

The Constitution of 1866 was, in essence, a minimalist accommodation by the forces of yesteryear to the fact of military defeat. This figured even in the language of that instrument, which was reproduced conveniently in the form of the prior one, with omissions as now required and revisions and additions in italics. The "slavery" article of the Texas constitution as last amended by the Secession Convention of 1860 had put that peculiar institution beyond modification both by the legislature and by slaveholders themselves by prohibiting the emancipation of slaves by statute or

1822–1897, at 62, 62–63 (Austin, Gammel Book Co. 1898); William Pitt Ballinger, Diary of William Pitt Ballinger 25 (June 12, 1879) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin). *See generally* Bryan v. Crump, 55 Tex. 1, 1 n.1 (1881) (*extra ordinem*) (noting that commission decisions, starting in March of 1881, first appear in the preceding volume).

11. *See* Stone v. Brown, 54 Tex. 330, 336–37 (1881) (emphasizing the court's authority to disregard the opinions of the commissioners of appeals).

12. George W. Paschal, 30 Tex., at iii (1870).

by voluntary act, even if to take effect out of state.[13] This slavery article was replaced in 1866 by one captioned "Freedmen," which started with the acknowledgement that African slavery had been "terminated within this State, by the Government of the United States, by force of arms, and its re-establishment being prohibited" by the Thirteenth Amendment.[14] Even the right of former slaves to testify in cases not involving them was made contingent upon legislative authorization of such testimony "as to facts hereafter occurring."[15]

The first elected post-war governor of Texas personified, in General Sheridan's words, "Pride in the Rebellion,"[16] as did the five justices of the state supreme court elected at the same time. Although no specific confrontation with the occupation authorities seems to have given rise to the supreme court purge by the military on September 10, 1867, the legislature sought to eliminate five of the eight Unionist state district judges by gerrymander, and members of the military had suffered from vexatious proceedings in the lower courts.[17] Perhaps decisively in final analysis, the (third) Reconstruction Act of July 19, 1867, had authorized military commanders to remove civil officers who obstructed the reconstruction process, and to replace them by members of the military or by the appointment of some other person.[18] This led to the replacement of Governor Throckmorton by Governor Pease on August 8, 1867, and to the removal of the attorney general, most state district judges, and other state officials along with the entire supreme court in September of that year.[19]

As will be seen further below, the supreme court justices appointed to the court on that occasion by military order were sound Union men, and there is considerable continuity between

13. TEX. CONST. of 1861, art. VIII, §§ 1–2.

14. TEX. CONST. of 1866, art. VIII, § 1.

15. TEX. CONST. of 1866, art. VIII, § 2.

16. WILLIAM L. RICHTER, THE ARMY IN TEXAS DURING RECONSTRUCTION, 1865–1870, at 62 (1987).

17. *Id.* at 91; Randolph B. Campbell, *The District Judges of Texas in 1866–1867: An Episode in the Failure of Presidential Reconstruction*, 93 SW. HIST. Q. 357, 364–66 (1990).

18. Act of July 19, 1867, ch. 30, § 2, 15 Stat. 14, 14.

19. RANDOLPH B. CAMPBELL, GRASS-ROOTS RECONSTRUCTION IN TEXAS, 1865–1880, at 14–15 (1997); *see also* Randolph B. Campbell, *The District Judges of Texas in 1866–1867: An Episode in the Failure of Presidential Reconstruction*, 93 SW. HIST. Q. 357, 375 tbl.3 (1990) (listing thirteen district judges removed by military order between August 8, 1867, and November 30, 1867).

that court (colloquially known as the "Military Court" for that reason) and the court regularly appointed and confirmed under the Constitution of 1869. This court, we will see, became "obnoxious" to the legislature elected in November 1872. The 1874 constitutional amendment mentioned above served essentially the purpose of dislodging the supreme court justices holding office under Republican gubernatorial appointment pursuant to the Constitution of 1869, and replacing them by jurists sharing, to use General Sheridan's words again, "Pride in the Rebellion." The 1876 constitution, which reduced the number of supreme court justices from five to three and provided for their popular election, was otherwise consistent with the pattern re-established by constitutional amendment in 1874.

Despite the four revisions of the pertinent section or sections of the judicial department article of the state constitution between 1866 and 1876, therefore, and even despite the removal and replacement of the entire five-justice supreme court bench by military command, there is considerable continuity in the selection of the Texas Supreme Court judiciary of those years. Or perhaps more accurately, there are two continuities. The first, and ultimately the prevailing one, is between the 1866–1867 court and the post-1873 court. However, an exhaustive discussion of this continuity is well beyond the confines of the present chapter. The second is between the Military Court appointed in 1867 and the Semicolon Court holding office under the 1869 constitution until the 1874 amendment. The tradition ultimately prevailing (for one century, if not beyond) is that of "Pride in the Rebellion." The tradition now resurfacing, if only in "revisionist" historical research,[20] found its expression in the preamble to the bill of

20. *See, e.g.*, RANDOLPH B. CAMPBELL, GRASS-ROOTS RECONSTRUCTION IN TEXAS, 1865–1880, at 220–32 (1997) (discussing in his conclusion the support and opposition to secession during Reconstruction); WILLIAM L. RICHTER, THE ARMY IN TEXAS DURING RECONSTRUCTION, 1865–1870, at 91 (1987) (writing about facts during the time period in question in an anti-rebellion light); Randolph B. Campbell, *The District Judges of Texas in 1866–1867: An Episode in the Failure of Presidential Reconstruction*, 93 SW. HIST. Q. 357, 364 (1990) (explaining that during the period of Reconstruction, Texas still generally supported politicians who had been Confederates); Carl H. Moneyhon, *Edmund J. Davis in the Coke-Davis Election Dispute of 1874: A Reassessment of Character*, 100 SW. HIST. Q. 131, 138–40 (1996) (challenging the negative historical characterization of Edmund Davis regarding his decision to support the ruling of the Semicolon Court which held his electoral defeat of 1873 unconstitutional); Carl H. Moneyhon, *Public Education and Texas Reconstruction Politics, 1871–1874*, 92 SW. HIST.

rights of the 1869 constitution, reading as follows:

> That the heresies of nullification and secession, which brought the country to grief, may be eliminated from future political discussion; that public order may be restored, private property and human life protected, and the great principles of liberty and equality secured to us and our posterity, [w]e declare that . . . .[21]

There seem to be light years between this affirmation and the truculent acknowledgement, three years earlier, of the abolition of slavery by "forces of arms" of the United States. The Constitution of 1876, unsurprisingly, omitted the preamble of its predecessor.

B. *Facilities and Finances*

As already mentioned, the salaries of Texas Supreme Court justices were mandated to be "at least" $4,500 under the Constitutions of 1866 and 1869, and "no more than" $3,550 under that of 1876. The legislature consistently ignored these invitations to generosity and appropriated exactly the sums appearing in the constitutional text.[22] The three civil appeals commissioners sitting under the Acts of 1879 and 1881 received the "same" salary as a supreme court justice, i.e., $3,550.[23]

In addition to the office of supreme court justice and chief justice, that of supreme court clerk (or clerks) was also of constitutional dignity. (The plural was used when the constitutional text authorized sessions at "two other places.") Following the Texas constitutional tradition first established in 1845,[24] all three constitutional texts here considered provided for the appointment of supreme court clerks (or in 1869 and 1876, of a supreme court clerk) by the court for a period of four years, subject to removal for cause.[25] These three constitutional texts

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Q. 393, 394 (1989) (asserting that public schools in Texas during Reconstruction failed because of popular and organized Democratic opposition to republican ideology).

21. TEX. CONST. of 1869, art. I, pmbl.

22. *See* CADWELL WALTON RAINES, ANALYTICAL INDEX TO THE LAWS OF TEXAS, 1823–1905, at 504–07 (1906) (tracing the annual and biennial appropriation acts).

23. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 1, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898); Act approved July 9, 1879, 16th Leg., 1st C.S., ch. 34, § 1, 1879 Tex. Gen. Laws 30, 30–31, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 62, 62–63 (Austin, Gammel Book Co. 1898).

24. TEX. CONST. of 1845, art. IV, § 4.

25. TEX. CONST. of 1876, art. V, § 4, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF

also incorporated the requirement of posting bond, which had been in effect by statute since 1846.[26]

No provision was made in any of these constitutions for the remuneration of supreme court clerks, but after they became ex officio supreme court librarians in 1864 (or 1866),[27] they received, on occasion, modest salaries in that respect.[28] Beyond that, their statutory fees were apparently deemed to be generally sufficient remuneration. Appropriations for supreme court clerks' fees in criminal cases were, however, a recurring state budget item until 1876, when the court ceased to have jurisdiction in such matters.

Although the provision for clerks (now briefing clerks) for individual supreme court justices is a much more recent phenomenon, its origins in Texas can be traced to an act "to provide for the employment of private clerks for the judges of the [s]upreme [c]ourt" of April 5, 1871.[29] Reciting that the number of supreme court judges was fixed by the constitution at three, the legislature declared it to be "found that more labor is required of the court than can without oppression be performed by so limited a number of judges," and to be "learned that it may materially aid the judges of said court in the proper discharge of their duties, to

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TEXAS 1822–1897, at 800, 800–01 (Austin, Gammel Book Co. 1898); TEX. CONST. of 1869, art. V, § 5; TEX. CONST. of 1866, art. IV, § 4.

26. *See* TEX. CONST. of 1876, art. V, § 4, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 801 (Austin, Gammel Book Co. 1898); TEX. CONST. of 1869, art. V, § 5; TEX. CONST. of 1866, art. IV, § 4; Act approved May 12, 1846, 1st Leg., § 4, 1846 Tex. Gen. Laws 249, 250, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1555, 1556 (Austin, Gammel Book Co. 1898).

27. Act approved Nov. 7, 1866, 11th Leg., ch. 105, §§ 1–2, 1866 Tex. Gen. Laws 98, 98–99, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1016, 1016–17 (Austin, Gammel Book Co. 1898); Act approved Nov. 10, 1864, 10th Leg., 2d C.S., ch. 2, § 4, 1864 Tex. Gen. Laws 3, 3–4, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 809, 809–10 (Austin, Gammel Book Co. 1898).

28. For 1872, the supreme court librarian's salary was $800; for 1873, it was $400. No appropriations appear to have been made for this position in 1874–1875. In 1876, $200 was appropriated for each of the three supreme court clerk-librarians then in office. Act approved June 2, 1873, 13th Leg., ch. 87, § 1, 1873 Tex. Gen. Laws 153, 159–60, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 605, 611–12 (Austin, Gammel Book Co. 1898); Act approved May 19, 1871, 12th Leg., R.S., ch. 102, § 1, 1871 Tex. Gen. Laws 98, 105, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1000, 1007 (Austin, Gammel Book Co. 1898).

29. Act approved Apr. 5, 1871, 12th Leg., R.S., ch. 28, 1871 Tex. Gen. Laws 20, 20, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 922, 922 (Austin, Gammel Book Co. 1898).

be allowed the assistance of private clerks."[30] Accordingly, it authorized each of the three sitting supreme court judges to employ one private clerk, at a salary of no more than $1,200 "to assist him in such manner as he may direct."[31] Such appointments were funded for an initial seventeen-month period terminating on September 1, 1872, at which time this pioneering program was apparently permitted to lapse for lack of funds.[32]

The names of the supreme court clerks in the period here discussed appear, along with those of the attorney general and the reporter, below those of the chief justice and the associate justices on the title page of the *Texas Supreme Court Reports*. Only the reporter's office, although hardly of less importance than that of the clerk, was not of constitutional dignity. In the period here discussed, its operative enactment was the "Act to provide for the publication of the decisions of the [s]upreme [c]ourt, and the appointment of a [r]eporter thereof," of November 12, 1866.[33] A prior enactment, passed two days earlier, had provided that the opinions of the supreme court which, in its discretion, were "of sufficient importance to be reported," were to be reduced to writing and recorded by the clerk of the court.[34] A like requirement was imposed, for obvious reasons, for all opinions ordering a new trial, even if they were not selected by the court for publication.[35]

Under the Act of November 12, 1866, the court was authorized and directed "to appoint one or more [r]eporters of its decisions" destined for publication.[36] No time period was specified for this

30. *Id.*

31. Act approved Apr. 5, 1871, 12th Leg., R.S., ch. 28, § 1, 1871 Tex. Gen. Laws 20, 20, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 922, 922 (Austin, Gammel Book Co. 1898).

32. Act approved Apr. 5, 1871, 12th Leg., R.S., ch. 28, § 3, 1871 Tex. Gen. Laws 20, 21, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 922, 923 (Austin, Gammel Book Co. 1898).

33. Act approved Nov. 12, 1866, 11th Leg., ch. 151, 1866 Tex. Gen. Laws 189, 189, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1107, 1107 (Austin, Gammel Book Co. 1898).

34. Act approved Nov. 10, 1866, 11th Leg., ch. 132, § 1, 1866 Tex. Gen. Laws 134, 134, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1052, 1052 (Austin, Gammel Book Co. 1898).

35. *Id.*

36. Act approved Nov. 12, 1866, 11th Leg., ch. 151, § 1, 1866 Tex. Gen. Laws 189, 189, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1107, 1107 (Austin, Gammel Book Co. 1898).

office, but reporters were removable by the court for "inefficiency or neglect of duty."[37] They were directed, in quite specific terms, to follow the format of Moore and Walker's reports (volumes 22–24 of *Texas Reports*), and to supply four hundred copies of each volume of reports to the secretary of state for use by the state.[38]

The Act of 1866 contemplated no compensation for the reporters other than the sum of $6 per page of every volume of reports if produced within Texas, and $5.50 if produced elsewhere.[39] The publication expenses, as such, were borne by the state, and are reflected in subsequent budgetary appropriations under that heading.[40] This formula was amended in 1874 by reducing the remuneration of the reporter to $3 per page, and providing for his removal from office if he charged "the profession" more than $6 per volume.[41] (The reporter's remuneration had been raised to $7 per page—in "greenbacks"—by an apparently short-lived military order of January 11, 1869.[42])

The scheme just described envisaged the existence of a body of supreme court opinions on file with the clerk or clerks of court but not destined for publication by the reporter. With the creation of the commission of appeals in 1879, the problem of unpublished opinions became more acute, for no provision was made at the time for the publication of the decisions of that commission. This seemed barely tolerable for the decisions of the 1879 commission of appeals, which exercised quasi-arbitral jurisdiction based on the (supposed) consent of parties no longer willing or able to wait for their day in (supreme) court. Once the supreme court was

37. *Id.*

38. Act approved Nov. 12, 1866, 11th Leg., ch. 151, §§ 2–4, 1866 Tex. Gen. Laws 189, 189–90, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1107, 1107–08 (Austin, Gammel Book Co. 1898).

39. Act approved Nov. 12, 1866, 11th Leg., ch. 151, § 4, 1866 Tex. Gen. Laws 189, 190, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1107, 1108 (Austin, Gammel Book Co. 1898).

40. *Id.*; *see also* Act approved Nov. 13, 1866, 11th Leg., ch. 175, § 1, 1866 Tex. Gen. Laws 213, 213, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1131, 1131 (Austin, Gammel Book Co. 1898) (illustrating the budget for the two years following 1866).

41. Act approved Apr. 23, 1874, 14th Leg., 1st R.S., ch. 46, § 1, 1874 Tex. Gen. Laws 120, 120, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 122, 122 (Austin, Gammel Book Co. 1898).

42. *See* George W. Paschal, *Preface* to 31 Tex., at v, v–vi (1870) (reprinting a military order that required payment of $7 per page for each volume of reports of decisions of the Supreme Court of Texas compiled by court reporters).

authorized to refer cases to the 1881 commission, however, this "arbitration" fiction was no longer tenable as to commission decisions in referred causes, which were subject to supreme court approval. Provision was made, therefore, for the publication of referred commission decisions approved by the supreme court in the official *Texas Supreme Court Reports*.[43]

That arrangement left unpublished the substantial body of commission of appeals decisions in "consent" cases, which were likely to be of substantial interest since the eventual losers, too, were obviously confident in their causes. The realization by an astute commercial publisher of this drain of close cases from the supreme court docket led to the production of Posey's *Texas Unreported Cases*, containing the consent cases of the commission of appeals. This was the first venture of the publication of Texas decisions by a commercial law book publisher which—despite the inducement of the 1866 legislation—was undertaken by an out-of-state publisher.[44]

To return briefly to the official *Texas Reports*: Under the 1866 Act, the reporter was authorized to display his name on the printed and bound reports.[45] It does not appear that, in the period here under consideration, this authorization was acted upon. That seems somewhat surprising, since the best known reporter at the time had a robust opinion of his abilities as a legal editor. This self-confidence appears to be borne out by the record, for the standard citation to Texas statutes in the reports up to the very end of our period is "Pasch." or "Pasch. Dig.," frequently, but not invariably, inserted by the reporter himself.

The citation referred to George W. Paschal's *A Digest of the Laws of Texas*, which appeared in five editions between 1866 and 1878.[46] It seems to have been quite impossible at the time to keep

43. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 4, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898).

44. *See* 1 S.A. POSEY, TEXAS UNREPORTED CASES, at v, v (St. Louis, Gilbert Book Co. 1886) (discussing the need for a compilation of the unreported cases and disclosing Mr. Posey's preparations for a second volume in contemplation of the first volume's success).

45. Act approved Nov. 12, 1866, 11th Leg., ch. 151, § 3, 1866 Tex. Gen. Laws 189, 190, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1107, 1108 (Austin, Gammel Book Co. 1898).

46. GEORGE W. PASCHAL, A DIGEST OF THE LAWS OF TEXAS (Galveston, S.S. Nichols 1866); GEORGE W. PASCHAL, A DIGEST OF THE LAWS OF TEXAS (2d ed.

abreast of the legislative output of the state, the Republic, and of prior sovereigns, without resort to this source, which not only preserved repealed enactments still applicable to past events and noted amendments as required, but also supplied ready references to the pertinent decisional law.[47] Despite its routine use by court and counsel, however, Paschal's *Digest* was not a commercial success. In 1879, its legislative part became largely obsolete through the enactment and publication of a one-volume edition of the *Revised Statutes of Texas*, compiled by mandate of the 1876 constitution.[48] Texas legal publications other than Paschal's *Digest* (of which Posey's *Unreported Cases* is an example) began appearing at the very end of the period here discussed.

Finally, as to library facilities, the supreme court sat, with the exception of a five-year interval between 1869 and 1874, at three places: Austin, Galveston, and Tyler. In the time period here discussed, the court had a clerk at all three locations when it sat there, and the clerks were ex officio librarians, at least occasionally receiving modest salaries in that capacity. The supreme court library was an antebellum creation, supplied from three sources. First, the secretary of state sent copies of *Texas Reports* and statutes to his colleagues in all other states, and received sister-state statutes and decisions in exchange.[49] These were transferred, on an ongoing basis, to the supreme court pursuant to the Supreme Court Library Act of 1854.[50] Secondly, again pursuant to that Act, the court was allotted the (at the time, princely) sum of $15,000 out of the 1850 compromise funds as a

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Washington D.C., W.H. & O.H. Morrison 1870); GEORGE W. PASCHAL, A DIGEST OF THE LAWS OF TEXAS (3d ed. Washington D.C., W.H. & O.H. Morrison 1873); 1 GEORGE W. PASCHAL, A DIGEST OF THE LAWS OF TEXAS (4th ed. Washington D.C., W.H. & O.H. Morrison 1874); 2 GEORGE W. PASCHAL, A DIGEST OF THE LAWS OF TEXAS (4th ed. Houston, E.H. Cushing 1874); GEORGE W. PASCHAL, A DIGEST OF THE LAWS OF TEXAS (5th ed. Houston, E.H. Cushing 1878).

47. *See* James P. Hart, *George W. Paschal*, 28 TEX. L. REV. 23, 32–33, 33 n.52 (1949) (summarizing explanatory materials included by Paschal in the digests).

48. *See* TEX. CONST. of 1876, art. III, § 43, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 785, 790 (Austin, Gammel Book Co. 1898) (requiring the legislature to provide for the revising, digesting, and publication of civil and criminal laws).

49. Act approved Feb. 4, 1854, 5th Leg., ch. 39, § 1, 1854 Tex. Gen. Laws 49, 49, *reprinted in* 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1493, 1493 (Austin, Gammel Book Co. 1898) (requiring the secretary of state to transfer all law books and reporters to the control of the supreme court judges).

50. *Id.*

start-up for its law libraries at Austin, Galveston, and Tyler.[51] Thirdly, the court regularly received much more modest appropriations for library acquisitions in the biennial (or occasionally, the annual) state budget.

When the court terms at Galveston and Tyler were abolished by the Constitution of 1869, the state sold the supreme court library at Galveston to a St. Louis bookseller.[52] A like effort to liquidate the supreme court library at Tyler failed because, to quote Oran Roberts, "the lawyers there had . . . let the purchaser know that he might not find the books."[53] The interest of the Tyler bar in the matter was obvious, for the supreme court libraries served the general public and, most prominently, the supreme court and local bars. When the court sat once again at Tyler and at Galveston pursuant to the 1874 constitutional amendment, only the library at the latter place had to be re-established. This was accomplished simply by the purchase of the law library of the then leading Texas law firm of Ballinger & Jack, described by its senior partner as "the best in the South—public or private."[54]

The holdings of the supreme court library at Austin towards the end of the period here discussed can be determined through a printed catalogue of that library, dated August 1, 1880, and prepared under the direction of the Austin clerk—ex officio librarian at the time, V.O. King, with the assistance of his library clerk, W.F. Moore.[55] Under the heading of "Elementary Works," it listed the major English and American legal treatises and manuals then in use, with over one thousand entries, some of them

51. Act approved Feb. 4, 1854, 5th Leg., ch. 39, §§ 2–3, 1854 Tex. Gen. Laws 49, 49, *reprinted in* 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1493, 1493 (Austin, Gammel Book Co. 1898).

52. *See* Oran M. Roberts, *The Political, Legislative, and Judicial History of Texas for Its Fifty Years of Statehood, 1845–1895*, *in* 2 A COMPREHENSIVE HISTORY OF TEXAS, 1685 TO 1897, at 7, 195 (Dudley G. Wooten ed., 1986) (discussing the sale of the supreme court library at Galveston).

53. *Id.*

54. JOHN ANTHONY MORETTA, WILLIAM PITT BALLINGER: TEXAS LAWYER, SOUTHERN STATESMAN 1825–1888, at 186 (2000) (quoting a letter written by William Pitt Ballinger to Oran Roberts on February 19, 1874); *see* William Pitt Ballinger, Diary of William Pitt Ballinger 1 (Jan. 1, 1875) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (noting that the library was sold to Galveston County as of November 1, 1874, for $20,542, payable in ten per cent bonds).

55. *See generally* V.O. KING & W.F. MOORE, CATALOGUE OF THE SUPREME COURT LIBRARY AT AUSTIN, TEXAS (Austin, State Printing Office 1880) (listing the contents of the Texas Supreme Court's library in Austin).

to multi-volume sets.[56] Since many works were listed both by title and by author, however, the actual count was substantially less.

There was also a virtually complete set of English law reports, with gaps noted in the footnotes. Coverage of Canadian and Scottish reports was less comprehensive. So far as can be determined, the sets of United States law reports (Supreme Court and circuit as well as district) were complete, as were the sets of state and even United States territorial reports. Sister-state legislation, on the other hand, was not represented as comprehensively. There was also a thirty-seven item collection of "Miscellaneous Works," containing histories, biographies, dictionaries, and the like. Again, gaps in the multi-volume sets were noted in the footnotes. The six-volume set of Calhoun's *Works*, however, was complete.[57]

A remarkable feature of the 1880 catalogue of the Austin library of the Supreme Court of Texas was its collection of foreign law in French, Spanish, and Latin. Judging by the dates of publication, it appears to have been acquired mainly in the antebellum period. French and Spanish-language texts predominated, with 123 and 112 volumes, respectively, but twenty titles of the former as against fifty of the latter underline care in the selection of texts on Spanish and Mexican law. Since these two legal systems were also represented by the standard English-language texts then in use, this was obviously a working library, selected so as to cope with cases involving the law of Castile, law of the Indies and of Mexican law which continued to arise in the decades after Texas independence.[58]

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56. *Id.* at 1–24.

57. *Id.* at 25–29 ("English Reports"); *id.* at 30–32 ("United States Reports"); *id.* at 33–47 ("State Reports"); V.O. KING & W.F. MOORE, CATALOGUE OF THE SUPREME COURT LIBRARY AT AUSTIN, TEXAS 49–50 (Austin, State Printing Office 1880) ("Miscellaneous Works"). It should be added that a six-volume edition of Daniel Webster's *Works* was complete as well.

58. *See* Act approved Dec. 19, 1836, 1st Cong., R.S., § 1, 1836 Repub. Tex. Laws 133, 133, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1193, 1193 (Austin, Gammel Book Co. 1898) (setting out the boundaries of the Republic of Texas); State v. Bustamente, 47 Tex. 320, 322 (1877) (explaining that the effect of Texas defining its boundaries was to divest Mexico of all claims to new Texas lands); State v. Cardinas, 47 Tex. 250, 281–94 (1877) (discussing the procedure and evidence necessary to quiet titles that originated from Mexico or Spain and that pertain to Texas lands); State v. Sais, 47 Tex. 307, 318 (1877) ("It [is] the duty of the court to know and follow the law existing in any part of the present limits of this [s]tate, at the time, and under which, a title to land was acquired."); Fisk v. Flores, 43 Tex. 340, 343–45 (1875) (explaining the law of civil

It might also be worth noting that the "Rules of the Supreme Court Library" provided that while the library was accessible to all and the clerk was to be "at all times polite to visitors," only supreme court justices could check out books. The clerk, however, was to "inquire at reasonable intervals for all such borrowed books, and see that they are restored when no longer needed."[59] *Plus ça change* . . . .

II. THE PRESIDENTIAL RECONSTRUCTION COURT

A. *Judges, Sessions, and Reporters*

Five supreme court justices were elected under the Constitution of 1866, and as there provided, they elected the chief justice "from their own number."[60] George F. Moore, not unfamiliar to readers of these chronicles, became chief justice; the associate justices were Richard Coke, Stockton P. Donley, Asa H. Willie, and George W. Smith.[61] Chief Justice Moore stood firmly in the "Pride in the Rebellion" tradition. His judicial career

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donations); Paschal v. Dangerfield, 37 Tex. 273, 300 (1872–1873) (acknowledging that an imperfect Mexican title to land would not be recognized in Texas courts; thus the title could not be a basis for which to bring suit in Texas); *see also* DAVID M. PLETCHER, THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR 551 (1973) (examining United States citizens' reactions to news of the United States' annexation of Mexico). *See generally* JOSEPH M. WHITE, A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES OF THE GOVERNMENTS OF GREAT BRITAIN, FRANCE AND SPAIN, RELATING TO THE CONCESSIONS OF LAND IN THEIR RESPECTIVE COLONIES (Philadelphia, T. & J.W. Johnson 1839) (reporting laws governing land concessions between Mexico and Texas, as well as other locations).

59. *See* V.O. KING & W.F. MOORE, CATALOGUE OF THE SUPREME COURT LIBRARY AT AUSTIN, TEXAS, at iii (Austin, State Printing Office 1880) (detailing the rules of the Texas Supreme Court's library).

60. TEX. CONST. of 1866, art. IV, § 2.

61. *See generally* H. Allen Anderson, *Donley, Stockton P.*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 676, 676 (Ron Tyler et al. eds., 1996) (providing information about Stockton Donley); Thomas W. Cutrer, *Willie, Asa Hoxie*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 995, 995 (Ron Tyler et al. eds., 1996) (discussing Willie's appointment to the supreme court); Charles Christopher Jackson, *Smith, George Washington*, *in* 5 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 1098, 1098 (Ron Tyler et al. eds., 1996) (recounting Smith's appointment to the supreme court); John W. Payne, Jr., *Coke, Richard*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 193, 193 (Ron Tyler et al. eds., 1996) (detailing the life of Richard Coke); *Moore, George Fleming*, *in* 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 819, 819 (Ron Tyler et al. eds., 1996) (noting that Moore "advanced to chief justice in August 1866").

demonstrates the staying power of that tradition, which ultimately prevailed. Removed by military order along with the other members of the court in 1867, he was appointed by Richard Coke (his colleague on the bench from 1866 to 1867) as associate justice in 1874, and became chief justice again in 1878, succeeding Oran Roberts.[62] We will encounter him again further below in these capacities. Asa H. Willie, too, returned to the court, serving as chief justice from 1882 to 1888.[63]

Except for Justice Smith, all members of the Presidential Reconstruction Court served as officers in the Confederate armed forces. Justices Donley and Willie even shared the fate of being captured at Fort Donelson, to be later exchanged.[64] Chief Justice Moore and Justice Willie were born in Georgia; Justice (later Governor) Coke, in Virginia. Justice Donley hailed from Missouri, and Justice Smith, from Kentucky. Chief Justice Moore and Justices Donley and Smith were in their mid-to-late forties; Justices Coke and Willie were born in 1829. Justice Coke had received a law degree from William & Mary,[65] and Chief Justice Moore pursued academics at the University of Alabama and the University of Virginia.[66] Justice Willie, seemingly alone in that respect, had qualified for the bar by reading law in Texas.[67]

Two members of the court were, in present perspective, legal specialists. Justice Donley, a former district attorney, had been a leading criminal lawyer in antebellum Texas.[68] Justice Smith had served as commissioner of one of the first Texas railroads and, some years after his removal from the supreme court, had a

62. *Moore, George Fleming*, *in* 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 819, 819 (Ron Tyler et al. eds., 1996).

63. Thomas W. Cutrer, *Willie, Asa Hoxie*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 995, 995 (Ron Tyler et al. eds., 1996).

64. H. Allen Anderson, *Donley, Stockton P.*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 676, 676 (Ron Tyler et al. eds., 1996); Thomas W. Cutrer, *Willie, Asa Hoxie*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 995, 995 (Ron Tyler et al. eds., 1996).

65. John W. Payne, Jr., *Coke, Richard*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 193, 193 (Ron Tyler et al. eds., 1996).

66. *Moore, George Fleming*, *in* 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 819, 819 (Ron Tyler et al. eds., 1996).

67. Thomas W. Cutrer, *Willie, Asa Hoxie*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 995, 995 (Ron Tyler et al. eds., 1996).

68. H. Allen Anderson, *Donley, Stockton P.*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 676, 676 (Ron Tyler et al. eds., 1996).

locomotive named after him.[69] He served as a state district judge from 1859 to 1865 and again, by gubernatorial appointment, in 1866.[70] Shortly before his death in 1873, he was a member of the state legislature.[71] The most distinguished political career in this group, of course, was that of Richard Coke. He was elected governor in 1873, and served three six-year terms in the United States Senate after his two terms as governor of Texas.[72] Asa Willie served one term in the United States House of Representatives but preferred municipal office in Galveston before becoming chief justice at the end of the period here discussed.[73]

As authorized by the constitution and as mandated by law, the first post-Civil War Supreme Court of Texas held sessions at three locations: Austin, Galveston, and Tyler. As it happened, the supreme court sat in Austin for the December term in 1866, in Galveston for the January term of 1867, and in Tyler for the April term of that latter year. (The next Austin term was held by a court appointed by military authority.) William M. Walton was attorney general throughout the presidential reconstruction period; and George W.G. Brown, William F. Jarrett, and Thomas Smith were the clerks at Austin, Galveston, and Tyler, respectively.

The reports for all three terms, comprising the better part of three volumes, were published between 1869 and 1870 in Washington, D.C. by George W. Paschal, who held the copyright. He also figured as the reporter throughout, although his appointment in that capacity dated from January 1869. The reports for the Austin term, December 1866, and the Galveston term, January 1867, also list Charles L. Robards and Alex M. Jackson as the "Reporters of that day," but go on to state that "George W. Paschal reports this volume."[74] His prefaces to these three volumes of *Texas Reports*, and some of the "Statements of

69. Charles Christopher Jackson, *Smith, George Washington*, *in* 5 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 1098, 1098 (Ron Tyler et al. eds., 1996).

70. *Id.*

71. *Id.*

72. John W. Payne, Jr., *Coke, Richard*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 193, 193 (Ron Tyler et al. eds., 1996).

73. Thomas W. Cutrer, *Willie, Asa Hoxie*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 995, 995 (Ron Tyler et al. eds., 1996).

74. George W. Paschal, 28 Tex., at iii (1882).

the Case" prepared by him, are classic texts of Texas legal history.

This latter feature, however, was not judged entirely welcome at the time. It will be recalled that as then provided by law, the reporter received compensation calculated by dollar multiples of the number of pages published, so that his remuneration could (and apparently did, at least in his view) increase with the length of his statements of the case. That eventually led the Military Court to impose limits on the editorial (or perhaps more accurately, the authorial) discretion of the reporter in this respect.[75] No such restraints, however, were in place during the three terms here discussed, although starting with the Galveston term, the reporter felt the need "to abridge and in many instances to omit, the briefs of counsel."[76]

B. *The Decisional Output: An Overview*

The Presidential Reconstruction Court sat in appeal on decisions, almost invariably after jury trial, by Texas state district judges. Accordingly, the central issue, in case after case in those days without standard jury charges, was the correctness of the charge of the judge to the jury. Furthermore, the Constitutional Convention of 1866 had tolled the statute of limitations from March 2, 1861, to September 2, 1866.[77] Consequently, this first post-bellum court had to deal, in the majority of cases, with matters of no current interest. Indeed, as acknowledged by the reporter, the judges of this court "worked diligently to reduce a vastly accumulated docket."[78] In today's perspective, the product of this part of their labors is, as will be seen, an occasional gem affording historical insight.

Perhaps influenced by this need to cope with an overburdened

75. *See* George W. Paschal, *Preface* to 30 Tex., at vii, vii (1870) ("'[T]he reporter . . . in reporting the statement of facts, shall state so much only as may be absolutely necessary to show upon what the opinion was based, and that whenever the opinion includes this statement, that no further statement be published.'"); *see also* George W. Paschal, *Preface* to 31 Tex., at v, vi–ix (1870) (discussing the 1869 order, published in volume 30 of the *Texas Reports*, and its possible effects on the character of Paschal's reports had he obeyed it).

76. George W. Paschal, *Preface* to 29 Tex., at v, v (1869).

77. *See* Tex. Ord. no. 11, § 6 (Mar. 30, 1866), *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 895, 897 (Austin, Gammel Book Co. 1898) ("[T]he time between the 2d day of March, 1861, and the 2d day of September, 1866, shall not be computed in the application of any statute of limitations.").

78. George W. Paschal, *Preface* to 28 Tex., at v, viii (1869).

docket, the five jurists of the Presidential Reconstruction Court showed what appears to be, again in today's perspective, a truly amazing degree of harmony in judgment and felicity in the assignment of opinion-writing. It is only towards the very last session of this court—the Tyler term of April 1867—that Justice Donley (the leading criminal law authority on the court) started filing a few dissents in criminal cases.[79] Appeals in criminal matters, however—both by the defendant and by the State—were quite infrequent in all three terms. The chief justice—perhaps by nature or the requirements of office—chose to incorporate his lone disagreement with prevailing authority into an opinion reflecting the view of the majority of the court.[80]

Again by way of introduction, it seems well to keep in mind that there was little money in Texas in those days or, for that matter, in the seven or eight years preceding. Again and again, not only makers of bills and especially of bonds but also their hapless sureties were made to feel the rigor of the law, not so occasionally for amounts that should not have troubled twelve jurors, six judges, two lawyers, two clerks, and one reporter even then. Some of this litigation, however, shows the uncertainty of commercial law before the enactment of the Negotiable Instruments Law, and at least one challenge to a twenty dollar fine raised constitutional issues finally decided by a still higher court one century later.[81]

The decision of the legislature to continue the Texas tradition of holding supreme court sessions at three locations was justified, in the main, by the absence of ready means of communication. It served the convenience of litigants and, more particularly, of their lawyers, adding to the natural tendency towards the development (or perhaps more accurately, the strengthening) of local bars at Tyler and at Galveston in addition to Austin, where Texas public (and especially public-lands) litigation was necessarily centered.

79. *See, e.g.*, Horton v. State, 30 Tex. 191, 202–14 (1867) (Donley, J., dissenting) (demonstrating Justice Donley's occasional variance from the majority opinion); Smedly v. State, 30 Tex. 214, 216–24 (1867) (Donley, J., dissenting) (showing Justice Donley's disagreement with the court's majority opinion calling for an indictment for robbery).

80. *See* King v. Elson, 30 Tex. 246, 253–57 (1867) (illustrating Chief Justice Moore's dissatisfaction with Texas property statutes relied upon by a majority of Texas courts to decide cases arising from title disputes).

81. *See* ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 298 (6th Cir. 2001) (discussing the constitutional claim in *Gabel*); Gabel v. City of Houston, 29 Tex. 335, 335–47 (1867) (hearing a constitutional claim of a twenty dollar fine).

Judging by references to treatises and to out-of-state judicial decisions (even English authority), it seems that all three locations had sufficient library facilities.

There was, however, a noticeably different flavor to each term. Galveston produced most of the commercial litigation, including admiralty cases, and even one sophisticated marine insurance case.[82] Public-land litigation was concentrated in Austin (and seemed rather inconceivable without recourse to the archives of the public lands office). Tyler, finally, seemed quintessentially southern and agricultural, although it too did not escape the impact of the decisively non-"Anglo" system of marital property inherited from Spain. Even without formal proof, Texas lawyers and judges showed themselves amply familiar with—but ultimately unimpressed by—the common law-based system of marital property prevailing in their states of origin.

C. *Notable Decisions*

It is proposed to divide "notable decisions" into three sub-categories: those that are still authoritative in Texas; those that contributed significantly to the corpus of law that is quintessentially Texan (especially public land law, homestead, and community property); and finally, those that convey a significant insight into the course of Texas legal (and of necessity, political) history. Because the Presidential Reconstruction Court sat immediately after the collapse of the Confederacy and the re-establishment of United States rule under military occupation, it might be thought that this last sub-category was the most productive of noteworthy case law. That, however, is not (or at any rate, it is not quite) the case. As noted by the reporter, the five supreme court justices elected in 1866 showed "indisposition, as a court, to meet the questions which had grown out of the rebellion, and a disposition to give validity to some of the acts of the Confederate government."[83] His introduction to the very next volume of *Texas Reports*, we will see, sounded quite a different

82. *See generally* Marine Fire Ins. Co. v. Burnett, 29 Tex. 433 (1867) (affirming the trial court ruling that although marine insurance policies have an implied warranty that vessels will be seaworthy, such a warranty may be modified or waived by express agreement).

83. George W. Paschal, *Preface* to 29 Tex., at v, v (1869).

note,[84] but that was after the military purge of the Texas judiciary had changed the atmosphere in the supreme court chambers from one of (muted) "Pride in the Rebellion" to one of militant championship of the Union and of reconstruction.

Starting with decisions of the Presidential Reconstruction Court that are still authoritative today, we note initially that the fatal "o" (for "overruled") stands next to citations to only three criminal cases[85]—a subject that has not been the province of the Supreme Court of Texas for well over a century. Many a decision in civil cases found ready entrance into the stream of authority but faded away from the string of citations uncriticized and uncontradicted around the 1880s or, occasionally, the end of that century. This shows solid judicial craftsmanship under, it must be added, trying circumstances.

A few private-law decisions of the Presidential Reconstruction Court have retained their place in mid-to-late twentieth-century strings of citation. This applies particularly to those dealing with central issues at the borderline between contract law and evidence, such as the statute of frauds and the parol evidence rule. *Stroud v. Springfield*,[86] which discerned a "tendency of American decisions" in derogation of the common law rule restricting the admissibility of ancient documents in proof of title, is one such case.[87] Although sister-state and even English decisions were considered judicially in other cases as well, *Stroud* appears to be the only instance where, as it were, this court expressly entered into a discourse with national currents of jurisprudence.

Turning now to matters peculiarly Texan, these are left conveniently to later consideration as they are part of a more or less uneventfully evolving body of law. It might not be amiss, however, to note the absence of cases dealing with water rights or

84. George W. Paschal, *Preface* to 30 Tex., at vii, ix (1870) ("In the laws and reports of no other state are to be found laws and judicial precedents so valuable to the philosophical student. The present volume is exceedingly fruitful of some of these researches. We make history so rapidly, that we may not properly esteem the rulings upon slavery, sequestration, stay laws, Sunday laws, and *de facto* governments.").

85. Bennett v. State (The Sunday-Law Cases), 30 Tex. 521 (1867), *overruled by* Flynn v. State, 8 Tex. Ct. App. 398 (1880); Tharp v. State, 28 Tex. 696 (1866), *overruled by* Osborn v. State, 33 Tex. 545 (1870); Juaraqui v. State, 28 Tex. 625 (1866), *abrogated by* Ferguson v. State, 36 Tex. Crim. 60, 35 S.W. 369 (1896).

86. Stroud v. Springfield, 28 Tex. 649 (1866).

87. *Id.* at 651.

mineral rights—the latter awaiting judicial articulation of the relinquishment of previously state-owned mineral rights to surface land owners by the Constitution of 1866.[88] Similarly, there are no cases in these three terms on divorce or (except for a slave law case to be considered further below) on marriage.

City of San Antonio v. Jones,[89] decided early in the initial (Austin) term of the court, initiated judicial consideration of the venture of the City of San Antonio into railroad finance.[90] The report is preceded by a lengthy statement of the case by the reporter (himself of counsel) sketching the history of San Antonio since its foundation under Spanish rule. In *Jones*, the court upheld the constitutionality of municipal financing of railroad construction, but as we will see further below, that was not the end of the travails of bondholders to collect on their coupons. (The 1866 constitution had continued the tradition of prohibiting the legislative creation of a "corporate body ... with banking or discounting privileges";[91] Texas railroads could not be financed by bonds underwritten by Texas banks.)

Gabel v. City of Houston[92] was an appeal from a twenty dollar fine imposed on a Houston beer brewer for having sold "malt liquors" on Sunday in violation of a city ordinance prohibiting the sale of that beverage (among others) on Sundays.[93] Peter Gabel challenged the ordinance some seven years after the event, arguing both the lack of municipal legislative power and, more fundamentally, the unconstitutionality of "an ordinance for the sole purpose of having the Christian Sabbath enforced by city authority."[94]

Amazingly enough, the constitutionality of the Houston ordinance was upheld by the state supreme court, speaking through Justice Smith, not by reference to public need for a day of rest or to the predominantly Christian character of the state,

88. TEX. CONST. of 1866, art. VII, § 39. *See generally* WALACE HAWKINS, EL SAL DEL REY (1947) (providing a classic study on the subject).

89. City of San Antonio v. Jones, 28 Tex. 19 (1866).

90. *Id.* at 30–35.

91. TEX. CONST. of 1866, art. VII, § 30; *see also* TEX. CONST. of 1845, art. VII, § 30 ("No corporate body shall hereafter be created, renewed, or extended, with banking or discounting privileges.").

92. Gabel v. City of Houston, 29 Tex. 335 (1867).

93. *Id.* at 341.

94. *Id.* at 340.

although both of these factors were mentioned. The court chose to ground its decision on the final clause of article I, section 4 of the state Constitution of 1845 (as well as, it should have added, that of 1866), which declared it to be "the duty of the [l]egislature to pass such laws as . . . shall be necessary to protect every religious denomination in the peaceable enjoyment of their own mode of public worship."[95] The court said:

> This ordinance of the council of Houston is believed to be of the character embraced in this clause. It does not in the least interfere with the religion of any person, or the exercise thereof. It does not enjoin upon any person the duty of conforming his conduct to the rites of his church; but it does prevent him from following a tippling occupation in the city on Sunday, by which crowds of persons may be congregated at a public house, and, under the influence of intoxication, may commit riots and breaches of the peace, to the great annoyance of others, who may feel it their religious duty to desist from labor, attend worship, and keep the day holy; and we see a propriety and due respect for the sentiments or customs of our people manifested in the rule that compels a cessation from labor on Sunday, in order that not only man and beast may recuperate, and be restored to health and mental and physical vigor, but, that those who, in good faith, may desire to keep that day holy, for the worship of God, may remain undisturbed in the exercise of their religious duties; and any law that tends to this result cannot be considered as repugnant to the constitution.[96]

Another, less purple passage from *Gabel* was quoted as recently as 2001 to illustrate judicial attitudes toward the separation of church and state on the eve of the Fourteenth Amendment.[97]

Turning now to the jurisprudence of the Presidential Reconstruction Court on issues connected with the Civil War, the defeat of the Confederacy, and the establishment of a new constitutional order rejecting the notion of slavery, we start with

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95. TEX. CONST. of 1845, art. I, § 4, *construed in Gabel*, 29 Tex. at 344.

96. *Gabel*, 29 Tex. at 347.

97. ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 298 (6th Cir. 2001) ("In a Texas case involving the constitutionality of a blue law, similarly, the court, after noting that the government could not 'establish any religion for the people to obey,' observed that '[w]hen we consider the attributes of the Deity and of future rewards and punishments, and the temporal welfare of society, government can hardly consider itself entirely free from the fostering care and protection of religion, as connected with the personal, social and domestic virtues of its people . . . .'" (quoting *Gabel*, 29 Tex. at 345)).

Bishop v. Jones,[98] another case that had languished on the docket for several years. On April 15, 1861, Judge Terrell, sitting in Bastrop, had rendered judgment in favor of the plaintiff indorsees and holders of a note.[99] The defendants contended that the nominal plaintiffs held this note "for the use and benefit of alien enemies of the United States of North America," which was in a state of war against the Confederate States at the time.[100]

As the reporter wrote in the course of his twelve-page statement of the case: "While these Bastrop lawyers were coolly debating the question of war, Beauregard was firing away at Fort Sumter."[101] He followed this observation with an elaborate chronology, from the *Galveston News*, of the first days of hostilities between the North and South. These sources were brought to the attention of the trial court in defendants' motion for a new trial. Before the supreme court in the December term of 1866, in Austin, counsel for defendants argued once more, with elaborate reference to English and United States authorities (including four treatises on international law), that the United States and the Confederate States had been at war, and that the state of war precluded the recovery of debts in enemy courts by alien enemies.[102]

Writing for the court, Chief Justice Moore rejected both of these defenses: the former because there had been no declaration of war by the Confederate States at the time material; and the latter because President Jefferson Davis had, by proclamation, granted enemy aliens a period of grace to collect their debts and depart. Throughout his opinion, he scrupulously treated the two combatants as equal—a point to which he returned towards the end of his opinion, where he said:

> We have answered the question here presented, as it was discussed, as if the late war had been between two independent powers, and there being, on this hypothesis, no error in this ruling, we have not deemed it necessary to inquire whether the character of the government of the United States and the relationship of the states of the union to it require the application of different principles from those by which it should have been decided if the Confederate

98. Bishop v. Jones, 28 Tex. 294 (1866).
99. *Id.* at 302.
100. *Id.* at 296.
101. *Id.* at 302.
102. *Id.* at 307–08.

> States had succeeded in their attempt to sever their connection with the United States.[103]

This passage leaves little doubt as to what would have been, for the jurists of the Presidential Reconstruction Court, the preferred outcome of the Civil War. In any event, *Bishop* showed that in dealing with the legal effects of that conflict, this court regarded the secession of Texas, the formation of the Confederate States, and the war between the United States and the Confederate States of America as lawful acts, governed by the laws of war. Perhaps the best illustration of this attitude is furnished by the *Estray Cases*,[104] decided during the same term. At issue was the construction of an enactment of the state legislature of December 1863, suspending the operation of the estray laws "for and during the existence of the present war, and until six months after peace shall be concluded."[105]

In reliance on that enactment, several Texas district courts had quashed indictments for the unlawful taking up and using of estrays, which was an offense under the Texas Penal Code. On appeal by the State, these decisions were reversed and remanded. The court opined but did not decide that the purpose of the 1863 legislation "was, to prevent persons, who were at home and not in the army, from taking up and using the stock of others, who were compelled to be absent from home for years in defense of the country."[106] Neither the legitimacy of the 1863 legislature nor the more obvious question of the validity of statutes enacted in furtherance of the rebellion were deemed worthy of judicial comment at the time.

Somewhat surprisingly, the Presidential Reconstruction Court was also able to avoid, until its last term, the vexed question of the validity and (if so) the quantification of debts denominated in Confederate currency. This seems all the more astonishing in view of the frequency of debt claims on the docket, and the willingness of debtors to contest minor debts with any argument, however unlikely to succeed.

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103. *Bishop*, 28 Tex. at 320.

104. State v. Harvey (The Estray Cases), 28 Tex. 632 (1866).

105. Act approved Feb. 25, 1863, 9th Leg., 1st C.S., ch. 5, § 1, 1863 Tex. Gen. Laws 6, 6, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 594, 594 (Austin, Gammel Book Co. 1898).

106. *Harvey*, 28 Tex. at 634.

Williams v. Arnis,[107] decided early in the Tyler term of April 1867, seemed to offer the debtor a viable defense on at least two grounds. On January 1, 1865, Williams signed a promissory note undertaking to pay Arnis, twelve months after date, $700 "for the hire of three negroes . . . in current funds."[108] The key defenses of the debtor were that this debt was in Confederate funds, twenty or forty to the United States dollar at contracting and worthless at maturity, and that there was a failure of consideration, since the slaves had been freed. The plaintiff argued, successfully at both levels, that "current funds" meant whatever was lawful currency at maturity, that the slaves were not freed until the Emancipation Proclamation had been "sustained and enforced by the military," and that the defendant had not suffered damage in any event, since there was no proof that they had stopped working for him after that date.

Williams v. Arnis is prefaced with a lengthy statement of the case, including a summary of the evidence at trial and detailed extracts of arguments by counsel. In the opinion of the reporter, this extensive coverage was necessary because "a different view of the law ha[d] been taken by the supreme court in subsequent cases, which [would] appear in volumes 30 and 31."[109] Two comments seem appropriate here in historical perspective. First, the Presidential Reconstruction Court did not accept the defendant's invitation to rule on (and against) the constitutionality of the Emancipation Proclamation. It pointedly left this question open, however, by noting that even "[i]f it be conceded that the hired negroes were legally and constitutionally emancipated at or after the date of this note" (i.e., January 1, 1865), there was no proof that the defendant had not received the value of their work.[110] Similarly, it avoided passing on the enforceability of monetary obligations denominated in Confederate currency by observing that there was "no satisfactory evidence" that this was the currency contracted for.[111]

This latter issue (or complex of issues) was to be, we will see, one of the chief areas of disagreement between the Military and

107. Williams v. Arnis, 30 Tex. 37 (1867).
108. *Id.* at 39–40.
109. *Id.* at 43.
110. *Id.* at 50.
111. *Id.* at 49.

Semicolon Courts and their successors. In conclusion on the jurisprudence of the Presidential Reconstruction Court, however, some additional remarks on its decisions on slaves, "negroes," and freedmen are called for.

We might start conveniently with *Tippett v. Mize*,[112] one of the very last decisions of that court. This was a suit on a note for $2,600, dated July 14, 1863, given in payment for the purchase of a slave named Jerry. On May 1, 1865, Jerry asserted his freedom and left his master. The defendant purchaser argued, in the main, that the sale, having been made by the administrator of an estate acting without court approval, was invalid, and that in any event, the sale was in Confederate dollars which were worth only a small fraction of United States dollars. The court affirmed a decision in favor of the defendant on the first ground, adding that there was no obligation to return Jerry because of the "change in the *status* of the negro."[113] The court stated that "[i]f, by the act of government, the defendant was deprived of the power of returning the negro . . . he [could not] be required to perform an act which is prohibited by law."[114]

Throughout the three terms of the Presidential Reconstruction Court, plaintiffs sought recovery on contracts for the sale, the mortgaging, and the hire of slaves, and as heirs of estates comprising slaves. The court treated these cases in the same manner as any other litigation involving moveable property, so long as the right sought to be enforced arose before the abolition of slavery in Texas. It stopped short, however, of ordering the restitution of slaves to their owners or purchasers: the "*status* of the negro" had changed, as had the notion of "property" in this respect. In *Scranton v. Conlie*,[115] decided during the Galveston term, the court upheld, subject to the entry of a remittitur of the excess, a judgment awarding a sheriff compensation from the owner for the keeping of a runaway slave despite the owner's claim that as provided by law, the slave should have been offered for sale after six months.[116] In the words of Justice Coke, the failure of the sheriff to offer the slave for sale was justified by

112. Tippett v. Mize, 30 Tex. 361 (1867).
113. *Id.* at 367.
114. *Id.*
115. Scranton v. Conlie, 29 Tex. 237 (1867).
116. *Id.* at 237–39.

"[t]he utter worthlessness of the slave, arising from his mental insanity"; he was therefore not of "some value" so as to justify the formalities of a sale.[117]

In one respect, however, slaves were protected under prior law and even by constitutional mandate. Killing a slave by abuse or cruel treatment was murder, and the unreasonable abuse or cruel treatment of a slave was a misdemeanor punishable by fine. In *Wilson v. State*,[118] the accused had, quite literally, whipped a slave to death in 1861.[119] He was tried and acquitted for murder in March 1865, but assessed the maximum fine upon a jury finding of guilty of cruel treatment. A reluctant supreme court, speaking through Justice Donley, set aside the fine as being for an offense not charged in the indictment.[120] This was not a unique case.

When tried as freedmen under the general laws pursuant to the Constitution of 1866, former slaves who were adequately represented by counsel appear to have been accorded the safeguards available to criminal defendants generally. In *Warren v. State*[121] (another Donley decision), the court reversed the judgment against Warren, a freedman, because the charge to the jury "did not restrict the jury as to the character of the facts and circumstances that should be found true, in order to authorize them to consider the confessions of the defendant, made under duress."[122] Almost on the humorous side, in *Banks v. State*,[123] the court reversed the conviction of a freedman charged with stealing a "horse" which, at trial, turned out to be a mare.[124]

Finally, again from a historical perspective, mention should be made of *Timmins v. Lacy*,[125] a case of first impression construing the Texas apprentice laws of October 27, 1866.[126] The report is preceded, once again, by an elaborate, more than twelve-page statement of the case by the reporter, which provides important insights into the pre-history of apprenticeage in Texas law as well

117. *Id.* at 238.
118. Wilson v. State, 29 Tex. 240 (1867).
119. *Id.* at 240–41.
120. *Id.* at 246.
121. Warren v. State, 29 Tex. 369 (1867).
122. *Id.* at 375.
123. Banks v. State, 28 Tex. 644 (1866).
124. *Id.* at 647, 649.
125. Timmins v. Lacy, 30 Tex. 115 (1867).
126. *See id.* at 119–23 (reproducing the Texas apprentice act).

as, it must be said, some glimpses into the social self-consciousness of Mr. Paschal.[127] The case itself concerned the attempt by a former slave to hire out children of him and a slave woman whom he had long since abandoned. The court refused to stretch parental authority under the apprentice laws so as to deprive the mother, long since in another relationship, of her children. In the course of his judgment, Chief Justice Moore touched upon the subject of slave marriages, stating that "the only ground upon which the decision can be maintained is, that the assent manifested by their continued cohabitation, after acquiring capacity to contract, gives validity to the existing relation, sanctioned by moral, though not by legal obligation."[128] The Texas Constitution of 1869 went two steps further: it not only legitimized subsisting unions of former slaves and their offspring, but also terminated prior slave unions upon the death of one party.[129]

III. THE MILITARY COURT

A. *Judges, Sessions, Reporters, and Clerks*

By special order number 169 of September 10, 1867, Major General Charles Griffin removed the then-sitting chief justice and the four associate justices of the Supreme Court of Texas from office on account of their known hostility to the general government.[130] He then appointed a new court, consisting of Amos Morrill as chief justice, and Livingston Lindsay, Albert H. Latimer, Colbert Caldwell, and Andrew J. Hamilton as associate justices.[131] In view of the source of its appointment, this court is commonly known as the Military Court. Starting with the Austin session of October 1867, it sat, in that sequence, at Austin, Galveston, and Tyler until 1870. By order of Brigadier General Reynolds, the Tyler term of that latter year, from April 11 to June 8, was held not at Tyler, but at Austin.[132] This reflected the

127. *See id.* at 116–29 (stating emphatically that non-slaveholders in the South were not "white trash," and that they were important both politically and socially, since they, and not "wealthy planters," accounted for the "professional" classes).

128. *Id.* at 137.

129. TEX. CONST. of 1869, art. XII, § 27.

130. WILLIAM L. RICHTER, THE ARMY IN TEXAS DURING RECONSTRUCTION, 1865–1870, at 115, 235 n.89 (1987).

131. George W. Paschal, 30 Tex., at iii (1870).

132. E.M. Wheelock, *Preface* to 33 Tex., at v, v (1872).

judiciary article of the 1869 constitution, which abolished the sessions at Galveston and at Tyler.

The formal composition of the Military Court did not change until December 1869, when Moses B. Walker replaced Albert Latimer. Even before that date, however, the reports note the absence of ex-Governor (and gubernatorial candidate) Hamilton at the Galveston and Tyler sessions of 1868 and the Austin and Galveston sessions of 1869.[133] In January 1870, Justice Caldwell was replaced by James Denison.[134] For the remaining two sessions of the Military Court in that year, the court was composed of Chief Justice Morrill and Justices Lindsay, Walker, and Denison. Andrew Hamilton, who resigned on October 1, 1869, was not replaced.

Fortunately for legal historians (and for devotees of his acerbic style), George W. Paschal continued as reporter until the end of the Galveston session of 1869. He was succeeded by Edwin M. Wheelock, who continued as reporter of the Semicolon Court. Born in New York and Harvard-educated, first in law and then in theology, Wheelock came close to the prototypes of abolitionist and reconstruction officeholder, escaping the usual epithet only because he finished his career as a Unitarian minister in Austin in the last decade of the nineteenth century.[135] Edwin Wheelock had apparently not completed his legal studies. He did not continue his predecessor's elaborate statements of the case (let alone his acerbic comments), but tended to report arguments of counsel without much effort at editorial abbreviation, pressing factual information into the headnotes.

The replacement of the membership of the court in September 1867 brought with it, unsurprisingly, that of the clerks at Austin, Galveston, and Tyler. Two of them require special mention. The new clerk at Galveston, George W. Honey (the prototype of a "carpetbagger"), appears to have pioneered what are now known as advance sheets. He published the decisions of the court at its 1869 Galveston term in pamphlet form and advertised this venture in the press. His correspondence file shows numerous orders in April 1869, by lawyers for those pamphlets, at one dollar each. In

133. George W. Paschal, 31 Tex., at iii (1870).

134. E.M. Wheelock, 33 Tex., at iii (1872).

135. Carl H. Moneyhon, *Wheelock, Edwin Miller*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 919, 919 (Ron Tyler et al. eds., 1996).

his subsequent career as elected state treasurer, George Honey's removal from office by Governor Davis, for what turned out to be insufficient cause, will receive further attention below—as it did repeatedly by the Semicolon Court.[136]

Last, but perhaps not least, W.P. de Normandie succeeded George H. Gray as clerk at Austin for the Tyler term held at the capital city by military order from April to June 1870. Although he too was a Unionist, and indeed a founding member of the Austin Union Club in 1860, and had returned from exile with the rank of major in the Union army, he was to retain his position as clerk of the supreme court at Austin to the very end of the period here covered. So far as can be discovered, he remains the most prominent Texas public servant to survive in office after Reconstruction. He, too, was to figure in the annals of Texas jurisprudence.[137]

For obvious reasons, the biographies of the members of the Military Court require special attention. To start with, Chief Justice Amos Morrill, born in Massachusetts in 1809, moved to Texas in 1838. At the outbreak of the Civil War, he was in practice in Austin with Andrew Hamilton, his fellow judge on the Military Court. Because of his opposition to secession and his Unionist sympathies, he left Texas some time in 1863 but returned to Austin at the end of the hostilities. He served as chief justice of the Military Court throughout its existence and was appointed to the United States District Court in Galveston in 1872. After eleven years of service on that court, Morrill resigned his judicial position and returned to Austin, where he resided until his death in 1884.[138]

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136. *See, e.g.*, Honey v. Graham, 39 Tex. 1, 16 (1873) (reversing the lower court's judgment and holding that George Honey was "entitled to the office of state treasurer"); Honey v. Davis, 38 Tex. 63, 70 (1873) (recording Honey's appeal from his removal from office). *See generally* W.C. NUNN, TEXAS UNDER THE CARPETBAGGERS 105–09 (1962) (discussing Honey's career as treasurer); *Honey, George W., in* 3 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 682, 682 (Ron Tyler et al. eds., 1996) (providing biographical detail for Honey).

137. *See In re* Supreme Court Clerkship, 40 Tex. 1, 1 (1874) (recognizing the appointment of W.P. de Normandie as clerk of the supreme court).

138. *Morrill, Amos, in* 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 842, 842 (Ron Tyler et al. eds., 1996). *See generally* William Pitt Ballinger, Diary of William Pitt Ballinger 97 (June 16, 1875) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) ("[Waul] sa[id] he [was] waiting for a lucid interval in Morrill."); William Pitt Ballinger, Diary of William Pitt

Livingston Lindsay, born in Virginia in 1806, moved to Texas in 1860 and practiced law in La Grange—a municipality co-founded by Albert Latimer some two decades earlier. He participated in the Constitutional Convention of 1868–1869. After serving on the Military Court through its last session, he served as a district judge and then as county judge. He died in La Grange in 1892.[139]

Albert Hamilton Latimer, Tennessee-born, was one of the signers of the Texas Declaration of Independence of March 2, 1836. He served both in the house of the Republic of Texas and in the senate of the state, in antebellum years, but left Texas at the outbreak of the war because of his Unionist sympathies. As early as October 1865, Governor Andrew Hamilton appointed Latimer as the state comptroller. Elected to the Constitutional Convention of 1866, he joined its Radical Union caucus. He held various state and federal offices, including that of subassistant commissioner of the Freedmen's Bureau—a position from which he resigned when he accepted appointment to the supreme court in September 1867. His resignation from the court in late 1869 was due to military pressure resulting from his candidacy as lieutenant governor on the ticket headed by Andrew Hamilton. Nevertheless, Governor Davis appointed him to the position of district judge in 1870. He resigned from that position two years later, and died in 1877.[140]

Colbert Caldwell (or Coldwell in some publications), was also a native of Tennessee. Born in 1822, he practiced law in that state and moved to Texas in 1859 after spending some time in Arkansas, where he had served in the state legislature. On August 23, 1865, he was appointed a district judge by Provisional Governor

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Ballinger 93 (June 10, 1875) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) ("I think [Morrill] incompetent—and think him tricky—a low tone of honor."); William Pitt Ballinger, Diary of William Pitt Ballinger 14 (Jan. 19, 1874) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (discussing Morrill's solicitation for argument and Ballinger's decision to participate in discussion); William Pitt Ballinger, Diary of William Pitt Ballinger 37 (Feb. 22, 1872) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) ("If [Morrill] doesn't improve we had better close the court."); William Pitt Ballinger, Diary of William Pitt Ballinger 21 (Jan. 30, 1872) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) ("[Morrill's] professional ability is not adequate to the station.").

139. John D. Thompson, *Lindsay, Livingston*, *in* 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 204, 204 (Ron Tyler et al. eds., 1996).

140. L.W. Kemp, *Latimer, Albert Hamilton*, *in* 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 102, 102 (Ron Tyler et al. eds., 1996).

Hamilton. Appointed to the Military Court in October 1867, he was elected to the 1868–1869 Constitutional Convention after a campaign that included a white mob's assassination attempt. Despite his efforts to quell disorder in Texas, he was "increasingly perceived by radicals within his party as unsympathetic to freedmen's aspirations and the goals of congressional Reconstruction."[141] This led to his removal from the court by military authority. Caldwell then became a United States collector of customs in 1876. After retiring, he left Texas, but his son and grandson became major figures in the bench and bar of El Paso.[142]

Andrew Jackson Hamilton (1815–1875), born in Alabama and admitted to practice there, came to Texas in 1846. He was the prototype of a southern-born Texas lawyer-politician: utterly loyal to the Union and fiercely opposed to secession. Practicing law in Austin and having served both in the Texas legislature and in the United States House of Representatives, he had to leave the state in 1862 despite his then recent election to the state senate. He returned to Texas as a brigadier general in the United States Army, and served as the first provisional governor of the state from 1865 to 1866. As shown by the above biographic sketches of his fellow judges, much political patronage flowed through his hands. After his appointment to the court in 1867, he contributed significantly to the Constitutional Convention of 1868–1869, where he led the Moderate Republican faction. Narrowly defeated for governor by Davis in 1869, he retired and died in Austin in 1875.[143]

To summarize: except for the chief justice who was born in Massachusetts, all of the members of the Military Court discussed so far came from southern states (one from Virginia, one from Alabama, and two from Tennessee). To be sure, none were Texas-born, but neither was even one delegate of the Secession

141. Charles Christopher Jackson, *Caldwell, Colbert, in* 1 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 894, 894 (Ron Tyler et al. eds., 1996).

142. *See id.* ("Caldwell died in Fresno, California, on April 18, 1892."); J. MORGAN BROADDUS, JR., THE LEGAL HERITAGE OF EL PASO 121–23, 217 (Samuel D. Myres ed., 1963) (discussing how Caldwell's son, William Caldwell, was a prominent member of the El Paso bar, where his grandson, Ballard, also held state judicial office).

143. *See generally* JOHN L. WALLER, COLOSSAL HAMILTON OF TEXAS: A BIOGRAPHY OF ANDREW JACKSON HAMILTON (1968) (detailing the life of Andrew Jackson Hamilton).

Convention of 1861.[144] All but one of these jurists died in Texas. The "Yankee" chief justice capped his judicial career by serving as a federal district judge in Galveston until the end of 1883. When he died in retirement in Austin a few months later, he had spent more than half of his life in Texas. His only prolonged period of absence from this state after 1838 was his two-year exile during the Civil War.

Referring to this original Military Court as "carpetbag," or to any of its members discussed so far as "carpetbaggers," seems both absurd and unjust. That latter term, however, is not out of place in reference to Moses B. Walker, who replaced Albert Latimer on the court on November 27, 1869. Born in Ohio in 1819, Justice Walker had practiced law in Dayton from 1846 to 1861, and had served a term in the Ohio senate. He served in the Civil War as the colonel of an Ohio volunteer regiment and saw action in many a battle, including Chickamauga where he was wounded three times. After an unsuccessful candidacy for the United States House of Representatives, he resumed his military career which took him to Texas as part of the occupation forces. From active duty, he was appointed by General Reynolds as a state district judge and, after half a year's service in that capacity, to the Texas Supreme Court to replace Justice Latimer.[145]

As discussed further below, Justice Walker was to be appointed to the Semicolon Court by Governor Davis, and he is the author of the opinion which gave that court its name. His presence in Texas did not outlast his judicial tenure. Inescapably, therefore, he is quite generally characterized as a carpetbagger and, in view of his exalted position as a member of the supreme court, as the most prominent person of that description in reconstruction Texas.[146]

The background of James Denison, the last replacement appointment to the Military Court, could hardly be more different, although he too was of non-southern stock. Born in Vermont in 1812 and a graduate of Kenyon College, he came to Texas via New Orleans in 1839, settling as a lawyer in Matagorda. He served both in the army and the house of representatives of the Republic of

144. TEX. LIBRARY & HISTORICAL COMM'N, JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, at 405–07 (Ernest William Winkler ed., 1912).

145. Randolph B. Campbell, *Walker, Moses B.*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 797, 797 (Ron Tyler et al. eds., 1996).

146. *Id.*

Texas. His practice before the supreme court both of the Republic and the State of Texas indicates a keen interest in Louisiana law and in empresario land grants.[147]

Although James Denison appears to have taken a political position contrary to the views prevailing locally in the immediate antebellum period, his appointment to the Supreme Court of Texas by military authority on January 22, 1870, is likely to have been due, in good part, to his family relationship with Salmon P. Chase, the Chief Justice of the United States during Reconstruction. After serving on the court during its last two sessions in 1870, Justice Denison went home to San Antonio, where he died three years later.[148]

B. *The Decisional Output: A Framework*

As recalled in the words of its astute if hardly unbiased reporter, the Presidential Reconstruction Court had shown an "indisposition . . . to meet the questions which had grown out of the rebellion, and a disposition to give validity to some of the acts of the Confederate government."[149] Paschal's judgment of the work of the Military Court was quite different. In his preface to the reports of the first three terms of that court, he wrote:

> In the laws and reports of no other state are to be found laws and judicial precedents so valuable to the philosophical student. The present volume is exceedingly fruitful of some of these researches. We make history so rapidly, that we may not properly esteem the rulings upon slavery, sequestration, stay laws, Sunday laws, and *de facto* governments.[150]

Briefly put, the Military Court faced and decided central issues arising out of the secession of Texas from the United States, its four-year existence as one of the Confederate States of America,

147. *See* Denison v. Ingram, Dallam 519 (Tex. 1843) (showing Denison as counsel concerning a land grant dispute); *see also* Duncan v. Rawls, 16 Tex. 478, 501 (1856) (showing that J.H. Bell, also basing himself on the civil law, had the better of that argument).

148. James Denison died in San Antonio on February 16, 1873. Salmon P. Chase, who regarded Denison as a "favorite cousin," had assisted him financially while Denison was in New Orleans practicing law. JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 44 (1995); 1 THE SALMON P. CHASE PAPERS: JOURNALS, 1829–1872, at 98 & n.64 (John Niven ed., 1993) (confirming Denison's relation to Chase).

149. George W. Paschal, *Preface* to 29 Tex., at v, v (1869).

150. George W. Paschal, *Preface* to 30 Tex., at vii, ix (1870).

and the restoration of United States supremacy under military occupation. In facing these issues, it initially lacked the guidance to be supplied by *Texas v. White*,[151] decided by the Supreme Court of the United States in 1868. That decision (by Chief Justice Chase) clarified, at long last, the constitutional position of Texas in the preceding eight years. The ordinance of secession, it held, had been unconstitutional and hence "absolutely null"[152] (or in Texas parlance, void *ab initio*). Nevertheless, the Texas government during the Civil War was a de facto government.[153] The enactments of the Texas legislature between 1861 and 1865 were "invalid and void" to the extent that they were "in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens," but valid if they were "acts necessary to peace and good order among citizens."[154] The court expressly left open the question of the constitutionality of specific acts of military government and of specific provisions of the three reconstruction acts, but remarked that these enactments "necessarily imply recognition of actually existing governments."[155]

The holding of the Supreme Court of the United States in *White* became available to the Military Court at its Tyler session of April 1869. Ever since its initial session in Austin in October 1867, however, that court dealt with issues requiring an answer to the questions answered so succinctly by Chief Justice Chase some eighteen months after the summary replacement of the Texas judiciary by military authority. Crucially, it had to seek these answers by testing the premises (and more importantly, the

151. Texas v. White, 74 U.S. (7 Wall.) 700 (1869), *overruled on other grounds by* Morgan v. United States, 113 U.S. 476 (1885).

152. *Id.* at 726.

153. *Id.* at 733. In *White*, Chief Justice Chase explained:

> [I]t is an historical fact that the government of Texas, then in full control of the [s]tate, was its only actual government; and certainly if Texas had been a separate [s]tate, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

Id.

154. *Id.*

155. *White*, 74 U.S. (7 Wall.) at 731.

ordinances) of the Constitutional Convention of 1866 against what were, in its judgment, the commands of the Constitution of the United States.

Although the Constitutional Convention of 1866 had proclaimed the supremacy of that Constitution and had declared the secession ordinance to be "null and void," it had limited itself to annulling, title by title, some specific wartime enactments of the Texas legislature between 1861 and 1865,[156] and had sought to shield state officials from liability for their official acts during secession. As already observed, it had (grudgingly) acknowledged the abolition of slavery in the text of the 1866 constitution. It had also sought pragmatic solutions to the two most important practical problems left by the collapse of the Confederacy: the running of statutory time, and the decreasing worth of Confederate currency.

Both of these issues (and many others) were addressed by ordinance number 11 of the 1866 Constitutional Convention. Section 6 thereof provided, briefly and to the point, that "in all civil actions, the time between the [second] day of March, 1861, and the [second] day of September, 1866, shall not be computed in the application of any statute of limitations."[157] Most of the case load of the Texas judiciary for several years after the end of the Civil War would have been time barred but for this provision, or of a judicially developed analogue thereto. Like relief was granted, by section 8 of this ordinance, to Texas domiciliaries who had suffered default judgment between February 1, 1861, and July 31, 1865, while absent from the state.[158]

Section 7 of ordinance number 11, dealing with currency devaluation (or, in parlance then current in the former Confederacy, "scaling"), is best set forth verbatim. It read as follows:

That in all suits now pending, or that may hereafter be instituted,

156. Tex. Ord. no. 1 (Mar. 15, 1866), *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 887, 887 (Austin, Gammel Book Co. 1898); *see also* Tex. Ord. no. 11, § 12 (Mar. 30, 1866), *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 895, 898 (Austin, Gammel Book Co. 1898) (annulling specific Civil War acts).

157. Tex. Ord. no. 11, § 6 (Mar. 30, 1866), *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 895, 897 (Austin, Gammel Book Co. 1898).

158. *See* Tex. Ord. no. 11, § 8 (Mar. 30, 1866), *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 895, 897 (Austin, Gammel Book Co. 1898) (granting two years within which to "re-open and set aside such judgment" to those who were absent from Texas after February 1, 1861).

> upon contracts in writing, made since the [second] day of March, A. D., 1861, and prior to the [second] day of July, 1865, payable in dollars and cents, parol testimony may be introduced to show the intention of the parties to the transaction; and such parol testimony may be introduced to show that dollars in Confederate, or other paper currency, were intended, and the marketable value thereof at the time of maturity; and the same rules shall obtain where such currency was the consideration of a contract which is otherwise valid.[159]

The Presidential Reconstruction Court, we saw, had at least indirectly acknowledged the rule thus laid down. Its adamant rejection by the Military and Semicolon Courts, and its ultimate affirmation by the Roberts-Gould Court, were to become, however, one of the key marks of distinction between the two Texas judicial traditions discussed in the present survey. It seems appropriate, therefore, to summarize at this point the "Confederate money" jurisprudence of the Military Court, along with the decisions of that court deemed by its initial reporter of particular "philosophical" interest: those dealing with slavery, sequestration, stay laws, and de facto governments.

C. *Retrospective Constitutionalism*

William Pitt Ballinger noted in his diary on October 26, 1867, that William Alexander, the Texas attorney general appointed by military authority along with the Military Court, "announce[d] the opinion in which he [was] followed by the highest developed Radicals, that all legislation [and] acts of the convention since secession are null [and] void—and all acts of officers."[160] Governor Pease (also appointed by military authority) and "others," Ballinger went on to note, "held them void where they conflict with the Cons[titution of the] U[nited] S[tates]—otherwise binding as the acts of a *de*[ ]*facto* gov[ernmen]t."[161] The struggle

159. Tex. Ord. no. 11, § 7 (Mar. 30, 1866), *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 895, 897 (Austin, Gammel Book Co. 1898).

160. William Pitt Ballinger, Diary of William Pitt Ballinger 196 (Oct. 26, 1867) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

161. *Id.* By letter of October 28, 1867, William Alexander submitted his resignation as attorney general to Major General J.J. Reynolds, protesting an executive proclamation of October 25 of that year, which had declared the 1866 constitution and legislation thereunder, subject to some exceptions, to be "rules of the [g]overnment of the people of

between these two positions marks the constitutional jurisprudence of the Military Court.

The most pressing issue in this regard—and the subject of greatest impact on the pocketbook of many a Texan deemed worthy of credit by his fellow citizens between 1861 and 1865—was the "Confederate money" question. The Military Court dealt with obligations actually or assertedly denominated in Confederate money no less than some thirty times in the thirty-three months of its existence. The issue of the validity of undertakings to pay (or to accept payment) in Confederate dollars arose in practically all cases in which a debt had been stipulated or satisfied in "dollars" between secession and military occupation; for in fact, if not in strict law, paper dollars issued by the secretary of the treasury of the Confederate States of America were the only mode of payment available in Texas at the time. The issue of the validity of that currency could hardly be avoided, for as provided by (Confederate) statute, these notes were redeemable for a specified time after the conclusion of a peace treaty between the United States and the Confederate States of America, and as still known to collectors of Civil War memorabilia; this was spelled out in so many words on the face of many if not all notes issued by the Confederacy.[162]

In *McCartney v. Greenway*,[163] decided by the Military Court in the first (Austin) term of 1867 but not ordered to be reported at the time,[164] Chief Justice Morrill held that the court would "never lend its aid to assist any one in the enforcement of an illegal, much less a treasonable executory contract, or the rescission of one executed tainted with the same crime." Confederate money, he noted, "did not on its face purport to be of any value unless the

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Texas and the officers of the civil government." Letter from William Alexander, Attorney Gen., Tex., to Maj. Gen. J.J. Reynolds (Oct. 28, 1867) (on file with The Center for American History at The University of Texas at Austin).

162. Confederate statutory authority for the issuing of banknotes stated such notes to be redeemable for a specific period (typically six months; occasionally two years) after the "ratification of a treaty of peace between the Confederate States and the United States." Act of Aug. 19, 1861, Pub. Laws, Provisional Cong., 3d Sess., ch. 23, § 1, *reprinted in* THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 177 (James M. Matthews ed., 1964); *see also* 1 GROVER C. CRISWELL, JR., CONFEDERATE AND SOUTHERN STATES CURRENCY 21–121 (4th ed. BNR Press 1992) (1957) (listing descriptions and values of Confederate currency).

163. McCartney v. Greenway, 30 Tex. 754 (1868).

164. *Id.* at 754 n.1.

rebellion against the United States [is] successful."[165]

The Military Court adhered to that position throughout its existence. Subsequent cases before it did not so much challenge the basic proposition that promises to pay in Confederate currency were invalid as they disputed its applicability to the particular obligation at issue, since the stated unit of account was more often than not "dollars" without the fateful C-word. The court permitted parol evidence as to the intent of the parties in this respect.[166] It also rejected the compulsion defense as such, at least unless further substantiated by proof of actual duress.[167] The most remarkable feature of the "Confederate money" jurisprudence of the Military Court, however, was the refusal of the court to grant relief to those who, during secession, had accepted payment in Confederate dollars. Or, to put it bluntly, the *pari turpitudine* principle validated past payment in Confederate dollars.

This proposition was already implicit in the *McCartney* formula just quoted. It was tested most vigorously in *Ritchie v. Sweet*,[168] decided in the Austin term of 1869.[169] There, the two Paschals (father and son) argued that payment in Confederate dollars was of no effect because "it was a worthless, spurious, void, illegal, unconstitutional, treasonable and rebellious currency."[170] The court's answer, per Chief Justice Morrill, was somewhat more convincing in law than it was in grammar: "*nemo allegans suum turpitudinem audiendus*."[171]

By that time, the jurisprudence of the Military Court as to the validity of acts of the Confederate States of America and of the State of Texas as a constituent unit thereof was well in place. It was first articulated in the *Sequestration Cases*,[172] decided at

165. *Id.* at 754.

166. *See* Donley v. Tindall, 32 Tex. 43, 51–52 (1869) (acknowledging the availability of duress as a defense, but stating that "[v]ague and undefined fears of violence from nobody in particular, but from everybody in general, at some uncertain period, without some co[n]temporaneous demonstration of violence, is not the duress contemplated by law").

167. *See* Van der Hoven v. Nette, 32 Tex. 183, 184 (1869) (holding a contract payable in Confederate currency valid unless the party was under duress).

168. Ritchie v. Sweet, 32 Tex. 333 (1869).

169. *Id.* at 338 (arguing the legality of a contract payable in Confederate currency).

170. *Id.* at 335.

171. *Id.* at 338.

172. Luter v. Hunter (The Sequestration Cases), 30 Tex. 688 (1868).

Galveston's 1868 term—well over one year before *Texas v. White* was to supply ultimately authoritative guidance.[173] The eponymous issue in the *Sequestration Cases* was quite narrow and readily resolved.

A Confederate enactment had directed the sequestration of the assets (including the receivables) of "alien enemies" by receivers appointed by the Confederate judiciary. In the pithy words of the reporter, the Confederate judge for the Western District of Texas had, accordingly, "appointed a number of most industrious receivers, who proceeded to collect, as rapidly as possible, all moneys owing to northern people, or 'alien enemies.'"[174] One of the victims of such a forced garnishment sued his debtor on the original obligation, and was met with that defense provided by the Confederate enactment (among other defenses), which in effect extinguished the debt paid by the garnishee to the receiver.[175]

In an opinion written by Andrew Hamilton, the Military Court disposed of this defense by adopting a then recent decision by Chief Justice Chase sitting in circuit. Chief Justice Chase had held that "acts [of rebellion] hostile to the rightful government are violation[s] of law," and "compulsory payment, under the sequestration acts, to the rebel receiver . . . was no discharge."[176]

In the Texas case of *Luter v. Hunter*, however, the defendant had also relied on a "stay law" enacted by the Texas legislature during secession, and on the four-year limitation period ordinarily applicable.[177] Since the latter had been displaced by another act of the Texas legislature during secession that had extended all statutes of limitations until one year after the war,[178] the court had to address the question of the constitutionality of the enactments of the Texas "rebel" legislatures.

It did so by first distinguishing such enactments generally from the acts of the Confederate government, whose "very existence

173. Texas v. White, 74 U.S. (7 Wall.) 700, 726–31 (1869), *overruled on other grounds by* Morgan v. United States, 113 U.S. 476 (1885).

174. *Luter*, 30 Tex. at 692 (noting the Confederate district judge who had appointed the receivers was none other than Thomas J. Devine, familiar to the reader as one of the justices of the Presidential Reconstruction Court).

175. *Id.* at 692–93.

176. *Id.* at 712 (quoting Shortridge v. Macon, 22 F. Cas. 20, 23 (C.C.D.N.C. 1867) (No. 12,812)).

177. *Id.* at 693.

178. *Id.* at 707.

was . . . while it lasted, a continuous offense and crime against the government [of the United States]."[179] Expressly rejecting the void *ab initio* theory as to all acts of the Texas legislature between 1861 and 1865, the court then set the test for the validity of such enactments: conformity to the Constitution of the United States and lack of intent to further the rebellion.[180] The stay law, which would have protected the defendant, failed this test since it withheld its benefits from "alien enemies," but the extension of the statutes of limitation passed, as it was both constitutional and free of "rebel" taint.[181]

It remains to add that the court also indicated grave doubts as to the compatibility of the stay law (or, in present parlance, moratorium law) with the Contracts Clause of the United States Constitution.[182] This issue was more fully addressed in *Jones v. McMahan*,[183] decided during the same term and involving a stay law enacted in 1866. In an opinion by Chief Justice Morrill, which reviewed the various federal and state authorities on point, that statute was found to "impair the obligation of the contracts . . . in contravention of the constitution . . . and [was] void."[184]

By the end of 1868, it was firmly established that the Constitution of the United States continued to be the ultimate measure of validity of Texas state legislation, and that Confederate as well as Texas state statutes enacted in aid of the rebellion were incapable of creating rights or furnishing defenses presently enforceable. On the other hand, the Military Court had rejected the "radical" void *ab initio* theory as applied to secessionist state legislation, and it had refused to reopen transactions consummated in Confederate currency during the rebellion. This left for decision the then-present enforceability of the financial aspects of slave sale and lease transactions concluded in Texas after the Emancipation Proclamation (January 1, 1863) but before its promulgation in Texas by military authority on "Juneteenth" (June 19, 1865).

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179. *Luter*, 30 Tex. at 703.

180. *Id.* at 705.

181. *Id.* at 703–07.

182. *See id.* at 706 (noting the "constitutional difficulties" with the laws, but stating that even in the absence of these constitutional doubts, "there is still another and sufficient reason for the condemnation of these laws").

183. Jones v. McMahan, 30 Tex. 719 (1868).

184. *Id.* at 737.

As mentioned further above, the Presidential Reconstruction Court had routinely given effect to such transactions to the extent then possible—without mandating specific performance now outlawed by the Thirteenth Amendment (effective December 18, 1865).[185] The Military Court, faced with two such cases, called for argument of the constitutionality of this jurisprudence at its Austin session of October 1868. Despite its general invitation to the bar to address this question, only two lawyers responded—both arguing in the affirmative. One of these lawyers, perhaps surprisingly, was the reporter, George W. Paschal, whose statement of the case and summary of (only his own) argument occupies much space in the *Texas Reports*.[186]

The chief justice, with whom Justice Latimer concurred, upheld the validity of these undertakings in the two similar test cases involving suits on notes given in January 1865, in payment for the purchase and the annual hire of slaves. Slavery was legal in Texas at the time of these contracts, he ruled, since the Emancipation Proclamation of January 1, 1863, was only a "war measure" without congressional or constitutional sanction, effective under the laws of war solely in the territory occupied by the United States forces.[187] While Chief Justice Morrill stressed that slavery had been abolished in Texas by the Thirteenth Amendment, Justice Lindsay's concurring opinion placed the date of the abolition of slavery in Texas at "Juneteenth," the date of the promulgation of the Emancipation Proclamation by General Gordon Granger in Texas.[188]

As a practical matter, the seller and the lessor prevailed (assuming that the notes made by purchaser and lessee did not run in Confederate currency), for the chief justice and Justice Lindsay were agreed that the "owner" of the *res* (and of the reified contract right) at the time of its destruction was to bear the loss.[189]

In present perspective, the crucial question in the *Emancipation Cases* would seem to have been one of public policy: should courts

185. *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 380–89 (2001) (detailing the adoption of the Thirteenth Amendment).

186. *See* Hall v. Keese (The Emancipation Proclamation Cases), 31 Tex. 504, 509–12 (1868) (providing the statement of the case); *id.* at 512–18 (reprinting the argument of George W. Paschal).

187. *Id.* at 518, 524–26.

188. *Id.* at 526, 533–34.

189. *Id.* at 533 (Lindsay, J., concurring).

in the United States enforce rights deriving from an institution now so clearly condemned, not least on moral grounds, by the law of the land? Chief Justice Morrill touched upon this point at the end of his opinion. He did so by referring to, and quoting from, *Mittelholzer v. Fullarton*,[190] upholding a judgment of the Court of Queen's Bench in favor of the vendor of the services of British New Guinea apprentices (formerly his slaves) whose apprenticeage had been terminated by colonial legislation before the running of the contract.[191] This case stands for the proposition that the loss fell on the lessee, who still had to pay the last installment although he no longer received the services, and it was quoted on that point.[192] Although no issue of public policy had been pressed before Chief Justice Denman, before the full bench, or finally, on further appeal to Exchequer Chamber, Chief Justice Morrill added this paragraph at the end of his opinion:

> It certainly will not be contended that the policy of the British government, at the time the contract for the sale of the apprentices was made, had not become as notoriously opposed to slavery as that of the United States during the war. Yet the British courts did not conceive that the sale of these former slaves, under the name of apprentices, was contrary to public policy, or that the contract was illegal or void for want of consideration.[193]

In contradistinction to the two majority opinions, Justice Hamilton's dissent focused on the public policy factor. The real issue in the *Emancipation Cases*, he stated, was whether the sale of Negroes in Texas after the date of the Emancipation Proclamation (January 1, 1863) was "opposed to the solemnly-declared will and policy of the United States government," and whether "the United States [had] the right, under existing circumstances, to declare such policy."[194] The vast majority of southerners, he stated, believed that "separation was necessary to the security of the institution of slavery."[195] The Civil War had been fought, and decided, on these two issues, and the Emancipation Proclamation was within the constitutional and war powers of the President. Reformulating the

190. Mittelholzer v. Fullarton, (1842) 6 Q.B. 989.
191. *Id.* at 989–90.
192. *Hall*, 31 Tex. at 528–29 (majority opinion) (quoting *Mittelholzer*, 6 Q.B. at 1018).
193. *Id.* at 529.
194. *Id.* at 536 (Hamilton, J., dissenting).
195. *Id.* at 547.

issue once more, Justice Hamilton said:

> The question here is not as to the moment of time when the former slaves in Texas actually obtained their freedom by the events of the war; but it is whether now the courts will aid in carrying out and enforcing contracts against the public policy of the government, pronounced in the most solemn form as both sovereign and belligerent in a great civil war.[196]

There could, in his view, only be one answer, and no need for sympathy for one who bought or leased out a slave in January 1865. Such a person, he said, "knew when the sale was made that the United States government, his rightful sovereign, had declared them free; but he put himself upon the chances of the success of the revolution and overthrow of the authority of the United States."[197] Justice Hamilton was joined in his dissent by Justice Caldwell.[198]

Given the declared purpose of the military authorities to replace Texas Supreme Court justices known for their hostility to the federal government by sound Union men, the outcome of the *Emancipation Cases* may seem, at first, surprising. Perhaps even more surprising in retrospect, however, is the fact that some two years later, and over the impassioned dissent of Chief Justice Chase, the Supreme Court of the United States was to arrive at the same conclusion.[199] On the whole, the decisions of the Military Court on the detritus of secession were in the mainstream of post-Civil War jurisprudence, or, in the *Sequestration Cases*, ahead of it.

The one exception—of some importance in years to come—was the steadfast refusal of the Military Court to enforce obligations in Confederate money. This, too, had much support in contemporary state and federal jurisprudence. As will be seen further below, however, the United States Supreme Court ultimately bowed to the force of reality and permitted federal courts to enforce

196. *Id.* at 554.

197. Hall v. Keese (The Emancipation Proclamation Cases), 31 Tex. 504, 554 (1868).

198. *Id.* at 556.

199. *See* White v. Hart, 80 U.S. (13 Wall.) 646, 651 (1872) (stating that although citizens were part of the rebellion, "[t]heir constitutional duties and obligations were unaffected and remained the same," and thus a contract made under that period was still enforceable); Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 663 (1872) (holding that a contract involving the sale of slaves "cannot [be] regard[ed] . . . as different in its legal efficacy from any other unexecuted contract"). Chief Justice Chase dissented in both cases. *White*, 80 U.S. (13 Wall.) at 654; *Osborn*, 80 U.S. (13 Wall.) at 663–64.

appropriately converted Confederate dollar debts.[200]

At a more personal level, Texas lawyers appear to have had ready sources of information about national legal trends even at the highest level. The most intimate of these sources was Justice Samuel Miller of the United States Supreme Court, whose correspondence with his brother-in-law, William Ballinger, touched even upon matters then before that tribunal.[201] Another steady source of information was George Paschal, who edited the *Texas Reports* in his Washington law office, and whose United States Supreme Court practice included not only *Texas v. White*, but also the Texas component of the *Legal Tender Cases*,[202] which raised, and led to the laconic disposal of, the sequestration payment defense.[203] Law reports and treatises probably took their time arriving in the Lone Star State, but as early as November 23, 1868, William Ballinger noted there was a "considerable bill of books" including both *Benjamin on Sales* and Cooley's *Constitutional Limitations*—the former a miracle of speed in more ways than one.[204]

D. *The Setting*

Being in the mainstream of contemporary United States jurisprudence, however, was no guarantee of popularity with those who, with sword or in spirit, had adhered to the Lost Cause. Having given a formal dinner to all five members of the Military Court and some other dignitaries on February 29, 1868, Ballinger wondered a few days later "what other civility ha[s] been extended

200. *See* Thorington v. Smith, 75 U.S. (8 Wall.) 1, 11 (1869) ("[T]his currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States.").

201. *See* Charles Fairman, *Reconstruction and Reunion 1864–88 Part One*, *in* 6 THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 744–45 (1971) (describing a "secret conference of the court" in the *Legal Tender Cases*).

202. Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871).

203. *See id.* at 554 ("The other questions raised in the case of *Knox v. Lee* were substantially decided in *Texas v. White*."); *see also* Charles Fairman, *Reconstruction and Reunion 1864–88 Part One*, *in* 6 THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 753–54 n.194 (1971) (demonstrating George Paschal's involvement in the *Legal Tender Cases*).

204. William Pitt Ballinger, Diary of William Pitt Ballinger 243 (Nov. 23, 1868) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

to them."[205] At least one member of that court, Colbert Caldwell, had not only been set upon by ruffians in East Texas one month earlier, but had also been "expelled from [his] hotel because of [his] politics" and refused introduction to some lawyers who disclaimed the company of such a "radical."[206]

The political and social setting in which the Military Court operated is perhaps best illustrated by another entry in William Ballinger's diary. On July 11, 1868, he noted that Morgan Hamilton (Andrew's brother) had told him that the Radical Republicans expected to be "sustained in power" if Grant was elected president but that "they expect to migrate" if he were to be defeated.[207] As it happened, Grant was elected (and re-elected); Texas adopted a constitution incorporating many an input by the Radical Republicans, and when that constitution went into effect (putting an end to the existence of the Military Court), Morgan Hamilton was sent to Washington by the Legislature as a United States Senator. His brother, however, was narrowly defeated when he ran as a Moderate against E.J. Davis, the leader of the Radical Republicans, and the victory of the Radicals was made possible by the enfranchisement of the freedmen—a step not favored, at least without some qualification, by the Moderates.

One immediate effect of this political turbulence on the Military Court was the absence of Andrew Hamilton at two of its sessions.[208] Nevertheless, when present, he contributed opinions of substance. The same can hardly be said for Justice Latimer, who was to go down in defeat as candidate for lieutenant governor on the Hamilton ticket. Whether or not attributable to the distractions of his campaign, his reported contribution to Texas jurisprudence can hardly be described as other than minimal.

Justice Caldwell was more productive in that respect, although he remained silent for much of two terms. As a result, Chief

205. William Pitt Ballinger, Diary of William Pitt Ballinger 212 (Mar. 6, 1868) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

206. RANDOLPH B. CAMPBELL, GRASS-ROOTS RECONSTRUCTION IN TEXAS, 1865–1880, at 117 (1997).

207. William Pitt Ballinger, Diary of William Pitt Ballinger 221 (July 11, 1868) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

208. George W. Paschal, 31 Tex., at iii n.1 (1870) (noting Justice Hamilton's absence during the 1868 and 1869 terms in Tyler and Galveston, respectively).

Justice Morrill and Justice Lindsay carried virtually the full weight of opinion-writing before the removals and replacements starting in December 1869. The latter disposed of the majority of appeals in criminal cases. Judge Moses Walker (Latimer's replacement) carried his own weight and perhaps more immediately upon appointment. Justice Denison, on the other hand, seems to have followed the example set by Albert Latimer.

Despite the economy of effort on the part of, in effect, a majority of the seven justices who sat on the Military Court, there were a number of dissents in addition to the one already mentioned. The chief justice, usually on the prevailing side, was the lone dissenter on at least one occasion.[209] Rehearings, too, were entertained but were uniformly rejected by almost invariably brief opinion. The Military Court also (one is tempted to add, at long last) dismissed some particularly un-meritorious appeals "with damages" to the party prevailing below.[210] Again and again, however, it had to deal with procedural points. In this area, there was a fundamental difference of approach between the two pillars of the court. Chief Justice Morrill, a pure-bred Texas lawyer rooted in the Republic, passionately defended the single form of action; Justice Lindsay bemoaned the absence of the distinction between common-law and equity pleading.[211]

Leadership at the bar of the Military Court appears to have been mainly local or, perhaps more accurately, regional. Former Justice Donley appeared with some frequency at the Tyler term, once even in his own cause.[212] Ballinger and Jack, unsurprisingly, came to lead at Galveston term, and appeared increasingly in Austin as well. The most prominent law firm in the capital city was Hancock & West, well-positioned not only geographically but politically and, at least in federal court, personally as well.[213] John

209. Barrett v. Barrett, 31 Tex. 344, 352 (1868) (Morrill, C.J., dissenting).

210. Morris v. House, 32 Tex. 492, 495 (1870); Zachary v. Gregory, 32 Tex. 452, 457 (1870); Smith v. Frederick, 32 Tex. 256, 257 (1869); Harbert's Adm'r v. Henly, 31 Tex. 666, 667 (1869); Bledsoe v. Gonzales County, 31 Tex. 636, 638 (1869).

211. Sabriego v. White, 30 Tex. 576, 590 (1868); *id.* at 591 (Morrill, C.J., dissenting in part).

212. *See* Donley v. Tindall, 32 Tex. 43, 45 (1869) (noting that Donley initiated the cause of action).

213. *The Federal Court—The Way the Charge Is Met by the Organ—We Call for Denial*, AUSTIN ST. J., Feb. 29, 1872, *reprinted in* THE CHARGES AGAINST THE FEDERAL COURT AT AUSTIN 6, 7 (Austin, Tracy, Siemering & Co. 1872) (stating that success in Judge Duval's court could "only with certainty be purchased by the employment of this

Hancock was a Unionist who went into Mexican exile in 1864; Charles Shannon West had a distinguished Confederate military career and was the son-in-law of Thomas Duvall, the staunchly Unionist federal judge temporarily made idle by the rebellion.

E. *Notable Decisions*

The most notable decisions of the Military Court are likely to be those discussed above under the heading of "Retrospective Constitutionalism." To these might be added, for the sake of completeness, some constitutional decisions dealing with issues then current: those upholding the Legal Tender Acts, adhered to even after the United States Supreme Court had held them unconstitutional the first time around;[214] and those spelling out the strata of Texas law and constitutions after the implosion of the Confederacy in June 1865.[215] As already mentioned, abolition came to Texas on June 19, 1865. Provisional Governor Andrew Hamilton arrived at about the same time. His judicial appointments as well as his orders relating to the opening of courts and the temporary suspension of execution of judgments were upheld by the Military Court as legitimate acts of military occupation. Law and order were restored on July 25, 1865; the courts were open as of September 25 of that year, but civil judgments did not become subject to execution until January 1, 1868.[216]

In *State v. McLane*,[217] however, the court ordered the reinstatement of a prosecution dismissed at the direction of the military after indictment.[218] In the stern language of Chief Justice Morrill, it was stated:

> [H]owever much this military gentleman might have desired the acquittal of the parties indicted, and however unjust or oppressive might to him appear the charge of the grand jury, the officer appointed by the state authorities to conduct its causes is the one,

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firm").

214. Flournoy v. Healy, 31 Tex. 590, 592 (1869); Shaw v. Trunsler, 30 Tex. 390, 394–95 (1867).

215. *See* Phillips v. Lesser, 32 Tex. 741, 741–46 (1870) (noting appellants' arguments as to the enforceability of Texas laws during this period).

216. *Id.* at 746–47.

217. State v. McLane, 31 Tex. 260 (1868).

218. *See id.* at 261–62 (reinstating the case after concluding that "the military commander had no power" to ask "the district attorney to enter a *nolle prosequi* against the indictment").

> and the only one, who can assume the power to dismiss a criminal cause.[219]

Since that assertion of civil authority occurred at Austin term 1868 (and since the chief justice remained in office until the very end of the Military Court), it seems quite unlikely that this was the cause of the purge of the court one year thereafter.

Because the judges of the Military Court were neither elected by the people nor appointed by an elected governor and confirmed by an elected senate, their judgments may be, at best, of persuasive authority today. Remarkably enough, the last reported decision of that court, by none other than Justice Moses Walker, was cited as recently as 1998 by the Texas Court of Criminal Appeals.[220] Some twenty-one Military Court decisions were reproduced in the *American Reports* and *American Decisions*.[221] Its decisions on questions as varied as wills contests, "common law" marriage, civil law rules as to abandoned road beds, the presumption of identity of foreign law with Texas law, the definition of "family" for homestead exemption purposes so as to exclude single men letting out their premises, and warehousemen's negligence are staples of Texas jurisprudence.[222]

Perhaps even most significantly in this connection, what appears to be the most egregious and, in present perspective, the least

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219. *Id.* at 262.

220. Blake v. State, 971 S.W.2d 451, 454 (Tex. Crim. App. 1998) (en banc) (citing Johnson v. State, 33 Tex. 570 (1870)).

221. Cooper v. McCrimmin, 33 Tex. 383 (1870); Spencer v. J.H. Brower & Co., 32 Tex. 663 (1870); Shreck v. Shreck, 32 Tex. 578 (1870); Ward v. McKenzie, 33 Tex. 297 (1870); Donley v. Tindall, 32 Tex. 43 (1869); *Ex parte* Mosby, 31 Tex. 566 (1869); Jordt v. State, 31 Tex. 571 (1869); Haddock, Reed & Co. v. Crocheron, 32 Tex. 276 (1869); Hamilton v. Pleasants, 31 Tex. 638 (1869); Miller v. Burch, 32 Tex. 208 (1869); Welch v. Rice, 31 Tex. 688 (1869); Wilson v. Cochran (The Homestead Cases), 31 Tex. 677 (1869); Emerson v. Navarro, 31 Tex. 334 (1868); Hoffman v. Neuhaus, 30 Tex. 633 (1868); Luter v. Hunter (The Sequestration Cases), 30 Tex. 688 (1868); Müller v. Landa, 31 Tex. 265 (1868); Portis v. Hill, 30 Tex. 529 (1868); Tolle v. Correth, 31 Tex. 362 (1868); Vincent v. Rather, 31 Tex. 77 (1868); Wheeler, Geiger & Co. v. Mayfield, 31 Tex. 395 (1868); Hammond v. Myers, 30 Tex. 375 (1867).

222. *See* Mitchell v. Bass, 33 Tex. 259, 265 (1870) (applying civil law to abandoned road beds); *Wilson*, 31 Tex. at 681 (holding that a single man landlord does not qualify for homestead exemption); Paul v. Ball, 31 Tex. 10, 13 (1868) (interpreting contested wills); Pauska v. Daus, 31 Tex. 67, 73 (1868) (holding Texas law applied because Mexican law was not proven); Rice v. Rice, 31 Tex. 174, 180 (1868) (explaining how irregular marriage became a valid form of "common law" marriage); *Vincent*, 31 Tex. at 84 (ruling that a negligent warehouseman was liable for loss).

acceptable decision of the Military Court was not overruled but "explained" and thus defanged by the Roberts-Gould Court in the first year of "Redemption."[223] This is the case of *Murphy v. Coffey*,[224] where Chief Justice Morrill recited the old saw that by the common law of England, "the husband and wife are one person, and the husband is this person" for the proposition that a married woman had no standing to sue to recover community property.[225] In the restrained language of Justice Gould, this had "no reference to well-established exceptions to that rule" even at the time, including most prominently the right of the wife to sue a third party when injured in her proprietary rights by the "wrongful act of her husband" (or to sue the latter as well).[226]

Despite this obvious blunder, the Military Court was usually quite scrupulous in its reference to, and acceptance of, prior Texas authority. It is not unlikely, nevertheless, that its original contributions to Texas jurisprudence are few and far between. (The "presumption of identity," "common law" marriage in Texas, the civil law rules as to abandoned road beds, and the exclusion of unmarried landlords from the benefits of the homestead exemption come to mind, as does the rejection of sellers' liens to movables.[227]) Aside from its landmark constitutional jurisprudence both in retrospect and in the here-and-now of Reconstruction and military occupation, therefore, the casework of the Military Court is presently of interest mainly as a sourcebook of Texas social life. Here, the time frame is not set by the twenty-eight months of the active work of that tribunal, but by the exceptionally generous rules of prescription and limitation in

223. *See* Murphy v. Coffey, 33 Tex. 508, 510 (1870) (holding a wife, without including her husband in the cause of action, may not sue to recover community property), *construed in* Kelley v. Whitmore, 41 Tex. 647, 648 (1874) (holding *Murphy* did not mean the wife in the instant case, without joining her husband in the suit, could not sue for injunction against the sale of homestead).

224. Murphy v. Coffey, 33 Tex. 508 (1870).

225. *Id.* at 509–10.

226. *Kelley*, 41 Tex. at 648.

227. *See Mitchell*, 33 Tex. at 265 (applying civil law to abandoned road beds); *Wilson*, 31 Tex. at 681 (holding that a single man landlord does not qualify for homestead exemption); Gay v. Hardeman, 31 Tex. 245, 251 (1868) (holding no vendor lien on movables after transfer of possession); *Pauska*, 31 Tex. at 73 (holding Texas law applied because Mexican law was not proven); *Rice*, 31 Tex. at 180 (explaining how irregular marriage became a valid form of "common law" marriage); *Vincent*, 31 Tex. at 84 (ruling a negligent warehouseman was liable for loss).

civil matters then prevailing.

Criminal cases were necessarily compressed into a narrower time frame, reflecting the folkways, foibles, and more base inclinations of Texans after the collapse of the Confederacy. Although the criminal jurisprudence of the Military Court is of no consequence for the Supreme Court of Texas as reorganized in 1876 and of little significance now for its sister tribunal, it is, nevertheless, likely to offer insight to social and to legal historians.

A few examples should suffice here, if only to kindle interest for further reading. In *State v. Foster*,[228] Justice Lindsay held, and the attorney general conceded, that "simple fornication" was not a crime under the Texas Penal Code.[229] Fornication "in a state of cohabitation" was,[230] but the court, speaking again through Justice Lindsay, summarily reversed two interracial cohabitation-and-fornication convictions (both from Brazoria) for insufficient evidence.[231] In *Wolz v. State*,[232] a conviction for keeping a gaming table for the then-popular pastime of "pigeon-hole" (a precursor of pinball) was reversed since, as established by expert testimony, this was a game "for amusement solely."[233] On that occasion, the reporter allowed himself the levity of observing that the testimony of the defendant's expert qualified him as one "who would make a fortune in Patent Office practice at Washington, framing 'specifications' of strange inventions."[234]

Substantially more serious were the cases involving killings by a six-shooter—a weapon that seems to have increased the murder rate substantially by offering repeated opportunity to indifferent marksmen. The usual defense—self-defense—was upheld over the dissent of Justice Lindsay at Austin term 1868 in *Pridgen v. State*,[235] but in *Dawson v. State*,[236] a unanimous court speaking through Justice Walker set much stricter standards, expressly

228. State v. Foster, 31 Tex. 578 (1869).

229. *Id.* at 578–79.

230. *Id.* at 579.

231. Smelser v. State, 31 Tex. 95, 96–97 (1868); Spencer v. State, 31 Tex. 64, 65–66 (1868).

232. Wolz v. State, 33 Tex. 331 (1870).

233. *Id.* at 332–33, 336.

234. *Id.* at 332.

235. Pridgen v. State, 31 Tex. 420, 429 (1868), *overruled in part by* Dawson v. State, 33 Tex. 491 (1870); *id.* at 431 (Lindsay, J., dissenting).

236. Dawson v. State, 33 Tex. 491 (1870).

overruling *Pridgen*.[237] The most bizarre case where self-defense was asserted, surely, was *Ex parte Mosby*,[238] where a paramour had lain in wait for a reputedly vengeful cuckold with an arsenal of no less than "three pistols and a double-barreled shot-gun."[239]

Cattle rustling, too, made its appearance on the docket of the Military Court, usually but not invariably because a then-recent statute required the documentation of cattle sales and made the lack of proof of steak provenance by butchers a misdemeanor punishable by fine.[240] The Sunday law, we saw, was upheld by the Presidential Reconstruction Court, but a crafty tavern keeper sought to accommodate his customers on the Sabbath by placing a beer barrel at their disposal and leaving reimbursement to their discretion.[241] Three prosecution witnesses testified to the fact of availability of beer at his tavern on Sundays; no less than sixteen defense witnesses testified that on those days, the defendant's "counter was free, 'without money and without price.'"[242] Justice Caldwell, upholding the conviction, was led to remark that "we doubt not that so generous a man could have increased the number of his witnesses."[243]

Much more serious were the decisions reviewing the convictions of freedmen and, in one case, of an adolescent Negro girl. In *Ex parte Warren*,[244] the court, per Justice Caldwell, ordered the discharge of the defendant who, it was found, had been required to post "enormous bail" ($50,000), had been denied the benefit of testimony by another Negro in violation of the Civil Rights Act, and had been held in confinement in the face of clear evidence of self-defense.[245] In *Ake v. State*,[246] the defendant's murder conviction was reversed with the court noting his co-defendant's

237. *Id.* at 505–06.

238. *Ex parte* Mosby, 31 Tex. 566 (1869).

239. *Id.* at 569.

240. Act approved Nov. 13, 1866, 11th Leg., ch. 179, §§ 3, 5, 1866 Tex. Gen. Laws 223, 225, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1141, 1143 (Austin, Gammel Book Co. 1898).

241. *See* Elsner v. State, 30 Tex. 524, 527–28 (1867) (noting that the tap-room was accessible despite the front door being closed, and that the defendant told customers what the lager beer was worth).

242. *Id.* at 528.

243. *Id.*

244. *Ex parte* Warren, 31 Tex. 143 (1868).

245. *Id.* at 143–44, 146.

246. Ake v. State, 31 Tex. 416 (1868).

confession had been obtained by acts of torture described in detail, again by Justice Caldwell, and characterized by him as acts of "abominable and detestable villainy."[247]

Mention must also be made of *Mathews v. State*,[248] which was on appeal by "a colored girl of the age of fifteen or sixteen years" convicted of swindling a merchant in Gonzales of goods worth some twenty-three dollars by pledging some cotton held for her at the Littlefield Plantation.[249] George Littlefield, who was at the store at the time of the arrest, did not deny her statements about the cotton, and the prosecution was based on her presenting to the merchant a note assertedly from Littlefield, which may have been forged or unauthorized, but which was not expressly repudiated by him.[250] In an opinion by Justice Walker, the court set the conviction aside and ordered the release of the defendant from confinement.[251] It seems not unlikely that George Littlefield's visceral antipathy towards "carpetbaggers" and "scalawags" in later years is traceable to this encounter with Moses Walker.[252]

Three cases on the civil docket of the Military Court may also be of further interest to historians despite their relative insignificance in Texas jurisprudence. *Devoe v. Stewart*,[253] decided in Galveston term 1870, involved a claim for services in connection with oil operations in 1866 and 1867.[254] The plaintiff, Dugald Stewart, had undertaken to sink oil wells on Padre Island with equipment supplied by defendants, Devoe & Co. (a company composed of J.B. Devoe, G.O. Street, and "one Lindmark"), his compensation being one-eighth of the proceeds of his work.[255] Asserting breach of contract after five months' unproductive drilling, he sued for and recovered compensation on *quantum meruit*.[256] Judgment in

247. *Id.* at 419–20.

248. Mathews v. State, 33 Tex. 102 (1870).

249. *Id.* at 105.

250. *Id.* at 105, 108–09.

251. *Id.* at 109.

252. *See* J. EVETTS HALEY, GEORGE W. LITTLEFIELD, TEXAN 214–20 (1943) (noting Littlefield's "affection for the Confederacy and all that pertained to the South"). Even as late as 1911, Littlefield was most reluctant to serve on the Board of Regents of The University of Texas along with George W. Brackenridge, a prominent Unionist. *Id.* at 219–20.

253. Devoe v. Stewart, 32 Tex. 712 (1870).

254. *Id.* at 712.

255. *Id.* at 712–13, 716.

256. *Id.* at 716.

his favor was upheld because appellants had failed to furnish the requisite record in the time provided by law.[257] So far as can be determined, this is the first oil operations case decided by the Supreme Court of Texas. Also of interest is the use of the (later canonical) one-eighths formula, even if in a configuration that now seems quaint.[258] Finally, the timing of the operations appears to have been surprisingly astute, because it was only the relinquishment of mineral interests to the surface owners by the 1866 constitution that removed the most obvious legal obstacle to this pioneering venture.[259]

A second case deserving attention especially by Texas historians is *Portis v. Hill*,[260] decided at Galveston term 1868 and involving, in the reporter's words, "a single land grant, large enough for a kingdom"—a five-league grant to James Cummings in Austin's colony, dated August 9, 1824.[261] This matter had been before the court twice before, and the *dramatis personae* include Stephen F. Austin himself as well as several members of his family.[262] Justice Lindsay's opinion putting an end to this controversy is still cited as authority for the proposition that as between grantor and grantee, deeds are valid even without acknowledgment, but historians are more likely to be interested in the discussion of Stephen F. Austin's will.[263]

Finally, many an insight into the realities of Texas life at both ends of the social scale in the immediate antebellum and Reconstruction eras are afforded by *Webster v. Heard*,[264] decided at Galveston term 1870 and completely localized on that island.[265] David Webster, a wealthy bachelor, had left his entire fortune to his slave Betsy, whom he emancipated *uno actu*.[266] Under Texas

257. *Id.* at 717.

258. *Devoe*, 32 Tex. at 713.

259. *See* TEX. CONST. of 1866, art. VII, § 39 (relinquishing to surface owners all mines and minerals).

260. Portis v. Hill, 30 Tex. 529 (1868).

261. *Id.* at 530–31.

262. *Id.* at 531–33, 550.

263. *Id.* at 536–41 (discussing Austin's will in argument for appellants); *id.* at 562 (reciting proposition that deeds are valid as between grantor and grantee without acknowledgement).

264. Webster v. Heard, 32 Tex. 685 (1870), *overruled in part by* Webster v. Corbett, 34 Tex. 263, 267 (1870–1871).

265. *Id.* at 686–87.

266. *Id.* at 686.

law as it stood in 1856 when his will was probated, this act of manumission could take effect only out-of-state, but Betsy did not intend to leave Galveston.[267] William Pitt Ballinger, who represented her interests, successfully defended the will against challenge by a sister and devised a scheme for estate management by another law firm as trustee.[268] As a result of the decree of probate, Betsy was able to continue living in Galveston "in a home of comfort and taste—a white cottage embowered amid flowers and orange trees," as a free person until Juneteenth put her freedom and her (remaining) property rights beyond doubt.[269]

She had, however, paid a price for this successful scheme. The legal fee stipulated by her with Ballinger & Jack had been one-third of the estate, and pursuant thereto, that firm had directed the sale of some lands of the estate to the defendant.[270] Betsy (now Betsy Webster) sued for the recovery of these lands, arguing illegality and breach of trust.[271] The nominal defendant was represented, successfully at both levels, by William Ballinger himself, whose professional reputation was obviously at stake.[272] In this respect as well, he was successful. Chief Justice Morrill said, in this regard:

> The charges of fraud against her attorneys by the plaintiff have as little foundation to stand upon in the minds of those well acquainted with them, as in the facts disclosed in the record. When we take into consideration what the laws then required, and more especially what public opinion was, relative to making slaves free, and placing them pecuniarily in a position superior to that of a majority of those born free and belonging to a different and dominant race, we are led to believe that no person of less legal ability and tact, of less influence in regulating and controlling public opinion, of less legal, political and moral standing in the community than her counsel, could have saved for her either the property or freedom devised.[273]

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267. *Id.* at 698–700, 707.

268. *Id.* at 694, 707.

269. *Webster*, 32 Tex. at 707, 711.

270. *Id.* at 694–95.

271. *Id.* at 688.

272. *See id.* at 694, 698 (noting the payment arrangement between Webster and Ballinger in the first case and also noting that Ballinger submitted briefs on Webster's behalf in the second proceeding).

273. *Id.* at 711. Unfortunately, this was not the end of the matter. *See* Webster v. Corbett, 34 Tex. 263, 267 (1870–1871) (overruling the earlier decision of *Webster v. Heard*).

IV. THE SEMICOLON COURT

A. *Judges and Reporters*

The 1869 constitution provided for a supreme court consisting of three judges, to be appointed by the governor, subject to approval by the senate, for terms of nine years.[274] The judges first appointed, however, were classified by lot so that their terms expired at three-year intervals, and the judge whose term expired soonest was to become the "Presiding Judge."[275] Governor Davis appointed Lemuel D. Evans, Wesley Ogden, and Moses B. Walker to the court, and Lemuel Evans drew the shortest lot, becoming presiding judge. His term expired in 1873, and John D. McAdoo was appointed to replace him. Wesley Ogden, having drawn the six-year term, thereupon became presiding judge.

Edwin M. Wheelock continued as reporter until 1872, when he was replaced by Alexander W. Terrell and Alexander W. Walker. As already indicated, W.P. (William Penn) de Normandie continued as clerk. The court sat only at Austin, in annual sessions commencing December 1 and lasting until the disposal of pending business. It was to hold three full annual sessions. The fourth, commencing December 1, 1873, with the court composed of Ogden, P.J., and Walker and McAdoo, J.J., was to come to grief in the constitutional crisis of January 1874, which marks the end of Reconstruction.

For obvious reasons, the biographies of the Semicolon Court require special attention. Moses Walker, we saw, sat on the Military Court, having replaced Albert Latimer, and thus provided an element of continuity. His prior career has been summarized further above. His direct antipode, so to speak, was John McAdoo, the last appointee to this court. Born in Tennessee in 1824 and admitted to practice there, he moved to Texas in 1854.[276] Although an unsuccessful candidate for state attorney general under the "Constitution and Union" ticket in 1860, he remained in Texas during the Civil War and embarked on a military career,

274. TEX. CONST. of 1869, art. V, § 2.

275. *Id.*

276. Edloe A. Jenkins, *McAdoo, John David*, in 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 361, 361 (Ron Tyler et al. eds., 1996).

eventually rising to brigadier general of the Sixth Military District of Texas.[277] Despite this background, General McAdoo was appointed a state district judge by Governor Davis in 1871, and elevated to the supreme court at the first opportunity.[278] After his forced resignation in 1874, he was appointed postmaster in Marshall.[279] Retiring from that position in 1878, he died at his farm near Brenham in 1883.[280]

Although Judge McAdoo was not the favored candidate of senior members of the Texas bar for appointment to the state supreme court in 1873,[281] it seems likely that the choice of a high-ranking ex-Confederate officer for that position at that time was influenced by the need to secure confirmation of his appointment from a senate in which the Democrats by then had a solid majority. Kindred considerations are not unlikely to have led to the appointment of Lemuel Evans three years earlier. At that time, the Radical Republicans held all state-wide elective offices, but the Moderate Republicans and the soon-to-be Democrat Conservatives had a majority in the senate.[282] This might explain in good part, if not entirely, Governor Davis's choice of the unofficial leader of the Conservative opposition at the Constitutional Convention of 1868–1869 for what turned out to be the position of presiding judge of the Supreme Court of Texas.

Lemuel D. Evans was born in Tennessee in 1810 and admitted to practice there.[283] He came to the Republic of Texas in 1843.[284] A proponent of annexation, he served in the Constitutional

277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *See* William Pitt Ballinger, Diary of William Pitt Ballinger 29–31 (Feb. 25–Feb. 28, 1873) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (describing the various attempts to encourage Ballinger to accept the supreme judgeship). William Pitt Ballinger was apparently the first choice both of the bench and the bar. He was approached in this connection by Judges Ogden and Walker on February 25, 1373, and again by Alexander Terrell and George Flournoy on April 19, but refused to be a candidate for financial reasons. *Id.*; William Pitt Ballinger, Diary of William Pitt Ballinger 56–57 (Apr. 19, 1873) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).
282. CARL H. MONEYHON, REPUBLICANISM IN RECONSTRUCTION TEXAS 182 (1980).
283. Brian Hart, *Evans, Lemuel Dale*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 906, 906 (Ron Tyler et al. eds., 1996).
284. *Id.*

Convention of 1845.[285] After statehood, he moved to Harrison County, where he served as a state district judge until his election in 1855 to the United States House of Representatives as a one-term member of the Know-Nothing Party.[286] Lemuel Evans later supported Governor Houston in his opposition to secession, and served as a Texas delegate to the national convention of the Constitutional Union Party.[287] He chose exile during the Civil War and was residing in Washington in 1866[288] when Oran Roberts and David Burnet presented themselves unsuccessfully as Texas Senators-elect. Oran Roberts had kind words to say about Judge Evans's assistance on that occasion.[289]

Returning to Texas shortly thereafter, Lemuel Evans re-entered politics as a Conservative, and once again as a champion of East Texas. He was elected to the Constitutional Convention of 1868–1869, where he headed the small, but influential group of Conservatives. One of his speeches at the convention, dated January 6, 1869, and published by the "Historical and Philosophical Society of Clio," sheds substantial light on his then-current political views.[290] These can be summed up as apologies for white lawlessness against politically active freedmen and their white supporters in East Texas, continued adherence to the scheme of establishing "a country" for Negroes "either inside or outside the United States" so that they could learn self-government, and advocacy of the division of Texas into two or three states by invocation of the Annexation Resolution of 1845. Perhaps to counterbalance these, no doubt, strongly held positions, he included a two-page addendum in the printed version of that speech, recording his remarks that the triumph of representative government and a more precise definition of citizenship would

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285. *Id.*

286. *Id.*

287. *Id.*

288. Brian Hart, *Evans, Lemuel Dale*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 906, 906 (Ron Tyler et al. eds., 1996).

289. Oran M. Roberts, *The Political, Legislative, and Judicial History of Texas for Its Fifty Years of Statehood, 1845–1895*, *in* 2 A COMPREHENSIVE HISTORY OF TEXAS, 1685 TO 1897, at 7, 161 (Dudley G. Wooten ed., 1986) (praising Judge Evans for his assistance to the delegation).

290. *See* Honorable L.D. Evans, On the Condition of Texas, and the Formation of New States, Address at the Constitutional Convention of Texas 4–5, 9–28 (Jan. 6, 1869) (transcript available at The Center for American History at The University of Texas at Austin) (expressing views on the post-Civil War South).

lead to "woman suffrage."[291]

It may be that the endorsement of the division of Texas into two or more states (an objective pursued at the convention chiefly, if not exclusively, by Radical Republicans from West Texas), was also a factor in the judicial preferment of Lemuel Evans by Governor Davis.[292] In the end, as will be seen, Lemuel Evans was not to shine among the chief justices of Texas—a position which he attained quite literally by chance. His drawing of the short lot, however, saved him from the opprobrium attached to the Semicolon Court—a term simply inapplicable to him for that reason. Sad to relate, he accepted appointment as a United States marshal in Galveston in 1875, with his immediate predecessor-in-office now his Olympian superior.[293]

Wesley Ogden, his successor as presiding judge, was born in New York in 1818. He was admitted to the bar of Ohio, but after practicing there and in New York, he removed to Texas in 1849, practicing law in Port Lavaca. Judge Ogden, too, was a strong Unionist, and spent the last two years of the Civil War in exile. Returning soon after the end of hostilities, he served as a state district attorney by appointment by Governor Hamilton and, from 1867 to 1870, as a state district judge by military appointment. It seems likely that his choice for the supreme court by Governor Davis was influenced by regional considerations. Unlike Moses Walker, who severed his connection with Texas immediately after the resolution of the constitutional crisis of January 1874, Wesley Ogden seems to have been remarkably unperturbed by his removal from judicial office at that time. A leader of the Republican Party in Texas, he moved to San Antonio and developed a prominent law practice in that city, from which he retired in 1888. He died in San Antonio in 1896.

The promotion of two of the four Semicolon Court judges from among the state district court judiciary did not pose substantial difficulty, since the 1869 constitution provided that two members

291. *Id.*

292. *See* ERNEST WALLACE, THE HOWLING OF THE COYOTES, RECONSTRUCTION EFFORTS TO DIVIDE TEXAS 92 (1979) (listing Evans as one of the delegates who voted to divide the state).

293. Brian Hart, *Evans, Lemuel Dale*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 906, 906 (Ron Tyler et al. eds., 1996).

of the court constituted a quorum.[294] Judge Ogden, obviously, did not sit in the few cases reviewing his actions as a district judge. Given the shortness of Judge McAdoo's tenure on the supreme court, he was spared review of his judicial actions by his colleagues while sitting on the court. He had not, however, been as fortunate before his elevation to that tribunal. An unexplained refusal to enter judgment in favor of a plaintiff who had prevailed in a jury trial had earned him one of the most stinging rebukes by mandamus in the annals of Texas jurisprudence.[295]

As mentioned further above, Governor Davis had also favored Justices Lindsay and Latimer with appointments to the district bench. The Semicolon Court reviewed a few decisions by Judge Latimer, and several by Judge Lindsay. One of the latter will receive more attention below.

B. *The Setting*

The Semicolon Court reflects the last stage of Reconstruction in Texas, which is also the first phase of return to civil government. On December 16, 1867, General Hancock (then in command of the Fifth Military District) had ordered an election to choose delegates for a constitutional convention. That election was held from February 10–14, 1868, and the convention then elected sat in two sessions in Austin, from June 1868 to February 1869, with a recess from August 1868 through December of that year. After the adoption of a draft constitution by the convention, its presiding officer, Edmund J. Davis, issued a declaration calling for an election for its ratification or rejection, as well as for the election of the state legislature, of all elective officers under the new constitution, and of the Texas members of the United States House of Representatives. That election was to be held "commencing on the first Monday in July, 1869, and continuing for the number of days specified in the [draft c]onstitution" for general elections.[296]

294. TEX. CONST. of 1869, art. V, § 2.

295. *See* Lloyd v. Brinck, 35 Tex. 1, 6 (1871–1872) (criticizing Judge McAdoo for his failure to perform the ministerial act of entering a judgment in the case); *see also* Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 782 (Tex. 1967) (reiterating the admonition from *Lloyd*).

296. Election Declaration of 1871, §§ 1–5, ¶¶ 1–6, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 428, 428–29 (Austin, Gammel Book Co. 1898) (establishing post-Reconstruction elections).

At that stage, Congress intervened, prohibiting any election "for any purpose" in Texas unless authorized by the President of the United States.[297] That enactment (of April 10, 1869) was followed by a presidential proclamation of July 15 of that year calling for a referendum on the Texas constitution on Tuesday, November 30, 1869.[298] On that date, and the three days following as prescribed by article III, section 6 of the constitution then presented for adoption, Texas voters approved that constitution, and elected the entire slate of state officers eligible thereunder, plus both houses of the Texas legislature and the Texas members of the United States House of Representatives.

On January 8, 1870, E.J. Davis and the other elected state officials were appointed to their offices provisionally by military authority, pending the submission of the state constitution to Congress. General Reynolds, then in command, also called a provisional session of the state legislature, which met in Austin from February 8–24, 1870, and ratified the Fourteenth and Fifteenth Amendments as well as electing the two United States Senators from Texas. Thereupon, by Act of March 30, 1870, Texas was "admitted to representation in Congress as one of the States of the Union."[299] This was, however, subject to a series of provisos limiting (or purporting to limit) the power of Texas to amend the state constitution then approved by Congress.[300]

General Reynolds relinquished United States military authority in Texas on April 16, 1870, and civil authority was fully restored. The state legislature, called by Governor Davis, convened in Austin ten days thereafter, and on April 28, 1870, Edmund J. Davis was officially inaugurated as governor of Texas.

Since the state constitution drafted by the 1868–1869 convention contained a number of provisions directly affecting private rights, the determination of its effective date turned out to be of some moment. Furthermore, as the date of initial assumption of offices measured in calendar years (including that of the governor)

297. Act of Apr. 10, 1869, ch. 17, § 3, 16 Stat. 40, 41.

298. *See* Presidential Proclamation of July 15, 1869, No. 6, 16 Stat. 1129, 1129 (providing a deadline for submitting a new Texas constitution for adoption).

299. Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81.

300. *See id.* (limiting the future changes that could be made to the Texas constitution). These related to the right to vote, to hold public office, and to attend public school as then guaranteed by the state constitution. *Id.*

delimited the duration of such offices, there was the problem of determining when, so to speak, the constitutional time clock started ticking for state officials initially appointed by military authority to charges under the new constitution. Additionally, there was the issue of the effect of the ossification, by congressional mandate, of specific institutions of the Texas constitution, last but not least of the ultimate clause of the Act of March 30, 1870, which provided "[t]hat the constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said [s]tate."[301] It will also have been noted that President Grant had called for a constitutional referendum on one day but that Texas, pursuant to a constitution not yet in effect, had held it on four: was the time period of state-wide elections in Texas subject to modification?

This last question was addressed in the "Semicolon Decision" which was to give the court here discussed its name and to seal its fate. All of these issues arose in those thirty-eight months of the tenure of that court, and most of them were presented to the court for adjudication. Behind them, however, lurked a further question of constitutional magnitude, then known as the "void *ab initio*" question. It had been an article of faith of the Radical wing of the Republican Party that the illegality of the secession of Texas from the United States had the legal consequence of invalidating, *ab initio*, not only secession itself but also all acts of the secession state government, including all enactments of the Texas legislature from 1861 to 1865. In *Texas v. White*, we saw, the Supreme Court of the United States was to reject this latter proposition, invalidating only Texas enactments in violation of the Constitution of the United States or in furtherance of the rebellion.[302] Although that decision was dated April 12, 1869, and the constitutional convention had adjourned on February 7 of that year, the constitutional text then adopted had, after a long

301. *Id.*

302. *See* Texas v. White, 74 U.S. (7 Wall.) 700, 700 (1869) (reasoning that "the union between Texas and the other [s]tates was . . . perpetual"), *overruled on other grounds by* Morgan v. United States, 113 U.S. 476 (1885); *see also id.* at 726 (declaring that Texas's obligations "as a member of the Union" did not cease during the Civil War); *id.* at 731 (recognizing that Texas's Civil War-era government still existed after the war); *id.* at 733 (holding that only "acts in furtherance or support of rebellion against the United States" were void as a matter of law).

struggle, incorporated substantially the same formula, if in inverse order.

Proceeding from the premise of the initial invalidity of the secession ordinance and of the lack of constitutional authority of the state legislatures sitting from 1861 through 1865, the 1869 constitution had gone on to provide:

> That [it should] not be construed to inhibit the authorities of this [s]tate from respecting and enforcing such rules and regulations as were prescribed by the said [l]egislatures, which were not in violation of the Constitution and laws of the United States, or in aid of the rebellion against the United States, or prejudicial to the citizens of this [s]tate who were loyal to the United States, and which have been actually in force or observed in Texas during [secession or the interregnum following].[303]

Although this resolution of the issue documented at least the temporary defeat of the adherents of "void *ab initio*" at the constitutional convention, they had come back to elect their leader as the governor, and he had indicated his continued commitment to that position by appointing a leading champion of "void *ab initio*" as attorney general. It was inescapable, therefore, that the constitutional caseload of the Semicolon Court (heavy enough in view of the delayed transition to civil authority described above) would also be burdened by a replay of *Texas v. White* at the state level.

Although constitutional issues such as these are now of historical interest only, their treatment by the Semicolon Court seems essential for the understanding of the jurisprudence of that tribunal. Before proceeding to that subject, however, a few more observations about the legal and what might be called the social setting of that court appear to be appropriate.

The judicial appointments of the initial three members of the Semicolon Court date from July 5, 1870. On August 13 of that year, the legislature established the annual terms of that court to start on the first Monday of December of each year and to continue, with adjournments as deemed necessary, to the exhaustion of the docket or the beginning of the next term. Additionally, the court was authorized to adopt and to publish

303. TEX. CONST. of 1869, art. XII, § 33 (adopting the strictures imposed by *Texas v. White* into the Texas constitution).

"rules to govern the practice in [itself] and the [d]istrict [c]ourts"[304]—seemingly the first such statutory delegation of rule-making power. Such rules (other than those for the first term, then less than three months ahead) were to be submitted to, and discussed by, the bar in open court before being adopted.[305]

The first set of Supreme Court Rules was adopted on May 2, 1871.[306] By that time, it had become apparent that the three-member supreme court was hard-pressed to dispose of its docket in a timely manner, for on April 5 of that year, the legislature had made provisions for the employment of private clerks by the members of the supreme court, and appropriated salaries for them through August 1872.[307] This, too, appears to be a "first" in the history of the Supreme Court of Texas—although, as will be seen, not entirely a happy one.[308]

Despite its concern for the caseload of the court, the legislature authorized interlocutory appeals from state district court judgments with the Act of November 1, 1871.[309] This act was repealed—perhaps for doubly good reason—on April 18, 1873.[310] On the other hand, an enactment of March 4, 1873, authorized the court to hear and determine felony cases "without regard to their

304. TEX. SUP. CT. ORDER OF CT., 32 Tex. 807, 822 (1871).

305. *E.g.*, TEX. SUP. CT. R. 2, 32 Tex. 807, 807 (1871) (providing the time restrictions for arguments); TEX. SUP. CT. R. 4, 32 Tex. 807, 807–08 (1871) (stating oral arguments will not be allowed unless briefs have been filed); TEX. SUP. CT. R. 30, 32 Tex. 807, 813–14 (1871) (requiring consultation before opinion-writing); TEX. SUP. CT. R. 31, 32 Tex. 807, 814 (1871) (regulating preparation of opinions); TEX. SUP. CT. R. 32, 32 Tex. 807, 814 (1871) (requiring printed copies for briefs over eight pages).

306. TEX. SUP. CT. ORDER OF CT., 32 Tex. 807, 822 (1871).

307. Act approved Apr. 5, 1871, 12th Leg., R.S., ch. 28, §§ 1–3, 1871 Tex. Gen. Laws 20, 20–21, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 922, 922–23 (Austin, Gammel Book Co. 1898).

308. *See* William Pitt Ballinger, Diary of William Pitt Ballinger 8 (Jan. 10, 1872) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (noting a rumor to the effect that the clerk of Presiding Judge Evans had been soliciting hefty bribes for influencing opinions).

309. Act approved Nov. 1, 1871, 12th Leg., Adj. S., ch. 22, § 1, 1871 Tex. Gen. Laws 17, 17, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 19, 19 (Austin, Gammel Book Co. 1898).

310. *See* Act approved Apr. 18, 1873, 13th Leg., ch. 30, § 1, 1873 Tex. Gen. Laws 40, 40, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 492, 492 (Austin, Gammel Book Co. 1898) (repealing the Act of November 1, 1871); *see also* Ward v. Ward, 37 Tex. 389, 391 (1872–1873) (holding the Act of November 1, 1871, to be "nugatory and void" because it referred for its execution "to other laws which can have no application").

position on the docket."[311] It will be recalled that as provided by the judiciary article of the constitution then in effect, appeals in such cases went forward only if a member of the court found error of law in the record. This provision, while reflected in a supreme court rule and enforced judicially, does not seem to have had a marked effect on the criminal docket of the Semicolon Court.

Mention should also be made of what was then a unique enactment, at least in Texas. By Joint Resolution of June 3, 1873, Judge Moses B. Walker was granted "leave of absence from the . . . adjournment of the present term of the [s]upreme [c]ourt until the assembling of the next term of the same."[312] This was apparently a footnote to an epic in the annals of Texas constitutional jurisprudence, to be discussed below: Governor Davis had purported to dismiss George Honey from his position as state treasurer for absenting himself from the state without leave, and Judge Walker (unlike Mr. Honey, not an elected state official) was to be spared exposure to a like indignity.

As authorized by statute, the Semicolon Court adopted two distinct sets of rules on May 2, 1871: Rules of the Supreme Court (thirty-two in number), and a set of thirty-one Rules for the District Courts.[313] Only the former shed light on the operation of the court. Oral argument was limited to two hours for each side and half an hour for the appellant in reply.[314] Briefs filed in due time were a prerequisite for oral argument, but cases could be submitted on briefs alone.[315] Briefs in excess of eight pages of legal cap had to be printed.[316]

After a case had been submitted and the record was available, the presiding judge was to have a consultation with the other

311. Act approved Mar. 4, 1873, 13th Leg., ch. 8, § 1, 1873 Tex. Gen. Laws 11, 11, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 463, 463 (Austin, Gammel Book Co. 1898) (providing for the expeditious treatment of criminal cases by the Texas Supreme Court).

312. Tex. J. Res. 19, 13th Leg., 1873 Tex. Gen. Laws 233, 233, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 685, 685 (Austin, Gammel Book Co. 1898).

313. *See generally* TEX. SUP. CT. R. 1–32, 32 Tex. 807, 807–14 (1871) (containing all the supreme court rules adopted May 2, 1871); TEX. DIST. CT. R. 1–31, 32 Tex. 815, 815–21 (1871) (containing all the district court rules adopted May 2, 1871).

314. *See* TEX. SUP. CT. R. 2, 32 Tex. 807, 807 (1871) (laying out the rules for presenting oral argument before the court).

315. TEX. SUP. CT. R. 4, 32 Tex. 807, 807–08 (1871) (stating oral argument could not occur "unless a brief ha[d] been filed on the same side").

316. TEX. SUP. CT. R. 32, 32 Tex. 807, 814 (1871).

members of the court, and once a conclusion had been reached, the record was to be turned over to the "judge upon whom the court devolves the duty of writing the opinion."[317] No opinion was to be written before then, and all draft opinions were to be submitted in consultation to the other judges "at least one entire day before [their] delivery."[318]

The 1871 rules made only rudimentary provisions for admission to practice before the Supreme Court of Texas. This subject was addressed more fully by the additional rules adopted by the supreme court on May 6, 1872, which were accompanied by the appointment of an Examining Committee of nineteen, any three of whom were to constitute a quorum for examinations to be held the first Monday of every month when the court was in session.[319] Applicants were required:

> [T]o pass a satisfactory examination upon Blackstone's Commentaries, Kent's Commentaries, or Bouvier's Institutes, upon the law of evidence, upon the principles of pleading, upon the law of contracts in its important branches, upon equity jurisprudence, upon the statutes of this [s]tate, and upon the [c]onstitution of this [s]tate and the United States.[320]

The court assigned its docket in advance for each December term, allocating a number of weeks for the hearing of causes from discrete designated groups of judicial districts. The docket assignment for 1871, for instance, divided the state into six groups of districts, allocating time units ranging from two to five weeks to each of them for a total of twenty-two weeks, corresponding to a term from December 4, 1871, to the week commencing April 15, 1872.[321] This enabled counsel from various parts of the state to arrange their appearances in Austin, as need be, on a yearly basis, with only a few weeks spent at the capital.

It should be kept in mind that the Semicolon Court sat at the

317. TEX. SUP. CT. R. 30, 32 Tex. 807, 813–14 (1871) (requiring consultation with the other justices before the writing of an opinion).

318. TEX. SUP. CT. R. 30–31, 32 Tex. 807, 813–14 (1871) (stating the measures necessary to prepare opinions).

319. TEX. SUP. CT. R. 3, 7, 34 Tex. 717, 717–19 (1872).

320. TEX. SUP. CT. R. 4, 34 Tex. 717, 717 (1872); *see also* TEX. SUP. CT. R. 7, 34 Tex. 717, 718–19 (1872) (requiring members of the examining committee to consist of certain members of the bar, and imposing quorum requirements).

321. Assignment of the Docket for December Term, 1871, 32 Tex. 822, 822–23 (1871).

outset of the last decade of the horse-and-buggy era in Texas. The railroad from Galveston and Houston arrived in Austin in time for Christmas 1871. San Antonio could only be reached by stagecoach until well after the end of Reconstruction; Tyler became accessible—if inconveniently—by rail in 1873.[322] The stage coach journey to the former took one rather full day (and evening), and to the latter, two strenuous days with the prospect of primitive accommodation and miserable food (cold potatoes for breakfast being the nadir for Judge Duval). El Paso could be reached in reasonable comfort by a three-week expedition, preferably with military escort, or in two weeks by horse and buggy and with fierce determination.[323] The sale of that part of Texas had been contemplated at the constitutional convention, and the public school fund section of the 1869 constitution, with this possibility in view, allocated to that fund "all sums of money that may come to this [s]tate hereafter from the sale of any portion of the public domain of the State of Texas."[324]

Some of the practical effects of the legal and physical background sketched above on the operation of the supreme court in those years may be gathered from the diary of William Pitt Ballinger, who came to Austin regularly when the Galveston docket was due to be called. On Saturday, February 18, 1871, he called on Lemuel Evans and Wesley Ogden. He had heard about the presiding judge "that his mind had failed," but found him a very interesting talker and saw no evidence of "mental decay." He noted, however, that sore eyes had prevented Judge Evans from reading or writing, and that at that time (some ten weeks into the term) he had delivered no opinions.[325] On Sunday, March 5 of that year, he saw Judge Walker, who, he noted, was "evidently dissatisfied with the mode of proceeding in the Bench." Judge

322. *See* CHARLES P. ZLATKOVICH, TEXAS RAILROADS, A RECORD OF CONSTRUCTION AND ABANDONMENT 8 (1981) (listing in table three the railroad's years of arrival in various Texas cities).

323. *See* W.W. MILLS, FORTY YEARS AT EL PASO, 1858–1898, at 99–100, 107–08 (1962) (describing the severity of travel conditions on a trip to San Antonio and on another to El Paso).

324. TEX. CONST. of 1869, art. IX, § 6. Note that state lands to be sold or granted to individuals and entities are denominated "public lands," not "public domain." TEX. CONST. of 1869, art. X, § 2.

325. William Pitt Ballinger, Diary of William Pitt Ballinger 28 (Feb. 18, 1871) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

Walker had prepared a number of opinions, but did not know when they would be delivered since Chief Judge Evans was still examining them.[326]

It also appears from Ballinger's notes that Monday was "decision day" but was used for other purposes when there were no decisions to be announced. (Tuesday was "motion day" under the Rules.) Austin printers charged $2 per page of record or brief, which he found extravagant (the price in Galveston being $1.25). The two-hour time limit for oral argument was exceeded in important cases by leave of the court, and occasionally, in order to accommodate out-of-town counsel, there were Saturday sessions. The most disturbing entry in Ballinger's diary on the work of the Semicolon Court, surely, is that of January 11, 1872, when he noted a rumor to the effect that the clerk of Presiding Judge Evans had been soliciting hefty bribes for influencing opinions.[327]

When in Austin, Ballinger stayed at the Avenue Hotel, as did many other lawyers.[328] He found the supreme court library at the capitol "very imperfect—[n]ot 1/3 as good as mine."[329] The Pease mansion, on the other hand, was in his words "the finest, most elegant [and] beautiful residence I know any where." Although then located at the periphery of the capital city, it was also the center of social and political life at the time.[330]

Although Texas had been torn by political strife since Lincoln's election and was the scene of much violence (in good part politically inspired), Austin was by every account an oasis of civility and toleration virtually throughout the secession and

326. William Pitt Ballinger, Diary of William Pitt Ballinger 37–38 (Mar. 5, 1871) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

327. *See* William Pitt Ballinger, Diary of William Pitt Ballinger 8–9 (Jan. 11, 1872) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (describing with disdain how Judge Evans was taking kickbacks in exchange for favorable judicial treatment). *See generally* Act approved Apr. 5, 1871, 12th Leg., R.S., ch. 28, § 1, 1871 Tex. Gen. Laws 20, 20, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 922, 922 (Austin, Gammel Book Co. 1898) (limiting the salary of judicial clerks on the supreme court to $1,200 per year).

328. William Pitt Ballinger, Diary of William Pitt Ballinger 27 (Feb. 17, 1871) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

329. William Pitt Ballinger, Diary of William Pitt Ballinger 8 (Jan. 10, 1872) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

330. *Id.* at 7–8.

reconstruction periods.[331] Well-known and prominent Union loyalists resident there, like Thomas Duvall and Amos Morrill, had been forced into exile only when news of Gettysburg and Vicksburg led to conscription in earnest. John Hancock had persevered at the Austin bar, never appearing in Confederate courts, and even George Paschal had weathered his temporary arrest by military authority to be still there for the raising of the flag once again on the Hancock Pole. Despite initial apprehension, those returning from exile were always safe in Austin. Travis County had, after all, rejected secession in 1861 by a vote of 704 to 450.[332] A supreme court term in Tyler in 1872 or 1873 would not have been an equally pleasing prospect.

C. *The Decisional Output: A Framework*

The decisions of the Semicolon Court start with *Johnston's Administrator v. Shaw*[333] and end with *Ex parte Rodriguez*.[334] The former, more fully styled *A. Sydney Johnston's Administrator v. D. Shaw and Others*, sharply rebuked and reversed a lower-court decision approving a corrupt scheme to fleece the estate of the most prominent Confederate war hero of Texas. The latter (the notorious Semicolon Decision) declared invalid an election that had resulted in the defeat of the Radical Republican state governor by an ex-Confederate former supreme court justice by the lopsided vote of 93,682 to 45,670. Both opinions were written by Moses Walker, the lone "carpetbagger" on the court.

Despite its massive decisional output, which fills over six volumes of the *Texas Reports*, the Semicolon Court has been described (and judged) almost exclusively in the light of its last reported eponymous decision. To a considerable extent, this is due to the literary, and perhaps the judicial, efforts of Oran Roberts, who was appointed chief justice by Governor Coke on

331. David C. Humphrey, *A "Very Muddy and Conflicting" View: The Civil War As Seen from Austin, Texas*, 94 SW. HIST. Q. 369, 369 (1991); *see* A.C. Greene, *The Durable Society: Austin in the Reconstruction*, 72 SW. HIST. Q. 492, 493–97 (1969) (contrasting Austin with other cities in postbellum Texas and explaining how the presence of the Union was less stressful in the capital than elsewhere).

332. *See* A.C. Greene, *The Durable Society: Austin in the Reconstruction*, 72 SW. HIST. Q. 492, 493 (1969) (noting the disparity between votes for secession and votes against secession that were cast in Travis County).

333. Johnston's Adm'r v. Shaw, 33 Tex. 585 (1870–1871).

334. *Ex parte* Rodriguez, 39 Tex. 705 (1873).

January 29, 1874, and who continued in that office until 1878, concluding his long and distinguished public career with two terms as governor of Texas, followed by ten years as the founding senior professor at The University of Texas Law School.[335] In his monograph-length essay titled *The Political, Legislative, and Judicial History of Texas for Its Fifty Years of Statehood, 1845–1895*, which was published in the last year of his long life, he passed stern judgment on the Semicolon Decision, concluding with his much-quoted damnation of *Ex parte Rodriguez*:

> So odious has it been in the estimation of the bar of the [s]tate, that no Texas lawyer likes to cite any case from the volumes of the [s]upreme [c]ourt reports which contain the decisions of the court that delivered that opinion, and their pages are, as it were, tabooed by the common consent of the legal profession.[336]

Some six decades thereafter, Justice Norvell subjected this assertion to a searching reexamination and found it wanting.[337] It stands to reason that a court addressed with some frequency by counsel of the stature and ability of George Paschal, and especially William Ballinger, would produce many a nugget helpful to counsel, and that on some questions, the Semicolon Court simply had the last word because it spoke first. Judge Ogden's stern direction to the trial judge to enter judgment pursuant to the jury verdict in *Lloyd v. Brinck*[338] comes to mind in the former connection;[339] Judge Walker's setting the operative date of the 1869 constitution at December of that year in *Campbell v. Fields*[340] illustrates the latter.[341] Judge Edwin Hobby's *Treatise on Texas Land Law*, which appeared in 1883, contains well over two hundred references to Semicolon Court decisions, cited as

335. *See* Hans W. Baade, *Law at Texas: The Roberts-Gould Era*, 86 SW. HIST. Q. 161, 171 (1982) (discussing Governor Roberts's service as a governor and professor).

336. Oran M. Roberts, *The Political, Legislative, and Judicial History of Texas for Its Fifty Years of Statehood, 1845–1895*, *in* 2 A COMPREHENSIVE HISTORY OF TEXAS, 1685 TO 1897, at 7, 201 (Dudley G. Wooten ed., 1986).

337. James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 288–302 (1959); James R. Norvell, *The Reconstruction Courts of Texas 1867–1873*, 62 SW. HIST. Q. 141, 156–58 (1962).

338. Lloyd v. Brinck, 35 Tex. 1 (1871–1872).

339. *Id.* at 10.

340. Campbell v. Fields, 35 Tex. 751 (1871–1872).

341. *Id.* at 755.

authority for statements in the text.[342] It seems, therefore, that both the Supreme Court of Texas and leading Texas commentators were, to say the least, not consistently conscious of the anathema supposedly cast by the Texas bar on the jurisprudence of the Semicolon Court in the years immediately following the demise of that court.

Further discussion of this point is conveniently postponed here, to await consideration in connection with our account of the initial phase of the Roberts-Gould Court. Quite inescapably, however, the jurisprudence of the Semicolon Court has to be viewed against the background of the last phase of a political struggle between the champions of the Lost Cause and the forces of Reconstruction. Nevertheless, then as always, life went on, and many a matter presented for final adjudication by this court had little connection with the late rebellion or with Reconstruction then current.

An attempt will be made here to save such "non-political" cases for separate consideration, following a summary of the politically charged jurisprudence of the Semicolon Court. Since the eponymous Semicolon Decision was the last case to be decided by that court, and in view of the importance of that adjudication and of the reaction thereto in Texas constitutional and political history, *Ex parte Rodriguez* will receive separate attention at the end of the following account of the decisional output of the Semicolon Court.

D. *Retrospective Constitutionalism Continued*

It will be recalled that Presiding Judge Evans, nominally at the head of the Semicolon Court until its abortive fourth term starting December 1873, was described by William Pitt Ballinger as suffering from poor eyesight and blamed by Judge Walker for not acting on draft opinions by the two associate judges, which, under the rules, delayed the rendering of final decisions.[343] As amply demonstrated by the reports, Presiding Judge Evans made few contributions to the decisional output of his court, and the burden

342. *See generally* EDWIN HOBBY, A TREATISE ON TEXAS LAND LAW (St. Louis, Gilbert Book Co. 1883) (citing to the Semicolon Court throughout).

343. William Pitt Ballinger, Diary of William Pitt Ballinger 28 (Feb. 18, 1871) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin); William Pitt Ballinger, Diary of William Pitt Ballinger 37–38 (Mar. 5, 1871) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

of opinion-writing fell almost exclusively on Judges Moses Walker and Wesley Ogden. (Judge John D. McAdoo shared that burden with them in his few months on the Supreme Bench in Fall 1873.)

Moses Walker, we also saw, had been appointed to the Military Court to replace Albert Latimer because of the latter's prominent association with the Moderate wing of the Republican Party.[344] His appointment to the Semicolon Court by Governor Davis was, presumably, at least in part due to his solid (not to say super-abundant) credentials as a sound Union man. Wesley Ogden, too, had demonstrated his loyalty to the Union by choosing exile during the rebellion and had been rewarded for that loyalty both by Governor Hamilton and by occupation authorities. He, too, had been acceptable to Governor Davis, but so had Lemuel Evans. The Semicolon Court followed the jurisprudence of its predecessor as to the invalidity of Confederate-money debts, the enforceability of Confederate-era slave hire and sales contracts, and the ineffectiveness in Texas of the Emancipation Proclamation until the collapse of the Confederacy. It did so, however, with modifications of significance, and with occasional indications of regret.

The jurisprudence of the Military Court—denying enforceability of executory contracts denominated in Confederate currency developed when Texas was under military occupation—was in harmony with at least some lower federal courts. In *Thorington v. Smith*,[345] decided on November 1, 1869, however, the Supreme Court of the United States held that federal courts had jurisdiction to enforce scaled-down Confederate currency debts, since this had been a currency "imposed on the community by irresistible force" of the insurgent government.[346] In *Grant v. Ryan*,[347] the Supreme Court of Texas adhered to its prior jurisprudence, "allowing" (in the language of Judge Walker) "our own opinions and that of [*Thorington v. Smith*] to stand before the profession upon their own soundness or unsoundness."[348]

As will be seen, the Roberts-Gould Court was to have no

344. George W. Paschal, 31 Tex., at iii (1870); Randolph B. Campbell, *Walker, Moses B.*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 797, 797 (Ron Tyler et al. eds., 1996).

345. Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869).

346. *Id.* at 11.

347. Grant v. Ryan, 37 Tex. 37 (1872–1873), *abrogated in part by* Mathews v. Rucker, 41 Tex. 636 (1874).

348. *Id.* at 39.

difficulty in following federal authority on this point, with which (for once) it was in complete agreement. It is a matter of regret, nevertheless, that the jurisprudential implications of the refusal of Texas to follow United States Supreme Court authority on a point of, by definition, national concern did not receive further attention. It should be added, however, that the Semicolon Court as well had to endorse scaling of Confederate-currency denominated debts on occasion in order to avoid gross injustice. In 1870, over the dissent of Presiding Judge Evans, the court refused equitable credit when the debtor had accepted payment in that currency under duress but had spent some of it, but two years later, it permitted purchases from administrators and executors to lessen their nominal purchase money obligations to the estate.[349]

Grant v. Ryan might suggest that Judge Walker (the lone "carpetbagger" on the court) was an exceptionally militant reconstructionist. This impression receives additional support for his opinion in *Webster v. Corbett*,[350] overruling Chief Justice Morrill's prior decision which had upheld another conveyance out of the David Webster estate consented to by Betsy Webster while still a slave.[351] Judge Walker held, accurately enough, that "[w]hen the deed to Corbett was made, Betsy Webster was a slave and could not make a deed."[352] His discussion of the equities of the case left out all of the points considered in *Webster I* by Chief Justice Morrill and summarized further above.[353] (It might be added that William Pitt Ballinger was in attendance when *Webster II* was argued, but stated he "had nothing to do with the case."[354])

349. Harrell v. Barnes, 34 Tex. 413, 422–25 (1870–1871) (declining to extend equity under the facts given). *Contra* Thompson v. Bohannon, 38 Tex. 241, 244 (1873) (reaching the opposite conclusion).

350. Webster v. Corbett, 34 Tex. 263 (1870–1871), *overruling in part* Webster v. Heard, 32 Tex. 685, 710–11 (1870).

351. *Id.* at 263.

352. *Id.* at 266.

353. *Id.* Once again, this was not the end of the story. In *Webster v. Mann* (*Webster I*), 52 Tex. 416 (1880), the court upheld a purported conveyance by Betsy Webster (an elderly, illiterate former slave) of several Galveston city lots, including her residence. In *Webster v. Mann* (*Webster II*), 56 Tex. 119 (1882), the court rejected a new attack on this transaction on the ground of lack of mental capacity. It also upheld the exclusion of a deposition of Jesse Stancel (her lawyer in prior proceedings) on the ground that he had been convicted of forgery and was therefore incompetent to testify. *Id.* at 123–24.

354. William Pitt Ballinger, Diary of William Pitt Ballinger 35 (Mar. 1, 1871) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

Despite his obduracy in *Grant* and seeming militancy in *Webster II*, Judge Walker bowed at first (if reluctantly) to the jurisprudence of the Military Court, both as to the actionability of slave leases and sales and the initial ineffectiveness of the Emancipation Proclamation in Texas. *Morris v. Ranney*,[355] which was, in his words "an action on a promissory note made for the hire of slaves after the proclamation of emancipation," presented both of these issues.[356] He expressed the hope "that these difficult and troublesome matters shall soon cease to trouble the tribunals of the country" but also stated that the court would "not at this time disturb the previous rulings of the court,"[357] especially *Hall v. Keese*,[358] which we saw had held such contracts to be enforceable.[359] During the 1873 term, in *Dowell v. Russell*,[360] the court did not exhibit the same restraint when a plaintiff sought to enforce a slave transaction dated June 15, 1865, more than two months after Appomattox, almost two weeks after the surrender of Kirby Smith, and a bare four days before "Juneteenth."[361] Wesley Ogden, by then the presiding judge, said with some feeling:

> Without entering again into the discussion of the question when emancipation took effect in Texas, or attempting to fix the precise date when that important measure went into operation, this court is unanimously of the opinion, that on the fifteenth day of June, 1865, African slavery had been abolished in the United States, and that negroes were no longer the subject of legal traffic.[362]

Judgment below in favor of the plaintiff was reversed, and the case was dismissed.

The issue of "void *ab initio*" came up in *Houston & Great Northern Railroad Co. v. Kuechler*.[363] Reduced to its essentials relevant for present purposes, the question posed for decision in

355. Morris v. Ranney, 37 Tex. 124 (1872–1873).

356. *Id.* at 124.

357. *Id.* at 125.

358. Hall v. Keese (The Emancipation Proclamation Cases), 31 Tex. 504 (1868).

359. *Id.* at 534.

360. Dowell v. Russell, 39 Tex. 400 (1873).

361. *Id.* at 401–02; *accord* Lawrence v. Griffen, 30 Tex. 400, 401–02 (1867) (refusing to enforce such a contract).

362. *Dowell*, 39 Tex. at 400.

363. Houston & Great N. R.R. Co. v. Kuechler, 36 Tex. 382 (1871–1872), *overruled on other grounds by* Quinlan v. Houston & Tex. Cent. Ry. Co., 89 Tex. 356, 34 S.W. 738 (1896).

that case (and in others) was whether the benefits conferred upon railroads by a statute in 1854, for a ten-year period, had lapsed in 1864, or whether they had been extended by two January 11, 1862 enactments of the Texas legislature for the relief of railroads.[364] The validity of these enactments was upheld by a divided court, with all three judges writing elaborate opinions. Presiding Judge Evans, who for once wrote the opinion of the court, considered the 1862 enactments of the secessionist Texas legislature to have been validated by an ordinance of the Constitutional Convention of 1866.[365] Judge Walker reached the same result, relying on the formula set out by Chief Justice Chase in *Texas v. White*.[366] Judge Ogden, applying the same formula, dissented, as he considered the 1862 statutes to have been enacted in aid of rebellion.[367]

It remains to add that in the parallel case of *Davis v. Gray*,[368] decided on April 15, 1873, the Supreme Court of the United States reached the same conclusion as to the efficacy of the 1862 enactments of the rebel legislature of Texas.[369] In an opinion by Justice Swayne, that court stated: "These several acts are valid." That laconic holding was supported by reference to *Texas v. White* and to the section of the Texas Constitution of 1869 which, as discussed further above, had rejected "void *ab initio*."[370] In that respect, at least, Judge Walker was in harmony with the Supreme Court of the United States. It seems tempting, in view of *Kuechler*, to designate Wesley Ogden rather than Moses Walker as the "Radical" on the Semicolon Court. A more likely reading of that case, however, is that Judge Ogden showed more concern for the prudent disposal of Texas public lands than did Judge Walker, whose home state of Ohio had perforce left such matters to the federal government.

364. Act approved Jan. 30, 1854, 5th Leg., ch. 15, §§ 1–13, 1854 Tex. Gen. Laws 11, 11–15, *reprinted in* 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1455, 1455–59 (Austin, Gammel Book Co. 1898); Act approved Jan. 9, 1841, 5th Cong., R.S., § 8, 1841 Repub. Tex. Laws 24, 26–27, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 488, 490–91 (Austin, Gammel Book Co. 1898).

365. *Kuechler*, 36 Tex. at 385, 392–94.

366. *Id.* at 400, 413–19.

367. *Id.* at 436, 438–40.

368. Davis v. Gray, 83 U.S. (16 Wall.) 203 (1873).

369. *Id.* at 233.

370. *See id.* at 224–25 (referencing *Texas v. White* and article 12, section 33 of the Texas Constitution of 1869).

E. *Adjusting to the New Constitutional Order*

As Oran Roberts noted with biting disapproval three decades later, the adoption of the Fourteenth and Fifteenth Amendments of the Constitution of the United States (especially of the first section of the Fourteenth) had effected "a fundamental change in the political relation between the government of the United States and the States." The objects and effects of this section, he went on, had made it "necessary to continue the war four years after the last gun was fired," and the enfranchisement of the freedmen, as well as the disqualification of ex-Confederate voters, had served the purpose of enabling Union loyalists "to shape the future [s]tate governments of the South so that they could hold the offices and control the administrations in harmony with the principles of the Republican [P]arty."[371]

The same principles were embodied not only in the federal Constitution and in federal law, but also in the Texas Constitution of 1869, which was, after all, the work of Union loyalists. It fell to a supreme court composed entirely of loyal Union men to secure the implementation of the new constitutional order in an increasingly hostile environment. Since the administration of state government in such a setting brought with it policy and personality clashes of Homeric proportions, the Semicolon Court also had to assume the equally novel task of developing the ground rules of what would now be called public-law due process.

Miscegenation, school finance, gun control, and the right to a fair trial illustrate the former type of constitutional issues arising in the last phase of Reconstruction in Texas; mandamus and tenure of public office illustrate the latter. First, as to miscegenation: in *Bonds v. Foster*,[372] the court upheld a miscegenous union of long standing, with interim cohabitation in Ohio, noting that the parties had continued to live together in Texas as man and wife "until after the law prohibiting such a marriage had been abrogated by the 14th Amendment to the Constitution of the United States."[373] This brief opinion by Judge Walker was, of course, not the end of the matter, but like so much else among the "principles of the

371. Oran M. Roberts, *The Political, Legislative, and Judicial History of Texas for Its Fifty Years of Statehood, 1845–1895*, *in* 2 A COMPREHENSIVE HISTORY OF TEXAS, 1685 TO 1897, at 7, 182 (Dudley G. Wooten ed., 1986).

372. Bonds v. Foster, 36 Tex. 68 (1871–1872).

373. *Id.* at 69–70.

Republican [P]arty" derided by Oran Roberts, it was destined to be accepted as the law of the land within a century.[374]

A second miscegenation case, *Honey v. Clark*,[375] involved the estate of John C. Clark, who died intestate, leaving a large estate claimed by the State of Texas to have escheated since the decedent had been a bachelor and no ancestral or collateral heirs had been forthcoming.[376] Hence the nominal defendant's name was styled: "*G.W. Honey, Treasurer*," who was formerly a clerk to the court during the Galveston term and, at the time of the case, was the state treasurer. The plaintiffs were the descendants of Sobrina, a slave woman bought by Mr. Clark in 1833 or 1834. His former slaves testified that he had treated Sobrina as his wife; his white acquaintances testified that he had still been a bachelor at the time of his death in 1862. Sobrina died in or about 1869. The parentage of the plaintiffs seemed clear, and the jury found them to be the legitimate children and lawful heirs of John C. and Sobrina Clark. Speaking once more through Judge Walker, the court sustained the decision below, holding that the union between John C. Clark and Sobrina, even if invalid initially, had been within the ambit of article XII, section 27 of the 1869 constitution, which retroactively validated de facto marital unions previously inhibited by the laws of bondage.[377]

One of the main innovations of that constitution of 1869 (perhaps the central one in present perspective) was the introduction of a comprehensive system of public education, to be financed mainly by taxation.[378] The tax levied to fund that system survived constitutional challenge in *Kinney v. Zimpleman*.[379]

374. *See generally* Loving v. Virginia, 388 U.S. 1 (1967) (alluding to the United States Supreme Court's ruling on anti-miscegenation laws).

375. Honey v. Clark, 37 Tex. 686 (1872–1873).

376. *Id.* at 687; *see also* Treasurer of the State v. Wygall, 51 Tex. 621, 631 (1879) (providing further subsequent history of *Honey v. Clark*); Treasurer of the State v. Wygall, 46 Tex. 447, 454–55 (1877) (discussing subsequent litigation involving Mr. Clark). For an exhaustive look into the facts surrounding *Honey*, see Jason A. Gillmer, *Base Wretches and Black Wenches: A Story of Sex and Race, Violence and Compassion, During Slavery Times*, 59 ALA. L. REV. 1501 (2008).

377. *Honey*, 37 Tex. at 708–09.

378. *See* Carl H. Moneyhon, *Public Education and Texas Reconstruction Politics, 1871–1874*, 92 SW. HIST. Q. 393, 393 (1989) (describing the progressive system of public schools, which included "grading of classes into different levels" and "systematic teacher certification").

379. Kinney v. Zimpleman, 36 Tex. 554, 586 (1871–1872), *overruled by* P.J. Willis &

Presiding Judge Evans, however, in his concurring opinion in that case, noted that "perhaps a majority of the members of the bar throughout the [s]tate" thought the one per cent school tax law enacted by the twelfth legislature was unconstitutional.[380] Challenges to school tax collection continued to be repelled with increasing stridency by three consecutive unanimous opinions of the court, all of them authored by Judge Walker.[381] The intensity of professional feeling on both sides of this issue is perhaps best illustrated by the travails of District Judge Henry Maney.

Henry Maney was the judge of the Twenty-second Judicial District. Sitting in vacation at Seguin, he had scheduled for argument in vacation a motion to dissolve an injunction to restrain collection of the school tax, obtained by several prominent members of the Texas bar including John Ireland, who will appear later in these pages as a member of the Roberts-Gould Court. Before the hearing of the motion, Judge Maney chaired a meeting in Seguin, which approved a resolution expressing "unqualified condemnation of those who, by injunction or otherwise, have sought to hinder the onward progress of the free school system, and through political hatred and partisan prejudice have sought to starve the infant mind, and stamp on God-given intellects the curse of ignorance." Seven lawyers thereupon signed a statement reciting that resolution and Judge Maney's action (or inaction) in connection with it, and declaring that in view of the pre-judgment of a "great question of constitutional and statutory law" by a judge whom they "could not fail to see [as a] politician under ermine," they would withdraw from the case.

Whether this paper, properly styled as a legal filing, was actually filed as such with the court by counsel was a matter of dispute. In any event, Judge Maney fined the lawyers for contempt of court and committed them to custody for non-payment. The proceedings following are documented fully in *Ex parte Rust*.[382] They end with a note by Judge Maney, now himself in custody in

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Bro. v. Owen, 43 Tex. 41 (1875).

380. *Id.*

381. *See generally* State v. Bremond, 38 Tex. 116, 116 (1873) (rejecting objections to school tax collection); Hall v. Houston & Tex. Cent. Ry. Co., 39 Tex. 286, 286 (1873) (rejecting objections to school tax collection); Ireland v. Gordon, 39 Tex. 253, 255 (1873) (holding similarly to *Bremond* and *Hall*).

382. *Ex parte* Rust, 38 Tex. 344 (1873).

Austin, unbowed in spirit but acknowledging the authority of the supreme court. He had, in the end, been committed for contempt himself, as he had disobeyed several mandates of the court, speaking through all three judges, directing him to stop his attempts to fine counsel for extrajudicial utterances and, ultimately, to bar them from practice in his court. Interestingly, Presiding Judge Evans dissented in one of these dispositions, strongly rebuking counsel for having "allow[ed] themselves to be betrayed by passion or resentment into the formation of combinations to destroy or impair the authority of the bench."[383]

The proceedings in this protracted fracas, ranging from May 2, 1873, to September 8 of that year, fill over twenty-seven pages of the *Texas Reports*. They convey some idea of the "passion or resentment" aroused by political controversies at the time. A more direct illustration is afforded by *Gaines v. State*,[384] involving one of the two black state senators.[385] Mathew Gaines, born in Louisiana as a slave and brought as such to Texas where he was freed by "Juneteenth," was a member of the Radical wing of the Republican Party, on record as advocating, among other things, school integration.[386] He was prosecuted in state court for bigamy and sought removal to federal court, asserting that because of his well-known political views, he could not receive a fair trial in a state where juries were "composed by a large majority of democrats" and where, after exhaustion of his peremptory challenges, he would be "left defenseless and helpless against the malignant prejudices of his political enemies."[387]

The trial court overruled his motion to remove, and Gaines was convicted. His appeal to the supreme court turned on the narrow question whether for purposes of removal under the Civil Rights Act, allegation of local prejudice and of lack of availability of a fair and impartial tribunal was sufficient, or whether there had to be an allegation of denial of the rights specifically guaranteed by the removal statute. Wesley Ogden, now the presiding judge,

383. *Id.* at 372.

384. Gaines v. State, 39 Tex. 606 (1873).

385. *See id.* at 610 (describing the appellant in the case as an ex-slave from Louisiana).

386. *See* Ann Patton Malone, *Matt Gaines: Reconstruction Politician*, *in* BLACK LEADERS, TEXANS FOR THEIR TIMES 49, 50, 62 (Alwyn Barr & Robert A. Calvert eds., 2d prtg. 1981) (providing biographical information on Matt Gaines).

387. *Gaines*, 39 Tex. at 608.

answered this question in the former sense, and the cause was referred to the federal courts after reversal. In *Texas v. Gaines*,[388] the federal circuit court sitting in Austin held that only an allegation of denial of rights spelled out specifically in the 1863 Act supported removal and remanded the matter to the state courts.[389] No further prosecution appears to have been initiated, and Mathew Gaines was reelected to the state senate. Ostensibly in view of his conviction for bigamy, however, he was denied his seat, and his political career was at an end.[390]

As indicated by *Rust* and *Gaines*, the last phase of Reconstruction in Texas was a turbulent one. As a precautionary measure against more violent conduct, an enactment of April 12, 1871, had sought to regulate the carrying of deadly weapons, defined as "any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purposes of offense or defense." Such weapons could be carried only on one's own premises, or in reasonable anticipation of unlawful attack, or in frontier regions declared as such by the governor, or by certain public officials expressly defined to exclude members of the legislature. Subject to these exceptions, the carrying of such weapons was punishable by fine or, in case of repeated offense, by imprisonment.[391]

In *English v. State*,[392] the constitutionality of this statute was attacked as a violation of the Second Amendment to the Constitution of the United States. In an opinion by Judge Walker, this contention was rejected, although the applicability of that amendment to the states was (at least) assumed. Seemingly in recollection of his distinguished military career, he wrote:

> To refer the deadly devices and instruments called in the statute "deadly weapons," to the proper or necessary arms of a "well regulated militia," is simply ridiculous. No kind of travesty, however

388. Texas v. Gaines, 23 F. Cas. 869 (C.C.W.D. Tex. 1874) (No. 13,847).

389. *Id.* at 871 (noting that the Civil Rights Act does not support removal of a case to federal court for private infringement of a person's rights).

390. Ann Patton Malone, *Matt Gaines: Reconstruction Politician*, *in* BLACK LEADERS, TEXANS FOR THEIR TIMES 49, 68 (Alwyn Barr & Robert A. Calvert eds., 2d prtg. 1981).

391. Act approved Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 1, 1871 Tex. Gen. Laws 25, 25, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 927, 927 (Austin, Gammel Book Co. 1898).

392. English v. State, 35 Tex. 473 (1871–1872).

> subtle or ingenious, could so misconstrue this provision of the [C]onstitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit. The word "arms" in the connection we find it in the [C]onstitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms.[393]

Nevertheless, in *Waddell v. State*,[394] the court, again speaking through Judge Walker, reversed a conviction under this law, warning against vexatious prosecutions that might lead to the repeal of a law which "when properly understood and rightly administered, is wise and salutary."[395]

As already indicated, public law adjudication by the Semicolon Court involved mainly issues connected with the duties and tenures of state public officers. Under the Constitution of 1869, the court had power to issue the writ of mandamus "under such regulations as may be prescribed by law,"[396] but in the absence of legislative guidance, it was in considerable uncertainty on this subject. As William Pitt Ballinger recorded in his diary on January 23, 1872, he was invited by Presiding Judge Evans to come to his chambers before court that day, where he also found Judges Ogden and Walker. He was asked whether the court had power to issue a writ of mandamus in the Clark estate case, and prepared a written reply in the affirmative for delivery that evening.[397] Later that term, in *International Railroad Co. v. Comptroller*,[398] the court decided tersly and enigmatically, that under the constitution then in effect, it lacked original jurisdiction to issue that writ.[399]

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393. *Id.* at 476.

394. Waddell v. State, 37 Tex. 354 (1872–1873). The accused had purchased two pistols in Crockett, taken them to one or more ammunition stores in that town, and then taken them to his home some fifteen miles away. *Id.* at 356.

395. *Id.* at 355.

396. TEX. CONST. of 1869, art. V, § 3.

397. William Pitt Ballinger, Diary of William Pitt Ballinger 17–18 (Jan. 23, 1872) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

398. Int'l R.R. Co. v. Comptroller, 36 Tex. 641 (1871–1872).

399. *Id.* at 642. The reporter reproduced neither the "very elaborate and able" brief

The 1869 constitution provided that district court clerks as well as sheriffs were to be elected for four-year terms by the qualified electors of each county, "subject to removal by the judge of [the district] court for cause spread upon the minutes of the court."[400] Some judges apparently read this authority quite literally and removed sheriffs and clerks by ex parte fiat, simply declaring them to be incompetent. In *Davis v. State*[401] and in *Ex parte King*,[402] such removals were held to be invalid as in violation of traditional requirements of due process implicit in the Texas constitutional tradition.[403] As Presiding Judge Evans said in the latter case:

> [W]hen the constitution of the state clothed the district judge with the power summarily to deprive an officer of an office to which he had been elected by the people, it was intended that in the exercise of that power the judge should proceed in obedience to the rules of the common law. The proper mode of procedure would be to enter a rule *nisi*, requiring the officer to show cause why he should not be removed from his office; and this rule *nisi* may be entered by the judge, of his own motion, or upon the relation of another; but the rule should in every case set forth in plain and intelligible words the cause for which it is proposed to exercise the power of removal. The cause must be made up of the issuable facts, so as to give the accused an opportunity to contest and disprove them. General allegations of incompetency, or wholesale charges of any kind, will not be enough.[404]

The rule stated in this passage was absorbed into Texas Supreme Court jurisprudence, with its pedigree duly acknowledged. The more fundamental proposition that public

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by E.M. Pease, J.H. Bell, and Moore & Shelley for the railroad, nor the "masterly" brief by William Alexander, the attorney general. *Id.* The opinion of the court by Judge Walker consists of one two-sentence paragraph. *Id.* The constitutional provision in point reads as follows: "The Supreme Court, and the [j]udges thereof, shall have power to issue the writ of *habeas corpus*; and, under such regulations as may be prescribed by law, may issue the writ of [mandamus], and such other writs as may be necessary to enforce its own jurisdiction." TEX. CONST. of 1869, art. V, § 3. In the Semicolon Decision, *Ex parte Rodriguez*, Judge Walker stated that the semicolon in that sentence had been the rationale of the *International Railroad* decision. *Ex parte* Rodriguez, 39 Tex. 705, 773–74 (1873).

400. TEX. CONST. of 1869, art. V, §§ 9, 18.

401. Davis v. State, 35 Tex. 118 (1871–1872).

402. *Ex parte* King, 35 Tex. 657 (1871–1872).

403. *See Davis*, 35 Tex. at 124–25 (holding that the removal of sheriffs by judges should be exercised with caution and in a manner that does not violate due process); *King*, 35 Tex. at 664 (holding that judges cannot arbitrarily remove clerks and sheriffs).

404. *King*, 35 Tex. at 666.

officials accused of malfeasance are entitled to what would now be called procedural due process, however, was subjected to a more stringent test in the waning days of the Semicolon Court. The occasion was the attempted dismissal from office of the state treasurer by the governor of the state. The sequence of events appears from a combined reading of *Honey v. Davis*[405] and *Honey v. Graham.*[406]

The eponymous plaintiff in these cases is of course none other than George W. Honey, elected in December 1869 on the Radical Republican slate as state treasurer for the constitutional term of four years from his installation. He qualified for office on April 13, 1870. On April 23, 1872, he left the state, saying that he would be gone for six weeks. By proclamation of May 27 of that year, Governor Davis declared that Honey had abandoned his office, and appointed Dr. Beriah Graham, superintendent of the state lunatic asylum, as state treasurer. James Davidson, the state adjutant general, was ordered to seize the treasury, but neither military force nor medical proficiency proved capable of opening the vaults.[407]

Honey, represented by able and prominent counsel, promptly brought action against the governor for restoration to office, but by judgment of July 6, 1872, the state district court of Travis County found against him, and ordered him to give the keys and combinations to Beriah Graham, whom it held to be now the lawful treasurer. On appeal, in *Honey v. Davis*, the supreme court recognized Beriah Graham as the state treasurer *pro tempore* and ordered George Honey to deliver the keys and combinations to him. The court left open, however, the question of the validity of the replacement of Honey by Graham as state treasurer by the governor of Texas.[408] Davidson may have realized on this occasion that the pen is a mightier key to the state treasury than the sword.[409]

405. Honey v. Davis, 38 Tex. 63 (1873).

406. Honey v. Graham, 39 Tex. 1 (1873).

407. *Id.* at 2–3; Honey v. Davis, 38 Tex. 63, 65–67 (1873).

408. *See* Honey v. Davis, 38 Tex. 63, 65–67 (1873) (questioning the validity of the governor's replacement of Honey with Graham).

409. *See* W.C. NUNN, TEXAS UNDER THE CARPETBAGGERS 67–78 (1962) (noting that in November 1872, Davidson fled the state, apparently having pocketed some $37,000 drawn from the state treasury by unsubstantiated voucher); *see also* Carl H. Moneyhon, *Davidson, James*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS

The question left open in *Honey v. Davis* was ultimately decided in *Honey v. Graham*, in favor of the plaintiff-appellant.[410] Judge Walker (who we saw had prudently obtained legislative permission for absence from the state between terms) wrote the majority opinion. He proceeded from the premise that the right to hold and to exercise elective office was both a property and a privilege within the ambit of the due process clause of the state constitution. Nothing authorized the governor to declare that office forfeited: "Judgment belongs to the judiciary." Finally, as a factual matter, absence from the state, without more, did not constitute abandonment of office, which required intent to abandon.[411]

Judge McAdoo, concurring, proceeded from this latter proposition: abandonment of office required intent to abandon, and this was not established by several weeks absence from the state. He agreed emphatically that the due process clause of the state constitution barred the governor from creating a vacancy by removing an officer holding office by constitutional tenure. This could, in his opinion, only be achieved by impeachment, or by indictment and conviction for malfeasance.[412]

Presiding Judge Ogden (who had replaced Lemuel Evans in that capacity at the beginning of the fourth term of the Semicolon Court) felt that the functions of the state treasurer, which he described in some detail, were so vital to the very existence of state government that in his opinion "the state treasurer has no right under the law to abandon for a day or an hour the personal supervision of his entire department, unless demanded by a consideration for the health of the body or mind." Moreover, Honey was the plaintiff. The burden to explain his absence from the state was on him, and he had not met that burden.[413]

It remains to add that *Honey v. Graham*, too, is a leading case, recognized as such not only in Texas, but also in several other

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522, 522 (Ron Tyler et al. eds., 1996) (providing an account of Davidson's troubles). By Joint Resolution of February 25, 1874, the legislature directed the attorney general to institute suit against Davidson, and embargo his property in Texas pending such proceedings. Tex. J. Res. 6, 14th Leg., 1st R.S., §§ 1–4, 1874 Tex. Gen. Laws 238, 238, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 240, 240 (Austin, Gammel Book Co. 1898).

410. Honey v. Graham, 39 Tex. 1, 17 (1873).

411. *Id.* at 9, 11, 15.

412. *Id.* at 17.

413. *Id.* at 19, 24–26.

states.[414] Its practical importance for the prevailing party was, however, to be of short duration. As William Pitt Ballinger noted in his diary on January 19, 1874, the Radicals in Austin "—including Honey—" were vacating their offices at the time.[415] His forensic victory had not exempted him from the fate of the other state officers elected in 1869, although his four-year term was not due to expire for another three months.

F. *Notable Decisions*

The Semicolon Court sat for slightly over five months from December 1870, to May 1871, and practically without interruption from December 1871, to January 16, 1874, the 1871–1872 and 1872–1873 terms being separated from the one succeeding only by a Sunday and a full weekend, respectively.[416] (No out-of-state leave of absence between terms, after all, for Judge Walker.) The leading lawyers of the state frequently appeared before the court in those years, and others eager to emulate them regularly sought admission to its bar pursuant to the new supreme court rules. Not unexpectedly, even aside from the constitutional cases discussed above, the jurisprudence of the Semicolon Court is not without interest to students of Texas legal history or, for that matter, of Texas law.

Remarkably enough, that includes Texas criminal law, although this has long since become the province of another tribunal of last resort. In *Long v. State*,[417] for instance, a divided court held, per Presiding Judge Evans: "Every circumstance constituting a statutory offense which would affect the degree of punishment,

414. Denison v. State, 61 S.W.2d 1017, 1019, 1022 (Tex. Civ. App.—Austin 1933, writ ref'd); *see, e.g.*, State *ex rel.* Nagle v. Sullivan, 40 P.2d 995, 998 (Mont. 1935) ("It follows, inevitably, that when a statute provides for an appointment for a definite term of office, without provision otherwise, or provides for removal 'for cause,' without qualification, removal may be effected only after notice has been given to the officer of the charges made against him and he has been given an opportunity to be heard in his defense." (citing Honey v. Graham, 39 Tex. 1 (1873))).

415. William Pitt Ballinger, Diary of William Pitt Ballinger 14 (Jan. 19, 1874) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

416. Minutes of the Supreme Court of Texas 1870–1872, at 1–190, 466 (unpublished minutes, on file with The Texas State Library and Archives); Minutes of the Supreme Court of Texas 1872–1875, at 3, 318, 321, 338 (unpublished minutes, on file with The Texas State Library and Archives).

417. Long v. State, 36 Tex. 6 (1871–1872).

must be alleged in the indictment."[418] Long lines of Texas criminal jurisprudence are still based on that proposition, with express acknowledgement of pedigree, and the Roberts-Gould Court supplied an early link in the chain of authority.[419] We may surmise that taboo or not, no criminal defense lawyer would ever overlook this nugget—much as he would hope for ignorance on the part of the prosecution.

Texas lawyers prevailing at civil jury trial have formed an almost equally strong attachment over the years to *Lloyd v. Brinck*, where Judge Ogden sternly rebuked then-District Judge McAdoo for not entering judgment pursuant to jury verdict in a civil case.[420] "[T]he entry of the judgment" in such cases, he wrote, "involves no judicial or discretionary powers, but is simply a ministerial act, which follows the verdict as a matter of course."[421] This, too, has become standard fare in Texas jurisprudence, and again, there has been, over the years, no hesitation in acknowledging pedigree.[422]

It seems idle to search for similar examples, or to set out once again the many cases refuting the myth of non-citation of Semicolon Court precedent by Texas judges and lawyers. Many of these decisions have long passed into Texas jurisprudence and into anonymity, and the place of the Semicolon Court in the chain of authority is typically not at the apex but somewhere in the middle. The charge of political bias poses a more fruitful line of inquiry. Did the Semicolon Court exhibit unbecoming zeal when deciding what had and what had not been in aid of the rebellion?

This question came up with some frequency in connection with claims arising out of contractual schemes to export cotton—the financial lifeblood of the Confederacy—in violation of federal law and/or in evasion of the naval blockade of the Texas coast during the Civil War. The prime focal points for such contraband trade were Brownsville (across the Rio Grande from Matamoras) and, more secure militarily but otherwise much less convenient, Piedras Negras on the "safe" side of that river in the wilds of northeastern

418. *Id.* at 10.

419. Hobbs v. State, 44 Tex. 353, 354 (1875).

420. Lloyd v. Brinck, 35 Tex. 1, 1, 6 (1871–1872).

421. *Id.* at 6.

422. The case of *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779, 782 (Tex. 1967) (Norvell, J.), is so far the most recent of a string of some thirty Texas citations to this case.

Mexico. Schemes contemplating shipments via Piedras Negras were obviously in evasion of the Union blockade, and claims arising out of such transactions were disallowed.[423] Cotton haulage contracts to Brownsville while in Confederate hands, however, survived scrutiny as to ulterior motive, and carriers recovered for haulage still owing.[424]

As already indicated, acts of sequestration by Confederate authority were manifestly in aid of rebellion and did not absolve paying debtors from liability to their erstwhile "enemy" creditors. On the other hand, where the sequestrator had seized "enemy" goods at the hands of the bailee and the goods perished, the bailee escaped liability: *res perit domino*, and that was that.[425]

A problem of almost grotesque irreality arose in connection with a federal transaction stamp tax act, which, even when known locally, defied compliance for want of stamps. The Semicolon Court resolved the issue of the validity of unstamped instruments by following judicial authority elsewhere—that the absence of the federal stamp did not absolve from federal tax liability but also did not affect the validity of unstamped documents.[426]

It is difficult to discern in decisions such as these any bias beyond that displayed by the Supreme Court of the United States in *Texas v. White* against secession and acts in support thereof. Even a case such as *Rodgers v. Ferguson*[427] where the court observed with obvious disapproval that the matter had been before it and that no less than four jury trials had resulted in insufficient damage awards against a sheriff for malfeasance in office, turns out to have involved nothing more than over-zealous execution against exempt property.[428] Much of the caseload of the Semicolon Court involved the sufficiency of the indictment and the sufficiency of the evidence (for refusal of bail as well as for conviction) in criminal prosecutions, and the correctness of the jury charge in civil cases. One miserable case, over a ten-dollar subscription for the construction of a bridge that was built with

423. Whitis v. Polk, 36 Tex. 602, 603 (1871–1872).
424. House v. Soder, 36 Tex. 629, 633–34 (1871–1872).
425. Wilkinson v. Williams, 35 Tex. 181, 182 (1871–1872).
426. Dailey v. Coker, 33 Tex. 815, 816–17 (1870–1871).
427. Rodgers v. Ferguson, 36 Tex. 544 (1871–1872).
428. *See* Rodgers v. Ferguson, 32 Tex. 533, 534–35 (1870) (explaining that the court gives the most liberal construction to laws dealing with exemption from forced sales).

some delay, reached the court and its predecessors twice, leading to a judgment, at long last, for plaintiff because the second trial judge had disregarded the parol evidence rule.[429] Parson's *The Law of Contracts*,[430] the *vademecum* of the court in such cases, was apparently not available regularly to district courts on circuit in East Texas.

Before proceeding to a discussion of cases of historical interest decided by the Semicolon Court, it seems appropriate to note some possibly revealing gaps in its jurisprudence. *Bartee v. Houston & Texas Central Railway Co.*[431] appears to have been one of the few tort cases decided by that court, and the only one involving a railroad. Its holding (apparently of first impression in Texas) that railroad companies, being corporations, were "persons" in contemplation of the law, found ready acceptance, again with due acknowledgement of pedigree.[432] The dearth of railroad accident litigation at the time is readily explained by contemporary railroad maps.[433] Divorce cases as well, although not entirely absent from the docket, were few in number.

Cases that are now purely of historical interest include, most prominently, *Dauchy v. Devilbiss*.[434] Judge Walker's opinion in that case is a documented account of the establishment of New Braunfels and of the efforts of the Prince of Solms-Braunfels in that connection. The court had to deal with challenges to the settlers' land titles twice before. It now put that issue to rest, paying handsome tribute to the settlers confirmed in their titles and to their princely benefactor. The latter was much in need of praise at the time.[435]

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429. Cooper v. McCrimmin, 33 Tex. 383, 388–89 (1870); *see* McCrimmin v. Cooper, 27 Tex. 113, 113, 115 (1863) (noting that the subscription had been made in 1857, and the bridge was built in 1858).

430. THEOPHILUS PARSONS, THE LAW OF CONTRACTS (6th ed. 1984).

431. Bartee v. Houston & Tex. Cent. Ry. Co., 36 Tex. 648 (1871–1872).

432. Fleming v. Tex. Loan Agency, 87 Tex. 238, 240 (1894).

433. *See* CHARLES P. ZLATKOVICH, TEXAS RAILROADS, A RECORD OF CONSTRUCTION AND ABANDONMENT 108–09 (1981) (showing Texas railway lines in 1870 and 1880). In 1870, Texas had 486 miles of rail; in 1880, it had 2,440. *Id.* at 4.

434. Dauchy v. Devilbiss, 37 Tex. 93 (1872–1873).

435. Glen E. Lich & Günter Moltmann, *Solms-Braunfels, Prince Carl of, in* 5 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 1141, 1141–42 (Ron Tyler et al. eds., 1996) (stating that the performance of Prince Carl zu Solms-Braunfels as a general in the Austrian army in the 1866 war with Prussia was reviewed by court-martial; however, he was acquitted).

The lands at issue in *Dauchy* had been granted out of Spanish sovereignty, but the validity of the original grant was no longer in dispute at that stage. Otherwise, there would have been occasion to consider Spanish law (or more precisely, the law of Castile and of the Indies) as applicable in that part of Texas at the time of the sovereign's grant, for under Texas law, both the validity and the extent of public land grants is governed by the law of the granting sovereign, as that law stood at the time and place of the grant.

Over the years, this has increasingly become a dead law in a foreign language, no longer in effect either in Texas or in its country of origin. With increasing remoteness in time, however, the means for its ascertainment have improved, as has judicial disposition to question former adjudications in the light of new insights. *Paschal v. Dangerfield*[436] documents the state as well as the sources of knowledge of the Texas bench and bar as to Spanish and Mexican law *qua* law of the former sovereign in the decade before increased land values in South Texas led to on-site searches of the archives of the Intendency of San Luis Potosí and of the Viceregal archives in Mexico City.[437]

At issue in that case, once again, was the question whether a grant from the government of a part of the public domain could be presumed on the basis of undisturbed possession authorized by public (in this case, Spanish) authority. George Paschal, arguing in the negative, submitted an elaborate written argument, several parts of which are reproduced in the *Reports*. This includes especially a section thereof on "The Law of Imperfect Titles"—a mini-monograph on that subject.[438]

The court, speaking once more through Judge Walker, drew the obvious distinction between presumption of grant between private parties and as applied to grants out of the sovereignty of the soil, and dismissed, at long last, an action based on the latter. The authorities considered in this connection by the court and counsel show that despite the extensive holdings of Spanish and Mexican law books in the supreme court library, no resort was had to these sources.[439] Access to English-language translations of the pertinent Spanish and Mexican enactments was provided readily

436. Paschal v. Dangerfield, 37 Tex. 273 (1872–1873).
437. *Id.* at 276–305.
438. *Id.* at 277–89.
439. *Id.*

by White's *Recopilacíon*.[440]

The adjudication of land rights deriving from Spanish and Mexican grants was, of necessity, an exercise in legal history. The determination of entitlements to the waters of streams in the newly settled western parts of the state for irrigation purposes, on the other hand, called for the application of common-law rules to novel circumstances or for the creation of new rules to fit conditions radically different from those prevailing in the mother country of the common law and in the temperate regions of North America. In *Fleming v. Davis*,[441] the Semicolon Court had to choose between these two approaches.[442] Its decision in favor of a variant of the riparian system and, perforce, against prior appropriation was an event of historical significance. Once again, it has always been acknowledged as such in subsequent Texas jurisprudence.[443]

At issue in that case was the division of the waters of Simpson's Creek, a tributary of the San Saba River about three miles in length and rising on lands irrigated initially by a squatter, but subsequently acquired by Fleming, the appellant.[444] Fleming's extensive use of the waters of the creek was found by the jury to have caused damage to the lands of the plaintiff, a lower riparian, who was awarded the princely sum of seventy-five dollars in damages.[445] Since other riparians intervened in the case, the trial judge felt emboldened to divide the waters, awarding three-sevenths of the flow of the creek to Fleming and enjoining him from using more.[446]

Judging by the eminence of counsel on both sides, this was

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440. *See generally* JOSEPH M. WHITE, A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES OF THE GOVERNMENTS OF GREAT BRITAIN, FRANCE AND SPAIN, RELATING TO THE CONCESSIONS OF LAND IN THEIR RESPECTIVE COLONIES (Philadelphia, T. & J.W. Johnson 1839) (providing Spanish laws relating to land titles).

441. Fleming v. Davis, 37 Tex. 173 (1872–1873).

442. *See id.* at 193–94 (deciding a controversy between one party who claimed exclusive rights to the water for irrigation purposes and another party who claimed rights to the water through prior appropriation).

443. *See In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 439 (Tex. 1982) (citing *Fleming* as support for the proposition that "Texas [has] recognized both the law of riparian rights and also the law of appropriation of waters").

444. *See Fleming*, 37 Tex. at 192–93 (discussing the division of Simpson's Creek in San Saba County).

445. *Id.* at 173–74.

446. *Id.*

obviously a test case. George F. Moore (soon to resume his position on the court) and Nathan G. Shelley (appearing for Fleming) argued for the adoption of what they conceived to be the California system, described by them as permitting upstream riparians to exhaust, if need be, the whole flow for irrigation purposes.[447] Interestingly from a later perspective, they did not rely expressly on what came to be known subsequently as the "first in time, first in right" rule, and they made no mention of Fleming's ownership of the headspring. Terrell and Walker (soon to become supreme court reporters and then rise to higher positions) argued for a modified riparian system, which, they maintained, had a statutory basis in Texas by virtue of the common-law reception Act of 1840.[448] They did, however, defend the division of the waters as reasonable under the circumstances. Their argument was illustrated by references to foreign irrigation systems ranging from Lombardy to British India.[449]

Writing yet again for the court, Judge Walker set out the modified common law rule as stated in Kent's *Commentaries*, which he quoted at great length.[450] He then proceeded to discuss whether local conditions were so different as to justify departure therefrom.[451] Although he answered this question in the negative, he concluded his opinion by noting that it could "scarcely be doubted that the wealth and comfort of our people throughout a large portion of the [s]tate might be greatly augmented by wise legislation on [the] subject," and calling upon the legislature then in session to consider the matter.[452]

In the decision, the plaintiff was allowed to recover her damages, plus interest, "for the trespass against her rights as a riparian proprietor in the ordinary use of the water," but the division of the waters by the district court was reversed.[453] The lower riparians were thus left to seek judicial determinations of

447. *Id.* at 180–81.

448. *Cf. id.* at 186–202 (citing case law showing that the legislature had recognized preexisting English common law, and then adopting the common-law rule of riparian rights as a result).

449. *See Fleming*, 37 Tex. at 190–91 (recounting the laws of other countries that divided water so that all users could share in the use of it).

450. *Id.* at 194–96.

451. *Id.* at 194–99.

452. Fleming v. Davis, 37 Tex. 173, 201–02 (1872–1873).

453. *Id.* at 201.

their entitlements against the owner of the headwater lands in the future as occasion arose. Almost needless to say, they felt the need to do this less than a decade thereafter, in *Baker v. Brown*.[454] The Roberts-Gould Court, expressly following *Fleming*, again ordered the topmost riparian to moderate his consumption.[455] The legislature, unsurprisingly, had failed to heed the call from the Semicolon Court for remedial legislation. Nevertheless, in 1889, it sought to superimpose the prior appropriation system on the arid parts of the state, subject to the vested water rights of riparians.[456]

G. *The Semicolon Decision and the End*

On June 4, 1873, the state legislature proposed three constitutional amendments for consideration at the next general election. One of these provided for a supreme court of one chief justice and four justices, appointed by the governor for terms of nine years subject to senate approval, and holding its sessions at the capital as well as "two other places in the [s]tate."[457] Elections were held on December 2 of that year, and the amendment was approved along with the two others being considered.[458] Under the 1869 constitution, however, the amendment did not become effective unless also approved by a qualified majority of the two houses of the state legislature elected at the same time.[459]

Thus, one day after the opening of its fourth annual session on Monday, December 1, 1873, the three-judge supreme court

454. Baker v. Brown, 55 Tex. 377 (1881).

455. *See id.* at 380–81 (discussing the deed in controversy and stating "that the defendants had no lawful right to use the waters of Simpson['s C]reek for the purposes of irrigation" if such use would "materially . . . impair the right of the plaintiff to the reasonable use of the same").

456. Act approved Mar. 19, 1889, 21st Leg., R.S., ch. 88, § 1, 1889 Tex. Gen. Laws 100, 100, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1128, 1128 (Austin, Gammel Book Co. 1898).

457. Tex. J. Res. 1, 14th Leg., 1st R.S., § 2, 1874 Tex. Gen. Laws 233, 234, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 235, 236 (Austin, Gammel Book Co. 1898).

458. *See* Tex. J. Res. 1, 14th Leg., 1st R.S., §§ 1–4, 1874 Tex. Gen. Laws 233, 233–35, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 235, 235–37 (Austin, Gammel Book Co. 1898) (detailing three proposed amendments to the constitution and noting their passage by two-thirds of the legislature).

459. *See* TEX. CONST. of 1869, art. XII, § 50 (providing for ratification of proposed amendments by two-thirds of the newly elected legislative members).

established under the 1869 constitution faced its complete replacement by another tribunal. Its fate as an institution depended on the will of two-thirds majorities in both chambers of the legislature then elected, but since the Democrats had prevailed massively, approval of the court amendment was a foregone conclusion. The newly elected governor might decide to appoint one or more of the three holdover supreme court judges to the new five-justice court, but this too, was unlikely. Edmund Davis, the incumbent running for reelection, had been defeated by Richard Coke by a lopsided vote of 100,415 to 52,141, and the other Republican candidates for state-wide elective office had suffered a like fate.[460]

There was, however, a curious discrepancy (or at least a potential discrepancy) between the constitutional provision on state elections then in effect and the Act of March 31, 1873, under which these elections were held. That enactment provided, in so many words, that elections were to be held "for one day only," and a subsequent statute, of May 26 of that year, had designated the first Tuesday of December 1873 (and of every two years thereafter) as the date of general elections in Texas.[461]

One-day general elections had been the statutory pattern in Texas since the Republic, and this time frame had been compatible with all Texas constitutions until, at least arguably, that of 1869. Article III, section 6 of the latter instrument provided, in terms:

> All elections for [s]tate, district, and county officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days, from eight o'clock [a.m.] until four o'clock [p.m.] of each day.[462]

This provision clearly authorized the enactment of a statutory scheme for the holding of elections at places other than county seats, i.e., more conveniently accessible to voters in an as yet sparsely settled state. Indeed, this had been the primary purpose of the Act of March 31, 1873, which had constituted justice of the peace precincts, "election precincts," and had authorized county

460. *See* CARL H. MONEYHON, REPUBLICANISM IN RECONSTRUCTION TEXAS 223 (1980) (recounting the election votes between Edmund Davis and Richard Coke).

461. Act approved May 26, 1873, 13th Leg., ch. 66, § 1, 1873 Tex. Gen. Laws 100, 100, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 552, 552 (Austin, Gammel Book Co. 1898).

462. TEX. CONST. of 1869, art. III, § 6.

courts to divide these even further if "expedient."[463] Under this new scheme, there seemed little need to hold elections for four days—a time frame introduced by the Constitution of 1869 and put into use prenatally, as it were, at the election on its own adoption.

There was, however, the contrary argument that the clause in question following the semicolon stood apart from the initial clause authorizing legislative modification of the localization scheme otherwise prevailing. Central to this argument was the grammatical structure of this sentence, emphasized by the significance of the semicolon between its two clauses. If that punctuation demonstrated (as it would ordinarily) that the two half-sentences divided by it stood independently of each other, the four-day election time scheme of the second clause was not subject to legislative modification but was mandatory. It would follow that the Texas general election held on Tuesday, December 2, 1873, was unconstitutional because as mandated by the constitution then in effect, it should have continued through Friday of that week. Whether the presiding officer and the bipartisan pairs of "judges" and "clerks" who had served as volunteers at each precinct on that day would have been willing to do so for the better part of a working week is another question.

More directly to the point, perhaps, were the political implications of a constitutional challenge to the 1873 election. Governor Davis had signed both the Act of March 31, 1873, and that of May 26, and he had submitted the three constitutional amendments for popular vote on one day only. The supreme court was in an even more delicate position. The unexpired terms of Chief Judge Ogden and of Judges Walker and McAdoo were three, six, and nine years, respectively. If the electoral results stood and, then to be expected, the constitutional amendment of the judiciary article was to be approved, their judicial tenures were at an end, and appointment to the new supreme court would be a faint hope at best for at least two of them.

In short, the Texas Supreme Court, sitting under the 1869 constitution as originally adopted, was not a neutral forum for the adjudication of the constitutionality of an election, which, if upheld, would almost certainly put an end to its existence. That

463. Act approved Mar. 31, 1873, 13th Leg., ch. 19, § 1, 1873 Tex. Gen. Laws 20, 20–21, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 472, 472–73 (Austin, Gammel Book Co. 1898).

alone should have suggested judicial self-restraint. Moreover, with interlocutory appeals no longer available, it was quite impossible to mount a challenge to the constitutionality of an election held on December 2, 1873, in time to forestall the convening of the legislature in January 1874, without resort to the original jurisdiction of the court—an unusual procedure suggestive of judicial activism and hence enhancing exposure to the charge of partisan impropriety.

The court had previously disavowed original mandamus jurisdiction in the absence of statutory implementation of constitutional authority.[464] Its habeas corpus jurisdiction, however, was not similarly encumbered. At the instigation of A.B. Hall, who had been defeated on December 2, 1873, for re-election as sheriff of Harris County, one Joseph Rodriguez was charged with having voted twice in that election.[465] This was a felony under the Act of March 31, 1873.[466] Represented by Andrew Hamilton and by former Judge Chauncey B. Sabin of Galveston (apparently the originator of the scheme to challenge the constitutionality of that enactment), Rodriguez promptly petitioned the supreme court for a writ of habeas corpus. Presiding Judge Ogden granted that writ,[467] setting the stage for a fierce debate over the propriety of the exercise of habeas corpus jurisdiction in a case where the state disclaimed any interest in prosecuting the relator.

The dispute was, in the main, between a committee of distinguished members of the Austin bar intervening with permission of the court, and Sabin and Hamilton on the other side, ostensibly in defense of Rodriguez. At the preliminary stage, both sides were arguing for dismissal: the interveners because the case was fictitious, and the Rodriguez team because the law under which he was charged was unconstitutional. These proceedings

464. *See* Int'l R.R. Co. v. Comptroller, 36 Tex. 641, 642 (1871–1872) (holding that the Texas Constitution of 1869 did not grant original jurisdiction to the supreme court in cases of mandamus).

465. *See Ex parte* Rodriguez, 39 Tex. 705, 707–08 (1873) (detailing the arrest of Joseph Rodriguez for allegedly voting twice in state elections).

466. *See* Act approved Mar. 31, 1873, 13th Leg., ch. 19, § 31, 1873 Tex. Gen. Laws 20, 29, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 472, 481 (Austin, Gammel Book Co. 1898) ("[A]ny person who shall vote, or attempt to vote, more than once at the same election, shall be deemed guilty of a felony . . . .").

467. *Rodriguez*, 39 Tex. at 707.

are well-summarized and documented[468] due to the happy coincidence (happy, that is, for students of judicial history) that lead counsel for the interveners went on to become one of the supreme court reporters.

At one stage, the court intimated that Rodriguez, not having been indicted, would be discharged unless proof of guilt was forthcoming.[469] This obstacle was overcome, however, by testimony actively elicited by the court itself, thus opening the way to argument of the constitutional point. The official report does nothing to allay the suspicion of judicial connivance in a contrived scheme. Particularly disturbing in this connection is the refusal of the court to grant the district attorney of Harris County additional time to procure witnesses in support of his motion suggesting fraud on the court—a motion supported by his intimate knowledge of the proceedings in the county where the alleged offense had been committed.[470] The grand jury had, after all, refused to indict Rodriguez, and the prosecutor was convinced of his innocence.

The outcome of the constitutional issue in *Ex parte Rodriguez* is likely to have been of little surprise to counsel at the time. Alexander W. Terrell, for the interveners, argued in the main that the case was fictitious, that it called for dismissal because of the political question doctrine, and that in any event, the legislature had exclusive jurisdiction in the matter, relying on article III, section 15 of the constitution, which provided: "Each house shall judge of the elections and qualifications of its own members."[471] He brought in the governor under that clause, but did not mention the three constitutional amendments.[472]

Andrew Hamilton's argument in response is reproduced less comprehensively. Its main feature, in historical perspective, is his impassioned defense of his actions in and after the Civil War. As an even more personal aside, he stated that he had not learned his lessons in patriotism "in a foreign land, in Mexico, under a carpet-bag emperor, who was afterwards shot for interfering with the

468. *See generally id.* at 707–47 (reporting the disposition of the case).

469. *Cf. id.* at 715 (noting courts should not entertain fictitious cases, but ultimately concluding the arrest and charge to be legal).

470. *Id.* at 717.

471. *Id.* at 729 (citing TEX. CONST. of 1869, art. III, § 15).

472. *Rodgiguez*, 39 Tex. at 730.

constitutional rights and liberties of a free people."[473]

With that epithet in the record, it was perhaps even more unfortunate that Judge Moses Walker was to write the opinion for a unanimous court. After stating that for habeas corpus purposes the contention that a fictitious case had not been presented, he dwelled at length on the duty of the judicial branch in a separation-of-powers system to pass on the constitutionality of legislation.[474] A more direct answer to the bald assertion that the constitutional power of each house of the legislature to judge the qualification and election of its members included the sole power to decide the constitutionality of the statute under which the whole legislature was elected would not have been out of place here.

Several generations of Texas lawyers have internalized the tradition that the decisive factor in *Rodriguez* was the semicolon dividing the two clauses of article III, section 6 of the state constitution then in effect. While that punctuation mark was of some moment in Judge Walker's reasoning, his main focus was on the grammatical structure of that section, read as a whole. As he summarized this point at the end of his opinion:

> Now, let us look again at section 6, and ask this question: if the convention had intended the words "until otherwise provided by law," to apply to both clauses of the section, why do not these words follow the second as well as the first clause, or why were they not inserted at the conclusion of the section where they could grammatically apply to both clauses? Neither will the rules of grammar nor of good composition admit of a proviso or condition, placed at the conclusion of an antecedent clause, applying to the subsequent clause of the sentence.[475]

In the face of a steady stream of vituperation over the years, it is perhaps sobering to note that in the view of two manifestly disinterested recent commentators, this decision "was almost

473. *Id.* at 745–46. This was a reference to Alexander Terrell's brief service, in the latter part of 1865, in Marshal Bazaine's army in Mexico with the provisional rank of Chef de Bataillon. He served with the French garrison at St. Luis de Potosí and saw no action. *See generally* ALEXANDER WATKINS TERRELL, FROM TEXAS TO MEXICO AND THE COURT OF MAXIMILIAN IN 1865 (1933) (chronicling Watkins's post-Civil War military service in Mexico).

474. *See Rodriguez*, 39 Tex. at 748–50, 752–73 (detailing many of the difficulties faced by courts in reviewing the constitutionality of legislation and discussing the various factors a court must consider when making such a review).

475. *Id.* at 775–76.

certainly correct as a matter of the plain meaning of the constitutional text."[476] Plain meaning, however, is (and was at the time) only one canon of constitutional interpretation. Purposive interpretation, even if not delving into the proceedings of the 1868–1869 Constitutional Convention, would have at least led to the consideration of a seemingly obvious question. Why would the convention (and/or those voting for the constitution) have wanted to encourage a legislative scheme more humane than biennial pilgrimage to county seats but still tied permanently to an increasingly extravagant mandatory time frame—one that was going to become, predictably, too long rather than too short with the shrinking of the distance to the polling place?

Different reasoning with the same result would have spared the Semicolon Court its epithet but would hardly have improved its image in the years to come. That court had, after all, a direct interest in the outcome, and it had, with unbecoming haste, seized upon a case manufactured for the occasion. Perhaps most importantly, it reached a result regarded almost universally as an attempt to nullify (or at least to delay significantly) the decision of the vast majority of Texas voters to put an end to Reconstruction.

As will be seen in the next chapter, the Semicolon Decision did not prevent the seating of the legislature elected in December 2, 1873, the assent of that legislature to the constitutional amendments then adopted, and in consequence, the replacement of the three judges of the court now known as the Semicolon Court by a tribunal with a quite different composition and orientation.[477] The minute book of the supreme court records an order made *nunc pro tunc* on January 16, 1874, in, of all cases, *Honey v. Graham*.[478] This is followed by several entries noting the absence of a quorum. On January 29 of that year, with Presiding Judge Ogden and Judge Walker sitting, the court issued an order amending a prior opinion, but by that time, the legislature

476. Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 340 (2002).

477. *See* Tex. J. Res. 1, 14th Leg., 1st R.S., § 2, 1874 Tex. Gen. Laws 233, 234, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 235, 236 (Austin, Gammel Book Co. 1898) (creating a supreme court of five justices, "any three of whom shall constitute a quorum").

478. Minutes of the Supreme Court of Texas 1872–1875, at 338 (unpublished minutes, on file with The Texas State Library and Archives).

had already approved the constitutional amendment[479] creating an entirely new supreme court.

V. THE ROBERTS-GOULD COURT, 1874–1876

A. *Judges, Sessions, Reporters, and Clerks*

The decision of the supreme court in *Rodriguez* was announced on January 5, 1874. It had no immediate effect on the qualification for office of county and local officials elected in December 2, 1873, who appear to have assumed their offices with little, if any, resistance. In Austin as well, Governor Davis was unable to prevent either the convening of the legislature elected on that day or, as a last resort, the inauguration of Governor-elect Richard Coke.[480] In both instances, Washington refused to intervene, and by January 19, 1874, the Republicans in state-wide office had yielded their positions to their successors elected in December 1874. Most significantly for present purposes, the newly elected secretary of state was able to certify on January 26, 1874, that the three constitutional amendments approved by the electorate on December 2, 1873, had been approved by both houses of the legislature with the requisite two-thirds majorities.[481]

Thus, on January 24, 1874 (the date of house approval of the amendment of sections 2, 3, and 4 of the judiciary article of the 1869 constitution), the Semicolon Court had been replaced by a state supreme court consisting of a chief justice and four associate justices, to be appointed by the governor (subject to senate approval) for terms of nine years. Governor Coke promptly appointed Oran Roberts chief justice, Thomas J. Devine, Reuben A. Reeves, George F. Moore, and last but hardly least, a very

479. *See* Tex. J. Res. 1, 14th Leg., 1st R.S., § 2, 1874 Tex. Gen. Laws 233, 234, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 235, 236 (Austin, Gammel Book Co. 1898) (sanctioning the composition of the Texas Supreme Court).

480. *See* Carl H. Moneyhon, *Edmund J. Davis in the Coke-Davis Election Dispute of 1874: A Reassessment of Character*, 100 SW. HIST. Q. 131, 137–50 (1996) (chronicling the reaction of the Democrats to Republican Governor Davis's stalling of Governor-elect Coke's inauguration).

481. *See* Tex. J. Res. 1, 14th Leg., 1st R.S., § 4, 1874 Tex. Gen. Laws 233, 235, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 235, 237 (Austin, Gammel Book Co. 1898) (certifying that the resolution passed both the senate and the house with the requisite two-thirds majority).

reluctant William Pitt Ballinger.[482]

Ballinger had been the prime candidate of both parties and the Texas bar to replace Lemuel Evans on the Semicolon Court but had declined, mainly for financial reasons.[483] Richard Coke and Oran Roberts approached him even before the December elections, and had pressed his offer of judicial preferment repeatedly thereafter. In the end, Ballinger lent his name (and his presence) for one day only, resigning immediately after the first session of the new court.[484] At his suggestion, Peter W. Gray was appointed in his place.[485]

This episode throws some light on the realities of law practice in Texas in 1873. Ballinger was clearly the leader of the Texas bar at the time. His annual income from practice was about $10,000, but book purchases and entertainment burdened his budget to such an extent that he was constantly in debt. At one stage, he envisaged selling his library and leasing the upper part of his house to the Galveston branch of the supreme court to be reestablished pursuant to the 1873 amendment. In the end, however, the prospect of a judicial salary of $4,500 even under those circumstances appears to have weighed heavily on his mind, as surely did the negative counsel of his wife.[486]

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482. *See* J.H. DAVENPORT, THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS 110–11 (1917) (detailing those appointed to the state supreme court by Governor Coke).

483. William Pitt Ballinger, Diary of William Pitt Ballinger 121 (Nov. 14, 1875) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

484. *See* J.H. DAVENPORT, THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS 111 (1917) (noting the resignation of Justice Ballinger shortly after his commission to the court).

485. *See* William Pitt Ballinger, Diary of William Pitt Ballinger 133 (Dec. 12, 1873) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (recalling correspondence between Ballinger and Richard Coke regarding Ballinger's appointment); William Pitt Ballinger, Diary of William Pitt Ballinger 131 (Dec. 8, 1873) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (recording Ballinger's acceptance of the judgeship and his desire to see the appointment of Justice Gray); William Pitt Ballinger, Diary of William Pitt Ballinger 121 (Nov. 14, 1873) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (noting Ballinger's correspondence with Richard Coke about a possible appointment to the supreme court and the consideration he gave to his personal debts).

486. *See* William Pitt Ballinger, Diary of William Pitt Ballinger 129 (Dec. 5, 1873) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (recalling the reluctance of Ballinger's wife to see him confirmed).

With Ballinger's resignation and Gray's appointment, the new supreme court consisted of Chief Justice Roberts and Justices Devine, Gray, Moore, and Reeves. Justice Gray was of poor health at the time of his appointment. He resigned on April 13, 1874, and was succeeded by Robert S. Gould.[487] Justice Devine served until September 2, 1875, and was replaced by John Ireland.[488]

Oran Roberts, George Moore, and Reuben Reeves had served on the Supreme Court of Texas during the Civil War, and Justice Moore had been elected chief justice of the Presidential Reconstruction Court. Thomas Jefferson Devine, too, had held judicial office under the Confederacy, being the Confederate District Judge for the Western District of Texas.[489] Justices Gray, Gould, and Ireland had been members of the Texas Secession Convention, and Chief Justice Roberts was chosen to be its presiding officer by acclamation. The United States Senate had refused to seat Oran Roberts.[490] George Moore, Robert Gould, John Ireland, and Reuben Reeves had been removed by United States military authority from judicial office on account of their designation as "impediment[s]" or "obstruction[s]" to Reconstruction.[491] Thomas J. Devine had the rare distinction, along with Jefferson Davis, of being one of the three persons prosecuted for treason after the Civil War.[492]

It will be recalled that Richard Coke himself had been removed by military authority from the Supreme Court of Texas for his

487. *See* J.H. DAVENPORT, THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS 111 (1917) (recording the appointment and resignation of several justices).

488. *Id.* at 127.

489. *Id.* at 113.

490. *See id.* at 51 (noting that Justice Roberts was prohibited from serving as a United States Senator because he was deemed an "unpardoned rebel" and an "impediment to reconstruction").

491. *See* Fred F. Abbey, *Gould, Robert Simonton*, *in* 3 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 258, 258 (Ron Tyler et al. eds., 1996) (providing biographical information on Robert Gould); Georgia Kemp Caraway, *Reeves, Reuben A.*, *in* 5 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 508, 508 (Ron Tyler et al. eds., 1996) (profiling Reuben Reeves); Claude Elliott, *Ireland, John*, *in* 3 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 867, 867 (Ron Tyler et al. eds., 1996) (detailing the life of John Ireland); *Moore, George Fleming*, *in* 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 819, 819 (Ron Tyler et al. eds., 1996) (describing the life of George Moore).

492. Yancey L. Russell, *Devine, Thomas Jefferson*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 613, 613 (Ron Tyler et al. eds., 1996).

"known hostility to the general government."[493] Upon his return to power as the governor of Texas, he concentrated his appointments to the supreme court on those who had suffered a like fate, including a former chief justice and no less than three ex-district judges: George Moore and former district judges Gould, Ireland, and Reeves. His remaining two appointments to the court included the president of the Texas Secession Convention and one of the few ex-Confederates prosecuted for treason.

It seems difficult to conceive of a court more radically different in composition from its immediate predecessor. Perhaps to underline this point, the reporters of the jurisprudence of what is called here the Roberts-Gould Court saw fit to remark in the first paragraph of their preface to volume forty of the *Texas Reports*:

> With this volume we pass to another era in the judicial history of Texas. Those who have before construed the laws of this [s]tate, and who have assisted in the effort to preserve constitutional freedom for its citizens, again constitute its court of last resort.[494]

One of these reporters, Alexander W. Terrell, had recently argued before the Semicolon Court on behalf of the Austin Committee of Lawyers. When addressing the justices of the supreme court some twenty-five years later, he was emboldened to add an explicit racial component to the observation just quoted, saying: "In 1874, after the white race had, by the election of Governor Coke, resumed the control of the [s]tate [g]overnment, Judge Roberts was appointed [c]hief [j]ustice of the [s]upreme [c]ourt, to which office he was afterwards elected in 1876."[495] A few months before his death, the ex-chief justice penned his anathema on the Semicolon Court, concluding with the assertion that the volumes containing the decision of that court were "as it were, tabooed by the common consent of the legal profession."[496]

It seems likely that by the end of the nineteenth century, the

493. *Cf.* John W. Payne, Jr., *Coke, Richard*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 193, 193 (Ron Tyler et al. eds., 1996) ("Coke was . . . removed [from the court] . . . by Philip Henry Sheridan, the military commander." (citation omitted)).

494. Alex W. Terrell & Alex S. Walker, *Preface* to 40 Tex., at v, v (1882).

495. A.W. Terrell, In Memoriam, *Proceedings Touching the Death of Hon. Oran M. Roberts, Late Chief Justice of the Supreme Court*, *in* 92 Tex., at v, viii (1898).

496. Oran M. Roberts, *The Political, Legislative, and Judicial History of Texas for Its Fifty Years of Statehood, 1845–1895*, *in* 2 A COMPREHENSIVE HISTORY OF TEXAS, 1685 TO 1897, at 7, 201 (Dudley G. Wooten ed., 1986).

notion of such a taboo was in the ascendancy. The acid question in the months and years immediately following January 1874, however, was whether a Supreme Court of Texas composed of unrepentant champions of the Lost Cause was to disregard, vilify, or perchance seek occasional guidance from the jurisprudence of its immediate successor, which had marched (triumphantly, at that) to a different drummer.

In practical terms, part of the answer came about immediately, for the new court convened in February 1874, and was in need of a clerk. W.P. de Normandie had been re-appointed to that position by the Semicolon Court on December 8, 1873. "[S]upported by the recommendation of respectable attorneys," he asserted his right to the office of clerk of the supreme court for the constitutional term of four years.[497] In a decision styled *In re Supreme Court Clerkship*,[498] his claim was upheld. Writing for a unanimous court, Chief Justice Roberts held that while the constitutional amendment adopted on January 24, 1874, had changed the provisions of the judiciary article relating to the composition of the supreme court, it had continued the existence of the court as an institution, including the provision relating to the clerk and his term of office.[499] W.P. de Normandie was to continue as clerk of the supreme court until the very end of the Roberts-Gould era.[500]

The 1873 constitutional amendment had not only changed the composition of the court, but had also mandated that it hold its sessions "at the capital and at two other places in the [s]tate."[501] It had also omitted the provision conditioning appeals in criminal cases on a finding of error of law by a member of the court. The former change required legislative implementation, and the latter, judicial construction.

The Act of February 27, 1874, provided, unsurprisingly, that the

497. *In re* Supreme Court Clerkship, 40 Tex. 1, 1 (1874).

498. *In re* Supreme Court Clerkship, 40 Tex. 1 (1874).

499. *See id.* at 2–3 (discussing the appointment of clerks to the supreme court).

500. W.P. de Normandie served as the clerk of the Supreme Court of Texas at Austin from December 6, 1869, to November 25, 1881. He died three days later. *See* Leila Clark Wynn, *A History of the Civil Courts of Texas*, 60 SW. HIST. Q. 1, 21 (1956) (detailing the dates of de Normandie's service).

501. Tex. J. Res. 1, 14th Leg., 1st R.S., § 2, 1874 Tex. Gen. Laws 233, 234, *reprinted in* 8 H.P.N GAMMEL, THE LAWS OF TEXAS 1822–1897, at 235, 236 (Austin, Gammel Book Co. 1898).

supreme court was to hold annual sessions at Austin, Galveston, and Tyler.[502] A further enactment of April 2 of that year laid down the calendar for these sessions. The Austin term, then current, was continued through August 1874 if need be. Thereafter, the court was to hold sessions from October through December in Tyler, from January through March in Galveston, and from April through June in Austin.[503] The court, accordingly, finished the 1873–1874 Austin term of its predecessor, and the Tyler term in 1874. It held all three terms in 1875, and the full Galveston term in 1876. Its Austin term that year terminated on April 17 but was continued by the three-justice court sitting under the Constitution of 1876. Thus, the five-justice Roberts-Gould Court sat from February 2, 1874, to mid-April 1876, for altogether twenty-six months and two weeks.

Having clarified the essential points of institutional succession in the first decision of his court, Chief Justice Roberts promptly raised the question of the disposition of criminal appeals after the elimination of the requirement of a preliminary finding of error of law by a member of the court. In *Smyrl v. State*,[504] the court, again per Chief Justice Roberts, decided that "an allowance of an appeal by one of the justices of the supreme court is no longer necessary to perfect [an] appeal" in criminal cases.[505]

The removal of the quasi-certiorari barrier to criminal appeals is likely to have had some impact on the docket of the court and to have figured in the decision of the Constitutional Convention of 1875 to establish a separate court of appeals for criminal cases. The five-justice Roberts-Gould Court—the last Supreme Court of Texas to entertain criminal appeals—decided some 370 criminal cases by published opinion in slightly over two years, or more than one every two days, allowing for weekends and adjournments. Since appeals in felony cases were accorded a preferred rank on

502. *See* Act approved Feb. 27, 1874, 14th Leg., 1st R.S., ch. 17, § 1, 1874 Tex. Gen. Laws 13, 13, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 15, 15 (Austin, Gammel Book Co. 1898) (requiring the Texas Supreme Court to hold "its sessions once in every year" at Austin, Galveston, and Tyler).

503. Act approved Apr. 2, 1874, 14th Leg., 1st R.S., ch. 42, §§ 1, 3, 1874 Tex. Gen. Laws 49, 49, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 51, 51 (Austin, Gammel Book Co. 1898).

504. Smyrl v. State, 40 Tex. 121 (1874).

505. *Id.* at 123.

the supreme court docket under an Act of March 4, 1873,[506] civil litigants appear to have attributed the delays suffered by them in good part to this source.

Although the court returned to Tyler in October 1874 and to Galveston at the beginning of the following year, it does not appear to have appointed (or to have been authorized to appoint) clerks for either of these two sessions. The supreme court library at Tyler survived; that at Galveston had been sold,[507] but the state had the good fortune of purchasing the law library of Ballinger & Jack, the finest in Texas at the time. This purchase was financed by Galveston County. The legislature made modest appropriations for libraries and for upkeep at Galveston and at Tyler. The railroad had arrived at Tyler in 1873, but the connection to Austin was neither direct nor invariably reliable.

Alexander W. Terrell and Alexander S. Walker were chosen by the new court as reporters.[508] As we have seen, it fell to them to publish the last two volumes of Semicolon Court decisions as well. Alone or together, they published the decisions of the Supreme Court of Texas until Judge Alexander S. Walker's death in 1896.[509] Terrell tended toward politics, serving in the state legislature and even as minister to the Ottoman Empire; Walker occupied a number of judicial positions, including a term on the commission of appeals and an even shorter term on the Texas Supreme Court.[510] On occasion, those reporters' headnotes in

506. Act approved Mar. 4, 1873, 13th Leg., ch. 8, § 1, 1873 Tex. Gen. Laws 11, 11, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 463, 463 (Austin, Gammel Book Co. 1898).

507. *See* J.H. DAVENPORT, THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS 94–95 (1917) (describing the sale of the library at Galveston and the retention of the Tyler library).

508. *See* Irby C. Nichols, Jr., *Terrell, Alexander Watkins*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 258, 258–59 (Ron Tyler et al. eds., 1996) (describing the life of Alexander W. Terrell); *Walker, Alexander Stuart*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 792, 792 (Ron Tyler et al. eds., 1996) (providing details on the life of Alexander S. Walker).

509. *See* Irby C. Nichols, Jr., *Terrell, Alexander Watkins*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 258, 258–59 (Ron Tyler et al. eds., 1996) (noting that Terrell and Walker "annotated thirteen volumes of Texas Supreme Court decisions"); *Walker, Alexander Stuart*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 792, 792 (Ron Tyler et al. eds., 1996) (stating that Alexander Walker "died in Austin on August 14, 1896").

510. *See* Irby C. Nichols, Jr., *Terrell, Alexander Watkins*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 258, 258–59 (Ron Tyler et al. eds.,

politically sensitive cases are in need of verification.[511]

B. *The Decisional Output: A Framework*

The era of the five-justice Roberts-Gould Court marks the end of Reconstruction in Texas. The seven jurists who served on that court were the contemporaries of the eleven jurists on the Military and Semicolon Courts. Most of the lawyers who addressed the court in and shortly after 1874 had done so some time in the preceding seven years, as had many if not most of the new justices (Oran Roberts being the most conspicuous exception). It would seem, therefore, that the place accorded by the Texas bench and bar from February 1874 to April 1876 to the decisions of the Military and Semicolon Courts affords a particularly useful insight into the position of these two tribunals in the stream of Texas Supreme Court jurisprudence.

In this connection, it should be recalled that the installation of the Military Court and the wholesale removal of the district bench in 1867 had directly affected no less than four of the seven jurists who were to sit in the first phase of the Roberts-Gould Court.[512] Moreover, the Military Court had been appointed by the occupation authorities, whereas the Semicolon Court judges sat under a constitution approved by popular vote and by virtue of appointment by an elected governor, who was confirmed by an elected senate.[513] Indeed, in his very first decision upon return to the bench, Oran Roberts had pointedly drawn attention to the fact that W.P. de Normandie owed his initial appointment to a supreme court "then acting in such capacity by military

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1996) (recording that Terrell served as "minister plenipotentiary to the Ottoman Empire"); *Walker, Alexander Stuart*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 792, 792 (Ron Tyler et al. eds., 1996) (outlining the judicial service of Alexander Walker).

511. *See* Clements v. Crawford, 42 Tex. 601, 601, 604 (1875) (failing to qualify the persons affected by article XII as those who "lived together, recognizing each other as husband and wife"); Honey v. Clark, 37 Tex. 686, 686, 708–09 (1872–1873) (stating that no law in Texas, from 1828 to Independence, prohibited marriage between "whites and negroes").

512. *See* Yancey L. Russell, *Devine, Thomas Jefferson*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 613, 613 (Ron Tyler et al. eds., 1996) (providing a biography of Thomas Jefferson Devine and lending insight on the history of the Texas Supreme Court).

513. *See* J.H. DAVENPORT, THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS 94 (1917) (recounting the appointment of the Semicolon Court justices).

authority."[514] Expressly taking no position on the legal effects of that appointment, Chief Justice Roberts upheld de Normandie's tenure as supreme court clerk on his retention as such "by the succeeding court, appointed under the constitution."[515]

It is quite clear, nonetheless, that in the two-plus years following, neither the first Roberts-Gould Court nor counsel appearing before it showed hesitation in invoking Military Court precedents.[516] So far as can be ascertained, the bar, at least, did not hesitate to invoke Semicolon Court jurisprudence as well. The reporters' summaries of arguments of counsel for the period from February 1874 to April 1876 contain at least forty-one references to Semicolon Court decisions, routinely included in the briefs of both sides, the attorney general, and of leading counsel. Since the reporters frequently omitted reproducing extracts from arguments of counsel, this account is necessarily incomplete. No instance has been found of a citation of a Semicolon Court decision accompanied by negative ad hominem (or more precisely, contra curiam) arguments.

Since the Roberts-Gould Court continued the 1873–1874 session (now the Austin session) of the Semicolon Court, a number of decisions of its predecessor were still open to motion for rehearing. The 1871 Supreme Court Rules had formalized proceedings in such cases, and there had been an increase of petitions for review in subsequent years.[517] The Roberts-Gould Court entertained a substantial number of such petitions in 1874, frequently coming to conclusions different from those reached by its predecessor but also, with some frequency, agreeing with it.[518] The terminology

514. *In re* Supreme Court Clerkship, 40 Tex. 1, 1 (1874).

515. *Id.*

516. *See, e.g.*, Magee v. Chadoin's Ex'r, 44 Tex. 488, 490 (1876) (reporting a distinction drawn by Justice Moore between prior decisions of "this court" and those of the "[s]upreme [c]ourt of the provisional government, appointed by the commanding general of the district of Texas").

517. TEX. SUP. CT. R. 21, 32 Tex. 807, 811 (1871). Exactly three years thereafter, there appears to have been a need felt to assume timely notice to adverse parties in proceedings upon motion for rehearing. *See* Act approved May 2, 1874, 14th Leg., 1st R.S., ch. 159, §§ 1–5, 1874 Tex. Gen. Laws 215, 215–16, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 217, 217–18 (Austin, Gammel Book Co. 1898) (stating the manner of proceeding in the supreme court upon motions for rehearing).

518. *See* James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 289 n.25 (1959) (listing numerous cases decided upon rehearing by the Roberts-Gould Court).

used on such occasions is instructive. The Semicolon Court was routinely referred to as "this court"; its judges were "our predecessors."[519] *Kuechler v. Wright*[520] seems to be the only case of some significance to be considered by the Semicolon Court on petition for rehearing, which was denied by a sharply divided Roberts-Gould court.[521]

In *Smith v. Alston*,[522] the court, per Justice Moore, refused emphatically to reform opinions of its predecessor that had become final.[523] Its treatment of Semicolon Court precedent has been studied in detail by Justice Norvell, who concluded that at the time, the opinions of all of the justices of the Roberts-Gould Court followed the decisions of their immediate predecessors with express citation unless departure from precedent was called for in the ordinary course of adjudication.[524] There seems little need to replicate his study in detail, although his conclusions are in agreement with what follows.

For obvious reasons, the justices of the Roberts-Gould Court had occasion to disagree with their predecessors—most frequently where politically charged issues of the day were involved. Miscegenation, Confederate currency and legislation, and the constitutionality of school taxes were expectedly focal points of disagreement. It seems appropriate to treat these areas separately, to be followed by a more general survey of the casework of the Roberts-Gould Court in its initial stage.

C. *Incremental "Redemption"*

The constitutional amendments approved by the newly elected legislature on January 24, 1874, brought about a complete change in the composition of the supreme court, but they left in place a

519. *See, e.g.*, Chadwick v. Meredith, 40 Tex. 380, 384–85 (1874) (agreeing with "our predecessors in the judgment rendered by them reversing and remanding the cause"); Cundiff v. Campbell, 40 Tex. 142, 145–46 (1874) (deeming it "not necessary" to discuss the "decisions of our predecessors" in order for "this court" to set aside a verdict on rehearing).

520. Kuechler v. Wright, 40 Tex. 600 (1872).

521. *See id.* at 611 (agreeing with the prior court that the case should be dismissed).

522. Smith v. Alston, 40 Tex. 139 (1874).

523. *Id.* at 142.

524. *See* James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 291–92, 296–302 (1959) (discussing the court's attitude towards the Semicolon Court and providing a list of cases the author believes "illustrative" of the Roberts Court).

constitutional document that condemned the "heresies of nullification and secession."[525] That constitution had barely stopped short of adopting the "void *ab initio*" position, but it had validated Texas legislative enactments and other acts of government during secession only if they met stringent requirements of constitutionality and non-discrimination, and were "not in aid of rebellion against the United States."[526] Furthermore, President Grant had ultimately refused the appeal of Governor Davis for federal military assistance in enforcing the Semicolon Decision, but he had done so after some delay.[527] As the "White League" in Louisiana found out, and as Texas Democrats were keenly aware, there was at that time still the real prospect of United States military intervention in the event of overt challenge to the new constitutional order brought about by Reconstruction legislation and by the three post-Civil War amendments to the United States Constitution.[528]

"Redemption," accordingly, proceeded in an incremental manner. This is most readily apparent in the decisions of the initial Roberts-Gould Court on the vexatious question of the enforceability of monetary obligations denominated in Confederate dollars. In *Cundiff v. Campbell*,[529] the court let stand a judgment enforcing payment of the nominal amount, plus interest, of three notes executed in 1861 and payable in 1862.[530] These notes were not in terms of Confederate dollars, and

525. TEX. CONST. of 1869, art. I.

526. TEX. CONST. of 1869, art. XII, § 33.

527. *See* Carl H. Moneyhon, *Edmund J. Davis in the Coke-Davis Election Dispute of 1874: A Reassessment of Character*, 100 SW. HIST. Q. 131, 138–47 (1996) (providing an account of the state and federal controversy surrounding the *Ex parte Rodriguez* decision).

528. United States Armed Forces frequently acted to protect Republican local public officials driven from office by the "White League" in Reconstruction Louisiana. In January 1875, they intervened to restore order in the state capitol. JOE GRAY TAYLOR, LOUISIANA RECONSTRUCTED 1863–1877, at 304–05 (1974). The Democratic State Convention, which met in Austin on September 3–5, 1873, adopted no less than three resolutions protesting such interventions, including one for the annexation of Caddo and De Soto Parishes, claimed to be "identified, politically and otherwise, with the State of Texas." ERNEST WILLIAM WINKLER, PLATFORMS OF POLITICAL PARTIES IN TEXAS 157, 162 (1916). These two parishes in uppermost northwest Louisiana face east Texas across the Red River and were the scene of protracted violence at the time, leading to the Coushatta Massacre of August 1874.

529. Cundiff v. Campbell, 40 Tex. 142 (1874).

530. *Id.* at 145–46.

speaking through Justice Gray, the court was able to indulge in the presumption that the parties had intended nothing illegal.[531] There was thus no need to address "the merits of the various decisions of our predecessors" on this subject.[532]

In *Coburne v. Poe*,[533] the court went even further, upholding, in effect, the illegality defense in a suit on a note dated November 14, 1864, by holding against the plaintiff-appellant on a technical point of pleading.[534] In *Mathews v. Rucker*,[535] finally decided at Tyler term later that year, the court overruled the Confederate currency jurisprudence of its predecessors, expressly resting its judgment on the authority of the decision of the United States Supreme Court in *Thorington v. Smith*.[536] Henceforth, Confederate money obligations were recoverable in Texas state courts at their scaled-down value.

Contracts more directly in aid of the Confederate war effort posed a more delicate problem. In *McKinney v. Andrews*,[537] the plaintiff was able to "recover the value of an oxcart hired by [a]ppellant from her intestate" who used it to transport Confederate cotton to San Antonio and who later, without authority, sold the cart.[538] The court held that the invalidity of the transport arrangement did not affect the plaintiff's entitlement to the cart's value, which had been sold without owner authority.[539]

In *Jones v. Williams*,[540] the court went somewhat further, upholding an ostensibly voluntary sale of cotton to the regional purchasing agent of the Confederate government.[541] The latter had also urged immunity in respect of his acts as an official agent of the Confederate government. The court expressly stated that it was "not necessary for the decision of this case to inquire what

531. *Id.* at 146.

532. *Id.* at 145.

533. Coburne v. Poe, 40 Tex. 410 (1874).

534. *See id.* at 411, 415–16 (holding that failure to amend the petition to ask the trial court to consider the legality of the contract waived the issue).

535. Mathews v. Rucker, 41 Tex. 636 (1874).

536. *See id.* at 637–38 (permitting recovery on a contract based upon Confederate money because such a contract was deemed to be a private contract for legal purposes (citing Thorington v. Smith, 75 U.S. (8 Wall.) 1, 11 (1869))).

537. McKinney v. Andrews, 41 Tex. 363 (1874).

538. *Id.* at 364.

539. *Id.* at 366.

540. Jones v. Williams, 41 Tex. 390 (1874).

541. *Id.* at 391–92.

measure of protection should and can be legally extended for the protection of an officer acting as an officer or agent of that [g]overnment."[542] The reporters, nevertheless, composed a headnote stating baldly: "All officers and agents of the Confederate [g]overnment who, during the late war, acted under and by virtue of instructions from the department commander, issued under existing authority, are protected by such instructions from personal accountability."[543]

In *Honey v. Clark*, it will be recalled, the Semicolon Court upheld a de facto marriage between a white man and his slave, holding that such unions were cured by article 12, section 27 of the 1869 constitution, relating to couples who had lived together as husband and wife but had been, "by the law of bondage ... precluded from the rites of matrimony."[544] In *Clements v. Crawford*,[545] that provision was held to be applicable only to persons in the connection of whom "there had been no violation of either law or good morals."[546] Interracial concubinage, on the other hand, was now described by the court to have been "illegal and immoral," and not within the ambit of that provision.[547] Robert Gould, who wrote this opinion, went on to state that *Honey v. Clark*, to the extent at variance therewith, "may be regarded as overruled."[548] The headnote by the reporters omitted that qualification.[549]

There were, however, some limits on the revisionism of this court on slavery issues. In *Garrett v. Brooks*,[550] it was earnestly contended that slavery was not abolished in Texas until December 18, 1865—the effective date of the Thirteenth Amendment—so that a note found by the jury to have been given on July 5, 1865, in payment of a slave was still enforceable.[551] Chief Justice Roberts and Justice Moore, one must assume prudently, chose not to sit in

542. *Id.* at 400.
543. *Id.* at 390 n.2.
544. Honey v. Clark, 37 Tex. 686, 708–09 (1872–1873) (citing TEX. CONST. of 1869, art. XII, § 27).
545. Clements v. Crawford, 42 Tex. 601 (1875).
546. *Id.* at 604.
547. *Id.*
548. *Id.*
549. *Id.* at 601 n.2.
550. Garrett v. Brooks, 41 Tex. 479 (1874).
551. *Id.* at 481–82.

this case, and it fell to Justice Devine to write the opinion of the court. He held that although the plaintiff's contention was "correct if we limit our consideration to what was the written law," the "military power of the [f]ederal [g]overnment had . . . struck down (before the date of this contract) the laws of the [s]tate and the rights of its citizens . . . ."[552] The object of the sale had been "de facto free" at the date of the contract, which thus failed for want of consideration.[553]

Perhaps the second-most controversial issue faced by the Semicolon Court had been the constitutionality of the school tax, which had been upheld in the landmark case of *Kinney v. Zimpelman*.[554] In *P.J. Willis & Brother v. Owen*,[555] *Zimpelman* and its progeny were overruled, and the 1871 school tax was held to be unconstitutional.[556] Speaking through Justice Moore, the court held that under article 9 of the 1869 constitution, decisive authority to levy local school taxes could not be vested in a statutory board of education composed of the governor, the attorney general, and the superintendent of public instruction.[557] The constitution contemplated the delegation of legislative power, including the variation of the school tax rate, to district boards of school directors, but not, it held, to a board of education not contemplated by the constitutional text.[558] Additionally, the 1871 Act was held to suffer the infirmity of unconstitutional accumulation of office on the part of the governor and the attorney general.[559]

The main point in this lengthy exegesis of constitutional and statutory texts seems to have been the characterization of the

552. *Id.* at 481, 483.

553. *Id.* at 483.

554. Kinney v. Zimpleman, 36 Tex. 554, 586 (1871–1872) (upholding the constitutionality of the 1871 school tax), *overruled by* P.J. Willis & Bro. v. Owen, 43 Tex. 41 (1875).

555. P.J. Willis & Bro. v. Owen, 43 Tex. 41 (1875).

556. *See id.* at 71–73 (discussing *Zimpleman* and holding the state's school tax system "ha[d] not been levied in [the] manner prescribed, or under authority of law").

557. *See id.* at 48–59 (providing an in-depth discussion of the constitutionality of the school tax system).

558. *See id.* at 58–62 (reasoning that the school tax system in place at that time violated the constitution).

559. *See id.* at 67–68 (explaining that the two state officers had exceeded their constitutional roles). This latter holding has been routinely ignored in Texas legislative practice.

public schools article of the 1869 constitution as "intended, while sufficiently broad to afford the means of education to every child in the [s]tate within the scholastic age, to establish a system in respect to some of its most important and vital essentials, if not all of them, which should be local in its character."[560] The quaint point about accumulation of functions by two of the three members of the statutory board of education, it may be surmised, weighed less heavily on the court than the conferral on that board of "an official patronage with an extent of following far greater than that of the entire executive department of the [s]tate."[561] Perhaps prudently, the court did not ask whether a state-wide free school system could have been introduced in Texas without central authority and without patronage in favor of those dedicated to it.

D. *Notable Decisions*

Criminal appeals to the Supreme Court of Texas came to an end with the creation of the Texas Court of Appeals in 1876. By March of 1875, the legislature had created the office of assistant attorney general to cope with the criminal docket.[562] Colonel A.J. Peeler (the first incumbent of that office) came to represent the state regularly in the supreme court in criminal cases,[563] and Justice Devine appears to have been favored (if that is the right word) with the assignment to write opinions for an almost invariably unanimous supreme court in such matters until his replacement on the bench by Justice Ireland. William Pitt Ballinger had shared a stagecoach ride from Austin to San Antonio with Thomas Devine in March 1873, and had found him "sensible and pleasant," adding, however, "he doesn't look intellectual."[564] Justice Devine's opinion in *Randle v. State*,[565]

560. *P.J. Willis*, 43 Tex. at 54.

561. *Id.* at 67.

562. Act approved Mar. 13, 1875, 14th Leg., 2d R.S., ch. 76, §§ 1–4, 1875 Tex. Gen. Laws 90, 90–91, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 462, 462–63 (Austin, Gammel Book Co. 1898).

563. *See* JAMES D. LYNCH, THE BENCH AND BAR OF TEXAS 457–63 (St. Louis, Nixon-Jones Printing Co. 1885) (detailing several of Peeler's representations on behalf of the State of Texas in the Texas Supreme Court).

564. William Pitt Ballinger, Diary of William Pitt Ballinger 31 (Mar. 2, 1873) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

565. Randle v. State, 42 Tex. 580 (1875).

however, shows considerable learning and ability.

Be that as it may, Justice Devine did not write the two most important opinions of the supreme court in this last phase of criminal jurisprudence, both of which were authored by Chief Justice Roberts. The first of these, *Ex parte Ezell*,[566] upheld the denial of bail to criminal defendants after conviction against constitutional challenge.[567] It stands as authority today[568] and was followed by several states with similar constitutional guarantees of bail to the accused. The second decision, *Horbach v. State*,[569] was an appeal from conviction for second-degree murder. The appellant had shot the victim in a barroom brawl.[570] His defense was that the victim had reached for a pistol under his jacket, putting him in apprehension of immediate assault with a deadly weapon.[571] The trial court had excluded evidence as to the victim's proclivity for violence and habit of carrying weapons.[572] By reversing this ruling, the supreme court was said to have endorsed "the 'hip-pocket-movement' type of self-defense," with considerable impact on the rate of murder convictions in Texas.[573]

The Roberts-Gould Court did not, however, sympathize with those who carried pistols in violation of the Gun Control Act of April 11, 1871. In *State v. Duke*,[574] the court upheld the constitutionality of that statute on state constitutional grounds.[575] It rejected both the applicability of the Second Amendment to state legislation and Justice Walker's restrictive definition of "arms" insofar as it excluded "such pistols at least as are not adapted to being carried concealed."[576] However, later that same

566. *Ex parte* Ezell, 40 Tex. 451 (1874).

567. *See id.* at 460 (refusing to grant an application for bail because the court was not satisfied that the applicants showed sufficient factual circumstances to warrant a granting of the application).

568. *See Ex parte* Anderer, 61 S.W.3d 398, 403 & n.26 (Tex. Crim. App. 2001) (citing to *Ex parte Ezell* and holding that the Texas constitution does not recognize a defendant's right to bail pending appeal).

569. Horbach v. State, 43 Tex. 242 (1875).

570. *Id.* at 246–47.

571. *Id.* at 247–48.

572. *Id.* at 248.

573. J.H. DAVENPORT, THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS 125–27 (1917).

574. State v. Duke, 42 Tex. 455 (1875).

575. *See id.* at 459 (upholding the challenged provision).

576. *Id.* at 457–58.

term, in *Titus v. State*,[577] the court let stand the conviction of a pistol-wielding defendant who claimed to have been hunting at the time.[578] This latter decision, peremptory in language and curt in form, was expressly based on a prior decision of the Semicolon Court where a like defense had been rejected.[579]

Some other decisions of the Roberts-Gould Court in criminal cases deserve mention because they afford useful insights into contemporary social conditions. Expectedly, horse and cattle theft occurred with some frequency. *King v. State*[580] is a particularly remarkable horse theft case because of the audacity of the defense.[581] The accused, having stolen a horse from *A*, sold it to *B* and then, perhaps having acquired the habit, stole it from *B* as well.[582] His plea of double jeopardy as to the second theft fell on deaf judicial ears.[583]

Although horse and cattle theft was prominent, it would seem that the hog (which supplied the standard meat fare in Texas at the time) was the prime object of animal larceny. A "black and white-spotted sow hog" was the object of the alleged theft in *Varas v. State*.[584] The defendant, who spoke little English and kept hogs of a like coloration, had identified this particular pig as "my hoggy" when he was intercepted by the owner while carrying it away from a common pasture.[585] The trial court refused to charge that *mens rea* was the gist of the offense, and the supreme court reversed.[586] Language also figured, in the obverse manner, in *Lyles v. State*,[587] which reached the court from far-away El Paso.[588] The appellant had been convicted of second-degree murder by a jury with only three English-speakers. The court, per Justice Devine, proclaimed in ringing terms that "proceedings in the courts of Texas are in the

577. Titus v. State, 42 Tex. 578 (1875).

578. *Id.* at 579.

579. *Id.* (citing Baird v. State, 38 Tex. 599 (1873)).

580. King v. State, 43 Tex. 351 (1875).

581. *See id.* at 351 (recording the defendant's claim that he could not be tried for stealing the horse).

582. *See id.* at 351–52 (providing the details of the changes in supposed ownership of the horse).

583. *See id.* at 351–53 (denying the defense of double jeopardy to the defendant).

584. Varas v. State, 41 Tex. 527, 527 (1874).

585. *See id.* (referring to the pig as "my hoggy").

586. *Id.* at 527–28.

587. Lyles v. State, 41 Tex. 172 (1874).

588. *Id.* at 172.

English language," and held that the trial court erred in rejecting the challenge of the defendant to the nine Spanish-speakers.[589]

In *March v. State*,[590] on the other hand, it may be assumed that all of the twelve jurors were familiar with the English language, since trial was held in Tyler.[591] Moreover, nine of the jurors were apparently as sober as the proverbial judge. Not so, however, with the three remaining ones. In the words of Justice Ireland:

> It is pretty clearly established that there were four or five bottles of liquor taken to the jury-room during the deliberations in this case. The affidavit of the nine jurors cannot be regarded as disproving this fact, and their affidavit may fairly be taken as strengthening the idea that liquor was used to excess. If those nine know nothing of it, it is the more probable that the others had more than is compatible with a correct administration of the law, and this may account for the jurors leaping and dancing.[592]

The court found it "difficult to say how much liquor a juror could drink without its influencing his verdict."[593] In this case, however, it had no difficulty in finding "excessive use of intoxicating liquors" sufficient to call for reversal.[594]

The two most important decisions of the first Roberts-Gould Court on the civil docket relate, unsurprisingly, to railroads and to public lands. *Bledsoe v. International Railroad Co.*[595] was an appeal from a decision of the Travis County District Court, ordering the then comptroller of the State of Texas to issue certain bonds to the plaintiff company, as provided in its act of incorporation of August 1870, upon completion of a segment of a railway line to be constructed by it from the Red River boundary with Arkansas to El Paso via Austin and Laredo.[596] At the time, the Texas constitution prohibited grants of public lands to railroads, and the state lacked ready funds.[597] The compensation (or inducement) for the construction of the line was to be in the

589. *Id.* at 176–78.
590. March v. State, 44 Tex. 64 (1875).
591. *Id.* at 65.
592. *Id.* at 84.
593. *Id.*
594. *Id.*
595. Bledsoe v. Int'l R.R. Co., 40 Tex. 537 (1874).
596. *Id.* at 537–38.
597. *See* TEX. CONST. of 1869, art. X, §§ 5–7 (governing lands reserved for and granted to railroad companies).

form of $10,000 in state bonds per mile of track laid, to be issued by the governor, signed by the treasurer, and countersigned by the comptroller.[598]

Governor Davis had opposed this scheme but let the act of incorporation become effective without his signature. He had initiated the issuing of $500,000 in state bonds to the railroad upon the completion of fifty-two miles of track, and Mr. Honey (then the treasurer) had signed these. The comptroller, however, refused his countersignature, claiming (among other things) that the act of incorporation of the International Railway Company had been procured by bribery and corruption. The company promptly brought mandamus proceedings against him in the supreme court, but in *International Railroad Co. v. Comptroller*, the Semicolon Court decided that it did not have original jurisdiction in mandamus proceedings.[599] Like proceedings were instituted thereupon in district court, where the writ was granted.

On appeal, the supreme court (now composed of justices appointed by Governor Coke) found itself faced with the prospect of being evenly divided, since Justice Moore, having been of counsel below, did not sit. The governor thereupon appointed J.W. Ferris as special justice to sit in his stead.[600] The legislature later appropriated $500 as compensation for his services in this matter, estimated to have occupied him for slightly less than a month.[601] Even more remarkably, the Act of April 25, 1874, passed during the pendency of the appeal, had incorporated a compromise between the state and the company, contingent upon the determination, "in a decision on the merits,"[602] that the

598. TEX. CONST. of 1869, art. X, § 6; *see also* Act approved Aug. 5, 1870, 12th Leg., C.S., ch. 54, § 9, 1870 Tex. Gen. Laws 104, 107–08, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 606, 609–10 (Austin, Gammel Book Co. 1898) (authorizing bonds to be issued for railroad track).

599. *See* Int'l R.R. Co. v. Comptroller, 36 Tex. 641, 642 (1871–1872) (disposing of the case due to lack of jurisdiction).

600. *See* David Minor, *Ferris, Justus Wesley*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 986, 986–87 (Ron Tyler et al. eds., 1996) (noting that Ferris became a "special judge" on the court at the request of Governor Coke).

601. *See* Act approved Mar. 13, 1875, 14th Leg., 2d R.S., ch. 78, §§ 1–3, 1875 Tex. Gen. Laws 124, 124–25, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 714, 714–15 (Austin, Gammel Book Co. 1898) (granting a special appropriation to Special Justice Ferris for sitting on the court).

602. *See* Act approved Apr. 25, 1874, 14th Leg., 1st R.S., ch. 24, § 1, 1874 Tex. Gen. Laws 49, 49, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 315, 315

company was entitled to the bonds. In that event only, bonds at the rate set by the Act of August 5, 1870, were to be limited to the section of tracks between Jefferson and San Antonio, with no further obligations on the state.[603]

Argument before the supreme court, however, did not focus on the merits of the company's claim to the bonds. William Alexander, the attorney general of the Davis administration, had argued that mandamus did not lie because the action sought of the comptroller was discretionary rather than ministerial, and George Clark, the new attorney general, took over that argument.[604] It turned out to be embarrassingly successful. In an opinion by Special Justice Ferris, a majority of the court held not only that the duties of the comptroller under the International Railroad Company Act were discretionary and thus not susceptible to enforcement by mandamus, but also, more fundamentally, that in view of the strict separation-of-powers scheme of the state constitution, the writ itself could not lie against "an officer of the executive department of the government [performing] an official duty."[605] Justice Reeves dissented, deeming the functions of the comptroller under the 1870 Act to have been ministerial.[606] Associate Justice Devine, while concurring in this dissent, wrote a twenty-three page attack on the more basic proposition that mandamus did not lie at all against the heads of the executive departments established by the state constitution.[607]

In the end, the railway company, with more promising prospects in another forum, was able to extract from the state a settlement carved out of the public domain, which still astounds by its generosity.[608] The more fundamental holding in *Bledsoe*,

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(Austin, Gammel Book Co. 1898) ("[T]he obligation of the [s]tate to aid in the construction of the [i]nternational railroad, by the donation of bonds to said company . . . is hereby limited to that portion of said line of said railroad now constructed and to be hereafter constructed between the city of Jefferson, in Marion County, and the city of San Antonio, in Bexar [C]ounty . . . .").

603. Act approved Apr. 25, 1874, 14th Leg., 1st R.S., ch. 24, § 5, 1874 Tex. Gen. Laws 49, 51, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 315, 317 (Austin, Gammel Book Co. 1898).

604. Bledsoe v. Int'l R.R. Co., 40 Tex. 537, 541–44 (1874) (recording that both Alexander and Clark participated in the argument).

605. *Id.* at 564.

606. *Id.* at 570 (Reeves, J., dissenting).

607. *Id.* at 577–600 (Devine, J., dissenting).

608. *See* Act approved Mar. 10, 1875, 14th Leg., 2d R.S., ch. 49, § 1, 1875 Tex. Gen.

however, came under immediate challenge in *Kuechler v. Wright*, the very next case to be decided, with Justice Moore sitting and Special Justice Ferris back in Waxahachie. Reduced to its essentials, this was an appeal from a decision ordering the then commissioner of the general land office to issue a patent for land located by the holder of a land certificate on an "even" section of a railway grant, which pursuant to the statutory grant was reserved exclusively to the state and later allocated to the permanent school fund.[609] In an opinion by Presiding Judge Evans, the grant of mandamus had been reversed, and the cause dismissed, for the obvious reason that public lands appropriated by the state for specific purposes were withdrawn from entry by settlers.[610] Rehearing was denied on October 21, 1873, with Judge McAdoo writing a short opinion, but the successor supreme court took the unusual step of granting a second motion for rehearing.[611]

The disposition of the case was clear, as it was agreed that the Semicolon Court had decided the substantive point correctly. Under the second limb of the majority opinion in *Bledsoe*, however, that stage should not have been reached, since mandamus did not lie against heads of the executive department under the 1869 constitution.[612]

It turned out that with the special justice no longer sitting and Justice Moore relieved of his disability, there was no majority on the court for that proposition. Justice Moore now wrote a lengthy opinion for the court, holding that ministerial acts of chief executive officers were reviewable on mandamus but discretionary acts were not, and that Commissioner Kuechler's act of refusing to issue the patent had been discretionary and hence not reviewable.[613] He was able to add that Justice Gray, who had heard argument but had resigned shortly thereafter, was in

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Laws 69, 70–71, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 659, 660–61 (Austin, Gammel Book Co. 1898) (awarding "twenty sections, of six hundred and forty acres each, of the unappropriated public lands of the [s]tate, for each mile of railroad which has been and which may hereafter be constructed").

609. *See* Kuechler v. Wright, 40 Tex. 600, 601–02 (1874) (detailing the general disposition of the case upon first appeal).

610. *See id.* at 605–07 (stating that to allow settlers on the land would do violence to the language, spirit, and policy of the constitution).

611. *Id.* at 608–11.

612. *See* Bledsoe v. Int'l R.R. Co., 40 Tex. 537, 556–63 (1874) (illustrating that the decision had not yet been overturned).

613. *Kuechler*, 40 Tex. at 610–45.

agreement with him.[614] Justices Reeves,[615] Devine,[616] and Gould[617] (the latter having replaced Justice Gray) wrote short concurring opinions.

This left Chief Justice Roberts as the lone dissenter. He contended, in a lengthy opinion, that in the United States at least and Texas in particular, the constitutionally ordained separation of powers limited the writ of mandamus to the judicial branch itself, i.e., to the supervision of lower functionaries of the judiciary by courts superior to them.[618] Fortunately for those with valid claims on parts of the Texas public domain, this attempt to obliterate even the possibility of direct judicial review of what were for some time to come the most important acts of public administration in Texas was to have no practical consequences. Students of the history (or perhaps more accurately, the pre-history) of Texas administrative law are well advised to read both Justice Moore's opinion[619] and Chief Justice Roberts's dissent[620] in *Kuechler*. Of particular interest, is the pervasive influence on both of these jurists, of Chief Justice John Marshall's discussion in *Marbury v. Madison*[621] of the mandamus remedy against public officers.[622]

Lewis v. Ames,[623] on the other hand, will afford no major insights into the course of Texas jurisprudence beyond supplying a link between the custom of marriage by bond in pre-independence Texas and the recognition of so-called common law marriage in later years.[624] It (or rather, its voluminous record, mined by both a novelist and an eminent occasional legal historian[625]) is, however, a goldmine of information on the history of the Texas-

614. *Id.* at 610, 614–45.

615. *Id.* at 646 (Reeves, J., concurring).

616. *Id.* (Devine, J., concurring).

617. *Id.* at 692–93 (Gould, J., concurring).

618. *Kuechler*, 40 Tex. at 646–92 (Roberts, C.J., dissenting).

619. *Id.* at 610–45.

620. Kuechler v. Wright, 40 Tex. 600, 646–92 (1874) (Roberts, C.J., dissenting).

621. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

622. *Kuechler*, 40 Tex. at 632–34, 651–52 (discussing differing interpretations of the mandamus discussion in *Marbury v. Madison*).

623. Lewis v. Ames, 44 Tex. 319 (1875).

624. *See id.* at 337–45 (discussing whether Mrs. Harriet A. Ames and Robert Potter were legally married and noting the legal history of marriage in Texas).

625. *See* James R. Norvell, *The* Ames *Case Revisited*, 63 SW. HIST. Q. 63, 63–83 (1959) (providing a detailed twenty-page study of the case). *See generally* ELITHE HAMILTON KIRKLAND, LOVE IS A WILD ASSAULT (Shearer Publ'g 1984) (1959) (fictionalizing the lives of Harriet Ames and Robert Potter).

Arkansas border in the early days of the Republic of Texas. *Dramatis personae* include Robert Potter, Secretary of the Navy in President Burnet's cabinet, but notorious nationally for quite another reason;[626] the redoubtable Mrs. Harriet A. Ames of Caddo Lake; and even Amos Morrill as her legal adviser, then in practice at Clarksville. While on the subject of marriage, mention should also be made of *Johns v. Johns*,[627] decided earlier in the same Tyler term. There, the court upheld what would now be called a shotgun marriage, quite literally induced by the proverbial sheriff.[628]

Historians will also note with satisfaction that in *Newby v. Haltaman*,[629] the court held that the government and laws of the Republic of Texas were in force until February 16, 1846, and that Anson Jones, who signed the patent at issue on February 11 of that year, was indeed the President of the Republic at the time.[630]

On a more prosaic note, the casework of the initial Roberts-Gould Court is replete with cases involving notes for small amounts. Checks made what is believed to be their first appearance in *Sherwood v. State*[631] and in *City Bank of Houston v. First National Bank of Houston*,[632] both of them expectedly at Galveston term and reflecting a temporary gap in a Texas constitutional hostility towards banks. A judgment in the then princely amount of $107,000 against a railroad, at issue in *Waco Tap Railroad Co. v. Shirley*,[633] did not survive appeal.[634] Other railroad cases included both a successful wrongful-death suit and an unsuccessful industrial-accident claim.[635] The law firm of

626. *See* James R. Norvell, *The* Ames *Case Revisited*, 63 SW. HIST. Q. 63, 63–83 (1959) (detailing the peculiar mayhem of two suspected adulterers that gave rise to the term "Potterizing").

627. Johns v. Johns, 44 Tex. 40 (1875).

628. *See id.* at 40 (suggesting the marriage was influenced by the sheriff).

629. Newby v. Haltaman, 43 Tex. 314 (1875).

630. *Id.* at 314–15.

631. *See* Sherwood v. State, 42 Tex. 498, 498 (1875) (referring to a check that was not genuine).

632. *See* City Bank of Houston v. First Nat'l Bank of Houston, 45 Tex. 203, 203 (1876) (suggesting the case was brought because of an allegedly altered check).

633. Waco Tap R.R. Co. v. Shirley, 45 Tex. 355 (1876).

634. *See id.* at 379 (ruling against the appellant).

635. *See* Houston & Tex. Cent. Ry. Co. v. Bradley, 45 Tex. 171, 180 (1876) (affirming the judgment that the defendant was liable for the circumstances surrounding the wrongful death of the deceased); Halloran v. Tex. & New Orleans R.R. Co., 40 Tex. 466, 467, 472 (1874) (dismissing the case for failure to file a bond).

Baker & Botts (co-founded by Peter Gray, who sat on the court from February to April 1874) began to appear regularly in routine railroad cases, but these were not as yet a prominent factor on the docket of the court.[636] Finally, *Armstrong v. Parchman*[637] held that, in line with former precedents, wagers on horse races were not only legal but also actionable, and the fairness of such races was a subject of proper judicial inquiry.[638]

VI. THE ROBERTS-GOULD COURT, 1876–1882

A. *Judges, Sessions, Reporters, and Clerks*

The Constitution of 1876 (commonly so called) was approved by popular vote on February 15, 1876. In a general election held the same day, Oran Roberts was elected chief justice, and George Moore and Robert Gould, associate justices. Reuben Reeves and John Ireland, the remaining two justices of the five-member supreme court appointed by Governor Coke in and after January 1874, went out of office on April 17, 1876.[639] The very next day, the new supreme court, reduced to three members elected for a term of six years, continued the Austin session then in progress.[640]

Justice Reeves returned to law practice in Palestine, but was later appointed by President Cleveland to the Supreme Court of the Territory of New Mexico.[641] John Ireland, too, returned to practice, soon appearing before the supreme court. His political career later led to two terms as governor, but he was unsuccessful as a candidate for the United States Senate.[642] Governor Coke,

636. *See generally* J.H. Freeman, *Baker and Botts*, *in* 1 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 352, 352–53 (Ron Tyler et al. eds., 1996) (recounting the early history of Baker & Botts).

637. Armstrong v. Parchman, 42 Tex. 185 (1875).

638. *See id.* at 186 (approving agreements for wagers as actionable).

639. *See* Alex W. Terrell & Alex S. Walker, *Reporter's Note* to 45 Tex., at 402, 402 (1876) ("April 17, 1876, the members of the court, under the operation of the new [c]onstitution, went out of office.").

640. *See id.* (noting the term continued with three new justices).

641. *See* Georgia Kemp Caraway, *Reeves, Reuben A.*, *in* 5 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 508, 508 (Ron Tyler et al. eds., 1996) (mentioning Reeves's law practice in Palestine and his appointment to the Supreme Court of the New Mexico Territory); *see also* ARIE W. POLDERVAART, BLACK-ROBED JUSTICE 137 (1948) (noting Reeves's service on the Supreme Court of the New Mexico Territory).

642. *See* Claude Elliott, *Ireland, John*, *in* 3 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 867, 867 (Ron Tyler et al. eds., 1996) (detailing the life of

however, was successful in that respect. His election to the Senate in 1878 led to a prolonged deadlock of the Democrats in the search for a successor, resolved by the choice of Oran Roberts as a compromise candidate. Nomination by that party assured election, as it would for many a decade to come, and the office of chief justice vacated by him was filled once more by George Moore. His vacancy, in turn, was filled by Micajah Hubbard Bonner, a state district judge at Tyler who served out the remainder of George Moore's six-year term as associate justice.[643]

Chief Justice Moore, however, was not in good health at the time. His chronic eye troubles led to his resignation on November 1, 1881,[644] at which time Robert Gould advanced to that office.[645] His vacancy, in turn, was filled by John W. Stayton, previously in practice in Victoria and reported to be the owner of one of the largest private libraries of Spanish and Roman law in the state.[646] Justice Stayton was elected to a six-year term in 1882 and later became chief justice; Robert Gould failed to obtain the nomination by then indispensable for election to public office in Texas and ended his judicial career when his (or rather Oran Roberts's) six-year term of office expired along with Roberts's second term as governor. The ex-governor and the ex-chief justice promptly went on to distinguished academic careers as the founding members of the Law Department of The University of Texas at Austin, established in 1882.[647]

John Ireland).

643. *See* JAMES D. LYNCH, THE BENCH AND BAR OF TEXAS 116 (St. Louis, Nixon-Jones Printing Co. 1885) (identifying Bonner as having obtained the highest position on the bench). Some of his extra-judicial writings have been reproduced. *Id.* at 121–47.

644. *See generally Moore, George Fleming*, *in* 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 819, 819 (Ron Tyler et al. eds., 1996) ("[Moore] resigned on November 1, 1881 . . . .").

645. *See generally* Fred F. Abbey, *Gould, Robert Simonton*, *in* 3 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 258, 258 (Ron Tyler et al. eds., 1996) ("Governor Oran M. Roberts appointed [Gould] chief justice in 1881 . . . .").

646. *See* Craig H. Roell, *Stayton, John William*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 77, 77–78 (Ron Tyler et al. eds., 1996) (noting that his library housed one of the most extensive collections of Roman and Spanish law books). Justice Stayton's familiarity with the Spanish language and with Spanish and Roman law, as well as his collection of treatises pertinent thereto, was mentioned on the occasion of the presentation of his portrait to the court on July 5, 1910. Lewis M. Dabney, Address at the Texas Bar Association (July 5, 1910).

647. *See* Hans W. Baade, *Law at Texas: The Roberts-Gould Era*, 86 SW. HIST. Q. 161, 161 (1982) (identifying Roberts as the first elected professor and Gould as the second

The Constitution of 1876 provided that the supreme court was to sit from the first Monday in October to the last Saturday of June of the year following (literally "of every year") at the seat of government and no more than two other places—the customary synonyms for Austin, Galveston, and Tyler.[648] Somewhat oddly in retrospect, annual terms started in Tyler in October, continued in Galveston in January, and came to Austin in April, terminating there in late June.

The 1876 constitution also mandated the appointment of a clerk for each place where the court sat.[649] W.P. de Normandie, we saw, was confirmed in his four-year appointment in 1874. He was reappointed, and continued in office almost until the end of the period dealt with here. He was followed in office in 1881 by Charles S. Morse. N.J. Moore was the clerk at Galveston in 1881, when he was succeeded by Daniel Atchison. At Tyler, R.P. Roberts clerked until 1879, when he was followed by S.D. Reaves.

Terrell and Walker continued as joint reporters until the Tyler term of 1879, when Alexander Terrell became the sole reporter. William Ballinger started reading volume forty-seven of the *Texas Reports*, edited jointly by Terrell and Walker, on March 15, 1878.[650] That volume already contained the new rules adopted by the court at Tyler on December 1, 1877.[651] On January 2, 1883, Alexander Terrell presented him with volume fifty-six (his own product).[652] The last decision there reproduced was dated April 18, 1882.[653] Commendably, when he became the sole reporter, Judge Terrell noted the delivery date of the opinions reported.

By Act of May 3, 1882, the legislature set new rules for the

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elected professor).

648. TEX. CONST. of 1876, art. V, § 3, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 800–01 (Austin, Gammel Book Co. 1898).

649. *See* TEX. CONST. of 1876, art. V, § 4, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 801 (Austin, Gammel Book Co. 1898) ("The [s]upreme [c]ourt shall appoint a clerk for each place at which it may sit . . . .").

650. William Pitt Ballinger, Diary of William Pitt Ballinger 49 (Mar. 15, 1878) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

651. TEX. SUP. CT. R. 73, 47 Tex. 597, 614–15 (1877).

652. William Pitt Ballinger, Diary of William Pitt Ballinger 49 (Mar. 15, 1878) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

653. *See* Henderson v. Ownby, 56 Tex. 647, 651 (1882) (stating the opinion was delivered April 18, 1882).

publication of the decisions of the state supreme court. The reporter was directed to publish these "with promptness, as fast as there shall be sufficient number to form a volume," each volume to contain an average number of pages of reports published previously.[654] Even the type and the thickness of the lines were specified, with volume twenty-three of Wallace's *Reports* (volume ninety of the *United States Reports*) serving as the model.[655] The reporter had to supply the state one thousand copies of each volume, for a compensation of $5.50 per page, or roughly $4,400 for each lot.[656] The reports were to contain only such cases as were designated by the court for publication, and the reporter was admonished to reproduce "only the main propositions specified by the court contained in the briefs of cases reported, with the authorities relied on."[657]

Since Alexander Terrell continued as reporter for many a year after receiving these statutory instructions, it seems reasonable to suppose that he had some hand in drafting them. It may also be, however, that the main purpose of this enactment was to assert the copyright of the state in the *Texas Reports*. Each volume thereof had to be copyrighted in the name and for the State of Texas, excepting only manuscript reports then "in the hands of the publisher."[658]

B. *The Setting*

The three-judge court that convened on April 18, 1876, sat under a new constitution. Its composition, remuneration, and functions had been, and continued to be, a matter of intense debate necessarily envisaging constitutional amendment. One such amendment, contemplating a supreme court of five members

654. Act approved May 3, 1882, 17th Leg., C.S., ch. 12, § 1, 1882 Tex. Gen. Laws 7, 7, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 267, 267 (Austin, Gammel Book Co. 1898).

655. *See id.* (outlining the stylistic specifications for publishing decisions).

656. *See id.* (providing more publication guidelines).

657. Act approved May 3, 1882, 17th Leg., C.S., ch. 12, § 1, 1882 Tex. Gen. Laws 7, 8, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 267, 268 (Austin, Gammel Book Co. 1898).

658. Act approved May 3, 1882, 17th Leg., C.S., ch. 12, § 3, 1882 Tex. Gen. Laws 7, 9, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1882–1897, at 267, 269 (Austin, Gammel Book Co. 1898). Remarkably, this section combined the "emergency" clause, which then started to appear in the statute book with an operative provision. *Id.*

to be elected for periods of seven years at a salary of $4,500, had been proposed by the legislature on March 12, 1875, but had not been approved by popular vote.[659] The scheme adopted soon thereafter, providing for a three-member court elected for six years at a salary of "no more than" $3,550 (or less than ten dollars per day), gives some indication as to popular feelings then prevailing, but penny-pinching parsimoniousness was not the sole motivating factor shaping the contours of the judiciary article of the Constitution of 1876, or even the main one.[660]

By 1875, the supreme court had simply been overwhelmed by its caseload. The constitutional convention of that year focused not so much on saving a few thousand dollars in judicial salaries as on designing a judicial structure that cleared the backlog then existing and that also prevented—or at least minimized—similar overload in the future. The twin devices contemplated for this purpose were intake control and an intermediate appellate court. There was consensus as to the former: only cases from district courts were to reach the supreme court, and cases with an amount-in-controversy below $500 were to go to county courts, with a court of appeals as the last resort.

Once that scheme became the dominant model, however, it was seen that placing one three-judge court of appeals below a three-judge supreme court would double the levels of congestion. This insight led, at an advanced stage of deliberations, to a radical revision of the model. Caseloads were divided by subject matter as well, and the court of appeals became the court of last instance in all criminal cases, relieving the supreme court entirely of its criminal docket.[661]

As of April 1876, Texas had two courts of last resort: a three-member supreme court of general jurisdiction to the exclusion of criminal cases and appeals from county courts, and a three-

659. *See* Tex. J. Res. 12, 14th Leg., 2d R.S., § 3, 1875 Tex. Gen. Laws 189, 196, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 561, 568 (Austin, Gammel Book Co. 1898) (outlining the election of and remuneration for supreme court justices).

660. *See* TEX. CONST. of 1876, art. V, § 2, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 800 (Austin, Gammel Book Co. 1898) (addressing the structure and configuration of the Texas Supreme Court).

661. *See* TEX. CONST. of 1876, art. V, § 6, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 801–02 (Austin, Gammel Book Co. 1898) (addressing the formation of the court of appeals).

member court of appeals with final jurisdiction in criminal cases as well as general appellate jurisdiction over county courts. These two courts of last resort were at least formally established as twins, with the same number of judges elected for the same number of years at the same salary, with clerks and sessions at the same times at Tyler, Galveston, and Austin, and with their respective reporters in charge of two sets of reports, the *Texas Criminal Reports* now taking their place beside the *Texas Reports*. This left out decisions of the court of appeals in civil appeals from county courts, later published selectively by two judges of that court.[662]

In the period here covered, the court of appeals seems to have been a success, clearing the criminal docket backlog and keeping up with its new caseload.[663] The supreme court, on the other hand, was unable to do either, even though its docket was now limited to civil cases to the exclusion of petty debt collection. Perhaps some of the causes of this failure were personal. Mention has already been made of Justice (later Chief Justice) Moore's eye troubles. As noted by the reporters, he only delivered oral opinions in affirmed cases in Galveston and Austin terms in 1879, as the condition of his eyes prevented him from writing.[664] William Ballinger, who then attended the session of the court at Galveston, was critical of that practice, considering several such cases as deserving decision by written opinion. He was even more critical of George Moore's predecessor as chief justice, having noted of Oran Roberts that "as the [e]xecutive officer of the court he is deficient in dispatch, which is now [July 23, 1878] of all things most greatly needed."[665]

662. *See id.* (providing—in so many words—that in civil cases, the opinions of the court of appeals shall "not be published unless the publication of such opinions be required by law").

663. *See* Report of the Attorney-General of the State of Texas to the Governor 4 (Mar. 1, 1880) (noting that the court of appeals had disposed of 318 of the 331 cases before it from September 1, 1878, to September 1, 1879, and had thus "kept well abreast with the business before it, having disposed of nearly as many cases as were appealed to it"). Acknowledging some public criticism of the creation of a separate court, the attorney general considered its performance "most beneficial to the [s]tate." *Id.*

664. Alex W. Terrell & Alex S. Walker, 51 Tex., at iii (1880) (discussing Chief Justice Moore's eye problems).

665. William Pitt Ballinger, Diary of William Pitt Ballinger 134 (July 23, 1878) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin). *See generally* William Pitt Ballinger, Diary of William Pitt Ballinger 58 (Mar. 28, 1878) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (discussing the end of the term for the court of appeals).

Some nineteen months earlier, on January 31, 1877, Ballinger had recorded in his diary that the court was then "so behind that nothing will be decided submitted now, and as priority goes by the order of filing not of submission, the disposition is general to pass cases for the term."[666] It appears to have been generally agreed by the bar, the higher judiciary, and the political leadership that such delays were highly undesirable, and that they could be avoided by a revision of the judiciary article of the Constitution of 1876. Projects for reform focused on enlargement of the court, the division of the court into panels, or a combination of both.

Only one of these projects secured the legislative approval requisite for submission for adoption by the electorate. Adopted by joint resolution on March 14, 1881, it contemplated a seven-member supreme court ordinarily sitting in panels of three, with resort to the whole court by dissenting panel members. Justices were to hold elective office for terms of six years, at a salary of "no less than" $3,600—in the absence of legislative largess, a raise of fifty dollars over the maximum salary prescribed in 1876.[667] The electorate was not ready, however, for such a permanent enlargement of the supreme judiciary, and that constitutional amendment was defeated.

With no solution to judicial backlog and a logjam in sight through enlargement of the court, the legislature resorted to the creation of a statutory alternative institution of last resort in civil cases. The initial move in that direction preceded the elaboration and submission of the constitutional amendment just discussed. The Act of July 9, 1879, established for an initial period of two years, a three-member commission of arbitration and award to hear and determine "all civil cases now or hereafter pending in the supreme court or the court of appeals, wherein the parties or their attorneys may file consent in writing to the reference thereof to [that] commission."[668]

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666. William Pitt Ballinger, Diary of William Pitt Ballinger 18 (Jan. 31, 1877) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

667. Tex. J. Res. 6, 17th Leg., R.S., § 2, 1881 Tex. Gen. Laws 128, 128, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 220, 220 (Austin, Gammel Book Co. 1898).

668. Act approved July 9, 1879, 16th Leg., 1st C.S., ch. 34, § 2, 1879 Tex. Gen. Laws 30, 31, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 62, 63 (Austin, Gammel Book Co. 1898).

The commissioners, appointed by the governor with the consent of the senate to terms of office of two years, received the same salary as judges of the supreme court. Their decisions were final and had the same effect as supreme court judgments, but were declared to have "no force or effect or authority as precedent in other causes."[669] They were specifically directed not to be published in the *Supreme Court* or *Court of Appeals Reports*.[670]

Judging by the later publication of Posey's *Texas Unreported Cases*,[671] this initial commission of appeals was not without some attraction to litigants facing hopeless delays on the road to final adjudication and, more particularly, of respondents with some confidence in their cause. Neither parties interested in resolving issues of principle nor, more importantly, respondents glorying in delay, could be enticed to relieve the supreme court docket by resort to this precursor of alternative dispute resolution. This first voluntary commission of appeals may not have been, as William Ballinger had predicted, "frivolous [and] useless,"[672] but it was not a satisfactory remedy for court congestion at the top.

The seventeenth legislature, sitting from January to April 1881, had obviously arrived at the same conclusion. On March 14 of that year, it adopted the proposition of a constitutional amendment enlarging the supreme court by the addition of four justices. Slightly over a month prior thereto, on February 9, 1881, it had extended the life of the 1879 commission by another two years, renaming it "Commission of Appeals"[673] and authorizing both the supreme court and the court of appeals to refer to that commission any civil case then or thereafter pending before them.[674] This

669. Act approved July 9, 1879, 16th Leg., 1st C.S., ch. 34, § 8, 1879 Tex. Gen. Laws 30, 31, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 62, 63 (Austin, Gammel Book Co. 1898).

670. *See id.* (noting that certain decisions were not to be published).

671. *See generally* 1 S.A. POSEY, TEXAS UNREPORTED CASES (St. Louis, Gilbert Book Co. 1886) (containing cases decided by the commissioner's court in 1879–1881); 2 J.W. POSEY, TEXAS UNREPORTED CASES (St. Louis, Gilbert Book Co. 1891) (providing unreported cases decided during the years 1882–1884).

672. William Pitt Ballinger, Diary of William Pitt Ballinger 104 (June 12, 1879) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

673. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 1, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898).

674. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, §§ 1–2, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin,

power of reference was independent of the consent of the parties. Decisions of the commission in supreme court references, when adopted by that court upon submission, were to be "published as the opinions thereof as in other cases."[675]

This enactment minced no words about its motivation in adopting such a drastic step. The emergency clause stated that the accumulation of business in the two courts of last resort was "so great as to prevent that speedy determination to litigation which is essential to justice."[676] More directly to the point, the Act itself made it the "duty" of the supreme court and of the court of appeals to:

> [R]elieve the dockets of said courts of the great number of cases now encumbering them, from time to time to refer to said commissioners of appeals so many of said cases now or hereafter pending in said courts, as may be reasonably considered and acted upon by the same, at the several sessions thereof; having respect in such reference, to the length of time such cases have been pending, as well as to promote an early disposition of the cases on the docket.[677]

Perhaps the sting of this language was somewhat reduced by the penultimate clause of this enactment, providing that it was to be inoperative in the event of the popular adoption of a constitutional amendment enlarging the membership of the supreme court.[678]

That, we saw, did not happen, and the commission of appeals went into operation immediately, with Richard S. Walker as presiding justice and George Quinan and A.T. Watts as associate justices. Justice Quinan, who had been repeatedly recommended for judicial appointment by W.S. Ballinger, served as a justice until

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Gammel Book Co. 1898).

675. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 4, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898).

676. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 7, 1881 Tex. Gen. Laws 4, 5, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 97 (Austin, Gammel Book Co. 1898).

677. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 2, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898).

678. *See* Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 6, 1881 Tex. Gen. Laws 4, 4–5, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96–97 (Austin, Gammel Book Co. 1898) (stating that the provision would not take effect if the voters of the state approved "an increase of the judges of the supreme court").

January 5, 1882,[679] and was replaced shortly thereafter by W.S. Delaney. The first decision of the commission approved by the supreme court after reference is dated March 7, 1881, and appears in the *Texas Reports* as provided by law.[680]

It may be added that the constitutional amendment proposed by the legislature on March 14 of that year would have left in place, and indeed incorporated, the clause providing that the annual terms of the court were to run from the beginning of October to the end of June of the year following.[681] It would seem that the latter date was taken quite literally, with the result that no judicial business was transacted from the beginning of July to the end of September.

The Semicolon Court, we saw, operated under a constitution providing for annual terms of court, leaving further details to be established by legislation, which provided that the annual terms of the court were to start in the first week in December of each year and to continue until the exhaustion of the docket or the beginning of the next annual term. As a result, unlike the second Roberts-Gould Court, the Semicolon Court had enjoyed no vacation either in 1872 or in 1873.[682] Perhaps the long judicial vacations customary since 1876 were thought to be justified at least in part by the three annual migrations of the court, permitting an uninterrupted six-month period of home life only to members of the court who lived in, or who chose to remove to, Tyler or Austin. Semicolon Court judges who sat only in the capital had not suffered a like inconvenience.

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679. *See* Merle R. Hudgins, *Quinan, George E.*, *in* 5 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 389, 389 (Ron Tyler et al. eds., 1996) (detailing the life and service of George Quinan).

680. Focke, Wilkins & Co. v. Weishuhu, 55 Tex. 33 (1881) (*extra ordinem*); *see* Bryan v. Crump, 55 Tex. 1, 1 n.1 (1881) (stating that commission decisions, starting March 8, 1881, first appear in the volume preceding because "the records were not accessible when they should have been reported").

681. *See* Tex. J. Res. 6, 17th Leg., R.S., § 3, 1881 Tex. Gen. Laws 128, 129, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 220, 221 (Austin, Gammel Book Co. 1898) ("The supreme court shall sit for the transaction of business from the first Monday in October in each year until the last Saturday in June of the next year . . . ."); *see also* TEX. CONST. of 1876, art. V, § 3, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 800–01 (Austin, Gammel Book Co. 1898) (indicating that the court was to "sit for the transaction of business from the first Monday in October until the last Saturday of June of every year").

682. Minutes of the Supreme Court of Texas 1872–1875, at 3, 318 (unpublished minutes, on file with The Texas State Library and Archives).

While on the subject of inconvenience, mention should be made of the difficulty of timely access by the bar (and to some extent, by the lower and even different branches of the higher bench), to decisions of the supreme court. The reporters, we saw, worked with commendable dispatch, but the newest volume of the *Texas Reports* was likely to be at least one term behind.[683] To a substantial extent, this gap was closed by the *Texas Law Journal*, which was "published every Wednesday" in Tyler, starting in September 1877. It reproduced current decisions of the supreme court, the court of appeals, and of federal courts sitting in Texas. It even included decisions of the court of appeals in civil appeals from county courts, which pursuant to constitutional mandate were not to be published officially "unless ... required to be published by law."[684]

That journal, however, ceased publication in 1881. At its first annual meeting in Galveston in December 1882, the Texas Bar Association considered a resolution calling for "the weekly publication of the opinions of our [s]upreme and [a]ppellate [c]ourts, as they are delivered from the bench" by a journal, to be considered the official journal of that association.[685] The *Texas Law Review*, established in 1883, was endorsed for that purpose by the Texas Bar Association "by a close vote" at its next annual meeting, one year beyond the period here described.[686] As of June 1, 1886, decisions of the two Texas courts of last resort appeared regularly in the *Southwestern Reporter*.

The *Texas Law Journal* also preserved for posterity the officially unpublished decisions of the commission of appeals at Galveston terms, which perished in a courthouse fire on January 13, 1881.[687]

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683. *See* Henderson v. Ownby, 56 Tex. 647, 651 (1882) (illustrating the delay in publishing opinions); William Pitt Ballinger, Diary of William Pitt Ballinger 2 (Jan. 2, 1883) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (referring to published court opinions brought to his sick bed by colleagues); William Pitt Ballinger, Diary of William Pitt Ballinger 49 (Mar. 14, 1878) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (referring to another instance of published court opinions being brought to his sick bed by colleagues).

684. TEX. CONST. of 1876, art. V, § 6, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 801 (Austin, Gammel Book Co. 1898).

685. 1–2 TEX. BAR ASS'N PROCEEDINGS OF THE ORG. SESSION 15, 15 (1882–1883). The committee consisted of W.P. Ballinger, J.H. McLeary, and W.S. Robson.

686. *Id.* at 29–30.

687. *See* Eastham v. Roundtree, 56 Tex. 110, 110 n.1 (1882) (stating that it was the

The conflagration that destroyed the Texas State Capitol on November 9, 1881, apparently did not cause substantial damage to the papers at the library of the supreme court at Austin, although it destroyed other state records.[688] The court, however, lost its physical accommodation in the capitol (and the capital). By Act of April 11, 1882, the legislature authorized the renting of the upper floor and of six rooms of the Brueggerhoff Building on Congress Avenue, at a rental of $562.50 for renewable three-month periods, for the use of the supreme court, the court of appeals, the commissioners of appeals, and the state law library at Austin.[689]

Before proceeding to discuss the jurisprudence of the supreme court from mid-April 1876 through December 1882, a few remarks about the 1876 constitution seem in order. It is generally described as exceptionally restrictive of state and local public power in general, and of legislative power in particular. As Oran Roberts put it:

> Formerly reliance had been placed upon the "Bill of Rights," and the implied limitation arising from a division of the government into three separate departments, to prevent legislation from encroaching upon the reserved rights of the people. From the generality of the terms used in the "Bill of Rights" this was found to be not always an efficient preventive, and, therefore, in this [c]onstitution there were subjoined to the legislative department limitations and directions under the head of "requirements and limitations," in sixteen sections, some of which had a number of distinct clauses, and all of which were intended to be specific restrictions, either upon legislation itself or upon the manner of it,

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only opinion saved from the Galveston fire); Saylor v. Marx, 56 Tex. 90, 90 (1882) (describing the destruction of documents by fire at Galveston during the 1882 term); 1 JOHN P. WHITE & SAM A. WILLSON, CONDENSED REPORTS OF DECISIONS IN CIVIL CAUSES IN THE COURT OF APPEALS 9–10 (St. Paul, Gilbert Book Co. 1883) (opining that the cases decided during the Galveston term could not be reported because all records of these cases were destroyed in the Galveston fire on January 13, 1881). The *Judgment Book of the Supreme Court* was saved.

688. *See* DOROTHY GAMMEL BOHLENDER & FRANCES TARLTON MCCALLUM, H.P.N. GAMMEL: TEXAS BOOKMAN 25–28 (1985) (recounting the fire and Hans Gammel's efforts to save state papers from the smoldering capitol). That experience inspired him to publish the collection of *The Laws of Texas* used throughout the present study.

689. *See* Act approved Apr. 11, 1882, 17th Leg., C.S., ch. 3, § 1, 1882 Tex. Gen. Laws 2, 2, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 262, 262 (Austin, Gammel Book Co. 1898) (appropriating funds for the renting of portions of the Brueggerhoff Building).

> and applied to a large number of subjects previously open to general legislation.[690]

Some of the restrictions then imposed were responsive to unfortunate prior experience. This includes, in particular, the ban on change of venue in civil or criminal cases by local or special law[691]—a reaction to the Clark estate case which was to reappear on the court's docket.[692] Other changes reflect the outlook of the agrarian, Jeffersonian majority of the Constitutional Convention of 1875. A prime example is the return of the prohibition of incorporation of banks and discounting establishments, which had been omitted by the Constitution of 1869.[693]

Some provisions on legislative power, on the other hand, were forward-looking. This applies especially to the prohibition of the creation of private corporations by local or special law, coupled with an express mandate for the enactment of a general corporation law.[694] Of even more importance was the direction to the legislature to provide for the reviewing, digesting, and publishing the laws of the state on a ten-year basis, which led to the enactment of the *Texas Revised Civil Statutes* in 1879.[695] The judiciary article, which has already been discussed above, empowered the supreme court to make rules and regulations for proceedings not only in that court, but in all courts of the state.[696]

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690. Oran M. Roberts, *The Political, Legislative, and Judicial History of Texas for Its Fifty Years of Statehood, 1845–1895*, *in* 2 A COMPREHENSIVE HISTORY OF TEXAS, 1685 TO 1897, at 7, 216 (Dudley G. Wooten ed., 1986).

691. TEX. CONST. of 1876, art. III, § 56, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 785, 792 (Austin, Gammel Book Co. 1898).

692. *See* Treasurer of the State v. Wygall, 51 Tex. 621, 631–35 (1879) (hearing *Clark* for a second time); Treasurer of the State v. Wygall, 46 Tex. 447, 454–66 (1877) (hearing *Clark* on issues of venue and jurisdiction).

693. TEX. CONST. of 1876, art. XVI, § 16, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 826, 828 (Austin, Gammel Book Co. 1898) ("No corporate body shall hereafter be created, renewed or extended with banking or discounting privileges.").

694. *See* TEX. CONST. of 1876, art. XII, §§ 1–2, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 820, 820 (Austin, Gammel Book Co. 1898) (stating that corporations may only be created by the passage of a general law, and that general laws are necessary to create private corporations and to protect stockholders and the public).

695. *See* TEX. CONST. of 1876, art. III, § 43, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 785, 790 (Austin, Gammel Book Co. 1898) (requiring a "digest and publication" of laws "every ten years"). The *Texas Revised Civil Statutes* of 1879 are the first product of this mandate.

696. *See* TEX. CONST. of 1876, art. V, § 25, *reprinted in* 8 H.P.N. GAMMEL, THE

C. *The Decisional Output: A Framework*

It soon became apparent to the court sitting under the Constitution of 1876 that even when relieved of the entire criminal docket and of petty civil cases, a three-member supreme court at the apex of a two-tier judicial hierarchy could not cope with its caseload without drastic procedural reform. As Justice Moore put it in *Haley v. Davidson*,[697] decided in Galveston term 1878:

> As is obvious to every attorney of this court, it is utterly beyond the ability of the court, under the present system and rules of practice, to keep pace with the accruing business, much less bring up the arrearages of former terms. The delay in the decision of cases pending in the court for the past three or four years is, even now, almost tantamount to a denial of justice; and unless some remedy can be found, and the business dispatched more rapidly, it will soon be a debatable question whether it would not be better for the court to be entirely abolished.[698]

He added that even an increase in the number of judges would be "mere palliation, and not a cure," and that popular sentiment as well as legislative opinion opposed limitation on the right of appeal.[699] That left, as the only viable option, the use of the court's rule-making power "to regulate proceedings, and expedite the dispatch of business."[700]

One year earlier, at the 1877 Galveston term, the court adopted a rule providing for the expedited consideration not only of cases relating to "the administration of the [g]overnment, or of general public interest," but also of cases submitted by agreement of counsel, "printed in pamphlet form," and raising specific points of law at issue.[701] Later that year, at Tyler term, this provision was incorporated as Rule 59 in a set of seventy-three Rules of the Supreme Court, effective as of March 1, 1878.[702]

Although the fast-track procedure was put into effect immediately, its attractiveness to counsel was hardly enhanced by

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LAWS OF TEXAS 1822–1897, at 800, 808 (Austin, Gammel Book Co. 1898) ("The [s]upreme [c]ourt shall have power to make rules and regulations for the government of said court . . . .").

697. Haley v. Davidson, 48 Tex. 615 (1878).

698. *Id.* at 616.

699. *Id.*

700. *Id.*

701. TEX. SUP. CT. R. Jan. 18, 1877, 45 Tex. 656, 656 (1877).

702. TEX. SUP. CT. R. 59, 47 Tex. 597, 611–12 (1878).

Texas Land Co. v. Williams,[703] where Chief Justice Roberts "discussed, illustrated, and explained" the pertinent supreme court rules by, in effect, holding up a first attempt at compliance to professional ridicule.[704] In *Haley v. Davidson*, immediately following, Justice Moore was somewhat more restrained.[705] In his remarks following his *cri de coeur* quoted above, he concentrated his criticism of counsel on the lack of effort to prune the appellate record to its essentials.[706] In both cases, motions for advancement were denied, and in the period here discussed, Rule 59 cases were seldom a major factor. The court seems to have been more successful, however, in admonishing counsel to keep the record within bounds, although as late as April 1882, Chief Justice Gould felt compelled to complain about a statement of facts over seventy pages in length "whereas the facts of the case are few and simple, and might well have been stated in one-tenth of the space."[707]

It seems quite likely that the new rules, distributed in pamphlet form and reproduced in the appendix to volume forty-seven of the *Texas Reports*, performed a major educational function in a state as yet without a law school or a state-wide bar association. Supreme Court Rule 36, in particular, provided that to each proposition stated in appellate briefs, there should be annexed, in that order, as authorities relied on, Texas statutes and decisions, United States statutes and decisions if applicable, "elementary authorities [and] other decisions in the American and English courts."[708] The reference to "elementary authorities" was fleshed out by Supreme Court Rule 71, relating to admission to practice.[709] Applicants for legal licenses were expected to be familiar with:

> Blackstone's Commentaries; Kent's Commentaries; Stephen, Gould, or Chitty on Pleading; Story's Equity Pleading; [First] Greenleaf, Starkie, or Phillips on Evidence; Parsons, Story, or Chitty on

703. Tex. Land Co. v. Williams, 48 Tex. 602 (1878).

704. *Id.* at 603–15. The characterization is that of the reporters. *Id.* at 603.

705. *See Haley*, 48 Tex. at 616 (addressing the supreme court rules).

706. *Id.* at 618–19 (discussing the difficulties the court faced when time-saving rules were not followed by counsel).

707. Dreiss v. Friedrich, 57 Tex. 70, 72 (1882).

708. TEX. SUP. CT. R. 36, 47 Tex. 597, 604 (1878).

709. TEX. SUP. CT. R. 71, 47 Tex. 597, 614 (1878); *see also* TEX. DIST. CT. R. 106, 47 Tex. 615, 636 (1878) (adopting virtually the same requirements for practice in state district court).

> Contracts; Story, Parsons, or Daniels on Promissory Notes; Story or Gow on Partnership; Story's Equity Jurisprudence or Adam's Equity; or works of like character in each department of the law . . . .[710]

It is interesting to note that English decisions figured on the same level of authority as sister-state decisions, and that both were outranked, so to speak, by elementary treatises. The latter may be due, however, to the then obvious path of law office (and judicial chamber) research from treatise to case law via textual reference or footnote. Another point worthy of note is the omission of two of the treatises cited most frequently: *Cooley on Constitutional Limitations*[711] and *Freeman on Judgments*,[712] and the total neglect of the law of negligence or, in current parlance, of torts.[713]

On the whole, the decisional output of the Roberts-Gould Court in its ultimate phase reflects this scheme of authorities and of sources. The court was usually (but not invariably) unanimous, and motions for rehearing were almost invariably unsuccessful. Chief Justice Roberts, in particular, favored long sentences subdivided by commas and even the occasional semicolon.[714] A much more concise style of opinion-writing came with Justice Bonner, who joined the court, as luck would have it, in Tyler term 1878.[715] Since he had been a state district judge at Tyler before his elevation, this had the consequence that his two colleagues

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710. TEX. SUP. CT. R. 71, 47 Tex. 597, 614 (1878).

711. The then-current edition was THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (3d ed. Boston, Little, Brown & Co. 1874).

712. Three editions of A.C. Freeman's *A Treatise on the Law of Judgments* appeared in 1873, 1874, and 1881. The limited time between the first and third editions seems remarkable.

713. *See generally* Baker v. Wasson, 53 Tex. 150, 156 (1880) (using the term "tort" for apparently the first time in a Texas court decision by stating that liability in contract was more likely than liability based upon the commission of a "technical tort"). However, the term "tort" had been previously used, although only in citations to non-judicial sources. *See* Brandon v. Gulf City Cotton Press & Mfg. Co., 51 Tex. 121, 127 (1879) (referencing Mr. Cooley's treatise on torts).

714. *See, e.g.*, Miller v. Rogers, 49 Tex. 398, 414–15 (1878) (containing a single sentence authored by Chief Justice Roberts that runs for sixteen lines and is divided by fourteen commas and three semicolons).

715. *See generally* Jeanette H. Flachmeier, *Bonner, Micajah Hubbard*, *in* 1 TEX. HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 637, 637 (Ron Tyler et al. eds., 1996) ("In 1878 [Bonner] was appointed associate justice of the Texas Supreme Court . . . .").

(Chief Justice Moore and Justice Gould) had to sit in judgment on no less than fourteen of his decisions rendered below.

Justice Bonner's reversal rate (five out of fourteen) is representative of the casework of the court that term. It decided a total of sixty-eight cases by opinion, reversing thirty decisions below and affirming thirty-eight (three of the latter by dismissing the appeal). No less than twenty-five of the reversals, however, were termed "[r]eversed and remanded," opening the door to another trial below. In only four cases, with three of the four termed "[r]eversed and reformed," did the court substitute its final judgment for that of the court below, thus precluding further proceedings in the cause.[716]

These statistics appear to be fairly representative of the work of the court in the period here discussed. They explain in good part the reasons for its overload. Chances for success on appeal were somewhere between one-third and one-fifth, and even an adverse supreme court decision put the matter at rest in less than two out of three cases. This latter factor was due, in the main, to the limited power (and the even greater reluctance) of the court to resolve issues of fact. It was also attributable in good part, however, to the pressure of the docket. As the court stated in *Summers v. Davis*:[717] "The condition of the business of this court forbids all unnecessary delay in the examination of questions not essential to the disposition of a case."[718] As a result, many a viable proposition of law raised on appeal remained undisposed of on remand. Albert Sidney Johnson's action of trespass to try title, filed on October 10, 1845, and reversed and remanded by the court after trial twice before, met the same fate once again in *Johnson's Administrator v. Timmons*.[719] This was an extreme case, recognized as such, but appeals after a second trial on remand were not uncommon.

The second commission of appeals, created by legislation early in 1881, relieved some of the pressure on the supreme court

716. E. Line & Red River R.R. Co. v. Terry, 50 Tex. 129 (1878); Hunt v. Reilly, 50 Tex. 99 (1878); McCarty v. Moorer, 50 Tex. 287 (1878); Piedmont & Arlington Life Ins. Co. v. Ray, 50 Tex. 511 (1878). In *Hunt*, the lower court was reversed and reformed subject to remittitur, which was filed. *Hunt*, 50 Tex. at 105.

717. Summers v. Davis, 49 Tex. 541 (1878).

718. *Id.* at 554.

719. Johnson's Adm'r v. Timmons, 50 Tex. 521, 531 (1878) (indicating that the cause had been before the court twice before).

docket. By legislative mandate, the commission of appeals "considered and determined" the cases "referred" to it by the supreme court, and submitted its opinions, together with a "brief synopsis of the case" to the court for further action.[720] If and when "adopted" by that court, the commission's opinions were to be published in the *Supreme Court Reports* "as the opinions thereof[,] as in other cases."[721]

Opinions of the commission, starting with *Focke, Wilkins & Co. v. Weishuhu*,[722] were reported by Alexander Terrell (by then the sole reporter) without what he termed the supreme court's "indorsement of adoption."[723] Eventually, but not initially, he reported the date of the latter as the operative date. So far as can be determined, once the constitutionality of the referral process was upheld, adoption of commission decisions was almost invariably automatic. The three commissioners styled themselves presiding and associate justices, respectively. Their opinions, at least as communicated to the supreme court and as published in the reports, were always unanimous. In time, perhaps in response to hints from above, they concluded with a suggestion or recommendation to the supreme court rather than a command to the district court below.

The precedential value of commission of appeals decisions will require separate attention. In keeping with their function as reports to a court of ultimate appeal, reinforced by the legislative call for brief synopses, commission decisions are, in the main, faithful accounts of prior legislation and Texas jurisprudence. Occasionally, however, such accounts provide valuable insights into otherwise virtually intractable subjects peculiar to Texas and especially to parts thereof, such as the law of land grants in Austin's colony.[724] It seems reasonable to assume that the supreme court retained cases posing important issues of first

720. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 3, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898).

721. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, § 4, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898).

722. Focke, Wilkins & Co. v. Weishuhu, 55 Tex. 33 (1881).

723. Alex W. Terrell, 55 Tex., at iii (1882).

724. *See, e.g.*, Bryan v. Crump, 55 Tex. 1, 7–16 (1881) (deciding an appeal from a suit to try title to land grants in Austin's colony).

impression on its own docket, but this does not appear to have been the invariable practice. In *Watts v. Holland*,[725] the commission extended "the Rule" (the exclusion of prospective witnesses while others are testifying) to civil cases as well, although it was mandated by statute only in criminal trials.[726] More significantly, in *Houston & Texas Central Railway Co. v. Rust*,[727] the commission had to take the first step in addressing the thorny subject of freight discrimination by Texas railroads.[728]

D. *Stare Decisis*

Since the Roberts-Gould Court sitting under the Constitution of 1876 was the first elected post-Reconstruction supreme court clearly identified with the Lost Cause, its treatment of Military and Semicolon Court jurisprudence deserves special attention. It seems extravagant, however, to view that specific subject in isolation. The most immediate question faced by that court was its relation to the jurisprudence of the commission of appeals in referred and approved cases, which were, by legislative mandate, published in the *Texas Reports* as "opinions" of the court itself.[729] Closely related thereto was the precedential effect of agreed commission cases—cases submitted to the commission pursuant to the agreement of the parties—which were, again by legislative mandate, binding in such cases only.[730] Finally, there were the decisions of the court of appeals in county-court civil appeals, which were published in official law reports at a later date but which were frequently accessible to the legal profession almost immediately via the *Texas Law Journal*. At a different and even more prohibiting level, there were the decisions of federal courts, primarily but not exclusively in Texas cases.

725. Watts v. Holland, 56 Tex. 54 (1881).

726. *Id.* at 58–59.

727. Houston & Tex. Cent. Ry. Co. v. Rust, 58 Tex. 98 (1882).

728. *Id.* at 107.

729. *See* Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, §§ 3–4, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898) (requiring publication of commission opinions alongside supreme court opinions).

730. *See* Act approved July 9, 1879, 16th Leg., 1st C.S., ch. 34, §§ 1, 7–8, 1879 Tex. Gen. Laws 30, 30–31, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 62, 62–63 (Austin, Gammel Book Co. 1898) (clarifying that commission opinions were not to be considered precedent nor were they to be extended beyond the scope of the individual case decided).

Given the time frame of the present inquiry, the focus is on the treatment of stare decisis by the Supreme Court of Texas between April 18, 1876, and the end of December 1882. It seems a fair assumption that the court followed the hierarchy of authorities called for in appellate briefs under the Supreme Court Rules of December 1, 1877: Texas statutes and decisions came first, followed by United States statutes and decisions so far as applicable.[731] In reality, by virtue of the Supremacy Clause of the United States Constitution, the latter came first, and the construction of federal statutes followed federal jurisprudence, including federal rules of stare decisis. There was, however, not much by way of federal statutory law applicable in civil disputes in state courts at the time. The prime example was bankruptcy, where the court meticulously followed the exposition of federal bankruptcy law as set forth in a treatise and reported in specialized serial publications now long forgotten.[732]

The Supreme Court of Texas was, however, the final authority on Texas law, and that was that. In *Peck v. City of San Antonio*,[733] the court had to consider once again the constitutionality of railroad bonds issued by the City of San Antonio under a Texas statute, which was claimed to be in violation of the single-subject clause of the state constitution.[734] The constitutionality of that enactment had been upheld by the Military Court[735] but later denied by the Semicolon Court,[736] which in turn was followed by the first Roberts-Gould Court decision concerning the issue in an opinion by its chief justice.[737] In a previous diversity case brought in federal court by astute

731. TEX. SUP. CT. R. 36, 47 Tex. 597, 604 (1878).

732. The treatise cited with some regularity was ORLANDO F. BUMP, THE LAW AND PRACTICE IN BANKRUPTCY (New York, Baker, Voorhis & Co. 1869), which appeared in no less than ten editions between 1869 and 1884, and a posthumous one (by Eugene Williams) in 1898. *See, e.g.*, Wofford v. Unger, 53 Tex. 634, 637–39 (1880) (including citations to *Bump on Bankruptcy* in the arguments by counsel for appellant and appellee); *see also id.* at 639, 641 (making indirect citations to "B.R."). "B.R." stood for the *National Bankruptcy Register Reports*.

733. Peck v. City of San Antonio, 51 Tex. 490 (1879).

734. *Id.* at 492.

735. *See* City of San Antonio v. Lane, 32 Tex. 405, 411–13 (1869) (upholding the constitutionality of the statute), *abrogated by* City of San Antonio v. Gould, 34 Tex. 49 (1870–1871).

736. *See Gould*, 34 Tex. at 53–55 (declaring the statute to be unconstitutional).

737. *See* Giddings v. City of San Antonio, 47 Tex. 548, 557–58 (1877) (deciding, once again, against the constitutionality of the enactment).

counsel, however, the United States Supreme Court upheld the validity of the San Antonio railroad bonds, noting that this question was "still unsettled" in Texas jurisprudence.[738] In an opinion by Justice Bonner, the Supreme Court of Texas now decided to adhere to its own prior decisions, saying:

> Although we entertain the very greatest respect for the opinions of that high tribunal, yet we feel it our duty, upon a question which involves the proper construction of a local statute under the Constitution of Texas, to follow the latest decisions of this court; and particularly when, as in this case, the direct point involved has received our deliberate consideration upon a reexamination of the question.[739]

Since *Peck* also failed to follow prior decisions of the Military Court but expressly reiterated acceptance of a decision by the Semicolon Court, it will require brief comment in that connection. Before returning to that matter, however, it seems appropriate to note the precedential value accorded to court of appeals and commission of appeals decisions. In *Crane v. Blum*,[740] the supreme court accepted a court of appeals decision as final and binding between the parties, adding, however, that it did "not wish to be understood as questioning or passing upon" the correctness of that decision.[741] In *English v. Miltenberger*,[742] the initial opinion of the court by Justice Bonner had given some weight to "the practice which has prevailed in at least some of the districts in the [s]tate," as well as to a decision of the court of appeals reported in the *Texas Law Journal*.[743] On rehearing, Justice Bonner became the lone dissenter, adhering to his original opinion. The court, per Justice Gould, strongly disapproved of the reference to district court practice, and pointedly refused to express any views on the court of appeals decision cited by Justice Bonner.[744] The only case cited approvingly by the supreme court to the *Texas Law Journal* turns out to be its own decision.[745]

738. City of San Antonio v. Mehaffy, 96 U.S. 312, 315 (1878).
739. *See Peck*, 51 Tex. at 493 (referring to *Mehaffy*, 96 U.S. at 315).
740. Crane v. Blum, 56 Tex. 325 (1882).
741. *Id.* at 330–31.
742. English v. Miltenberger, 51 Tex. 296 (1879).
743. *Id.* at 300.
744. *Id.* at 301.
745. *See* Freeman v. Mahoney, 57 Tex. 621, 626 (1882) (citing *Freeman v. Gerald*, 2 TEX. L.J. 744 (Tex. 1879)).

We turn now to commission of appeals decisions, whose precedential value seemed assured by the Act of February 9, 1881, which ordered the publication of commission opinions approved by the supreme court in the *Texas Reports* as the opinions of that court, "as in other cases."[746] Such decisions passed into Texas jurisprudence, however, only upon, and by virtue of, approval by the supreme court. In *Stone v. Brown*,[747] that court announced that its review of a commission opinion did not encompass "incidental propositions or views of the commissioner who prepares the opinion, but not essential to maintain the correctness of its conclusions, or even the vital legal propositions upon which it depends."[748]

The effect of this qualification on the precedential effect of the officially published decisions of the commission of appeals is not readily apparent. It remains to add that the commission freely referred to its own prior decisions as authority.[749] This includes decisions in cases submitted by agreement, which were not subject to supreme court review and which were, by express statutory mandate of "no force or effect or authority as precedent" in causes other than the one decided.[750]

It might thus be said, with but little exaggeration, that in the period here under discussion, Texas started out with two courts of last resort in civil matters and ended up with three. Harmony in the jurisprudence of the commission of appeals and the supreme court could be enforced by the latter through rigorous review prior to approval, but this, we just saw, was not deemed practical or desirable.[751] Harmony between court of appeals jurisprudence in county-court civil appeals and the decisional law of the supreme

746. Act approved Feb. 9, 1881, 17th Leg., R.S., ch. 7, §§ 2, 4, 1881 Tex. Gen. Laws 4, 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 96, 96 (Austin, Gammel Book Co. 1898).

747. Stone v. Brown, 54 Tex. 330 (1881).

748. *Id.* at 337.

749. *See, e.g.*, Bergstroem v. State, 58 Tex. 92, 95 (1882) (citing Mays v. Cockrum, 57 Tex. 352 (1882)) (recording an opinion of the commission authored by Judge Delany).

750. Act approved July 9, 1879, 16th Leg., 1st C.S., ch. 34, §§ 2, 8, 1879 Tex. Gen. Laws 30, 31, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 62, 63 (Austin, Gammel Book Co. 1898).

751. *See Stone*, 54 Tex. at 337 (reasoning that it would be unrealistic to expect the supreme court to agree with every inference or deduction made by the commission, though the court agrees with the commission as to the facts and judgment).

court was not attainable short of constitutional amendment.[752] Virtually instantaneous publication of court of appeals decisions in civil cases in the *Texas Law Journal* assured their citation in counsels' briefs. Federal courts, accountable to a different judicial hierarchy, increasingly decided issues governed by Texas state law.

In short, the question of the precedential force of Military and Semicolon Court decisions was hardly the central issue under the rubric of stare decisis in the period here under review. The primary concern of the supreme court in this regard was to preserve its position as the ultimate expositor of Texas private and public law, leaving only criminal law to the court of appeals and as little as possible to the federal courts. This latter concern is reflected most clearly in *Peck v. City of San Antonio*, where Justice Bonner's opinion concluded by stating: "To remove any doubt which may arise in the courts of this [s]tate from the above case of *San Antonio v. Mehaffy*, we again reaffirm the unconstitutionality of the section of the act under consideration."[753]

City of San Antonio v. Mehaffy[754] was a decision of the highest court in the land, but on the validity of Texas statutes under the Texas Constitution, the Supreme Court of Texas had the last word.

The ultimate authority of that court depended, of course, in good part on the consistency of its jurisprudence. In *Peck*, the court took pains to inform the district judiciary (and more generally, the Texas bar) of its determination to "again reaffirm" its prior decisions in point.[755] These were, more specifically, *City of San Antonio v. Gould*[756] and *Giddings v. City of San Antonio*.[757] In *Gould*, Moses Walker had departed from a prior decision to the contrary by the Military Court,[758] whereas in *Giddings*, Oran Roberts had followed the decision of his arch enemy, remarking that "it would be unfortunate that it should be thought practicable, on a doubtful question, to easily procure a

752. *See* William Pitt Ballinger, Diary of William Pitt Ballinger 57 (Apr. 2, 1879) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (proposing a constitutional amendment containing such a provision).

753. Peck v. City of San Antonio, 51 Tex. 490, 493 (1879).

754. City of San Antonio v. Mehaffy, 96 U.S. 312 (1878).

755. *Peck*, 51 Tex. at 493.

756. City of San Antonio v. Gould, 34 Tex. 49 (1870–1871).

757. Giddings v. City of San Antonio, 47 Tex. 548 (1877).

758. *See Gould*, 34 Tex. at 71–73 (abrogating City of San Antonio v. Lane, 32 Tex. 405 (1869)).

change of decision with every change in the members, who might, from time to time, compose the [s]upreme [c]ourt."[759]

This passage was also quoted in Justice Bonner's opinion in *Peck*.[760] The chain of authority there vindicated had its origins, however, in a decision in which the Semicolon Court departed from Military Court precedent. The ready explanation of that departure from precedent, in Justice Bonner's words, lay in the "military organization" of the latter tribunal: "That court not having been organized under the [c]onstitution and laws of the [s]tate, with all due respect to the members who composed the same as individuals, their opinions have not received the same authoritative sanction given to those of the court as regularly constituted."[761]

This passage, in turn, referred to a prior opinion of Chief Justice Moore in *Taylor v. Murphy*,[762] in which he had expressed his "individual opinion" as to the precedential effect of decisions of the Military Court, which in his words "did not exercise its functions under and by virtue of the [c]onstitution and laws of the State of Texas, but merely by virtue of military appointment."[763] For that reason, he continued, he could not regard a Military Court decision arguably on point "as authoritative exposition of the law involved in the cases upon which it was called to pass, but merely as conclusive and binding determinations of the particular case in which such opinion was expressed."[764] Immediately after this frequently quoted attack on the legitimacy of the jurisprudence of the Military Court, however, he went on to discuss the decision of that court there at issue on the assumption that it was "entitled to the same consideration as it should have if made by our predecessors," i.e., by the Semicolon Court.[765] He then proceeded to criticize the Military Court precedent urged upon the court as employing overbroad language, not supported by prior Texas authority there relied on.[766]

In short, *Peck* and *Taylor* stand for two propositions. First,

759. *See Giddings*, 47 Tex. at 557 (referring to *Gould*, 34 Tex. at 49).
760. *Peck*, 51 Tex. at 493.
761. *Id.* at 492.
762. Taylor v. Murphy, 50 Tex. 291 (1878).
763. *Id.* at 295.
764. *Id.*
765. *Id.* at 296.
766. *Id.* at 296–300.

Semicolon Court decisions were accepted as part and parcel of Texas jurisprudence. Secondly, in view of the para-constitutional foundations of the Military Court, decisions of that tribunal were not. As to the first proposition, it remains to add that it was never in doubt in the second phase of the Roberts-Gould Court, i.e., between April 18, 1876, and the end of December 1882. In case after case cited and relied upon, Semicolon Court precedent and the opinions of Moses Walker and Wesley Ogden were quoted with attribution and with approval.[767] Briefs of counsel summarized in the reports, although frequently not including those of the prevailing party, tell the same story. Here and there, chains of authority show a hiatus between volumes twenty-eight and forty of the *Texas Reports*. Justice Bonner cited Military and Semicolon Court decisions rather more frequently than other members of the court, and the commission of appeals did so rather more sparingly. It would take a peculiar cast of mind, however, to see any trace of a taboo in such variations from the norm.

Citations to decisions of the Military Court are also abundant in this phase of the Roberts-Gould Court. Chief Justice Moore, we saw, characterized his above-quoted remarks in *Taylor* as his "individual opinion," surely not entirely influenced by the recollection of his own fate at the hands of military authority.[768] The endorsement by the full court, in *Peck*, of this attack on the precedential stature of Military Court decisions is perhaps best seen primarily as a rhetorical device supplying additional justification for continued departure from a Military Court decision overruled by the Supreme Court of Texas but revived by the Supreme Court of the United States. At any rate, *Peck* does not seem to have been invoked subsequently on this point, and there is no dearth of citation of Military Court authority by and before the Roberts-Gould Court in its ultimate phase. In *Grigsby v. Peak*,[769] for instance, five Military Court decisions were cited in support of a single proposition.[770]

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767. *See, e.g.*, Trigg v. State, 49 Tex. 645, 672 (1878) (quoting Justice Ogden in Davis v. State, 35 Tex. 118, 123 (1871–1872)).

768. *See* Magee v. Chadoin's Ex'r, 44 Tex. 488, 490 (1876) (indicating that Moore, the opinion's author, was an associate justice in 1876); George W. Paschal, 30 Tex., at iii (1870) (listing Moore as chief justice in 1867).

769. Grigsby v. Peak, 57 Tex. 142 (1882).

770. *Id.* at 145 (citing Waters v. Waters, 33 Tex. 50 (1870); Haddock, Reed & Co. v. Crocheron, 32 Tex. 276 (1869); Maloney v. Roberts, 32 Tex. 136 (1869); McClelland v.

It needs to be added that the five justices who sat in the initial six-year judicial election and vacancy appointment cycle under the 1876 constitution were neither moved by overt appeal to political prejudice nor, at least as a rule, motivated by resentments built up under Reconstruction. In *County of Anderson v. Houston & Great Northern Railroad Co.*,[771] for instance, counsel for the county seeking to void a local railroad bond election assailed a statute enacted in May 1871, as "passed by a corrupt and alien [l]egislature, which did not represent the intelligent tax-paying people of the [s]tate."[772] Micajah Bonner, sitting as a district judge, dismissed the action, and his decision was upheld in an opinion by Robert Gould who pointedly observed that it was "not for the courts to impute improper motives to the [l]egislature."[773] Ex-Governor Edmund Davis appeared with some frequency as counsel for South Texas interests at Galveston term, and in *City of Laredo v. Macdonnell*[774] and *City of Laredo v. Martin*[775] he secured remarkable victories for his client.[776]

As will be seen further below, another prominent Radical Republican of the Reconstruction era was not as fortunate,[777] and there can be little doubt that although seldom displayed and never expressed in extreme terms, the political sympathies of the first court sitting under the 1876 constitution were squarely with the Lost Cause. Judicial attention, however, focused necessarily not on past political battles, but on current legal disputes. Some of these, too, reflected tangible political antagonisms: rural against municipal interests; incumbent against challenger; or, with amazing regularity, taxpayer against taxing authority.

Slauter, 30 Tex. 497 (1867); Ryan's Adm'r v. Flint, 30 Tex. 382 (1867)).

771. County of Anderson v. Houston & Great N. R.R. Co., 52 Tex. 228 (1879).

772. *Id.* at 231.

773. *Id.* at 239.

774. City of Laredo v. Macdonnell, 52 Tex. 511 (1880).

775. City of Laredo v. Martin, 52 Tex. 548 (1880).

776. *See Macdonnell*, 52 Tex. at 529 (ordering a judgment in favor of Mr. Davis's client); *Martin*, 52 Tex. at 562 (ruling again in favor of Mr. Davis's client).

777. *See* State v. De Gress, 72 Tex. 242, 242, 11 S.W. 1029, 1029 (Tex. 1888) (ruling that J.C. De Gress, another Radical Republican, was unfit to serve as an alderman in Austin); State v. De Gress, 53 Tex. 387, 395–96, 400–01 (1880) (holding that De Gress was not eligible to serve as the City of Austin's mayor); De Gress v. Hubbard, 2 Posey 735, 736–37 (Tex. Comm'n App. between 1882 and 1884) (not precedential) (affirming the dismissal of a suit instituted by J.C. De Gress against several defendants for "an alleged assault and battery and false imprisonment, and a claim . . . for money [a defendant] had and received [from De Gress]").

The bulk of the work of the court in the period discussed, however, consisted of private disputes. These, too, are readily divided into the old and the new. The former included mainly land grants, homestead, and community property, and the latter, the arrival of the industrial age: railroads, industrial accidents, corporations, finance, the export trade, and even contemporary innovations such as telegraph communications and photography. In the following, Texas Supreme Court and Texas Commission of Appeals jurisprudence from April 18, 1876, to the end of December 1882 will be discussed in the order just indicated, proceeding from politics through land law to the Texas judicial response to the Industrial Revolution.

E. *Constitutional Law and Local Government*

By 1876, the main constitutional issues posed by secession and the Civil War had been resolved, at least for some time to come. The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States made its first appearance in the Texas Supreme Court in *Grigsby v. Peak*,[778] where it was held not to inhibit legislative and state constitutional extension of limitation periods as to matters still pending.[779] The constitutional jurisprudence of the supreme court centered not on federal but on state constitutional law, mainly but not exclusively proceeding from the construction of the Constitution of 1876.

In practical terms, the most important constitutional questions faced by the court in the period here discussed involved the constitutionality of the first and second commission of appeals Acts of 1879 and 1881, respectively. Since the former was based in terms on the "duty of the [l]egislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial,"[780] its constitutionality was upheld by a divided court, with Justices Gould[781] and Bonner[782] in separate opinions in the majority, and Chief Justice

778. Grigsby v. Peak, 57 Tex. 142 (1882).

779. *See id.* at 148–51 (discussing the applicability of the Due Process Clause in the case at bar).

780. TEX. CONST. of 1876, art. XVI, § 13, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 826, 828 (Austin, Gammel Book Co. 1898).

781. *See* Henderson v. Beaton, 52 Tex. 29, 32–36 (1879) (Gould, J.) (stating that the constitution does not "prohibit[] the creation of the 'commissioners of appeals'").

782. *See id.* at 36–38 (Bonner, J., concurring) (agreeing, with some mild trepidation,

Moore dissenting[783] on the ground that the commission created by the Act of 1879 was in reality a court of law. The dissenting opinion in *Henderson v. Beaton*[784] gives a useful account of the derivation and the legislative history of that enactment.[785]

In *Stone v. Brown*, the same majority of the court upheld the constitutionality of the second commission of appeals statute.[786] Chief Justice Moore felt that the imposition of a mandatory reference scheme on a supposedly voluntary one through amendment of the 1879 Act was in violation of the single-subject clause of the constitution.[787] Writing for the majority, Justice Bonner gave a comprehensive historical account of single-subject clauses and of their construction in state constitutional law.[788] The standard text of reference, in this as well as in other constitutional adjudications by the Supreme Court of Texas, was Thomas Cooley's treatise on constitutional limitations, even by then in its fourth edition.[789]

Another seminal constitutional decision, at least in retrospect, was *Norris v. City of Waco*.[790] The appellant's land, encompassed in the Waco city limits under a legislative charter of April 26, 1871, was purely agricultural in character and did not (or it did not as yet, or directly) benefit from municipal improvements such as roads.[791] The appellant contended that the municipal taxes levied on these lands deprived her of property without due process of law, as she, unlike city dwellers, received no benefit from the

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with Justice Gould's opinion).

783. *See id.* at 38–60 (Moore, C.J., dissenting) (arguing that the creation of a commission of appeals was unconstitutional).

784. Henderson v. Beaton, 52 Tex. 29 (1879).

785. *See id.* at 38–60 (Moore, C.J., dissenting) (providing, in great detail, the history of the enactment).

786. Stone v. Brown, 54 Tex. 330, 340–41 (1881).

787. *Id.* at 336–41.

788. *Id.* at 341–46.

789. *See generally* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (3d ed. Boston, Little, Brown & Co. 1874) (1868) (appearing in four editions between 1868 and 1878). The third edition was most frequently in use in the period here covered; the first was purchased by William Ballinger, who arrived in Texas in 1868. William Pitt Ballinger, Diary of William Pitt Ballinger 243 (Nov. 23, 1868) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

790. Norris v. City of Waco, 57 Tex. 635 (1882).

791. *Id.* at 637.

expenditure of such funds.[792] Although such suits had been successful in some other states, the majority opinion (including, crucially, that of Judge Cooley) held both the legislative delimitation of incorporated municipalities and taxation within such areas to be political rather than legal issues.[793] In an opinion by Justice Stayton, with ample quotation from Cooley's treatise, the court upheld the constitutionality of the municipal tax assessed on the agricultural lands of the appellant.[794]

Norris documents two tendencies in the jurisprudence of the Roberts-Gould Court in its final phase: the classification of large areas of municipal and local government disputes as political and hence nonjusticiable; and perhaps even more importantly, the strenuous avoidance of partiality towards rural constituencies, which were, after all, still the numerically dominant political element in the state. In *Williamson v. Lane*,[795] the court held that election contests were not "civil cases" within the constitutionally prescribed jurisdiction of state district courts, and were therefore "political question[s], to be regulated, under the [c]onstitution, by the political authority of the [s]tate."[796] Qualification (including continued qualification) for public office, however, was a different question. In *Trigg v. State*,[797] one V.C. Giles and a number of citizens of Travis County sought to remove Bingham Trigg, the county attorney, from office, charging him to be guilty of "habitual drunkenness."[798] He had been elected to that office in February 1876 under the new constitution which made habitual intoxication, among other derelictions, a cause for removal of county attorneys.[799] Mr. Trigg, who had acted as court-appointed counsel for the State in the Semicolon Decision,[800] was accused of four acts of drunkenness, months or several weeks apart, in the course

792. *See id.* at 638 (recording the appellant's complaint that her rights under the Texas and United States Constitutions were being violated).

793. *Id.* at 640, 642–43.

794. *Id.* at 643–44.

795. Williamson v. Lane, 52 Tex. 335 (1879).

796. *Id.* at 346–47.

797. Trigg v. State, 49 Tex. 645 (1878).

798. *Id.* at 660.

799. *See* TEX. CONST. of 1876, art. V, § 24, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 800, 808 (Austin, Gammel Book Co. 1898) ("[C]ounty attorneys . . . may be removed . . . [for] habitual drunkenness . . . .").

800. *See Ex parte* Rodriguez, 39 Tex. 705, 718–20, 722–26 (1873) (referring to Bingham Trigg as appointed counsel).

of twelve months in office. This alone, the court held, was insufficient to prove that he was a "habitual" drunkard.[801]

The lengthy opinion of Chief Justice Roberts in *Trigg* traces the history of constitutional provisions on the disqualification and removal of elected officials from the Constitution of the Republic of Texas in 1836 to that of the State of Texas in 1876.[802] It seems appropriate to observe at this point that the Roberts-Gould Court, sitting under the latter instrument, was the last in Texas able to supply such a comprehensive view of Texas constitutional history with the confidence of personal knowledge and observation, not excluding actual participation by some of its members in the constitutional drafting and revision process. Another notable feature of *Trigg* is that in fleshing out the due process requirements for removal of elected officials, Oran Roberts expressly relied on the jurisprudence of the Semicolon Court, with a full-page excerpt of Judge Ogden's opinion in *Davis v. State*.[803]

Trigg offers some interesting insights into Austin and Travis County low-life and judicial politics, since Mr. Trigg was also charged (grotesquely, in more recent perspective) with "official misconduct" consisting of leniency towards his star witness in a prosecution for petty professional gambling.[804] Almost needless to add, this, too, did not stand as a ground for removal, but it seems not unreasonable to wonder how such a charge could ever have made it to (and through) a Travis County jury. *Milliken v. City Council of Weatherford*,[805] the other removal-from-office case decided by the Roberts-Gould Court in its last phase, gives no cause for speculation in that respect. James H. Milliken, the duly elected mayor of Weatherford, was removed from office after having been found by a statutory court of aldermen to be guilty of violation of a city ordinance, a statutory ground for removal.[806] The ordinance at issue, fully reproduced in the *Texas Reports*, made it an offense to keep a house of prostitution within the city limits.[807] Additionally, it imposed a penal sanction on those who

801. *Trigg*, 49 Tex. at 664–65, 676–77.
802. *Id.* at 667–71.
803. *Id.* at 672–73 (citing Davis v. State, 35 Tex. 118, 123 (1872)).
804. *Id.* at 678–79.
805. Milliken v. City Council of Weatherford, 54 Tex. 388 (1881).
806. *Id.* at 389 ("Milliken . . . was . . . removed from office by the board of aldermen . . . .").
807. *See id.* at 393 (quoting the statute that made it unlawful to establish a house of

rented premises "'to any prostitute or lewd woman.'"[808] The mayor was found guilty of the latter, and removed from office.[809]

His appeal to the supreme court for a writ of mandamus ordering reinstatement was successful.[810] Speaking through Justice Bonner, the court "heartily approve[d] the desire of the city council" to prohibit prostitution within city limits, but held the criminalization of renting accommodation to fallen women not to be within the legislative power of Texas municipalities.[811] In a passage quite out of tune with the restrained, precise style which he had brought to the court, Micajah Bonner wrote:

> That unfortunate and degraded class against whom the ordinance was mainly intended, however far they may have fallen beneath the true mission of women, which it is one of our highest duties to foster and protect in social and domestic life, are still human beings, entitled to shelter and the protection of the law; and the council did not have the power to so far proscribe them as a class, as to make it a penal offense in any one to rent them a habitation without regard to its use.[812]

State v. De Gress,[813] also a mayoral disqualification case, gave rise to emotions of quite a different kind. Jacobus C. De Gress had fought valiantly for the Union as a cavalry officer, suffering ultimately disabling wounds and rising to high if temporary rank. The end of the Civil War saw him in military occupation in Texas, commanding a Negro unit. Upon disbandment, he served first in the Freedmen's Bureau but was subsequently appointed by Governor Davis as the first state superintendent of public education under the Constitution of 1869. He was ousted from that office, apparently by force, on February 16, 1874, some considerable time before the expiration of his four-year constitutional term. After returning to military service briefly with the rank of captain, he retired from active duty, and settled in Austin. The citizens of the capital city elected him to the office of mayor on November 3, 1879, and he was duly installed as such by

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prostitution in Weatherford city limits).

808. *Id.*

809. *Id.* at 389.

810. *Milliken*, 54 Tex. at 395.

811. *Id.* at 393–95.

812. *Id.* at 394.

813. State v. De Gress, 53 Tex. 387 (1880).

the Austin City Council ten days thereafter.[814]

It seems difficult to think of a prominent Radical Republican of the Reconstruction era whose continued and visible presence in Texas could cause greater resentment among the adherents of the Lost Cause who had returned to state-wide power in 1874. Ex-Governor Edmund Davis comes to mind, but he had to eke out a living through practice before his former political adversaries at Galveston term. Jacobus De Gress had no such worries. He could live on his pension in Austin, readily supplemented by appointment as postmaster if need be.[815] Moreover, well-connected through marriage and socially adept, he enjoyed considerable popularity in Austin, as amply demonstrated by his repeated election to local public office.[816]

The very source of Captain De Gress's economic independence, however, was to be the cause of his judicial disqualification as mayor. The Austin City Charter provided that no person could be mayor "who [held] any lucrative office under authority of the United States or any state."[817] In proceedings brought by the Travis County attorney, it was asserted that retired military officers receiving pensions held lucrative office under the United States and were therefore disqualified from serving as mayor of Austin. This proceeding was filed on February 14, 1880, and duly dismissed by the district judge. By May 28 of that year, however, the supreme court was ready to give judgment.[818] Prior thereto, it had found time on its crowded calendar to announce from the bench that the appeal could proceed.[819]

Unsurprisingly, given this background, the court held that "[t]he office of mayor of the City of Austin cannot legally be held by one who at the same time continues [to be] an officer of the army of

814. *See id.* at 395–96 (describing the efforts to remove Mr. De Gress as mayor); *see also* Michael E. McClellan, *DeGress, Jacob Carl Maria*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 565, 565–66 (Ron Tyler et al. eds., 1996) (providing a sketch of the lawsuit against De Gress).

815. *See* MARY STARR BARKLEY, HISTORY OF TRAVIS COUNTY AND AUSTIN 1839–1899, at 253 (1963) (noting that De Gress served as postmaster for Austin from 1881 to 1885 and again from 1889 to 1893).

816. *See* Michael E. McClellan, *DeGress, Jacob Carl Maria*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 565, 565–66 (Ron Tyler et al. eds., 1996) (reviewing the many public offices held by De Gress).

817. *De Gress*, 53 Tex. at 395.

818. *See id.* at 401 (reporting the opinion was delivered on May 28, 1880).

819. *Id.* at 396.

the United States, though on the retired list."[820] This conclusion was based on the finding that such officers, by express federal enactment, constituted part of the army of the United States, that they retained their rank held at retirement, that they received a pension of 75% of pay at that rank, that they were subject to court-martial, and—last but surely not least—that they could be "assigned to duty at the soldiers' home."[821]

Much earlier, on May 4, 1874, Jacobus De Gress had instituted proceedings against various officials, seeking damages for his wrongful removal as state commissioner of public education.[822] Amended from time to time, these proceedings were dismissed, and apparently faced with substantial delay of his appeal to the supreme court, De Gress agreed to the transfer of proceedings to the commission of appeals. The defense, upheld by that tribunal in *De Gress v. Hubbard*,[823] was "misjoinder of defendants and causes of action, or . . . multifariousness."[824] This disposed of what appears to have been a serious challenge of the legality of the dismissal of Republican state officials in January and February 1874, before the expiration of their constitutional terms.

Happier to relate, Jacobus De Gress was not ousted from his office as alderman of the City of Austin, to which he was elected a few years later. Once again, in *State v. De Gress*,[825] he was challenged, and once again, the district judge dismissed quo warranto proceedings. The court held that because the district court found the office of alderman to not be a lucrative one, the district court had been without jurisdiction because of the insufficiency of the amount in controversy.[826] The action to oust Jacobus De Gress from his city council seat was, accordingly, dismissed, and he had the satisfaction of holding elective municipal office in the capital city after all. It must be added that in his submissions in that case, the attorney general ("Jim" Hogg, no less), denied United States military pensioners settled in Texas the

820. *Id.* at 401.

821. *Id.* at 400.

822. De Gress v. Hubbard, 2 Posey 735, 735 (Tex. Comm'n App. between 1882 and 1884) (not precedential).

823. De Gress v. Hubbard, 2 Posey 735 (Tex. Comm'n App. between 1882 and 1884) (not precedential).

824. *Id.* at 736.

825. State v. De Gress, 72 Tex. 242, 11 S.W. 1029 (1888).

826. *Id.* at 243, 11 S.W. at 1030.

right to be citizens of this state.[827]

De Gress left open the question whether a properly drafted legislative municipal charter or code might make municipal authorities the final judges not only of local elections, but also of qualifications for office. The court was divided on that issue in *Seay v. Hunt*,[828] involving the refusal of the Dallas City Council to seat an elected mayoral candidate for failure to meet the residency requirements of the city charter.[829] The decision of the municipal authorities in that case was affirmed nevertheless because it was found to be correct.[830]

As indicated by the frequency of these cases, the Roberts-Gould Court sitting under the Constitution of 1876 had to pass with some frequency on the legality of the actions of municipal and local governments. Two cases involved the disposition and management of the town square. In *Lamar County v. Clements*,[831] the Lamar County Commissioners were enjoined from selling part of the courthouse square of the county seat, destined to become the town of Paris.[832] In *Corporation of Seguin v. Ireland*,[833] the most prominent citizen of Seguin was unsuccessful in blocking the construction of a market house on the town square.[834] The court found the location of such a structure at that place to be within the purpose of the original dedication but left open the question whether this applied also to the town jail at one wing of the market hall.[835]

Brief mention has already been made further above of the forensic efforts of ex-Governor Edmund Davis on behalf of the City of Laredo. In *City of Laredo v. Macdonnell*, the court set aside, as beyond the authority of the mayor and as induced by manifest fraud, the sale of a tract of municipal lands fronting the Rio Grande.[836] In *City of Laredo v. Martin*, the court, again by

827. *See id.* (reporting Hogg's argument that military pensioners were not citizens of Texas).

828. Seay v. Hunt, 55 Tex. 545 (1881).

829. *See id.* at 555–58 (discussing the facts of the case).

830. *See id.* at 560 (affirming Hunt's dismissal as mayor of Dallas).

831. Lamar County v. Clements, 49 Tex. 347 (1878).

832. *Id.* at 357–58.

833. Corp. of Seguin v. Ireland, 58 Tex. 183 (1882).

834. *Id.* at 186.

835. *Id.*

836. *See* City of Laredo v. Macdonnell, 52 Tex. 511, 528–29 (1880) (setting aside the mayor's attempt to sell city property without the authority to do so).

Chief Justice Moore, enjoined the parties behind that scheme from operating a ferry in competition with one operated pursuant to a franchise granted by the city, which later was held to have had that right since its foundation under Spanish rule in 1767.[837] This litigation offers valuable insights into the process of municipal settlement in that part of the present State of Texas. It also seems worthy of note that the mayor of Laredo at the time of the transaction had previously testified that he had no knowledge of English.[838] The indignation of the court at the fraudulent schemes unmasked by Edmund Davis is apparent not only in unusually strong judicial language, but also in the seldom-used formula, "[r]eversed and rendered," in both cases.[839]

Although municipal politics and property appear with some frequency on the docket of the court after the adoption of the Constitution of 1876, most municipal and local government cases then decided dealt with matters of finance and, more particularly, of taxation. Perhaps not unexpectedly, the City of Galveston figures quite frequently in such cases. Given the superior library and intellectual resources of the firm of William Pitt Ballinger, Galveston municipal tax cases appear to have been one of the major avenues for the infusion of then-current notions of American local government law into Texas jurisprudence. Perhaps the best example in point is *City of Galveston v. Heard*,[840] dealing with sidewalk assessments.[841] Ballinger did not prevail in the case, but a five-page extract from his brief furnishes an excellent overview of jurisprudence and literature of the day.[842]

The most important decision of the Roberts-Gould Court in its last year was probably *City of Fort Worth v. Davis*,[843] involving the taxing powers of cities and towns in their capacity as independent school districts.[844] The opinion of Chief Justice

837. City of Laredo v. Martin, 52 Tex. 548, 559–62 (1880).

838. *See Macdonnell*, 52 Tex. at 513–14 (recording the testimony of Mayor Refugio Benavides that "I cannot speak or read English, and cannot understand it when it is spoken to me").

839. *Id.* at 529; *Martin*, 52 Tex. at 562.

840. City of Galveston v. Heard, 54 Tex. 420 (1881).

841. *See id.* at 426–27 ("The city of Galveston brought this suit to recover ... an alleged assessment for a sidewalk ....").

842. *See id.* at 422–26 (outlining Ballinger's arguments).

843. City of Fort Worth v. Davis, 57 Tex. 225 (1882).

844. *Id.* at 229.

Gould in that case provides not only a convenient survey of Texas constitutional and statutory law on public education under the Constitutions of 1869 and 1876, but also useful insights into the rules of state constitutional interpretation prevailing at the time. Among the latter, the significance of subsequent legislative and executive practice in the interpretation of ambiguous constitutional provisions seems worthy of specific mention, as does, more for historical reasons, resort to the journals of the Constitutional Convention of 1875.[845] In any event, the court invalidated a Fort Worth Independent School District property tax of 0.25% for the operation of the Fort Worth public schools.[846] Although it did so on the narrow ground of failure to comply with the precise terms of a school finance law since repealed, the court reached this conclusion after denying an inherent or a separate taxing power of independent school districts under the Constitution of 1876, and after dwelling with some emphasis on the "repeated and guarded constitutional limitations of the taxing power," stated to be "a prominent feature of that instrument."[847] Despite its limited holding, *Davis* came to be regarded as highly damaging to the cause of public education in Texas.[848]

F. *Public and Private Land Law, Community Property, and the Homestead Exemption*

As Chief Justice Roberts had occasion to remark in *State v. Sais*,[849] the Texas system of public land grants followed that prevailing in northeastern Mexico before the change of sovereignty.[850] It consisted of three steps: the official recognition

845. *See id.* at 232 (referring to the court's use of convention journals to explain the omission of a specific provision); Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1055–60 (1991) (describing the development of the use of records of conventions in constitutional interpretation by state and federal courts).

846. *Davis*, 57 Tex. at 238 ("The tax levied was illegal, and the judgment of the court below, enjoining its collection, is affirmed.").

847. *Id.* at 232.

848. *See* Mikal Watts & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 808–19 (1990) (documenting the fact that *Davis* led to the amendment of the Texas constitution in 1883 to authorize the legislative creation of school districts with limited taxing power).

849. State v. Sais, 47 Tex. 307 (1877).

850. *See id.* at 315 (explaining that the principal features of the Texas land grant system were founded on the Mexican land grant system).

of a quantified claim, the officially sanctioned and acknowledged survey of that claim, and the formal separation of the area thus claimed from the public domain—or, in Texas terms, certificate, location and survey, and patenting.[851] Unlike the public land system of the United States, that of Texas was not based on an official, astronomically accurate survey. Perhaps even more importantly, and for this reason, it permitted, and was indeed based on, public grants of unplatted land. Almost needless to add, this invited boundary disputes between the state and grantees, as well as between neighbors.

Even more significantly, however, Texas recognized not only legal title based on patent, but also equitable property rights flowing from land certificates and locations documented by filed survey. Such property rights were not only transferable by conveyance, devise, and descent, but they were also divisible, thus multiplying equitable rights to originally public land before or even after patent.

This system has to be viewed against the background of mass agricultural immigration, especially after the Civil War, and the absence of a mortgage credit system acerbated by the constitutional ban on banking which was reintroduced by the Constitution of 1876.[852] As a result, the typical land transaction was a purchase of a segment of a land grant, not necessarily reduced to patent, and financed by a short-term note running one, two, or at most three years, usually at hefty interest. The rate of 2.5% *per month* found in *Blackwell v. Barnett*[853] might have been extreme, although it was legal under the Constitution of 1869.[854] That of 1876 set the ordinary rate at 8% but permitted contractual stipulations of interest of up to 12%, and a statute of August 21 of that year voided the agreement on interest (but not the principal

851. *Id.*

852. *See* TEX. CONST. of 1876, art. XVI, § 16, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 826, 828 (Austin, Gammel Book Co. 1898) ("No corporate body shall hereafter be created, renewed or extended with banking or discounting privileges.").

853. Blackwell v. Barnett, 52 Tex. 326 (1879), *overruled in part by* Goldfrank, Frank & Co. v. Young, 64 Tex. 432 (1885).

854. TEX. CONST. of 1869, art. XII, § 44 (abolishing all prior usury laws, and barring the enactment of new ones save for the rate of interest in contracts where not specified by the parties); *see also Blackwell*, 52 Tex. at 327 (holding the interest rate was constitutional). Usury was not at issue in the case, as the debt was time barred.

obligation) where the latter rate was exceeded.[855]

On the whole, purchase money notes appear to have stipulated rates of interest of at least 10%. Unsurprisingly, purchasers of farm land were frequently unable to satisfy the financial obligations thus assumed. Suit on the note was not likely to be very fruitful, but the seller was protected by the vendor's lien, which constituted a first charge on the land. Crucially, it operated against third-party purchasers unless they bought in good faith and without knowledge of the purchase money debt, and registration of the original deed with appropriate mention of the purchase money outstanding constituted constructive knowledge. Third-party purchasers from defaulting vendors then still had the potential defenses of express or implied waiver of the vendor's lien or, if in possession for some time, of the statute of limitations. Since vendors were, naturally enough, more interested in recovering "their" land than in (perhaps quite literally) pursuing a defaulting debtor, the vendor's lien was a main source of litigation in Texas in the period here discussed.

So far as can be determined, virtually all vendor's lien cases reaching the court at that time were what the reporters, in their indices, classified as "fact cases." There were, however, at least two other "clouds" on land titles (or on real property rights) in Texas that were even more peculiar to this state: community property and the homestead exemption. The former, we will see, made the purchase of lands from Texas widowers a particularly dangerous undertaking. The latter, interestingly enough, posed no threat to vendors with purchase money claims, for their liens had priority over a homestead established on land subject to purchase money obligations.[856] Purchasers from married men, and unsecured creditors generally, however, were well advised to follow the jurisprudence of the supreme court on the homestead exemption as it then crystallized.

First, as to community property: In *Yancy v. Batte*,[857] a divided

855. *See* Watson v. Mims, 56 Tex. 451, 452 (1882) (applying the interest rate provisions); Watson v. Aiken, 55 Tex. 536, 541–42 (1881) (summarizing the interest rate provisions).

856. *See* TEX. CONST. of 1876, art. XVI, § 50, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 826, 832–33 (Austin, Gammel Book Co. 1898) (providing that homesteads were not exempt from forced sale for the payment of purchase money or parts thereof).

857. Yancy v. Batte, 48 Tex. 46 (1877).

court speaking through Justice Gould held, in reliance on a line of prior authority including Semicolon Court jurisprudence, that a half interest in lands acquired during marriage passed to the wife's heirs upon her death.[858] Justice Moore, in a lengthy dissent, sought to characterize the wife's interest in community property as merely an equitable one, basing his argument upon the premise—not questioned by the majority—that during marriage, the husband could sell community lands in satisfaction of community debts, and the obvious proposition that in probate of the wife's estate, community debts ranked higher than the claims of her heirs.[859] In subsequent cases, sales by widowers in satisfaction of community debts were upheld, and in *Veramendi v. Hutchins*,[860] the commission of appeals went so far as to presume that "Jim" Bowie acted in satisfaction of community debts when selling a league of land on October 15, 1835, some two years after the death of his wife and but a few months before his own death at the Alamo.[861] More recent purchasers from lesser mortals, however, were not as fortunate. The opinion of the Honorable T.N. Waul—sitting as special judge—reproduced with that of the court in *Jordan's Executors v. Imthurn*,[862] throws considerable light on the practical effects of what he called "a system of marital partnership not in consonance with the experience of our heterogeneous population."[863]

Texans took to homestead protection with considerably more enthusiasm. As stated by Justice Bonner in *Roco v. Green*,[864] Texas has "the honor of being the pioneer in that field of humane legislation which provides for homestead exemption."[865] At the time here discussed, the Constitution of 1876 provided that up to two hundred acres of rural land, or a "lot, or lots, not to exceed in value five thousand dollars" in cities, towns, or villages "used for the purpose of a home, or as a place to exercise the calling or

858. *See id.* at 57, 59 (affirming the trial court's judgment in favor of plaintiff heirs).

859. *See id.* at 60–65 (Moore, J., dissenting) (recording Justice Moore's arguments against the court's ruling).

860. Veramendi v. Hutchins, 56 Tex. 414 (1882).

861. *See id.* at 421–22 (discussing the "inauspicious" circumstances of the property's sale).

862. Jordan's Ex'rs v. Imthurn, 51 Tex. 276 (1879).

863. *Id.* at 280.

864. Roco v. Green, 50 Tex. 483 (1878).

865. *Id.* at 488.

business of the head of a family" were not subject to forced sale for the payment of debts except for purchase money, taxes, or materialmen's liens.[866] Although the court was well aware that the homestead exemption had to be balanced against the justified expectations of creditors, there was, in Chief Justice Moore's words in *Miller v. Menke's Widow*,[867] "a uniform and steady tendency in the popular mind in favor of its liberalization and enlargement."[868] The constitutional provisions just summarized were the end product of that popular pressure, which had manifested itself in repudiations of restrictive judicial construction through legislative and constitutional amendment.

In *Miller* itself, the court had to decide whether the urban homestead exemption protected the widow of an insolvent deceased in the possession, not only of the family home, but also of a shop located at some distance therefrom on the courthouse square. At the 1881 Galveston term, the court answered this question in the affirmative, apparently much to the consternation of part of the bar and of the business community, which had regarded shops located at some distance from home, in the words of counsel, as "'gilt-edge' security."[869] Nevertheless, after extensive briefing and argument on motion for rehearing, the court adhered to its prior decision at Galveston term one year later.[870] It remains to add that in a case intriguingly styled *McDonald v. Campbell*,[871] the commission of appeals refused to extend the homestead exemption to a shed standing apart from the debtor's drugstore, the latter being exempt from execution as his place of business.[872]

Since the Constitution of 1876 protected, in terms, the homestead of the "family," that latter term, too, came in need of judicial construction. Reviewing the authorities on point in *Roco v. Green*, Justice Bonner defined the family relationship as "one of social status, not of mere contract," characterized by the "[l]egal or moral obligation on the head to support the other members" and

866. TEX. CONST. of 1876, art. XVI, §§ 50–51, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 826, 832–33 (Austin, Gammel Book Co. 1898).

867. Miller v. Menke's Widow, 56 Tex. 539 (1882).

868. *Id.* at 550.

869. *Id.* at 551–52.

870. *Id.* at 562–64.

871. McDonald v. Campbell, 57 Tex. 614 (1882).

872. *See id.* at 616–18 (providing the court's holding).

the "[c]orresponding state of dependence on the part of the other members for this support."[873] Despite this definition, the court continued to deny family status to dependents in racially mixed relationships. In *Oldham v. McIver*,[874] family status was denied to a woman who had cohabited with the deceased as his wife for twenty-nine years, and to four children of that union.[875]

Returning to the subject of public land law, brief mention must be made of *Duncan v. Veal*,[876] where the court set aside a shabby plot of Jacob de Cordova to acquire, through feigned probate proceedings, the headright land certificate to one-third of a league of land due to the heirs of one of the fallen at Goliad.[877] The most remarkable development in Texas public land law in the period here discussed, however, was the adjudication of Spanish and Mexican land grants in the Nueces Strip—a term commonly used in later years to describe lands which were not part of Spanish or Mexican Texas but belonged to the Colonía de Nuevo Santandér, which later became the State of Tamaulipas. Until occupied by United States Armed Forces in 1845, these lands had been mainly under Mexican jurisdiction and control. Local Texas government in the area dates chiefly from the Treaty of Guadalupe Hidalgo.[878]

Three major difficulties were encountered by Texas state authorities in ascertaining land titles in that area. First and foremost, the original public land documentation was archived in what was now a foreign country. Secondly, Texas had little experience with large Spanish land grants, and none as yet with the colonization laws of the State of Tamaulipas. Thirdly, there was a question of political delicacy. The Republic of Texas had claimed the Rio Grande as its southern boundary, and the support of that claim by the United States had supplied the *casus belli* for the

873. Roco v. Green, 50 Tex. 483, 490 (1878).

874. Oldham v. McIver, 49 Tex. 556 (1878).

875. *See id.* at 563–64 (stating that since the wife was of "one-half African blood, and [the husband] being white," Texas law could not consider them to be "man and wife at the time of his death").

876. Duncan v. Veal, 49 Tex. 603 (1878).

877. *See id.* at 612–13 (setting aside the transfer of title to the property at issue).

878. *See* Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922, 926–28 (describing the agreed upon boundaries with Mexico). *See generally* THE NEWS FROM BROWNSVILLE: HELEN CHAPMAN'S LETTERS FROM THE TEXAS MILITARY FRONTIER, 1848–1852, at 3–48 (Caleb Coker ed., 1992) (shedding significant light on the status of the Nueces Strip under United States military occupation until the treaty's provisions became effective).

Mexican War of 1846–1848.[879] Tamaulipas state and municipal authorities had been in possession and control of most of the land between the Nueces and the Rio Grande between 1836 and 1846 and had continued to apply their public land law there. Arguably at least, land grants made at the time were within the property-protection guarantee of the Treaty of Guadalupe Hidalgo.

In a series of decisions at Austin term 1877, the court was faced with, in the main, these questions. Those relying on Spanish and Mexican grants were ably represented by James H. Bell. His key arguments in point are summarized by the reporters in *State v. Cardinas*.[880] On the issue last mentioned, they were unsuccessful. As stated summarily in *State v. Bustamente*,[881] Texas did not recognize the Mexican land grant activity on the left bank of the Rio Grande after the Boundary Act of the Republic, dated December 19, 1836.[882]

Questions relating to proof of prior Spanish and Mexican land grants are discussed especially in *Cardinas* and in *State v. Sais*.[883] The latter case was, for some considerable time, the main authority for the proposition that the law of the former territorial sovereigns of Texas was Texas law and thus within the judicial notice of the court.[884] Since property rights disputes stemming from Spanish and Mexican land grants in the Nueces Strip seem to have the habit of reappearing in Texas courts with every new generation of claimants, it seems indelicate, especially for the present author, to pursue the matter further.[885] It might be noted, nevertheless, that the Corpus Christi law firm of Powers & Wells, which dominated the next phase of litigation of South Texas land

879. Act approved Dec. 19, 1836, 1st Cong., R.S., § 1, 1836 Repub. Tex. Laws 133, 133–34, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1193, 1193–94 (Austin, Gammel Book Co. 1898). *See generally* DAVID M. PLETCHER, THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR 552–92 (1973) (discussing the tensions present during the annexation of Texas).

880. *See* State v. Cardinas, 47 Tex. 250, 252–72 (1877) (summarizing James Bell's arguments on appeal).

881. State v. Bustamente, 47 Tex. 320 (1877).

882. *Id.* at 322.

883. *Cardinas*, 47 Tex. at 283–92; State v. Sais, 47 Tex. 307, 317 (1877).

884. *See Sais*, 47 Tex. at 318 (stating that the court was charged with a duty of knowing and following the law of the land at the time title to the land was acquired).

885. *See, e.g.*, John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 281 (Tex. 2002) (showing that disputes arising out of Spanish and Mexican land grants continue even today).

grants, made its first appearance in the period here discussed in *Armendiaz v. Stillman*.[886] This was a conflict-of-laws case where the court assumed jurisdiction in a claim for damages through flooding of lands on the Mexican bank of the Rio Grande by an obstruction placed on its Texas bank.[887]

G. *The New Age: From Railroads to Telegraphs*

The eighth decade of the nineteenth century witnessed a phenomenal expansion of the Texas railroad network. In the period here discussed (from April 18, 1876, to the end of December 1882), litigation somehow connected with the "Iron Horse" came to dominate the docket of the Texas Supreme Court. In particular, the establishment, merger, and liquidation of railroad companies introduced the Texas judiciary to the intricacies of modern corporations law. Railroad accidents—in close competition with the occasionally quite amazing high-handedness of railroad conductors—laid the foundation for Texas tort law. Prior to this railroad litigation, tort was not a topic that had appeared much in the indices of the *Texas Reports*. One railroad—the Tyler Tap—suffered the indignity of having to respond to foreclosure on its roadbed for a miserable claim of $1,074.65, asserted as a mechanic's lien.[888] Another—the International Railroad—furnished the major test case of the era on concession forfeiture.

The International Railroad is no stranger to these pages. Chartered originally by Act of August 5, 1870, under a constitution that expressly prohibited the financing of railroads by grants of public lands, its state subsidy held out at the time was a ten million dollar bond issue backed by the public faith of the state, to be doled out as sections of its tracks were completed. The bonds, we saw, were never issued, and judicial relief in Texas state courts was ultimately unavailing.[889] The prohibition of land grants for public

886. Armendiaz v. Stillman, 54 Tex. 623 (1881).

887. *Id.* at 627–33.

888. Tyler Tap R.R. Co. v. J. Driscol & Co., 52 Tex. 13, 17 (1879).

889. *See* Bledsoe v. Int'l R.R. Co., 40 Tex. 537, 541–44, 556–63 (1874) (denying that the court has jurisdiction); *see also* TEX. CONST. of 1869, art. X, § 6 (prohibiting the legislature from granting land); Act approved Mar. 3, 1875, 14th Leg., 2d R.S., ch. 78, § 2, 1875 Tex. Gen. Laws 124, 125, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 714, 715 (Austin, Gammel Book Co. 1898) (directing the comptroller's actions); Act approved Apr. 25, 1874, 14th Leg., 1st R.S., ch. 24, §§ 1, 5, 1874 Tex. Gen.

improvements was removed by constitutional amendment in 1874, and by the so-called Compromise Act of March 10, 1875, and the railroad received a grant of no less than twenty 640-acre sections of public land for every mile of track built between Jefferson and Laredo—some 555 miles of track, entitling the grantee to over seven million acres of public land upon timely completion. In addition, the railroad was to enjoy immunity from state taxation for twenty-five years.[890]

Perhaps predictably, the railroad failed to finish one segment within the time specified, and the state initiated proceedings to forfeit its charter. That would have been the remedy under the 1870 Act, but the Compromise Act stipulated, more reasonably, for forfeiture of the land grants corresponding to segments of track not completed in time. In *State v. International & Great Northern Railroad Co.*,[891] the court chose the latter remedy—inescapably, it seems, since the latter enactment had the customary repealer clause.[892] The importance of this case is thus primarily historical. The meticulous decision of the district court (by the former co-reporter) is reproduced in full,[893] and the summaries of arguments[894] of counsel as well as Justice Bonner's opinion[895] combine with it to make this a veritable goldmine of Texas railroad history.

The importance of the Iron Horse for late nineteenth century Texas is also shown by more humble cases such as *Houston & Texas Central Railroad Co. v. Chandler*,[896] where the court enforced a $1,000 subscription to a fund of $75,000 offered by prominent Austin citizens to the railroad company for successfully

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Laws 49, 49–51, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 315, 315–17 (Austin, Gammel Book Co. 1898) (compromising on the previous land grant "contract"); Act approved Aug. 5, 1870, 12th Leg., C.S., ch. 54, § 9, 1870 Tex. Gen. Laws 104, 107–08, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 606, 609–10 (Austin, Gammel Book Co. 1898) (granting the land). *But see Bledsoe*, 40 Tex. at 570–600 (Reeves, J., dissenting) (contending that the case was properly before the court and mandamus should have been issued).

890. Act approved Mar. 10, 1875, 14th Leg., 2d R.S., ch. 49, § 1, 1875 Tex. Gen. Laws 69, 70–71, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 659, 660–61 (Austin, Gammel Book Co. 1898).

891. State v. Int'l & Great N. R.R. Co., 57 Tex. 534 (1882).

892. *Id.* at 553.

893. *Id.* at 534–41.

894. *Id.* at 542–48.

895. *Id.* at 548–55.

896. Houston & Tex. Cent. R.R. Co. v. Chandler, 51 Tex. 416 (1879).

completing its track between Brenham and the capital city.[897] It might be worth noting that since such inducements required the levying of local taxes if offered by counties or municipalities, railroads figure frequently in cases involving local and municipal government and taxation in those years. The Ballinger law firm and, expectedly, Baker & Botts were prominent as counsel for railroads at the time, providing the court with ready access to American and, where helpful, English railroad jurisprudence as it evolved in the nineteenth century.

Railroads were of necessity corporations which failed, merged, engaged in complicated financial transactions, and treated shareholders, as well as creditors, with varying degrees of probity. All of this presented issues of novelty in Texas, then barely beyond the threshold of general incorporation. *Houston & Texas Central Railroad Co. v. Shirley*[898] offers many insights into then current practices of merger and emergency financing, with Judge Gray and Mr. Botts in the role of trustees. Here, the court refused to award exemplary damages for breach of contract. In so doing, it had to articulate the difference between remedies in contract and in tort—the latter, a subject starting to assume importance in Texas jurisprudence due in good part to the operation of railroads.[899]

In keeping with general American law at the time, Texas tort law as it then developed was not particularly solicitous of those injured while working for railroads. In *Price v. Houston Direct Navigation Co.*,[900] the court adopted the fellow servant rule which, as applied subsequently to railroad workers, frequently precluded recovery.[901] In *Hays v. Houston & Great Northern Railroad Co.*,[902] it limited the liability of railroads for the torts of their agents by restricting exemplary damages to cases of authorization or ratification of malicious conduct.[903] With

897. *See id.* at 417–18, 421 (outlining the financial terms of the construction agreement and ultimately enforcing the $1,000 subscription).

898. Houston & Tex. Cent. R.R. Co. v. Shirley, 54 Tex. 125 (1880).

899. *Id.* at 141–42; *see also id.* at 147–48 (precluding the recovery of exemplary damages based on a breach of contract claim).

900. Price v. Houston Direct Navigation Co., 46 Tex. 535 (1877).

901. *See id.* at 537–38 ("We will, therefore, content ourselves with the citation of the authorities, in which the principle of non-liability of the master for damages, on account of injuries sustained by the negligence of a fellow servant, has been directly decided or clearly recognized.").

902. Hays v. Houston & Great N. R.R. Co., 46 Tex. 272 (1876).

903. *See id.* at 280–81 ("[T]here is no evidence that the railroad company was guilty

surprising frequency, such conduct consisted of the forceful expulsion of respectable passengers from trains by conductors.

It seems unjustified, however, to characterize the jurisprudence of the Texas Supreme Court at the time here discussed as one primarily designed to protect railroads from liability in tort. The court let stand many a judgment against railroads, some for what were then considerable sums of money, and the reporters, by reproducing the jury charge in such cases, provided the equivalent of reversal-proof standard jury charges to plaintiffs' lawyers.[904] A curious insight as to the latter is provided in *Houston & Texas Railway Co. v. Oram*,[905] where prominent counsel was recorded as having testified that plaintiffs' lawyers generally contracted for contingent fees of one-half, and occasionally of two-thirds (!), of the amount recovered.[906] As the court held, such testimony was improper on the issue of damages.[907] Railroads also attracted some litigation in their capacity as contractors. One such case was *East Line & Red River Railroad Co. v. Terry*,[908] where a creditor of a contractor paid by check sought to attach the debtor's funds supposedly still held by the railroad.[909] Chief Justice Moore's careful, step-by-step exposition of the mechanics of payment by check sheds some light on the novelty of such practices in Texas at the time.[910]

Perhaps the greatest contribution of railroads to the learning process of the Texas legal profession, however, was indirect. The most important function of railroads to the Texas economy in the last quarter of the nineteenth century was carrying goods from farm to market, or more specifically, cotton to Galveston for export by sea. The operation of this market is illustrated by a

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of any such 'fraud, malice, gross negligence, or oppression' as to subject it, in addition to actual damages, to exemplary damages, by way of punishment.").

904. *See* Houston & Great N. R.R. Co. v. Randell, 50 Tex. 254, 260 (1878) (affirming the $2,000 judgment against the railroad). The reporters reproduced Judge Bonner's charge to the jury so far as material. *Id.* at 255–58.

905. Houston & Tex. Ry. Co. v. Oram, 49 Tex. 341 (1878).

906. *Id.* at 342 ("'Attorneys usually make their contracts for contingent fees for one-half of the amount recovered; and I have known as much as two-thirds of the amount to be contracted for.'").

907. *Id.* at 346–47.

908. E. Line & Red River R.R. Co. v. Terry, 50 Tex. 129 (1878).

909. *See id.* at 130–31 (discussing the circumstances of the payment and garnishment).

910. *See id.* at 134–37 (detailing the process of accepting payment by check).

series of supreme court decisions describing and shaping its three major stages. Initially, the cotton was shipped in bulk by railroad to a factory in Galveston, with instructions to sell it on the Galveston cotton market. The nature of the factory business and the customs of that trade relating to cotton are well described (and thus, in a sense, codified) in *Harbert v. Neill Bros. & Co.*[911] The factory took receipt of the shipment and stored it in the warehouse of a storage and compression company or, more specifically, of one of the seven such companies that had monopolized that activity in Galveston and thus had, quite literally, a stranglehold on the Texas cotton trade. Virtually all Texas cotton was produced for sale at Galveston for export by sea.

The seven cotton storage and compression companies were in open agreement as to the rates charged for their services, including notional services neither demanded nor performed. In the important test case of *Ladd v. Southern Cotton Press & Manufacturing Co.*,[912] where these practices are fully described,[913] the court refused to set aside or to modify storage contracts concluded under such conditions on the ground of economic duress. The court acknowledged, however, that this might be a "business ... affected with a public interest" which could be regulated by the legislature.[914] Subsequently, in *Seeligson v. Taylor Compress Co.*,[915] the court held a cotton factory and commission merchant to the posted charges of the defendant storage company, which were conveniently reproduced in full by the reporter.[916] Storage with knowledge of such charges was held to be acceptance thereof, and the economic duress argument was rejected with reference to the prior decision of the court in *Ladd*.[917]

The last stage of the Galveston cotton export trade involved the

911. *See* Harbert v. Neill Bros. & Co., 49 Tex. 143, 156–60 (1878) (discussing the shipping and market processes of the cotton industry).

912. Ladd v. S. Cotton Press & Mfg. Co., 53 Tex. 172 (1880).

913. *See id.* at 173–76 (referring to the reporter's statement of the case); *see also* Kauffman v. Beasley, 54 Tex. 563, 567–68 (1881) (describing the agency relationship precluding cotton consignment merchants in Galveston from selling cotton by any other method than accepting cash).

914. *Ladd*, 53 Tex. at 191–92.

915. Seeligson v. Taylor Compress Co., 56 Tex. 219 (1882).

916. *See id.* at 221, 228 (reproducing the contractual charges and ruling on the case).

917. *Id.* at 226–27.

sale of the warehoused and compressed cotton and its shipment by sea, as well as the financing of the exporter's purchase, by pledging the cotton as security if need be. This practice is well illustrated by *Adoue & Lobit v. H. Seeligson & Co.*,[918] with an admirable description of the pertinent customs of the trade by Chief Justice Moore.[919] A peculiar custom prevailing in Galveston at the time was the signing of bills of lading by the masters of the maritime carriers before the cargo passed the rail—indeed, while it was still in the warehouse but appropriated to the contract(s) by distinct markings. Such bills, it was then held, might not bind the carrier, but they still evidenced title, and if endorsed to a lender, embodied rights superior to those of general creditors of the borrower.[920]

Especially for those who like their commercial law with a whiff of the sea, *Adoue* is a joy to read—as would be, presumably, William Ballinger's brief in that case, not reproduced by the reporter. Almost needless to add, all the cotton trade decisions just summarized were rendered at Galveston terms. It stands to reason that the sure-footed handling of these cases by the court was influenced by Mr. Ballinger's library, as well as by his erudition, and by judicial residence for three months of the year in what was then the most sophisticated city in the state. Perhaps more boldness was called for in dealing with the cotton presses, but the painstaking judicial exposure of their machinations is part of the documented pre-history of Texas anti-trust legislation.[921]

No attempt is made here to describe, by more than brief reference, the jurisprudence of the court in other cases of first impression in Texas where it followed dominant trends in the case law of sister states. This especially includes issues in company law, such as authority to bring what are now called derivative suits,[922] and the nature of share ownership, as well as the transfer or

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918. Adoue & Lobit v. H. Seeligson & Co., 54 Tex. 593 (1881).

919. *See id.* at 603–07 (detailing the customs of the cotton trade).

920. *See id.* at 606–07 ("[T]he transfer of such bill of lading or evidence of title is as effectual a transfer of the cotton as its manual delivery, if that was possible.").

921. *See* Act approved Mar. 30, 1889, 21st Leg., R.S., ch. 117, § 13, 1889 Tex. Gen. Laws 141, 142, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1169, 1170 (Austin, Gammel Book Co. 1898) (exempting "agricultural products or live stock while in the hands of the producer or raiser").

922. *See* Evans v. Brandon, 53 Tex. 56, 60 (1880) (acknowledging a stockholder's ability to bring a derivative suit against a corporation on behalf of the stockholders).

replacement of stock certificates.[923] Novel issues in the law of torts included medical malpractice,[924] slander,[925] and breach of promise.[926]

In contradistinction to cases arising out of the cotton trade, few cattle cases figured on the docket of the court at the time here discussed. There was, however, the curious matter of Peter Gabel's dog, recounted in *Gabel v. Weisensee*.[927] The appellant in this case is familiar to the reader as the Houston beer hall operator who launched an unsuccessful attack on the Texas Sunday Law as a violation of the constitutional principle of separation of church and state.[928] In *Weisensee*, Gabel lodged a criminal charge against the then defendant (now plaintiff) who was indicted "for the theft of a dog" but acquitted after trial.[929] Apparently, the dog preferred the company of Weisensee to that of Gabel, but the former had neither enticed the canine away from its master nor restrained it from returning to him.[930]

Speaking through Justice Gould, the court upheld a lower court judgment in favor of the plaintiff for malicious prosecution. The jury had been instructed properly that the criminal process could not be invoked lawfully to decide a question of property, and Mr. Gabel had crossed that line.[931] Remarkably, he had done so on

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923. *See* Galveston City Co. v. Sibley, 56 Tex. 269, 274–76 (1882) (permitting a court sitting in equity to replace a lost stock certificate of a shareholder); *see also* Strange v. Houston & Tex. Cent. R.R. Co., 53 Tex. 162, 166 (1880) (deciding, as a case of first impression, the liability of a company to a shareholder for having issued a new stock certificate while the original stock certificate remained in the possession of an innocent party).

924. *See* Brooke v. Clark, 57 Tex. 105, 109–10 (1882) (discussing the damages available to a patient who incurred injuries as the result of gross negligence by a physician).

925. *See* Ross v. Fitch, 58 Tex. 148, 149 (1882) (concerning a suit brought "to recover damages for slanderous words uttered and published by [defendant]").

926. *See* Glasscock v. Shell, 57 Tex. 215, 218 (1882) (litigating "an action for breach of promise of marriage").

927. *See* Gabel v. Weisensee, 49 Tex. 131, 132 (1878) (reviewing a claim of malicious prosecution brought against defendant for previously seeking criminal prosecution for "the theft of a dog").

928. *See* Gabel v. City of Houston, 29 Tex. 336, 348 (1867) ("[T]here is nothing in the [C]onstitution of the United States or of this state to prevent the legislature from forbidding the pursuit of worldly business upon Sunday.").

929. *Weisensee*, 49 Tex. at 132.

930. *See id.* at 132–34 (discussing the alternating possession of the dog by Gabel and Weisensee).

931. *See id.* at 141 ("That the defendant went before the grand jury with a criminal

legal advice, and even more remarkably, he was represented on appeal (although unsuccessfully) by none other than the law firm of Baker & Botts (which was, it should be added, not the source of the original legal advice obtained by Mr. Gabel before initiating criminal proceedings).

In conclusion, brief mention should be made of cases involving technologies that were new in Texas at the time. *Eborn v. Zimpelman*[932] raised the question of whether photocopies of a decedent's handwriting could be used to impeach the authenticity of a note purportedly executed by him.[933] The court characterized such evidence as not fully reliable and as, in any event, secondary in nature and thus inadmissible, unless it fell under an exception to the best evidence rule. It allowed, however, that archival documents which could not be removed from their repositories might be proved in this manner.[934]

Telegraphic messages made their first appearance in *So Relle v. Western Union Telegraph Co.*,[935] where the commission of appeals held the telegraph company to be liable for injury to the feelings of the plaintiff through failure of timely delivery of a message informing him of his mother's death, which prevented him from attending her funeral.[936] Almost simultaneously therewith, in *Western Union Telegraph Co. v. Neill*,[937] the court upheld a printed contract clause limiting the liability of the company for faulty transmission of so-called half-rate (nighttime) transmissions to ten times the amount charged theretofore.[938] In *Womack v. Western Union Telegraph Co.*,[939] it was held that such exemption clauses, even if not read by the customer, became part of the transmission contract.[940]

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charge against plaintiff only to get his dog, rather tended to establish the plaintiff's case than to make out a defense, even if his demeanor were such as to exhibit no bad feeling toward plaintiff.").

932. Eborn v. Zimpelman, 47 Tex. 503 (1877).

933. *Id.* at 519.

934. *See id.* at 520–21 (discussing the admissibility of archival materials).

935. So Relle v. W. Union Tel. Co., 55 Tex. 308 (1881).

936. *Id.* at 309, 313.

937. W. Union. Tel. Co. v. Neill, 57 Tex. 283 (1882).

938. *Id.* at 286, 290.

939. Womack v. W. Union Tel. Co., 58 Tex. 176 (1882).

940. *See id.* at 179 ("[I]n the absence of fraud or imposition, a party to a contract, which has been voluntarily signed and executed by him, with full opportunity for information as to its contents, cannot avoid it on the ground of his own negligence or

Western Union Telegraph Co. v. State,[941] finally, challenged the constitutionality of a state tax on messages sent by telegraph companies doing business in Texas.[942] In addition to messages sent from one place within Texas to another, this tax applied, due to the generality of its terms, to interstate messages as well as United States government messages sent from Texas. The latter were, pursuant to an agreement between Western Union and the United States, subject to special rates. In an opinion by Justice Gould, the court upheld the constitutionality of the tax as one of occupation, applying uniformly to all within-state activities of the taxpayer.[943] On writ of error to the United States Supreme Court, this decision was reversed both as to the government messages and (oddly, from a later perspective) as to interstate messages originating from Texas.[944]

H. *Federal-State Judicial Relations*

Remarkably enough, *Western Union Telegraph* was the first reversal of the Texas Supreme Court by higher authority since the re-establishment of the Texas state judiciary after the Civil War. In only three other cases in that sixteen-year period did those who failed to prevail in the Texas Supreme Court seek a writ of error from the Supreme Court of the United States. In all three instances, that writ was denied.

Tarver v. Keach[945] was an appeal from a decision of the Semicolon Court, which had denied recovery on a purchase money note denominated in Confederate dollars on the ground that this was a gambling transaction, contrary to Texas public policy.[946] In a one-paragraph opinion by Chief Justice Chase, the Court dismissed the case because the Court was precluded from reviewing a decision of the highest court of a state holding a transaction good or bad on grounds of public policy.[947] In *Basse*

omission to read it.").

941. W. Union Tel. Co. v. State, 55 Tex. 314 (1881), *rev'd*, 105 U.S. 460 (1882).

942. *See id.* at 316 (describing the constitutional challenge posited by the defendant as a defense to the State's suit to recover taxes).

943. *Id.* at 317–18 ("[A]lthough telegraph companies may be subject to congressional regulation, they are also subject to pay legitimate occupation taxes to the state . . . .").

944. W. Union Tel. Co. v. Texas, 105 U.S. 460, 465–66 (1881).

945. Tarver v. Keach, 82 U.S. (15 Wall.) 67 (1873).

946. *See id.* at 67 (setting forth the grounds for appeal).

947. *Id.* at 68.

v. City of Brownsville,[948] the court dismissed, again in a one-paragraph opinion, an appeal from a decision of the first Roberts-Gould Court in a Nueces Strip case, reiterating briefly a prior holding that "the treaty of Guadalupe Hidalgo ha[s] no relation to property included within the [S]tate of Texas."[949]

Tiernan v. Rinker[950] requires further attention. A Texas statute enacted in 1873 imposed an annual occupation tax on the sale of "spirituous, vinous, malt, and other intoxicating liquors," excluding, however, a like tax on the sale of "any wines or beer manufactured in this [s]tate."[951] The appellants were Galveston liquor dealers who sought to invalidate the tax on the ground that the exemption in favor of in-state beer and wine was unconstitutional—a contention hardly subject to serious denial in the light of then-current authority.[952]

When *Higgins v. Rinker*[953] first reached the Texas Supreme Court on appeal from a decision in favor of Rinker (the Galveston County treasurer) in 1876, the unconstitutionality of the provision in favor of local products was more or less conceded, and argument of counsel concentrated on severability.[954] Writing for the court, Justice Moore saw fit, nevertheless, to dwell on the constitutional point. Although concluding that tax discrimination in favor of in-state products had been held to be unconstitutional in the then recent case of *Welton v. Missouri*,[955] he took pains to observe that this conclusion (although binding) was "contrary to our own judgment as to the construction which should be given to the provisions of the Constitution of the United States."[956] After reviewing United States Supreme Court jurisprudence in point, Justice Moore stated once more that the Supreme Court of Missouri, overturned in *Welton*, had decided the matter "we think,

948. Basse v. City of Brownsville, 154 U.S. 610 (1875) (mem.) (dismissing writ of error for want of jurisdiction).

949. *Id.* at 610 (citing McKinney v. Saviego, 59 U.S. (18 How.) 235, 240 (1856)).

950. Tiernan v. Rinker, 102 U.S. 123 (1880).

951. Act approved June 3, 1873, 13th Leg., ch. 121, § 3, 1873 Tex. Gen. Laws 198, 200, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 650, 652 (Austin, Gammel Book Co. 1898).

952. *See Tiernan*, 102 U.S. at 125–28 (affirming the judgment of the Texas Supreme Court).

953. Higgins v. Rinker (*Higgins I*), 47 Tex. 381, *rev'd on reh'g*, 47 Tex. 393 (1877).

954. *See id.* at 382–89 (outlining the arguments of the parties).

955. Welton v. Missouri, 91 U.S. 275 (1876).

956. *Higgins I*, 47 Tex. at 390.

correctly."[957] In the end, however, the Supreme Court of Texas was "constrained" to follow *Welton*, and that, regretfully, was that.[958] He disposed of the separability point in a few words, saying that the liquor tax was "indivisible," and that holding to the contrary would be "exercising legislative power."[959]

Mercifully, one is tempted to add, rehearing was granted in March 1876, and at Austin term 1877, a majority of the court upheld the constitutionality of the 1873 tax law as applied to liquor dealers.[960] Chief Justice Roberts described, from "experience or observation," the difference between liquor stores and beer halls existing in Texas at the time of enactment, and went on to hold the offensive proviso to be separable.[961] Justice Gould, more directly to the point, wrote a separate opinion citing, along with *Cooley on Taxation*, two cases from other jurisdictions for the seemingly obvious proposition that provisos in tax statutes are separable.[962] Justice Moore, prudently no doubt, dissented without opinion.[963] With the federal constitutional point thus neutralized at the state level, the taxpayers' resort to higher federal authority proved unsuccessful, and in *Tiernan v. Rinker*, the United States Supreme Court denied the writ of error.[964]

Higgins was apparently a case of first impression in Texas on separability. It established that the partial invalidity of a Texas enactment did not necessarily lead to the invalidity of the entire statute. Justice Gould, who dealt with this issue most precisely, was careful to spell out, in so many words, that on the question of divisibility of the Texas tax statute of 1873, the decision of the United States Supreme Court in *Welton v. Missouri* was "no authority."[965] In *Western Union Telegraph Co. v. Texas*,[966] the United States Supreme Court returned to this issue, unequivocally stating that, as applied to state statutes, the partial invalidity

957. *See id.* at 391 (agreeing that the Missouri statute "simply imposed a tax upon an occupation").

958. *Id.* at 392.

959. *Id.* at 393.

960. Higgins v. Rinker (*Higgins II*), 47 Tex. 393, 404 (1877).

961. *Id.* at 398–99, 402 (describing changes in the liquor industry in Texas).

962. *Id.* at 405 (Gould, J., concurring).

963. *Id.* at 404 (Moore, J., dissenting).

964. Tiernan v. Rinker, 102 U.S. 123, 128 (1880) ("We see, therefore, no error in the ruling of the Supreme Court of Texas, and its judgment is accordingly [a]ffirmed.").

965. *Higgins II*, 47 Tex. at 405 (Gould, J., concurring).

966. W. Union Tel. Co. v. Texas, 105 U.S. 460 (1882).

doctrine was entirely a matter of state law, not subject to federal constitutional review, even if invalidity arose from violation of federal law.[967]

To that limited extent, then, the Supreme Court of Texas was able to preserve the autonomy of Texas law. In *Peck v. City of San Antonio*, we saw, the court had also rejected federal court guidance on matters of Texas law decided by the federal judiciary (including even the Supreme Court of the United States) in diversity-of-jurisdiction cases.[968] It could not, of course, control the outcome of such cases themselves, but there was no place in the Texas jurisprudence of the time for "federal common law" on questions of allegedly "general" law not governed by state statute.

In the time period here discussed, this was not yet a serious issue, although the Supreme Court of the United States heard exponentially more cases on appeal from the Eastern and Western Districts of Texas between 1866 and 1882 (eighteen and twenty-three, respectively) than it did on writ of error from the Supreme Court of Texas. Lower federal courts did not acquire federal-question jurisdiction until 1875, but some few diversity cases reaching the Supreme Court from Texas involved questions of federal law. The bulk of these cases, however, raised issues of Texas law, overwhelmingly classifiable as "local law" rather than general common law issues.

Under the rule laid down in *Swift v. Tyson*[969] and not overruled until almost a century thereafter, federal courts sitting in diversity applied state law on questions of "local" law but "general" common law on issues of "general" law.[970] To illustrate the

967. *Id.* at 466 ("Whether the law of Texas . . . can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the [s]tate, and as to which we have no power of review.").

968. *See* Peck v. City of San Antonio, 51 Tex. 490, 492–93 (1879) (citing City of San Antonio v. Mehaffy, 96 U.S. 312 (1878)) (reaffirming the unconstitutionality of section 12 of "[a]n act to incorporate the San Antonio and Mexican Gulf Railroad Company"); *see also* Giddings v. City of San Antonio, 47 Tex. 548, 558 (1877) (declaring section 12 of the act unconstitutional); City of San Antonio v. Gould, 34 Tex. 49, 63 (1870–1871) (discussing previous Texas Supreme Court decisions reviewing the constitutionality of section 12). *But see* City of San Antonio v. Lane, 32 Tex. 405, 412 (1869) ("[W]hen an act of the [l]egislature expresses in its *title* the object of the act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction, that every law shall embrace but one object, and that shall be expressed in its title."), *abrogated by Gould*, 34 Tex. 49.

969. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

970. *See id.* at 18 (discussing the application of state statutes and common law by the

former: In *Christy v. Pridgeon*,[971] the United States Supreme Court followed the Supreme Court of Texas rather than its own decisions in Mexican land grant cases on the interpretation of the Mexican Federal Colonization Law of 1824, which, so far as applicable in Texas, had become "local" legislation there by virtue of state succession.[972] With few exceptions, cases reaching the Supreme Court from the federal district courts in East and West Texas between 1866 and 1882 involved questions of "local" law, and are therefore of historical interest only. Although the Court erred in at least one occasion discussed further above,[973] it was almost invariably careful in following Texas jurisprudence in point.

The first federal appeal from Texas arguably raising a question of general law was *Hough v. Texas & Pacific Railway Co.*,[974] an industrial accident case involving an asserted exception to the fellow servant rule.[975] The Supreme Court gave effect to that exception, reversing judgment for the defendant below. In so doing, it cited authority mainly from Massachusetts, New York, and England. Texas jurisprudence figured only in the last paragraph of its fairly lengthy opinion, reaching as follows:

> Our attention has been called to two cases determined in the Supreme Court of Texas .... After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of statutory regulations by the [s]tate in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the [s]tate courts.[976]

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federal courts).

971. Christy v. Pridgeon, 71 U.S. (4 Wall.) 196 (1866).

972. *See id.* at 203–04 (discussing and adopting the Supreme Court of Texas's interpretation).

973. *See* Peck v. City of San Antonio, 51 Tex. 490, 492–93 (1879) (citing *Mehaffy*, 96 U.S. 312) (reaffirming the unconstitutionality of section 12 of "[a]n act to incorporate the San Antonio and Mexican Gulf Railroad Company"); *see also Giddings*, 47 Tex. at 558 (declaring section 12 of the act unconstitutional); *Gould*, 34 Tex. at 63 (discussing previous Texas Supreme Court decisions reviewing the constitutionality of section 12). *But see Lane*, 32 Tex. at 412 ("[W]hen an act of the [l]egislature expresses in its *title* the object of the act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction, that every law shall embrace but one object, and that shall be expressed in its title.").

974. Hough v. Tex. & Pac. Ry. Co., 100 U.S. 213 (1880).

975. *See id.* at 219 (discussing the fellow servant rule).

976. *Id.* at 226.

It so happened that in *Hough* the alternative federal forum proved more favorable to the dependents of a worker who perished in a railroad accident. Within a few years after this decision, however (but beyond the time period here discussed), removal to federal court became a powerful tool of railroad companies in such cases.[977]

Two other decisions of the United States Supreme Court in appeals from federal courts sitting in Texas require brief attention here. In *Davis v. Gray*, the Court held that under the Contracts Clause of the United States Constitution, the State of Texas was bound to comply with the terms of an antebellum statutory land grant to what was then the Southern Transcontinental Railroad Company.[978] This judgment upheld an order of the court below, restraining Governor Davis and Land Commissioner Kuechler from granting state lands within the area reserved for land grants to the railroad as and when its track progressed further between Marshall and El Paso.[979] This exercise of federal jurisdiction over, in particular, the commissioner of the general land office is likely to have been a strong inducement for the enactment of the Compromise Act of 1874, especially after the Supreme Court of Texas had declined jurisdiction in an action by the International Railroad Company against Mr. Kuechler's successor in office.[980]

977. *See* Tex. & Pac. Ry. Co. v. Kirk (The Pacific Railroad Removal Cases), 115 U.S. 2, 23 (1884) (allowing railroad companies to remove diversity suits to federal court).

978. Davis v. Gray, 83 U.S. (16 Wall.) 203, 231–32 (1873).

979. *Id.* at 204–05, 233.

980. *See* Bledsoe v. Int'l R.R. Co., 40 Tex. 537, 541–44, 556–63 (1874) (denying jurisdiction); *see also* TEX. CONST. of 1869, art. X, § 6 (prohibiting the legislature from granting land); Act approved Mar. 13, 1875, 14th Leg., 2d R.S., ch. 78, §§ 1–2, 1875 Tex. Gen. Laws 124, 124–25, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 714, 714–15 (Austin, Gammel Book Co. 1898) (appropriating five hundred dollars "to pay J.W. Ferris for his services as special [j]udge in the case wherein the International Railroad was plaintiff and A. Bledsoe defendant"); Act approved Apr. 25, 1874, 14th Leg., 1st R.S., ch. 24, §§ 1, 5, 1874 Tex. Gen. Laws 49, 49–51, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 315, 315–17 (Austin, Gammel Book Co. 1898) (reducing the amount issued in bonds to the International Railroad Company); Act approved Aug. 5, 1870, 12th Leg., C.S., ch. 54, § 9, 1870 Tex. Gen. Laws 104, 107–08, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 606, 609–10 (Austin, Gammel Book Co. 1898) (granting bonds for the construction of railroads across Texas). *But see Bledsoe*, 40 Tex. at 571 (Reeves, J., dissenting) ("The jurisdiction to inquire into the power of the legislature to pass an act, and to decide whether the enactment is constitutional or not, has never been denied to the courts . . . .").

It also was the inspiration of the plaintiffs in *Walsh v. Preston*,[981] which, by exploiting the avenue there opened, tested the validity of the Mercer Colony grant made by President Houston and promptly repudiated by Congress shortly before the absorption of the Republic of Texas into the United States.[982]

The claimants were initially successful in the United States Circuit Court for the Western District of Texas. The decree upheld by that court on January 26, 1882, would have, if allowed to stand, barred the general land office from handling applications for the settlement of a substantial portion of the state (or, perhaps more accurately, from settling disputes as to land ownership in some four million acres by issuing patents to settlers not claiming under General Mercer's contract).

Oran Roberts was governor of Texas at the time. Together with the land commissioner, he decided to employ, on behalf of the state, the law firm of Peeler & Maxey to pursue an appeal to the Supreme Court of the United States. A.J. Peeler prepared a record of 689 pages, which took him until June 8, 1882. He had to travel to Washington in December of that year in order to seek advancement on the docket, and again in March 1883 for oral argument. The fee set for these services was $2,500 for perfecting the appeal, and the same amount for proceedings in Washington. Attempts to secure the equivalent of supersedeas in the interim were equally time-consuming, and altogether, Mr. Peeler is likely to have spent a substantial portion of one year on this case. The result was well worth it, at least for the State of Texas.[983]

As shown by this account, handling appeals to the United States Supreme Court was likely to be time-consuming business for Texas lawyers. Not every case, of course, was as complicated as *Walsh*, but even a single trip to Washington for oral argument was a major undertaking at the time. William Ballinger recorded that in preparation for oral argument in *Hitchcock v. City of Galveston*,[984] he left home on November 29, 1877.[985] The voyage

981. Walsh v. Preston, 109 U.S. 297 (1883).

982. *See id.* at 304–07, 322–23 (outlining the details of the Mercer contract).

983. *See* JAMES D. LYNCH, THE BENCH AND BAR OF TEXAS 463–80 (St. Louis, Nixon-Jones Printing Co. 1885) (describing the massive effort put into the appeal).

984. Hitchcock v. City of Galveston, 96 U.S. 341 (1878).

985. William Pitt Ballinger, Diary of William Pitt Ballinger 198 (Nov. 29, 1877) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

to Washington took four days, as did, of course, the return after oral argument, just in time for Christmas.[986]

Ballinger, who had lunch with the President and dinner at least twice with most members of the Supreme Court while in Washington, may have spent much more time on professional contacts than necessary. Nevertheless, Texas lawyers could not develop an extensive Supreme Court practice at the time here discussed unless they neglected their practice within the state or secured a major and continuous share of appeals to Washington. George Paschal did both, but at the price (if such it was) of moving permanently to the federal capital.[987]

It seems safe to say that except for George Paschal, who established his professional presence in Washington by his spectacular victory in *Texas v. White*, no Texas lawyer became prominent at the bar of the United States Supreme Court in the sixteen-year post-bellum period here discussed. Practice before federal courts in Texas, however, was another matter—it became the daily bread of major practitioners in Austin, Tyler, and especially Galveston, and at least part of the professional experience of others less favorably located in this respect. This is not the place, however, for further discussion of the jurisprudence of the federal district and circuit courts for the eastern, western, and as of 1879, the northern districts of Texas. The recruitment of the federal judiciary in Texas in the two decades following the Civil War, on the other hand, seems in need of brief mention.

William Ballinger was put forward for appointment to the United States Supreme Court in 1877. He was a reluctant candidate. His supporters included Texas Supreme Court and courts of appeals judges then sitting, and the Texas congressional delegation, as well as then-Senator Coke. They had also obtained positive recommendations from Edmund Davis and Wesley Ogden. The appointment went, nevertheless, to a Republican: the first Justice Harlan.[988]

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986. *See* William Pitt Ballinger, Diary of William Pitt Ballinger 198–216 (Nov. 29–Dec. 24, 1877) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin) (describing Ballinger's trip to and from Washington).

987. *See* Amelia W. Williams, *Paschal, George Washington*, *in* 5 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 80, 80 (Ron Tyler et al. eds., 1996) (referencing Paschal's activities in Washington D.C., and his eventual death in that city).

988. William Pitt Ballinger, Diary of William Pitt Ballinger 56 (Mar. 29, 1877) (unpublished diaries, on file with The Center for American History at The University of

As mentioned further above, Wesley Ogden had settled in San Antonio after the fall of the Semicolon Court, and returned to practice. More significantly in this connection, he had also become prominent in the Republican Party in Texas,[989] and it seems reasonable to assume that presidents from Grant to Arthur gave considerable weight to his recommendations on Texas judicial patronage. Ballinger's candidacy had been advanced on the assumption that the Compromise of 1876 had opened the way to federal judicial preferment of ex-Confederates. When the newly created federal judgeship for the Northern District of Texas opened for appointment early in 1879, similar hopes were entertained by (or on behalf of) other members of the political class that came to power in Texas in January 1874.[990]

Once again, however, the appointment went to a Republican: Andrew P. McCormick, a former state judge then serving in the Texas senate as one of the few members of his party.[991] Similarly, one year thereafter, the succession to Judge Duvall in the western district went to Ezekiel B. Turner, who had followed William Alexander as attorney general by military appointment and had served as United States Attorney for the Western District before being elected—in 1875, no less—to the state district bench, sitting in Austin at the time of his federal preferment.[992] Perhaps even more significantly, and barely beyond the period here covered,

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Texas at Austin); William Pitt Ballinger, Diary of William Pitt Ballinger 70 (Apr. 21, 1877) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

989. ERNEST WILLIAM WINKLER, PLATFORMS OF POLITICAL PARTIES IN TEXAS 176 (1916) (noting that Wesley Ogden served as a presidential elector for the Republican Party of Texas).

990. William Pitt Ballinger, Diary of William Pitt Ballinger 34–35, 48–50 (Feb. 22–Mar. 18, 1879) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin). On April 7, 1879, Ballinger noted that the President had nominated McCormick, who was favored by Ballinger—and many others—if the appointment was to go to a Republican. William Pitt Ballinger, Diary of William Pitt Ballinger 60 (Apr. 7, 1879) (unpublished diaries, on file with The Center for American History at The University of Texas at Austin).

991. *See* Randolph B. Campbell, *McCormick, Andrew Phelps*, *in* 4 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 379, 379 (Ron Tyler et al. eds., 1996) (noting the judicial and political achievements of McCormick, who would go on to serve as a member of the United States Court of Appeals for the Fifth Circuit).

992. *See* Randolph B. Campell, *Turner, Ezekiel B.*, *in* 6 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 593, 593 (Ron Tyler et al. eds., 1996) (detailing the appointment of Turner as the "United States attorney for the Western District of Texas in 1866" and his appointments to several state judicial offices thereafter).

when the judgeship of the eastern district became vacant due to the retirement of Judge Morrill, the appointment went to former Judge Chauncey Sabin. Thus, in 1884, the former chief justice of the Military Court was succeeded in federal judicial office in Texas by the self-confessed mastermind of the Semicolon Decision,[993] presumably with the blessings of the last presiding judge of the tribunal known to posterity by that decision.

It should be kept in mind that the more prominent Texas lawyers of the day were likely to have had a considerable part of their practice in federal court before Judges Duvall, Morrill, McCormick and Turner, and before Judge Turner in state court as well. Any hope for federal judicial (or other) preferment as well was likely to be foreclosed by excessive "Redemptionist" oratory or agitation. Justice Moore, long beyond such considerations, might use the Texas Supreme Court pulpit to extol the talents of that tribunal over those of the Supreme Court of the United States in the interpretation of the Constitution of what was once more his country. Others (with the exception of a lone East Texas law firm)[994] were more circumspect at least in their opinions and pronouncements for the record. In conclusion, then, it seems not to be amiss to suggest that federal judicial patronage did its part, directly and indirectly, to keep "Redemption" within bounds at least on the judicial record in Texas from January 1874, to the end of December 1882.

993. *Ex parte* Rodriguez, 39 Tex. 705 (1873).

994. *See generally* County of Anderson v. Houston & Great N. R.R. Co., 52 Tex. 228, 231 (1879) (noting a vociferous argument by counsel that a piece of legislation was "'conceived in sin and born in iniquity'"). "It was conceived by those interested in the subject-matter, and passed by a corrupt and alien [l]egislature, which did not represent the intelligent tax-paying people of the [s]tate . . . ." *Id.*