HISTORY OF THE TEXAS SUPREME COURT THROUGH REBELLION, RECONSTRUCTION, & RESTORATION (1860-1876)

Richard R. Orsinger
richard@ondafamilylaw.com
http://www.orsinger.com

Orsinger, Nelson, Downing
& Anderson, L.L.P.

San Antonio Office:
1717 Tower Life Building
San Antonio, Texas 78205
(210) 225-5567
http://www.orsinger.com

Dallas Office:
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
(214) 273-2400

Frisco Office:
2600 Network Blvd, #200
Frisco, TX 75034
(972) 963-5459
http://www.ondafamilylaw.com

State Bar of Texas
Texas Supreme Court: History & Current Practice
April 14, 2021
Webcast

Chapter 1

Table of Contents

HISTORY OF THE TEXAS SUPREME COURT THROUGH REBELLION, RECONSTRUCTION, & RESTORATION (1860-1876)

by

Richard R. Orsinger
Board Certified in Family Law
& Civil Appellate Law by the
Texas Board of Legal Specialization

I. A SUCCESSION OF CONSTITUTIONS. In the span of 40 years Texans adopted six constitutions, in 1836, 1845, 1861, 1866, 1869, and finally 1876. A constitutional amendment in 1945 increased the size of the Supreme Court from 3 to 9 Justices, and a new Constitution, proposed in 1974, that would have combined the Supreme Court and Court of Criminal Appeals into one court with 15 appointed justices, was rejected.

1. 1836. Under the 1836 Constitution of the Republic of Texas, the Supreme Court consisted of a Chief Justice along with Associate Justices consisting of each of the Republic's District Judges, numbered between three and eight, elected by ballot of both Houses of Congress.

2. 1845. The 1845 Constitution of the State of Texas set the number of Supreme Court Justices at three, appointed by the Governor to 6-year terms.

3. 1861. Texas joined the Confederate States of America on March 1, 1861. The people of Texas amended the constitution later in 1861. Under the Constitution of 1861, the Texas Supreme Court consisted of one chief justice and two associate justices, appointed by the Governor to 4-year terms.

4. 1866. The Constitution of 1866 was adopted during Presidential Reconstruction. The members of the Court moved from three to five judges, elected to 10-year terms of office and a salary of $4,500 per year. The Chief Justice was selected by the five Justices.

5. 1869. The 1869 Constitution was promulgated by U.S. Military authorities during Congressional Reconstruction. The Supreme Court was reduced from five to three judges, appointed by the Governor to 9-year terms. The practice of circuit riding was eliminated, and annual sessions were required to be held in Austin.

6. 1876. Under the 1876 Constitution, the Supreme Court consisted of a Chief Justice and two Associate Justices, with a requirement that two Justices concur to reach a decision. The minimum age to be a Justice was 30 years, and the Justice must have practiced law in Texas for at least 7 years. The Justices were elected to 6-year terms, with a salary capped at $3,550 per year. The Governor could fill a vacancy until the next election for the unexpired term. Jurisdiction was limited to civil cases. A three-judge Court of Appeals was created, with both civil and criminal jurisdiction (criminal jurisdiction was final). The Supreme Court was given rule-making authority.

7. 1891. In 1891, the 1876 Constitution was amended to create a three-judge Court of Criminal Appeals elected to 6-year terms.

8. 1945. In 1945, the Texas Constitution was amended to increase the number of justices on the Supreme Court from three to nine, and the commissioners of the Supreme Court Commission of Appeals became Supreme Court Associate Justices. Since that time, the Texas Supreme Court has consisted of one Chief Justice and eight Justices, each holding 6-year terms.

9. 1974. In 1974, Texas empaneled a constitutional committee to propose a new Texas Constitution. The Committee closed after seven months and spending more than $3 million, falling three votes short of the two-thirds majority needed to advance the Constitution to popular vote. In 1975, the Legislature presented eight amendments to the Constitution to the voters, and all eight amendments were voted down. On the judiciary, the proposed Constitution would have merged the Court of Criminal Appeals into a Supreme Court with 15 members, and the judiciary from the Supreme Court down to district courts would be appointed by the governor with non-partisan retention elections. That proposal was voted down.

II. THE SUPREME COURT DURING THE CIVIL WAR. After Texas seceded from the United States of America by public vote on February 23, 1861, the people of Texas amended the Texas Constitution to reflect its joinder in the Confederacy. Under the Constitution of 1861, the Texas Supreme Court consisted of one chief justice and two associate justices appointed by the Governor for 4 year terms. The Court consisted of R.T. Wheeler, George F. Moore, and James H. Bell, each of whom was paid $3,000.00 annually for their service.[1] As the war progressed, the court system was mostly suspended. Part of the work of the Supreme Court was dealing with writs of habeas corpus of Confederate conscripts. The last battle of the Civil War was fought on May 13, 1865 at Palmito Ranch, in Cameron County, outside Brownsville,

Texas. The surrender of belligerent forces in Texas occurred on May 28, 1865. On June 2, 1865, General Edmund Kirby-Smith formally surrendered Confederate forces in Texas at Galveston to General Edmund J. Davis (later elected a Reconstruction Governor of Texas). The articles of capitulation were signed aboard the USS Fort Jackson in Galveston Bay, ending hostilities in Texas. The secessionist state government ceased to function on June 8, 1865.[2] On June 17, 1865, A. J. Hamilton was appointed as provisional governor by U.S. President Andrew Johnson. On June 19, 1865, General Gordon Granger issued General Order No. 3 proclaiming all slave in Texas free. Hamilton took control of the state on September 26, 1865. President Johnson proclaimed the civil war to have ended in Texas on August 20, 1866.

Indications are that trial court activity was greatly diminished during the war years. The Supreme Court continued to function during the war years. Volume 27 of the Texas Reports, covering two terms in 1863, three terms in 1864, and one term in 1865, covered 771 pages of case reports. The report was not copyrighted until 1867.

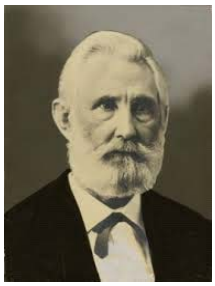
1. Wheeler. Royall Tyler Wheeler (1810-1864) was a Justice on the Supreme Court of the Republic of Texas, 1844-1845; Associate Justice, Texas Supreme Court, 1846-1858; and Chief Justice, Texas Supreme Court, 1858-1864.

Wheeler was the senior member of the Texas Supreme Court at the time of secession, having served on the Court since 1844. His tenure on the Court spanned from the Republic, to statehood, to Confederate state. The Tarlton Law Library gives the following biography of Royall T. Wheeler:

> Little is known about the early years of Royall Tyler Wheeler, except that he was born in Vermont in 1810 and grew up in Ohio, where he received his education, studied law, and was admitted to the bar. He moved to Fayetteville, Arkansas in 1837, and began a law practice with William S. Oldham.
>
> Wheeler married and moved to San Augustine, Texas in 1839. He formed a law partnership there with Kenneth L. Anderson, who served in the congress of the republic and was its vice president from 1844-45. Wheeler also lived briefly with the towns of Nacogdoches, Huntsville, and Independence, as well as Austin.
>
> In 1842 Wheeler was elected district attorney of the Fifth District, and in 1844 he was promoted to district judge, automatically making him a justice of the Supreme Court of the Republic of Texas. In 1845, with the adoption of the constitution of the new state of Texas, Wheeler was appointed associate justice of the state's Supreme Court, comprised of himself, John Hemphill, and Abner Lipscomb. When supreme court justices faced election he encountered no opposition, and was elected in 1851 and again in 1856. The following year, when Chief Justice Hemphill resigned to join the U.S. Senate, Wheeler was elected to the Chief Justice position without opposition. Wheeler aligned himself politically with the Whig party, had advocated statehood, and later became an outspoken secessionist.
>
> When Baylor University formally established its law school in 1857, Wheeler was named law professor and head of the law department. He served in this capacity until 1860, with two classes graduating under him. The following year he announced his plan to open a law school in Austin, but the timing was bad for a law school: Texas was about to secede from the Union, the Civil War was imminent, and males above the age of 16 were called into military service.
>
> Texas suffered, though not as greatly as other parts of the South, during the war. The economic system of the South, dependent on slavery, was destroyed. By the spring of 1864, the war had entered its final stage and its outcome was inevitable. On April 9, 1864, Royall Tyler Wheeler took his own life at his home in Washington County.[3]
>
> After Royall Wheeler died in 1864, a memorial message was published in 27 Tex. v. (1865).
>
> Court Opinion

Story v. Marshall, 24 Tex. 305 (1859), Chief Justice Wheeler wrote that a husband could make a gift of community property to his wife, which then made the property the wife's separate property. A presumption of gift arises from the interspousal deed.

2. Roberts. Oran Milo Roberts (1815-1898) was a Justice of the Texas Supreme Court from 1857-1862; Chief Justice from 1874-1878. Roberts was elected to the Texas Supreme Court in 1857. He replaced Chief Justice Wheeler with the Austin term of 1865. He resigned in 1862 to join the Texas infantry in support of Confederate armed forces. Oran Roberts was a dominant personality in the pre-war, secession, reconstruction, and restoration periods of Texas government and he ended his career as one of Texas' early law professors.



The Tarlton Law Library gives the following biography of Oran Milo Roberts:

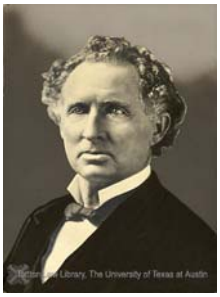
> Oran Milo Roberts was born July 8, 1815 in the Laurens District of South Carolina and was raised near Ashville. When Roberts was ten his father died, and he moved with his mother to a small farm. He worked on the farm and attended school in a log schoolhouse during the winter months. Roberts shared his father's dream that he would one day enter the legal profession. In 1832, at the age of seventeen, he left home to attend the University of Alabama.
>
> Following his college graduation in 1836, Roberts, then twenty-one, got a job tutoring the children of a judge. The position offered him access to his employer's law books, and he eagerly took advantage of the opportunity. He completed his law studies in the office of William P. Chilton, who later became an Alabama Supreme Court judge. In 1837 Roberts married and was admitted to the bar. The following year he was elected a representative to the Alabama legislature.
>
> Oran Roberts moved to San Augustine, Texas in 1840, where he established a law practice and began a long and distinguished career as a Texas jurist, statesman, and educator. In 1844 Sam Houston appointed him district attorney. The following year he was appointed district judge by Gov. Henderson. He also served as president of the board and lecturer at the law school of the University of San Augustine. In 1857 he was elected associate justice of the Texas Supreme Court.
>
> Roberts was an outspoken proponent of states' rights, was instrumental in calling the Secession Convention in Austin in January 1861, and was unanimously elected its president. He was among the leaders who succeeded in passing the ordinance removing Texas from the Union. When the Civil War broke out, Roberts resigned his position on the bench and helped to organize a regiment in East Texas. Following Chief Justice Wheeler's suicide in 1864, Roberts was elected to fill his vacancy on the court.
>
> After the war, Roberts was elected to the U.S. Senate, but as "unpardoned rebels" the southern senators were not allowed to be seated. He returned to private practice and opened a law school in Gilmer, Texas in 1868, where he taught for two years. Among his students was Sawnie Robertson, a future Texas Supreme Court justice.
>
> Gov. Richard Coke appointed Roberts chief justice of the Texas Supreme Court in 1874, and he was elected to the position in 1876. During his time on the bench, Roberts was involved in rewriting much of Texas civil law. He served on the court during "momentous times of conflict and change" under four state constitutions: 1845, 1861 (Confederacy), 1869, and 1876.
>
> In 1878 Roberts was elected governor, and his longtime associate, George F. Moore, succeeded him as chief justice. In 1880 Roberts was reelected governor. As governor, he advocated sweeping fiscal reforms, reduced debt, and increased the public school fund. During his terms The University of Texas at Austin opened and plans were made for the present Capitol building.
>
> Following his retirement from political office, Roberts served as a professor of law at The University of Texas from 1882-1892, where his students fondly called him "the Old Alcalde." While a professor he wrote an important textbook, The Elements of Texas Pleading (1890), as well as several other books. After he retired from teaching he moved to Marble Falls, where he focused on writing about Texas history. Returning to Austin in 1895, he became the first president of the Texas State Historical Association, an organization he helped found.

Oran M. Roberts died in Austin May 19, 1898 at the age of eighty-three. He was buried in Oakwood Cemetery in Austin. He was said to have been admired by friends and adversaries alike for his integrity, sincerity, and honor, and was remembered as a just and impartial judge, a firm and conservative governor, and a kind and painstaking law professor.

Court Opinions
His opinions extend from *Hart v. Weatherford* (19 Tex. 57) to *Lacoste v. Deffy* (49 Tex. 767).

Duncan v. Magette, 25 Tex. 252 (1860) "is familiar to every Texas judge and most Texas lawyers." James R. Norvell, *Oran M. Roberts*, 23 TEX. B.J. 727 (Nov. 1960).[4]

3. Bell. James H. Bell, Associate Justice of the Texas Supreme Court, 1858-1864. Bell served on the Court until the Tyler term of 1864.



The Tarlton Law Library gives the following biography of James H. Bell (1825-1892):

James Hall Bell, the first native-born Texan to serve on the Texas Supreme Court, was born January 21, 1825 in Bell's Landing (now Columbia) in Brazoria County. He was the son of Josiah Bell, a prominent member of the "Old Three Hundred," Stephen F. Austin's original colony of Anglo settlers in Texas. Josiah Bell established a sugar plantation in Brazoria County and developed the towns of East and West Columbia.

James Bell left home to attend St. Joseph's College at Bardstown, Kentucky in 1837. When his father died the following year, he returned to Texas. In 1839 he resumed his studies at Center College in Danville, Kentucky, but his education was again interrupted when he enlisted in the Texas army during the Mexican invasions of 1842. Following his military service, he studied law under William H. Jack until Jack's death from yellow fever in 1844. Bell entered Harvard University in 1846 and received his LL.B. the following year; he was the first Texas Supreme Court justice to be educated at Harvard Law School. In addition to studying law, he became fluent in Latin, French, and Spanish.

Upon completing his education, Bell returned to Texas, married, and began a law partnership in Brazoria with Robert J. Townes. He also ran his own plantation. From 1852 to 1856 he served as district judge of the First Judicial District. He was elected associate justice of the Texas Supreme Court in August 1858 and served until August 1864, when his term expired. He was an outspoken opponent of secession, believing that it would ultimately result in disaster for Texas; these sentiments cost him his reelection bid in 1864.

Following his supreme court service, Bell returned to private practice and served as Secretary of State under Provisional Governor A. J. Hamilton from August 1865 to August 1866. Bell subsequently undertook a successful mining operation in Mexico before returning to Austin, where he died after a lengthy illness on March 13, 1892.[5]

The Texas State Historical Association's biography notes:

[Bell] was secretary of state under [Governor] A. J. Hamilton from August 7, 1865, to August 17, 1866. At the time of the Coke-Davis controversy in 1873, Bell interviewed President U. S. Grant and is said to have persuaded Grant not to intervene in Texas in behalf of Edmund J. Davis.[6]

The Library goes on to describe Bell's notable opinions:

Bell was a "staunch defender of rights of the citizen against the exercise of undue powers of government." Example: *Ex Parte Frank H. Coupland*, on habeas corpus before Chief Justice Wheeler in 1863 regarding conscription.

De Blane v. Hugh Lynch & Co., 23 Tex. 25 (1859), holding an action against husband enforceable against community property of cotton grown on wife's land with labor of slaves owned separately by wife. Bell, J.,

initially relying on biblical exegesis, ultimately determines, "whatever is acquired, except by gift, devise or descent, or by the exchange of one kind of property for another kind, is acquired by their mutual industry," and "whatever is acquired by the joint efforts of the husband and wife, shall be their common property".

Withers v Patterson, 27 Tex. 491 (1864), holding jury instructions that an estate was closed before executor sold land to plaintiff not erroneous because the County Court held no authority to appoint a subsequent administrator after the estate had been duly administered.

A 22-page pamphlet is available on Amazon.com entitled "Excerpt from Speech of Hon. James H. Bell, of the Texas Supreme Court: Delivered at the Capitol on Saturday, Dec. 1st, 1860." A free copy can be downloaded from Hathitrust.org. In response to a request by a group of gentlemen for a copy of his speech, Bell wrote:

In furnishing a copy of the speech for publication, I do so, not so much in the hope that it will exert an influence on the public mind, favorable to the opinions which are expressed in it,as from a desire to let Ihe people of Texas see for themselves what I have said, instead of leaving them to form their conclusione from the reports of others. I spoke on the 1st inst., with a full knowledge of the fact, that the expression of my opinions would subject me to te denounced as a free-soiler and an abolitionist, by those who think that the greatest political offence of which a man can be guilty, is to differ from them in opinion. I am perfectly willing to take my full share of abuse from those who wish to plunge hastily into revolution, and just as much more than my share as they may think proper to heap on me, if by this means, I can be instrumental in persuading the people to act with calmness and moderation in this great crisis of our affairs. My conviction is profound that very many of the politicians of the South are anxious to bring about immediate secession, not because they think we are without remedy for existing evils, but because they have long thought that the South made a bad bargain in forming the Union, and because they do not wish to see it preserved on any terms. These opinions are now boldly avowed, and they are avowed for the purpose of inducing the people to close their eyes to any indications from the North of a willingness to do us justice. My own opinion is that the Union is an inestimable blessing to all the people, so long as the Constitution can be preserved ; and that it is the part of wisdom to endeavor to preserve both the Constitution and the Union. I believe too, that a sudden disruption of the Union will bring universal distress on the country. It may be that I am more timid than other men; but I remember the declaration of Edmund Burke, that " timidity, where the welfare of one's country is concerned, is heroic virtue."

Bell's speech began:

Fellow-Citizens: It may seem to you somewhat strange that a member of the profession to which I belong, accustomed for some years to public speaking in the discharge of professional duties, should feel any embarrassment on an occasion like this. But I do in fact appear before you with much concern. I am not a politician. I have never, at any time, been much fn the habit of addressing my fellow-citizens on political subjects. I feel that my abilities are unequal to the discussion of the great questions now be- fore the country; and the official position which I occupy, makes me diffident about engaging in the public discussion of political questions. But I have been requested to address you, and I choose to comply with the request because l think the times are such, that every citizen, no mat- ter what may be his position, may with propriety express his opinions, whenever he is re- quested to do so, and whenever by doing so there is any reason to hope that any good may be accomplished. These, fellow-citizens, are no ordinary times. Abraham Lincoln, a sectional candidate, has been elected to the Presidency of the United States. We have arrived at a momentous crisis in our history as a nation. The cloud that appeared in the sky, not so big as a man,s hand, when the Constitution was adopted, has spread, until to-day it almost shuts out the light of Heaven, from this fairest and once happiest land. The stoutest hearts are now concerned for the welfare of the Republic, and tens of thousands of thoughtful and patriotic men are anxiously looking for some ground of hope that our Constitutional Union, and the peace of our firesides, may be preserved. We do not indeed behold those signs and wonders which agitated the superstitious minds of the Roman populace. "a little ere the mightiest Julius fell," We do not see

"Fierce, fiery warriors fighting on the clouds,
In ranks and squadrons and right form of war,
Which drizzled blood upon the Capitol." [7]

But we do see signs of approaching convulsion, much more real. We see section arrayed against section. States against States. We see vast multitudes of men assembled under party banners. We hear their loud hosannas over the inflammatory appeals of reckless and ambitious leaders. We see processions of armed men. We hear the morning and the evening drum beat. We see friend arrayed against friend, brother against brother. All over the wide land, the voice of passion drowns the voice of reason.

"'Tis like the strife which currents wage,
Where Orinoco in his pride,
Rolls to the main, no tribute tide,

> But 'gainst broad ocean urges far
> A rival sea of roaring war;
> While, in ten thousand eddies driven,
> The billows dash their foam to heaven,
> And the pale pilot seeks in vain.
> Where rolls the river, where the main.'"[8]

In the opening Canto of Shelley's Revolt of Islam,[9] the poet represents, under a splendid figure, the great struggle which is continually going on in the world between the principles of good and evil. He describes the sky as all overcast with clouds, save one bright spot ; and in the midst of "the whirlwind and the rack;' he shows us an Eagle and a Serpent fighting in mid-air, with a yawning ocean beneath them. It seems to me that the same figure might be aptly employed to represent the relation which the two great sections of this Union now sustain towards each other. The North and the South are like the Eagle and the Serpent in the fight, and anarchy, civil and servile war, is the angry ocean that tosses high its foam-capped billows to engulf them both. But is there a blight spot in our sky? For one, I believe there is. Like Juliet in the tomb of the Capulets the country seems to be in the embrace of death; but in truth,

> "She is not conquered, beauty's ensign yet
> Is crimson in her cheek and in her lip,
> And death's pale flag is not advanced there."[10]

But it is not for me to presume to answer so grave a question. Can our present happy Constitution of government be preserved ? This is the question. None more momentous was ever propounded. The answer must come from the people; and it is because the people must answer this question for themselves, that I have not yet despaired of the Republic. One of the great evils of the times, and one to which, in my judgment, we are much indebted for the existing condition of things in the country, is, that the people have been willing to permit the politicians not only to make issues for them, but to pledge them beforehand to a particular line of action. The politicians have been continually asking questions, and answering them to each other; and I am sorry to say that the people have oftentimes, with too little reflection, adopted their conclusions. Now while I intend to be careful about making assertions, I shall nevertheless make one, and it is, that upon this question, whether our form of government shall be thrown away like a worn-out garment, or not, the people will claim the right to answer for themselves.

* * *

Pages later Bell brought his speech to a close:

> Let us in the meantime seek, by wise and moderate cousels, to restore peace to our distracted country. Pardon me for the repetition, but once more let me urge you to shun, if possible, the thorny path of revolution. Ladies, you have evinced by coming here today, that you are not indifferent to the events which are transpiring. You cannot be indifferent. To those of you who are wives and mothers, life has become a great reality. Remember that war, unless undertaken to redress great wrongs or in the necessary defence of great rights, is opposed to all the best interests of humanity. It erects no asylums for the insane, the blind, the dumb and deaf. It does not spread the sail of commerce to the wind. It has no respect for seed time and harvest. It brings not plenty to that board, nor cheerfulness to the fireside. I conjure you then to use the influence with which Heaven has so richly endowed you, to preserve peace and order in our land. And if perchance there be some one very dear to you, who thinks that change and revolution may bring to him honors and renown, speak to him, speak to him in |the presence of your little ones, and tell him to put away such thoughts, and to be content to tread the humble path of duty. Men of Texas, let us prove that we appreciate the government under which we live. Let us make a sincere and noble effort to preserve it. Let us keep reason in the ascendant. Let us tread passion under foot. Let us so act, that the world and posterity will allow that in a great crisis we behaved like men. And if the evil day must come when we shall be compelled to give up this Union, or to meet the calamities of war, let us all be united like brothers. Let us hush all our differences, and without distinction of party or class, rally in defence of our rights and honor, as we read in the spirit-stirring poetry of Sir Walter Scott, that the stripling left the unburied corpse of his sire, and the bridegroom the side of his virgin bride, when the Fiery Cross summoned Clan Alpine to battle.

Significant case authored by Justice Bell:

Westbrook v. Mitchell, 42 Tex. 561 (1859), declining to recognize a common law right of a negro man to sell himself into slavery. *Accord*, *Westbrook v. State*, 24 Tex. 563 (1860), approving an instruction that "a contract made with a free African person, by a white person, for the sale of such free African, is null and void."

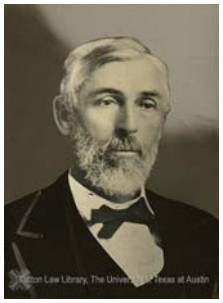
Bailey v. Mills, 27 Tex. 434 (1864), adopting the "presumed prejudice" rule for jury charge error: "It is the practice of this court to reverse a judgment whenever there is an erroneous instruction upon a material point which may have

influenced the jury in finding a verdict, although the evidence may appear to us to be sufficient to sustain the verdict; and the reason of the rule is, that it is impossible to know what effect the instruction had upon the minds of the jury; how much the verdict is due to the instruction, and how much to the evidence; and in a case of conflicting evidence, it is impossible to know that it would lead the minds of the jury to the same conclusion as the minds of this court." This continued to be the rule in Texas until the adoption of the Texas Rules of Civil Procedure in 1941. See Sherwood O. Jones, *Note*, 50 TEX. L. REV. 198 (1971). *Bailey v. Mills* was cited in Associate Justice Robert Calvert's article *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1, 3 (Nov. 1952). A parallel was noted between the articulation of the presumed harm rule stated in *Bailey v. Mills* and what the Court wrote about the harmless error doctrine in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). See Robert G. Gilbreath, *Crown Life Ins. Co. v. Casteel -- Return of the Prodigal Son*, 13 APP. ADVOC. 5 (Summer 2000).

In *Crow v. State*, 24 Tex. 12 (1859), Justice Bell wrote that a jury was available in a contempt of court proceeding only when the right to a jury was specified by statute. He also wrote that "[i]f the contempt is offered in the view or presence of the court, the judge proceeds summarily to punish the offender." This same distinction is drawn today between direct and indirect contempt. Justice Bell then laid out the proper procedure in proceeding against a sheriff for failure to serve and return a writ and proceeding against a person summoned as a juror who fails to appear at trial. 24 Tex. at 14. Bell also wrote that there is no remedy of appeal in cases of contempt. 24 Tex. at 15.

Bullock v. Hayter, 24 Tex. 10 (1859), was a case in which future Chief Justice Moore and his partner Richard S. Walker, both Reporters of the Supreme Court's decisions, represented the appealing party, the spouse of a person who signed a promissory note. The judgment was an agreed judgment. Justice Bell wrote: "We do not feel that it is our duty to consider and settle grave questions of law, presented to us in a case like the present. There was no controversy in the court below. The plaintiff took his judgment in the usual form, by consent of the defendants; and, doubtless, did not expert to be met in this court with questions like the one now presented. There is nothing in the record to show why Mrs. Bates became a party to the contract upon which this judgment was recovered. There is nothing to show, that she has any separate property which can be reached by an execution. The question argued by the counsel, in their briefs, is, whether or not a general or personal judgment can, properly, be rendered against a married woman. It is argued, that a judgment against a married woman must have reference to her property, and cannot be general in its terms, as in the case of judgments against other persons. We do not think this question is fairly raised by the assignment of errors; and we do not feel inclined to encourage the practice of making grave questions for the first time in this court, unless they are fairly embraced within the assignment of errors. Whenever this question, of the propriety of the rendition of a general judgment against a married woman, comes fairly before us, it will be time to consider it. We see no reason for disturbing the judgment, and the same is therefore affirmed, with damages for the delay. Affirmed with damages."

4. Moore. George Fleming Moore (1822-1883), was an Associate Justice on the Texas Supreme Court 1862-67; Chief Justice 1867; Associate Justice 1874-78; Chief Justice 1878-81.

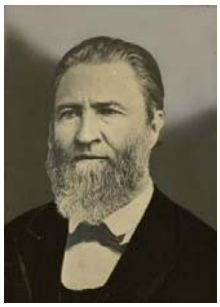


Moore was born in Georgia in 1822, and grew up in Alabama. Moore was educated at the University of Alabama and Virginia and began studying law in 1840. Moore was admitted to the bar in 1844. He moved to Alabama and then to Crockett, Texas in 1846. Moore moved to Austin in 1856, and then to Nacogdoches. In 1861, Moore and his partner were appointed State Reporters and they produced volumes 22, 23 and 24 of the Texas Reporter. He became an Associate Justice of the Texas Supreme Court in 1862. He was elected to the Texas Supreme Court in 1863, and when Chief Justice Oran M. Roberts resigned from the Supreme Court to assist the Confederate armed forces, Moore became Chief Justice. During the Civil War Moore was a colonel in the Seventeenth Regiment of the Texas Calvary. On the Court he supported the power of the Confederate Congress to draft soldiers. Moore was reelected to the Court under the Constitution of 1866. Moore was removed from the Court by the military commander of the Fifth U.S. Military District, Major General Philip Sheridan, in September 1867, but was reappointed in 1874 by Governor Coke. He was re-elected in 1875, and was elected as Chief Justice in 1878. He served until 1881. He died in Washington, D.C. in 1883 and was buried in Austin.

After Moore died, a memorial was presented by attorney, judge, veteran, state representative, state senator, ambassador, regent A.W. Terrell to the Texas Supreme Court, and was published in Volume 60 of the Texas Reports, p. vii. The Memorial read in part, speaking of George F. Moore:

"If its decision involved only law arising on recorded or admitted facts, he was always ready. As an advocate be never soared to impassioned eloquence or attempted to capture a verdict by appealing to the heart, but addressed himself to the understanding and conscience. His delivery of every sentence impressed the hearer with confidence in bis truth, and t he deliberate earnestness of his words, aptly chosen to convey his meaning, carried conviction, and made him invincible in a just cause. There was a clearness in his argument, whether on law or facts, which enabled the simplest understanding to grasp his meaning; and thus against his concise logic, which he riveted with deliberate words on the memory of his hearers, all the sophistry of empty eloquence broke in vain. With simplicity of speech and deep earnestness he marshaled his facts and argued their force until his case was presented clear as a sunbeam. No one ever saw him take a note of testimony during the most protracted trial, however complicated the facts or numerous the witnesses. On the tablets of his memory he relied with perfect faith, and I cannot remember that I ever heard his statement of evidence successfully contradicted. In his practice he observed the loftiest courtesy and purest ethics. As a reporter of the decisions of the supreme court he had no superior. A clear discrimination and happy faculty of grasping the very kernel of a cause distinguished his syllabus, and never left the reader in doubt as to the scope and meaning of a decision. An ardent love for this mighty state, that had honored and elevated him, was a part of his nature. Her soil, climate, and expanding greatness, as an undivided empire from the mountains to the sea, I have often heard him refer to, with pride and exultation. But as a supreme judge of Texas, his most lasting reputation was achieved. We know not which most to admire in him, a rigid regard for established law, or the boldness with which he would attack its semblance, whether reposing in precedent or fortified with the names of great men. I am not alone in believing that he was the best chancery practitioner in Texas; and thus when justice required that what seemed the harshness of law should not prevail, his quick sense of right recognized the demand, while his knowledge of equity applied the remedy." The Memorial goes on.

5. Reeves. Reuben A. Reeves (1821-1908) was an Associate Justice of the Texas Supreme Court from November 1864 to June 1866 and again from January 1874 to April 1876.



The Tarlton Law Library has this biographical description:

Little is known of Reuben A. Reeves between his birth on August 9, 1821 in Todd County, Kentucky, and his arrival in Texas in 1846 at the age of twenty-five. He was married before leaving Kentucky and settled with his bride in Palestine, the county seat of Anderson County. He established a successful law practice and in 1848 had a home built there. This home, today a Texas Historical Landmark and listed on the National Register of Historic Places, is considered an excellent example of Greek Revival architecture. It now belongs to the City of Palestine and is operated as Howard House Museum.

By 1850 Reeves counted five slaves among his property, and the following decade would continue to be prosperous for his career and his family. By 1860 he and his wife had six children and had relocated to a larger home, their number of slaves had increased to thirteen, and the value of their property holdings had increased many times over. Reeves had become active in civic affairs that included helping to establish the local school system. In 1857 he was elected district judge.

During the Civil War Reeves was a captain in Terrell's Texas Cavalry, part of Walker's Texas Division, and fought in the Red River Campaign in the spring of 1864. That August he was elected associate justice of the Texas Supreme Court; he resigned from the Confederate Army in September to accept the post, in which he served until war's end. He participated in the Constitutional Convention of 1866, and was elected district court judge for the Ninth Judicial District. During this time he reportedly refused to allow blacks to participate in the judicial process, and was among officials removed from office as "impediments to Reconstruction" on November 30, 1867 when Texas came under federal military control.

When Richard Coke took office in January 1874 following the notorious Coke/Davis gubernatorial election, he appointed Reeves associate justice of the supreme court. Reeves held the position until the adoption of the 1876 constitution.

Following his court service, Reeves returned to private practice in Palestine until President Cleveland appointed him to the supreme court of the New Mexico Territory after taking office in 1885. He relocated to Santa Fe and served in the position until 1889 when Cleveland 's term ended. Reeves moved to Dallas, where he lived until his death on January 30, 1908. He was buried in Dallas' Greenwood Cemetery.

Court Opinions

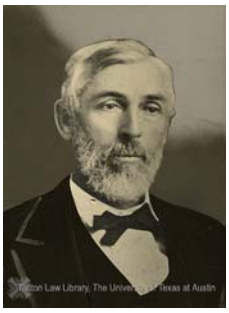
State v. Bristow, 41 Tex. 146 (1874), affirming dismissal of indictment charging defendant with illegal gambling on a billiard table, as the charge failed to specify that the defendant did not engage in a licensed billiards game, legal under the gaming statute.

Stafford v. King, 30 Tex. 258 (1867), establishing the principle that in locating disputed boundary lines, priority must be given to the calls of the original grant that are more specific and definite, in preference to those merely general and indefinite.[11]

III. THE SUPREME COURT DURING RECONSTRUCTION. After the Civil War ended, Texas went through three phases of Reconstruction: Presidential Reconstruction, Military Reconstruction, and Congressional Reconstruction.

A. PRESIDENTIAL RECONSTRUCTION. Presidential reconstruction occurred under conditions imposed by President Andrew Johnson. In 1866, Texas adopted a new Constitution that did not permit freed slaves to vote. In the following election James W. Throckmorton was elected the 12th Governor of Texas. Throckmorton took control of the Capitol on August 13, 1866, and on August 20 President Johnson declared that the insurrection in Texas had ended. The Constitution of 1866 established a Supreme Court consisting of five elected justices serving ten year terms. The persons elected as justices were George F. Moore (selected by other justices as Chief Justice), Richard Coke, Stockton P. Donley, Asa H. Willie, and George W. Smith. This court sat for three terms in December 1866, January and April of 1877. Reporter George W. Paschal commented in 1869 that "five men rarely performed more labor in the space of four months." Paschal, Preface to 29 Reports of Cases Argued and Decided in the Supreme Court of Texas During the Galveston Session, 1861, Etc. (1869) p. 7.

1. Moore. George Fleming Moore served on the Supreme Court for three stretches: Associate Justice, Texas Supreme Court, 1862-1867; Chief Justice, 1867; Associate Justice, Texas Supreme Court, 1874-1878; and Chief Justice, Texas Supreme Court, 1878-1881.



The Tarlton Law Library gives the following biography of George F. Moore:

George Fleming Moore, the seventh son of well-to-do planters, was born in Elbert County, Georgia on July 17, 1822. He grew up in Alabama where, as a child he was acquainted with Oran M. Roberts. Moore attended the University of Alabama and the University of Virginia, but did not graduate from either institution. In 1842 he undertook the study of law in Talladega, Alabama, and was licensed to practice in 1844.

In 1846 Moore moved to Crockett, Texas, where he practiced law for several years before returning to Alabama to marry. He returned to Texas in 1854, spending two years in Austin before moving to Nacogdoches in 1856, where he began a law practice with Richard S. Walker. Moore and Walker were appointed State Reporters in 1858, and prepared the twenty-second, twenty-third, and twenty-fourth Texas Reports (1860-61).

Moore served briefly as a colonel in the Texas cavalry during the Civil War before being elected an associate justice of the supreme court in 1862. In 1866 he was again elected to the court but was removed in 1867 when Texas was placed under federal military authority. He returned to practicing law, this time in Austin, and was licensed to practice in the U.S. Supreme Court in 1870, where he argued two successful cases (Hanrick v. Barton and Cordova v. Hood et al.). In January 1874 he was reappointed associate justice by Gov. Coke. The Constitution of 1876 made court positions elective by popular vote, and he was then elected to the position. When Oran M. Roberts was elected governor of Texas in 1878, Moore was appointed fill his vacancy as chief justice. Moore was then elected to the position by an overwhelming majority.

Moore was described as a studious, careful, and dignified judge who blended the attributes of sternness and generosity. He possessed strong analytical ability, and presented clear, concise, and logical arguments. He was an expert in Texas land laws, and during the years he practiced law, he handled a number of land cases.

In November 1881, his health and eyesight failing, Moore resigned from the court. He died in Washington, D.C. on August 30, 1883, and his body was returned to Austin for burial.

Court Opinions

State v. Sparks, 27 Tex. 627 (1864), in which he "maintained vigorously and successfully the sacred right of habeas corpus", Lynch 100.

Keuchler v. Wright, 40 Tex. 600 (1874), regarding courts issuing writ of mandamus to heads of the executive department of State government to compel proper performance of duty.

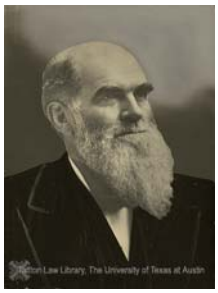
Farrer v. The State, 42 Tex. 265 (1875) he presented a definition of express malice and made a distinction regarding what constituted first and second degree murder.

Ex parte Coupland, 26 Tex. 386 (1862), affirmed remand of deserter soldier into custody of colonel upon writ of habeas corpus. Rejected constitutional challenge to Conscription Law for the Confederate Army, holding law valid as necessary and proper means for executing grant of power to make war that power to raise militia cannot adequately fulfill.

San Antonio v. Jones, 28 Tex. 19 (1866), affirmed judgment for railroad plaintiff that act to incorporate company did not confer legislative power on citizens and that extension of completion time for road did not affect essential condition of charter such that railroad forfeited subscription of stock rights.

Barnett v. Logue, 29 Tex. 289 (1867), reversing judgment for defendant on grounds that jury instruction directed verdict for defendants on determination of immaterial issue regarding ownership of notes by party other than plaintiff.[12]

2. Coke. Richard Coke (1829-1897) was an Associate Justice of the Texas Supreme Court, 1866-1867.



The Tarlton Law Library has this biography:

Born to a prominent family in Williamsburg, Virginia, in March 1829, Richard Coke was one of eight sons. One of his brothers died in childhood, but Richard and his six remaining brothers all received good educations and became either doctors or lawyers. Richard Coke entered William and Mary College in 1843 at the age of fifteen, studying law. Following his graduation in 1848, he visited his uncle and namesake, Richard Coke, a former U.S. Congressman, in Washington, DC. There he was introduced to Senator Sam Houston of Texas, who encouraged him to go to Texas and gave him a letter of introduction to former Texas Gov. Henderson.

The twenty-one-year-old Richard Coke arrived in Texas in 1850. At Henderson's suggestion, he settled in Waco, the county seat of McClennan County. He was admitted to the bar in 1851 and set up a law practice specializing mostly in land title disputes, though he also practiced some criminal law. Soon he took M.D. Herring and James Anderson as law partners. In 1852 Coke married, and he and his fifteen-year-old bride built a home and started a cotton plantation along the Brazos River. By 1860 the couple had some 2,700 acres of land in McClennan County. They raised cotton and pigs, with fifteen slaves providing the labor.

In 1859 Gov. Runnels appointed Coke to the Texas Peace Commission, a group charged with finding a peaceful solution to increasingly violent conflicts between white settlers and Indians in reservations on the Texas frontier. The commission's recommendation resulted in the removal of nearly 1,500 Indians from Texas "for their own protection." It was a move that pleased the settlers greatly.

In January 1861 Coke was elected as a delegate to the Texas Secession Convention, representing McClennan and Bosque Counties. Chief among the delegates' concerns was the protection of the institution of slavery.

They issued complaints that northern states were providing safe havens to runaway slaves, and that the federal government was failing to protect Texans from marauding Indians and Mexicans, all as part of a scheme to force the ruin of Texas due to its status as a slave state. Finally, they called for the repeal of annexation and the removal of Texas from the Union.

When the Civil War broke out, Coke volunteered in the Confederate Army, formed a company of infantry soldiers, and served as its captain. He was wounded in action in late 1863 but eventually returned to service until war's end. When Coke was discharged from the Confederate Army in May 1865 he returned to his family and his law practice in Waco. On June 19, 1865, the date known as Juneteenth, he freed his slaves as prescribed by law.

On September 1, 1865 Coke was appointed district judge of the Nineteenth Judicial District by Provisional Governor A. J. Hamilton. In August 1866 he was elected to the Texas Supreme Court. He served until being ousted along with Governor Throckmorton, all the supreme court justices, and other high-ranking public officials when Texas came under military command under the Reconstruction Acts in July 1867. By November, authority had been restored to the State, but none of the previous officials were reinstated. Coke returned to private practice until he ran for governor as a Democrat against Republican Gov. E.J. Davis in 1873.

The Coke/Davis election was one of the most notorious political contests in Texas history. The election was held on December 2, 1873. Coke won by a wide margin. Davis, whose governorship had been marked by his abuse of power, subsequently enlisted the help of Texas Supreme Court Justices Wesley Ogden, Moses B. Walker, and J.D. McAdoo, all of whom he had appointed, in an attempt to maintain control of the position. They became known as the "Semicolon Court" when they focused their attention on the meaning of the semicolon in Article 3, Section 6 of the state's constitution to declare the election invalid. Coke sought the aid of the Democrat-controlled legislature. The crisis reached its apex when both men arrived at the Capitol with armed men to claim the governorship. While Gov. Davis' troops patrolled the first floor, where the governor's office was located, the Democrats sneaked onto the second floor, locking the doors. The votes were recounted by a joint session of the legislature, Coke was declared the winner, and was sworn in as governor on January 13, 1874.

As governor, Coke turned his attention to education and tax reform, established a funding system for schools, and opened Texas A&M University. Frontier security was also a major concern. He sent forces to the border to protect Texans from marauding Mexican bandits, and he also enlisted federal help with Indian problems and organized troops in areas where Indian raids were frequent. He was reelected governor in February 1876, but was elected by the state legislature to the U.S. Senate later that year. He served eighteen years in the U.S. Senate before retiring due to ill health in 1894. He returned to Waco, where he died at his home on May 14, 1897. He was buried in Oakwood Cemetery in Waco.[13]

Court Opinions

O'Connell v. Duke, 29 Tex. 299 (1867), affirming a judgment for the plaintiff in a land conveyance dispute, following equitable doctrine that unexpected excessive surplus remains with grantor in lease by acre.

Cleveland v. Williams, 29 Tex. 204 (1867), ruling that a sale of corn was invalid where the goods were not "clearly identified" or measured separately before death of conveyor, and thus subsequent measurement and delivery by agent was unauthorized.

Stroud v. Springfield, 28 Tex. 649 (1866) affirming judgment for defendant in trespass action, where documents showing location of land properly rejected for not fitting ancient writings exception to hearsay since their genuineness was questionable due to lack of corroborating circumstantial evidence. Plaintiff's witness testimony also properly excluded for discussing reputation of boundary in community without limiting to a particular time. Defendant's patent evidence was properly admitted. Refusal to instruct jury that defendant's held the burden of proof was also without error. Finally, though noting that the jury found against the weight of the evidence, the Supreme Court rejected a claim of insufficient evidence since the jury are exclusive judges of credibility.

Justice Coke wrote the Court's opinion in *Cleveland v. Williams*, 29 Tex. 204, 213-14, 1867 WL 4513, *4 (1867), where the Court held that the reception of the Common Law of England into Texas did not include England's Statute of Frauds adopted during the reign of Charles II, which had been adopted "in nearly all the states of the Union except Texas."

Justice Coke introduced the offer-and-acceptance perspective on contract formation of in *Patton v. Rucker*, 29 Tex. 402, 1867 WL 4538, *5 (1867) where he wrote: "A proposal by one party, and an acceptance of that proposal according to the terms of it by the other, constituted a contract." Justice Coke wrote further:

> A letter properly signed, and containing the necessary particulars of the contract, is sufficient. But it must be such a letter as shows an existing and binding contract, as contradistinguished from a pending negotiation, a concluded agreement, and not an open treaty, in order to bind the party from whom it proceeds. So a correspondence consisting of a number of letters between the parties may be taken together, and construed and considered with reference to each other, and the substantial meaning of the whole arrived at; and if, when thus blended, as it were, into one, and the result is ascertained, it is clear that the parties understood each other, and that the terms proposed by one were acceded to by the other, it is a valid and binding contract, and may be enforced.... It is not only necessary that the minds of the contracting parties should meet on the subject-matter of the contract, but they must communicate that fact to each other, so that both may know that their minds do meet, and it is then only that the mutual assent necessary to a valid contract exists, and not until then that the contract is concluded.

Id. at 404.

In that same case, Justice Coke wrote that "[w]hile it is prohibited to the court to charge or comment on the weight of the evidence, it is proper and legitimate, where there is no evidence upon a given issue so to instruct the jury." *Id*. At 406.

3. Donley. Stockton P. Donley (1821-1871) was an Associate Justice on the Texas Supreme Court, 1866-1867.

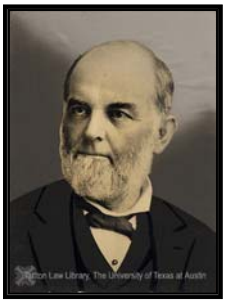
The Tarlton Law Library gives the following biography of Donley:

> Born in Howard County, Missouri, on May 27, 1821, Stockton P. Donley attended Transylvania University in Kentucky and was admitted to the bar in that state.
>
> In 1846 Donley moved to Texas and opened a law practice in Clarksville, the county seat of Red River County. The following year he relocated to Rusk, and went into partnership with James M. Anderson. Donley quickly established a reputation as a capable criminal attorney. In 1853 he was elected district attorney of the Sixth Judicial District and gained a reputation as an efficient prosecutor. In 1860 he relocated to Tyler.
>
> When the Civil War broke out, Donley enlisted as a private in the Texas volunteer army and was captured at Fort Donelson, Tennessee. He was eventually exchanged and promoted to lieutenant. Following the war he returned to Tyler and resumed practicing law.
>
> In 1866 Donley was elected by popular vote to the Texas Supreme Court, serving until he was among state officials removed by the military as "impediments to Reconstruction" on September 10, 1867. He went into practice with Oran Roberts and then with John L. Henry. He practiced privately until his death in Kaufman, Texas on February 17, 1871. He was buried in Tyler.
>
> Court Opinions

Maria v. State, 28 Tex. (1866), reversed a former slave's conviction for murder in second degree on the grounds of erroneous jury instruction. Trial court should have charged the jury that the deceased's whipping of defendant's child was adequate provocation if defendant was found to possess concomitant passion, reducing conviction to manslaughter).[14]

Wilson v. State, 29 Tex. (1867), saying that murder is murder, whether of a white man or a slave; the jury acquitted the defendant of murder of a slave, but then convicted him of cruelty to a slave, a misdemeanor, and imposed the maximum punishment of a fine of $2,000. Because the indictment charged only with the felony of murder, the fine was not proper and the defendant was discharged without penalty.

4. Willie. Asa Hoxie Willie served as an Associate Justice on the Texas Supreme Court, 1866-1867, and as Chief Justice, 1882-1888.



The Tarlton Law Library has the following biography of Asa Willie:

> Asa Hoxie Willie was born October 11, 1829 in Washington, Georgia. His father, who died when Asa was four years old, was a Vermont native; his mother was a Massachusetts Quaker. Willie received his early education in private schools near his Georgia home.
>
> In February 1846, at the age of sixteen, Asa Willie left home and moved to his uncle's home in Independence, Texas. In 1848 he undertook legal studies in the Brenham office of his older brother, James Willie, who served in the First and Second Texas Legislatures. In 1849 Asa Willie was admitted to the bar by a special act of the Texas Legislature, as he had not yet reached the age of twenty-one.
>
> Willie spent the following three decades practicing law and serving in public positions. After practicing law with his brother for several years, he served as district attorney for the Third Judicial District from 1852-54, and then returned to private practice. In 1857 he moved to Austin for a year to assist his brother, who had been elected Texas attorney general. In 1858 he relocated to Brenham, where he went into practice with Col. Alexander Pope, his sister's husband. Willie married the following year, and he and his wife eventually produced ten children.
>
> When the Civil War broke out, Willie joined the Confederate Army and served as a major in the Texas Infantry. During the war he was captured and spent nine months as a prisoner of war.
>
> In June 1866 Willie was elected associate justice of the Supreme Court of Texas, but he and the other justices, along with other state officials, were removed as "impediments to Reconstruction" when Texas came under military authority in 1867. Willie moved to Galveston and formed a law partnership with Judge T. F. Crosby and later, with Judge C. L. Cleveland. In 1872 Willie was elected to the U.S. Congress, serving one term in the House of Representatives. He declined a run for reelection, and returned to private practice in 1875. He served as Galveston city attorney from 1875-76.
>
> Willie was elected chief justice of the Texas Supreme Court in 1882 in what was then the largest majority of votes ever received by a political candidate in Texas. He served in the position until retiring in 1888. He died in Galveston March 16, 1899 at the age of sixty-nine and was buried in Mt. Olivet Cemetery there.[15]

Court Opinions

Pressley v. Testard, 29 Tex. 200 (1867), reversing a judgment of foreclosure that was too vague to allow execution in that it conformed to pleadings that failed to give a definite description of the portion of a lot to be foreclosed upon.

5. Smith. George W. Smith, Associate Justice of the Texas Supreme Court, 1866-1867.

The Tarlton Law Library gives the following biography:

> Little is known of George Washington Smith's early years, except that he was born in Kentucky around the year 1823 and moved to Texas in 1847.

Smith settled near Columbus in Colorado County, owned land there, and practiced law. He married and had two children. In 1859 he was appointed judge of the First District court, and served until 1866. In 1860 he became commissioner of the Columbus Tap Railway, which linked Columbus to Houston and Galveston. His leadership in railroad development would result in a locomotive being named after him in 1870. Smith was an opponent of secession but remained in Texas through out the Civil War.

Smith participated in the Constitutional Convention of 1866. That year Gov. Andrew Hamilton reappointed him to the First District judgeship, but in August he was elected to the Texas Supreme Court. He was one of the justices removed as an "impediment to Reconstruction" on September 10, 1867 when Texas came under military command. The following year he served as a delegate to the Democratic national convention. He went on to serve in the Texas House of Representatives during the Thirteenth legislative session in 1873.

Smith died of yellow fever at his home in Colorado County on October 24, 1873 at the approximate age of fifty.

Court Opinions

Casey v. March, Tex. 180 (1867), affirming judgment that while an attorney possesses a lien on a client's property to secure payment, the lien only vests in possession and thus attorney cannot collect on judgment until money has been collected.[16]

6. Removal. In September of 1867, by military fiat of Major General Philip Henry Sheridan, military commander of the Fifth Military District of Louisiana and Texas, removed the Governor of Texas and all members of the Texas Supreme Court from office. The Justices who were removed, Chief Justice George F. Moore, and Associate Justices Richard Coke, S.P. Donley, Asa H. Willie, and George W. Smith, were later described as "all men of culture, intellect, and fine judicial ability."[17]

B. MILITARY RECONSTRUCTION. In March and July of 1867, the United States Congress enacted three reconstruction statutes, which placed Louisiana and Texas in the Fifth Military District and authorized the military commanders to remove state officials who impeded Reconstruction. Governor Throckmorton drew the ire of the military commander in Texas, Major General Charles Griffin, because of the Governor's lenient attitude toward former Confederates and his attitude toward freedman's civil rights. On September 10, 1867, the commander of the Fifth Military District, Major General Phillip Sheridan, removed a large number of state and local Texas officials, including Governor Throckmorton and Chief Justice Moore and Associate Justices Coke, Donley, Willie, and Smith. George Paschal says that the removal of Justices resulted from their disqualification under the Fourteenth Amendment and Reconstruction.[18] On July 30, 1867, Major General Sheridan appointed Elisha M. Pease as Governor and Amos Morrill as Chief Justice, with Livingston Lindsay, Colbert Coldwell, Albert H. Latimer, and Andrew J. Hamilton as associate justices of the Supreme Court of Texas (now called the "Military Court"). Military Rule ended in Texas in April 1870.

Here is the description by the Official Reporter of the Texas Supreme Court;

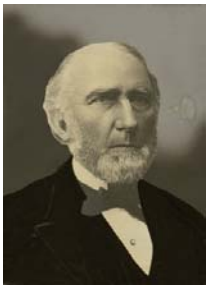
> But in the winter of 1866-7 Congress had arrested the governments which had restored to power the men who had conducted the war against the Union. The reconstruction laws were enacted, and the State of Texas, among others, was consigned to a military district. The governments which had arisen from the anarchy and chaos which had followed the rebellion were declared to be illegal and provisional only, and among the powers committed to the commanding general and the commanders of military districts was that of removing officers who were impediments to the reconstruction laws. Governor THROCKMORTON, and the supreme judges elected with him, were thought to come under this classification, and they were removed by Major General SHERIDAN. E. M. PEASE was appointed provisional governor; AMOS MORRILL, chief justice; LIVINGSTON LINDSAY, COLBERT CALDWELL, ALBERT H. LATIMER, and ANDREW J. HAMILTON were appointed associate justices in September and December, 1867. Corresponding changes were made in the district courts.

George W. Paschal, *Preface of Texas Reports*, p. ix (1860).

One case decided by the Military Court that is very interesting to read is *W.H. Hall v. T.M, Keese, Dougherty v. Cartwright*, 31 Tex. 504 (1868), often called "the Emancipation Cases." The question in both cases was whether a promissory note given to purchase or hire a slave that was signed after the date of President Lincoln's Emancipation Proclamation was enforceable after slavery was abolished, due to illegality or failure of consideration. 31 Tex. at 526. The Court had to determine the date slavery was abolished in Texas, and the effect of that abolition. Chief Justice Morrill wrote that "[t]he question is, Who was the owner at the time the slave became free?" – citing the Latin maxim *Res perit suo domino* (literally, the thing is the loss of its owner, or the risk of loss is on the owner). 31 Tex. at 527. The five Justices could choose between three dates for when slavery in Texas ended: the day of the Emancipation Proclamation (January 1, 1863), the date of General Gordon Granger's General Order No. 3 announcing that slaves in Texas were freed (June 19, 1865), or the date that the Thirteenth Amendment to the U.S. Constitution abolishing slavery was ratified (December 6, 1865). The Court divided 3-to-2 in favor of enforceability of the promissory notes. Chief Justice Morrill

gave a robust but emotionally charged analysis of the question and wrote that slavery was abolished in Texas upon ratification of the 13th Amendment. 31 Tex. at 524. Justice Lindsey concurred in the result enforcing the promissory notes, but he set the date for the end of slavery in Texas on June 19, 1865 ("Juneteenth"), when General Granger announced that all slaves in Texas were freed. Justice Latimer concurred with Morrill and Linsday, but Justice Latimer's written opinion has been lost. Justice Hamilton wrote a robust dissenting Opinion, based on the argument that the Emancipation Proclamation announced the public policy of the United States and that the two contracts were not enforceable for violating public policy. 31 Tex. at 556. Justice Coldwell adopted Justice Hamilton's Dissenting Opinion as his own. 31 Tex. at 556. The Opinions reflect a high level of reasoning, and a determined effort to support their conclusion by references to legal precedents, some quite wide-ranging. The Emancipation Cases are examined in more detail in Gilbreath's *The Supreme Court of Texas and the Emancipation Cases*, 69 TEX. B.J. 946, 948 (2006). He points out language from the Majority Opinion in *Hall v. Keese* and *Dougherty v. Cartwright*. "These cases ... in coming ages, will be referred to as a chapter in the history of great events. ... [T]hey will convince the antiquarian of future years that some generations make history so rapidly that they do not understand it themselves."

1. **Morrill.** Amos Morrill was Chief Justice of the Texas Supreme Court, 1867-1869.



Amos Morrill was born in Massachusetts in 1809. He received his law license in Tennessee. He moved to Clarksville, Texas in 1838. When the Civil War broke out, he fled to Mexico then Massachusetts and spent the final year of the war working at a customs house in New Orleans. After the Justices who made up Texas' Presidential Reconstruction Court were removed by Major General Philip Sheridan, Morrill was appointed Chief Justice of the "Military Court" and served from 1867 until Governor E. J. Davis appointed a new Court under the Military Constitution of 1869. Morrill became the Federal District Judge in Galveston in 1872, where he served for eleven years. Chief Justice Morrill wrote the Majority Opinion in the Emancipation Cases. His approach was that President Lincoln's Emancipation Proclamation was an exercise of a war power that contradicted Congressional enactments and ignored the fact that slavery was embedded in the U.S. Constitution from the start and could only be eliminated by an amendment to the Constitution. The Chief Justice's Opinion begins:

> In a country, nation, or state, where "what pleases the prince is law," it is only necessary to know the actions or even the wishes or whims of the prince to adjudicate upon the rights of person and property. In a state or nation where, in times of war, what pleases the commander-in-chief of the victorious party is law to the conquered, a proclamation of the commander, setting forth his will, would be decisive of the status of the conquered. There are but few nations, even among the civilized of modern times, who in times of peace are governed by a "rule of action prescribed by the supreme power in a state;" and still less is this number in times of war. Even in that nation which we denominate our parent country, and which is, par excellence, a country of laws in peace, the happiness or misery of the conquered in times of war depends in a great degree upon the wishes, will, whim, or caprice of the victorious commander. Whether the conquered shall retain their lives, liberty, or property, or whether their property shall be confiscated and they themselves blown from the cannon's mouth, depends in a great measure upon the humanity, avarice, or bloodthirstiness of the general *519 in command. The history of the world is a detail of wars, "and woe to the conquered" blackens every page. But there is a nation whose theory of government is based upon law, both in peace and war; where the organic law provides that "no person shall be deprived of property without due course of law;" and where in times of war not the commander-in-chief of the army and navy, but the "congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," "to raise and support armies," "to make rules for the government and regulation of the land and naval forces."
>
> We are so accustomed to look at the precedents furnished us by those nations who either have no constitutions, or whose organic laws do not contain provisions similar to those of the constitution of the United States, that we base our actions and principles and thoughtless declarations more upon those precedents than our own laws.
>
> In England the king is the sovereign power, and as such sovereign has the power to declare war and exercise such other rights of sovereignty as are especially delegated to the congress. In the United States the congress is vested with the sovereign power.

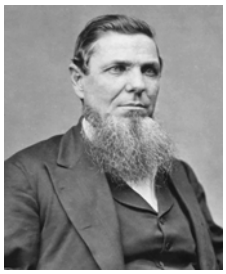
31 Tex. 518-19. Chief Justice Morrill wrote again on the emancipation question in *Algier and Another v. Black*, 32 Tex. 168 (1869), where one party sought to set aside a contract that exchanged real estate for slaves. Morrill wrote:

> From the briefs of the counsel it is presumed that the court assumed that the slaves were free when the contract was made, and therefore the negroes formed no consideration for the real estate conveyed. The records of this court apprise us that the public are greatly divided in opinion as to the time when slaves were emancipated, the three different periods being the 1st of January, 1863, the 19th of June, 1865, and the 18th of December, 1865; and it is supposed that the judge of the district court considered that slaves were all free in Texas from and after the 1st of January, 1863. At the Austin branch of this court, at the last session, this court, with a full bench, after as full and mature deliberation as practicable, decided that the slaves in this state were practically free from and after the 19th of June, 1865, the time of the proclamation or order of General Granger, on his arrival in this state. And though a minority of the court considered that slavery ceased to exist in the United States from and after the date of the emancipation proclamation of President Lincoln, yet, in that and other cases the members of the court have been unanimous in the opinion that the court will not lend its aid to assist any one to obtain relief in a contract made in violation of positive law or public policy. Had, therefore, the effect of the president's proclamation been to abolish slavery on the 1st of January, 1863, the plaintiff, by his own showing, would not have been able to come into court alleging that he had voluntarily purchased free men as slaves, and received the assistance of the court to relieve him. As, however, the contract was made in August, 1864, when the contract was legal, the credulity of the purchaser of the slaves, that they would continue such, however baseless to others, who had both different views and notions, furnishes no cause of action. Those who speculated upon the success [p. 170] of the rebellion against the United States, and made contracts founded upon chances of this success will not be heard in the courts of the United States in their request for relief from the iniquitous contracts. The principles which underlie this case were so fully considered in the case of *Hall v. Keese*, above referred to, that there is nothing left for us to do or say but to reverse and dismiss this case, which is done accordingly.
>
> Reversed and dismissed.

32 Tex. at 169-70. There were no dissents.

Chief Justice Morrill also wrote the opinion in *Thompson v. Houston*, 31 Tex. 610 (1869), holding that a promissory note due twelve months after a treaty of peace between the Confederate States and the United States, was not enforceable because it had not come due, since there was no such peace treaty. This decision was overruled in *Atcheson v. Scott*, 51 Tex. 213 (1879) (Gould, A.J.), which held that a similarly-worded promissory note came due "after the close of the war."

2. Hamilton. Andrew Jackson Hamilton (1815-1875) was an Associate Justice on the Texas Supreme Court, 1867-1869.



Photograph by Mathew Brady[19]

Andrew Jackson Hamilton, known as "Collosal Jack," was born in Alabama. He was admitted to the Alabama Bar in 1841. In 1846 he moved to La Grange, Texas to practice law. In 1849 he was appointed attorney general by Governor Bell and settled permanently in Austin. He later joined with Amos Morrill, later Chief Justice of the Military Court, in the practice of law. In 1859 Hamilton was elected to the U.S. Congress. He strongly and vocally opposed secession, but in 1861 he was elected to the Texas senate. However, as a Unionist, Hamilton declined to take pledge of loyalty to the Confederate States of America. He fled to Mexico and then to Washington, D.C. where he was appointed brigadier general for the Texas troops fighting on the Union side. In 1865 President Andrew Johnson appointed Hamilton as Provisional Governor of Texas. In 1867 Hamilton was appointed by Brevet Major General J.J. Reynolds as an associate justice of the Military Court. Hamilton participated in the Congressional Reconstruction Constitutional Convention of 1868. Hamilton "had a fine physique, a magnificent voice, a command of language surpassed by few, a logical mind, and a wonderful gift of oratory; these factors, added to his great talent as a lawyer, combined to make him a natural leader."[20]

Hamilton wrote the Dissenting Opinion in the Emancipation Cases. He noted:

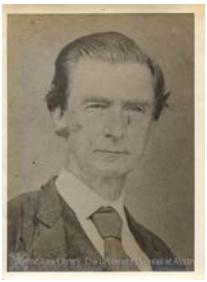
> In this and several other cases of the same character the question is, whether obligations for money, given for the purchase of colored persons as slaves in Texas, since the 1st of January, 1863, can now be enforced in the courts of the country?

> The importance of the question is at once perceived, and this court, being anxious to arrive at a conclusion resting upon reason and authority, some weeks past invited discussion [p. 535] of the point by the bar generally. It is to be regretted that this invitation was responded to by but two attorneys of the court, and that they both appeared on the affirmative side of the question, as stated above. Their arguments were certainly very able and exhaustive on that side, as was to be expected of them from their high and wellearned reputations at the bar; but I am constrained to differ not only with them, but also with some of my brethren of this court, as to much of the reasoning employed, and certainly as to the conclusion at which they have arrived. One of the able counsel alluded to says, in the first paragraph of his printed brief:
>
> > "We are invited to discuss the very question, What was the effect of President Lincoln's proclamation of the 1st day of January, 1863, upon negro slavery in Texas."
>
> This, to my mind, is not only not a fair and full statement of the real point involved, but does not in fact reach the proper inquiry. The manner in which the question is stated by him shows that he regards it as one to be settled by the legal effect to be given to the president's proclamation by the mere effect of his promulgation. It will, however, be more fair to give the questions, as stated more at length by him in his brief and as he has argued them. He asks, "Did the proclamation of President Lincoln operate, ipso facto, in Texas so as to liberate the slaves instanter, and to deprive the master of the ability to sell or hire them thereafter, and to recover the notes given for their sale or hire?" And, after having answered this, he proceeds to state another proposition, in the following form, the truth of which he denies: "But it is insisted that, although freedom did not exist, de facto, it did become the rule, de jure, on the 1st day of January, 1863;" and then adds: "Such seems not to be the understanding of the courts, whose peculiar province it is to interpret the federal constitution." He refers to a decision by Chief Justice CHASE in a case in Maryland, and one by Mr. Justice SWAYNE in Kentucky, neither of which, as I shall [p. 536] presently show, have the slightest applicability to the case at bar, and deduces from them, very unwarrantably, as must be manifest from a moment's reflection, authority for saying that slavery only ceased to exist in Texas by the ratification of the XIIIth amendment of the constitution of the United States.
>
> And these propositions I understand to be substantially those upon which the members of the court from whom I differ rest their opinion.
>
> The first and second of these points are delusive, and whether so intended or not, are well calculated to lead the mind from the true inquiry upon which this case rests.
>
> And, for the purpose of making myself understood at once in my effort to expose their fallaciousness as predicates from which to reason in this case, I will state what I regard as the real question in the case, to wit: "Was a sale of negroes in Texas after the 1st of January, 1863, opposed to the solemnly declared will and policy of the United States government, and had the United States the right, under existing circumstances, to declare such policy?" If these questions are to be answered in the affirmative, then it is unnecessary to do more than add, that they should receive no aid from loyal courts to carry them into execution.

31 Tex. 534-36.

Hamilton did not attend the Court's sessions in Galveston and Tyler in 1868 or in Austin and Galveston in 1869. He left the Court on October 1, 1869 to run for governor in 1870. (He lost to Edmond J. Davis by 809 votes, tallied by military authorities who rejected vote counts from counties favorable to Hamilton).[21] Hamilton died in Austin in 1875 of tuberculosis. Hamilton authored *Luter v. Hunter*, 30 Tex. 690 (1868), holding a statute that stayed the payment of debt unconstitutional as violating the Contract Clause of the U.S. Constitution.

3. Lindsay. Livingston Lindsay (1806-1892) was Associate Justice of the Texas Supreme Court, 1867-1870.



Livingston Lindsay was born in Virginia in 1806. Lindsay graduated from the University of Virginia. He was admitted to the Kentucky bar. In 1860 he moved to LaGrange, Texas. He was appointed by Major General Sheridan as an Associate Justice to the Military Court in 1867. Lindsay served on the Court until it was reorganized under the Constitution of 1869 and the number of justices was reduced from five to three.

After this, Lindsay served as district judge in five counties west and southwest of Houston. He ended his career as county judge of Fayette County.

Lindsay concurred in Justice Hamilton's Dissenting Opinion in the Emancipation Cases. Lindsay wrote the Opinion in *Roundtree v. Thomas*, 32 Tex. 286, 1869 WL 4819 (1869), on the collectability of a note out of a wife's separate property. Chief Justice Moore later refused to afford *Roundtree* stare decisis effect because "the court by which that case was decided did not exercise its functions under and by virtue of the Constitution and laws of the State of Texas, but merely by virtue of military appointment." *Taylor v. Murphy*, 50 Tex. 291, 1878 WL 9260, *3 (1878).

The Tarleton Law Library notes two significant cases written by Justice Lindsay:

Galan v. Town of Goliad, 32 Tex. 776 (1870), affirming a judgment for defendants in an adverse possession case where the state had erroneously doubly granted land, ruling that the junior grantee possesses land in question where it had successfully held adversely for a length of time sufficient to meet statute of limitations.

Shreck v. Shreck, 32 Tex. 578 (1870), affirming a divorce decree, as the lower court properly had jurisdiction since a marriage contract viewed as exception to rule that the laws of location of making of contract governs its construction and wife's domicile in Texas was sufficient to grant jurisdiction; evidence was sufficient and jury charges without error to sustain verdict.[22]

4. Latimer. Albert Hamilton Latimer (1800-1877) was an Associate Justice Texas Supreme Court, 1867-1869.

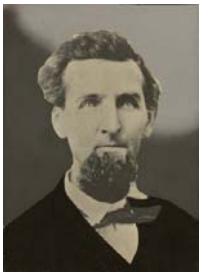
Latimer was born circa 1800 in Tennessee. He was admitted to the Tennessee Bar in 1830, migrated to Texas in 1831, and settled in Red River County. He signed the Texas Declaration of Independence, attended the 1836 Constitutional Convention, and fought in the Texas revolutionary war protecting settlers from Indian raids. He was a delegate to the 1845 Constitutional Convention. He served in two Texas Congresses, and one term as a state senator. He supported the Union cause during the Civil War, but was unmolested due to his advanced age. In 1865 he was appointed state comptroller by Provisional Governor A. J. Hamilton. Latimer was a delegate to the 1866 Constitutional Convention.He held various federal jobs, worked for the Freedmans' Bureau, and was appointed by Major General Sheridan to the Military Court on August 9, 1867. Biographical Directory of the Texas Conventions and Congress 1832-1835 (1941) p. 121. Latimer concurred in with the Majority in the Emancipation Cases, but his Opinion has been lost. It can be inferred that he rejected the Emancipation Proclamation as the date of slavery ended. Latimer served 14 months on the Texas Supreme Court. Latimer resigned his bench in 1869, to make an unsuccessful run for Lieutenant Governor. In 1870, Latimer was appointed by Governor E.J. Davis as district judge of the 8th District. He resigned in 1872.

The Tarlton Law Library notes two significant cases written by Justice Latimer:

Cannon v. Murphy, 31 Tex. 405 (1868), a ruling in favor of plaintiffs as inheriting mother's community property, since parents' acquired such inchoate right through their settlement and occupation of land.

Hamblin v. Warnecke, 31 Tex. 91 (1868), holding an administrator's sale of land to pay debts invalid because not necessary to pay estate's debts, land, being homestead, was exempt from sale by statute, and sale was fictitious since administrator sold land to himself for no consideration.[23]

5. Coldwell. Colbert Coldwell (1822-1892) was an Associate Justice of the Texas Supreme Court, 1867-1869.



The following biographical sketch was published by Justice Coldwell's great grandson, a lawyer in El Paso:

> Colbert Coldwell was born in Shelbyville, Tennessee. His father died of cholera when he was eleven. He came to Texas with an uncle, Hamilton Ledbetter, who settled in Victoria after 1836, then lived with his uncle Thomas Alfred Coldwell in southwestern Missouri. He went overland from Missouri on the Santa Fe Trail, with the scout and trailblazer, Kit Carson.13Coldwell engaged in the Santa Fe trade, based for six years in Chihuahua, Mexico and traveled as far south as Durango. He learned Spanish, his trade prospered, and he became a close friend of one New Mexico Governor, Mariano Martinez de Lejanza, from whom he received trade preferences. During the Mexican War he was interpreter and guide for the Missouri Volunteer Regiment under Colonel Alexander Doniphan, which captured El Paso and Chihuahua. He played a prominent role at the Battle of Brazito, New Mexico on Christmas Day, 1846, twenty-six miles north of El Paso. After the Mexican War, Coldwell "read" law and engaged in the family trading business. He married Martha Michie and moved to St. Francis County, Arkansas where he traded, practiced law, and served in the Arkansas Legislature. He served as a delegate to the 1856 Democratic Convention that nominated President James Buchanan. Coldwell moved, with his wife and seven children, to Mansfield, Texas, in 1859, and campaigned in the 1860 presidential election for Stephen Douglas, the Northern Democratic candidate. Coldwell refused military service under the Confederacy, causing his legal practice to languish during the Civil War. He traded from his home at Navasota to Brownsville and into Mexico during the war, only to see his wagons, mule teams, and goods commandeered by the increasingly desperate Confederates. He spent nine months in jail in late 1864 and through April, 1865 as a Union sympathizer. Soon after the Civil War ended, he won appointment as the first Chairman of the Union League in Texas, established to support for public office only reliable Union men. In August 1865, Provisional Governor Andrew Jackson "Colossal Jack" Hamilton appointed him as District Judge of the Seventh Judicial District, which included Galveston, Houston, Huntsville, and several rural counties. Judge Coldwell helped re-establish the rule of law after the war and generously assisted many former Confederates obtain the restoration of their legal rights and law licenses, including Judges James A. Baker and Peter W. Gray, founders of the Baker Botts law firm. …
>
> In 1867, Major General Philip Sheridan appointed Coldwell and four other anti-secessionists, including his mentor and colleague, former Provisional Governor and leading pre-war attorney, A.J. Hamilton, to a reconstituted Texas Supreme Court. Coldwell was the only appointee with prior judicial experience. Coldwell soon moved to Jefferson, then the second largest city of Texas, and acted as a political organizer in northeast Texas for the moderate Republican Governor, Elisha M. Pease. Although Coldwell had been a slave owner, he championed the right of former slaves to enjoy full civil and political rights in Marshall, Jefferson and elsewhere in Texas. This support for the rights of freedmen earned him the enmity of unreconstructed Confederates who supported the underground groups that became the Ku Klux Klan. He evaded assassins laying in ambush to kill him in Jefferson, and elsewhere. Despite those attacks, voters elected Coldwell to serve as Jefferson's delegate to the Constitutional Convention of 1868-1869. Once there, Coldwell and fellow Supreme Court Justices A.J. Hamilton and Livingston Lindsay led Moderate Republicans while continuing to serve on the Court. The Ultra Radical Republicans, led by former Union Brigadier Gen. Edmund J. Davis, won the Convention's first test vote by electing Davis President of the Convention over Coldwell by 44 to 33. Coldwell wrote the committee report on terror and violence, a subject on which he had first-hand experience. Davis convinced the Convention's delegates to ratify the Fourteenth Amendment by granting full civil rights to freedmen as a condition for Reconstruction and for Texas's readmission to the Union. Coldwell and other Convention delegates debated many issues, including the terms of a new state constitution; the effect of legal acts undertaken during the Civil War; the ab initio question of whether all acts take during rebellion from the beginning of the war were illegal or, on the other hand, whether only those acts tainted with support for the Confederacy were illegal; whether Texas should divide into as many as five states; the rate and extent of taxation; ways to address widespread lawlessness; and measures concerning railroads and public schools. Coldwell successfully opposed Governor Davis's efforts to divide the state, and in 1869, a military commander replaced all five justices of the Texas Supreme Court.
>
> * * *
>
> During his two years on the Texas Supreme Court, Justice Coldwell's opinions dealt with the usual array of commercial and criminal cases of the day, including liability for payment of debts in Confederate money. He was the lead writer in expounding on the issue of self-defense and in deciding cases involving proof in the Spanish language from trials in south and west Texas. In *Ake v. State*, a case involving the particularly brutal torture of Negro suspects in a sensational inter-racial murder, Justice Coldwell addressed issues arising from a confession obtained by hanging one of the suspects three times until nearly dead, then staking him to the ground and burning brush over him until skin peeled from his feet. Justice Coldwell's opinion rebuked "these monstrosities" to "mark in pointed and emphatic phrase our utter detestation of this fiendish outrage" from "this abominable and detestable villainy. "In 1873, President Ulysses S. Grant appointed Justice Coldwell to serve as the Collector of Customs at El Paso, a post Coldwell held until 1877. From El Paso he successfully appealed to the Texas Supreme Court *Lyles v. State*, which established the requirement that jurors be able to speak and deliberate in English. He then moved to Kansas to please his long-suffering wife, practicing law

> there. While visiting his lawyer son Nathaniel's home in Fresno, California, Justice Coldwell died in 1892, leaving a record of honorable service and bravery in the face of constant danger.[24]

The Tarlton Law Library website has this biography of Coldwell:

> Colbert Coldwell was born May 16, 1822 in Bedford County, Tennessee. As a young man he engaged in the Santa Fe trade for six years from 1840 to 1845 before returning to Tennessee to study law. In 1946 he was admitted to the bar and began practicing law in Arkansas. He later served as an Arkansas state legislator before leaving for Texas in 1859. He settled first in Mansfield, near Fort Worth, and then relocated to Navasota, where he established a plantation and had eleven slaves. Coldwell was married, and he and his wife had eight children.
>
> In 1865, immediately following the Civil War, provisional governor A.J. Hamilton appointed Coldwell judge of the Seventh Judicial District. In 1867, when Texas came under federal military rule, he was appointed an associate justice of the Texas Supreme Court by Gen. Philip Sheridan. The same year he campaigned to be a delegate to the Texas Constitutional Convention of 1868-69;[25] he was nearly killed by a white mob while speaking to a mostly black crowd during the campaign, but won the election and became a leader among the moderate republicans at the convention. He was removed from his seat on the bench in 1869 when radical republicans rose to power.
>
> Following his supreme court service, Coldwell was appointed a U.S. customs collector at El Paso in 1876. After retiring from that post, he relocated with his family first to Winfield, Kansas and then to California. He died in Fresno on April 18, 1892. A grandson, also named Colbert Coldwell, co-founded the Coldwell Banker real estate company in San Francisco.[26]

Chief Justice Coldwell's portrait was dedicated in the Supreme Court courtroom on Jan. 11, 2018. The comments of his great grandson Colbert Coldwell are at <https://www.youtube.com/watch?v=NoWeoZfZmc4>.

It is reported from several sources that on November 27, 1865, then recently-appointed District Judge, Judge Coldwell in charging the grand jury, said:

> The civil war which has recently terminated involved the destruction of the institution of slavery in this State, and swept away with it those distinctions, both as to protection and liability to punishment, which hitherto existed between whites and blacks. Hence the late slaves-now freedmen-and that class denominated "free persons of color," stand upon terms of perfect equality with all other persons in the "penal code."
>
> This greatly enlarges the scope of your enquiries, which will now embrace all persons who may have violated the criminal laws of the State, and are in contemplation of the law capable of committing an offence. It is logical and necessarily follows that persons of African descent are competent witnesses where any of that race are parties. Though hardly deemed necessary, yet, to avoid misconstruction, it is added that you are, as in all other cases, the exclusive judges of the weight of evidence and the credibility of the witnesses.
>
> The reason of their exclusion heretofore, it is now believed, has ceased to exist. It was because they were slaves, and descendants of slaves, that it was thought it would have been hazardous to the tenure by which they were as property, to permit them to testify where the whites were involved. And here an axiomatic principle, as old as our system of jurisprudence comes to our aid. "When the reason of the law fails, the law likewise fails."[27]
>
> I have thus very briefly stated some of the logical consequences that have flowed from the abolition of slavery. As officers of this court, it does not become us to discuss the rightfulness or wrongfulness of the act. But simply to act upon the grand fact that is patent to all. The tree having been cut up, by the roots, it would be idle to suppose that its branches could still flourish.[28]

6. Denison. James H. Denison (1812-1873) was a Judge of the Texas Supreme Court from January 22, 1870 to July 5, 1870. He replaced Judge Latimer who resigned in November of 1869.

The Tarlton Law Library has the following biography for Judge Denison:

> James H. Denison was born March 3, 1812 in Bethel, Windsor County, Vermont, son of Rachel and Joseph A. Denison. He graduated from Kenyon College in 1832, where one of his classmates was future United States Supreme Court Justice David Davis. He traveled from New York to Texas in December 1839 and received a conditional land certificate on December 30. He went into a law partnership with attorney Henry P. Brewster in Matagorda in 1841. He interrupted his practice, however, to serve in the campaigns against Rafael Vásquez and Adrián Woll. He represented Matagorda County in the Seventh Congress of the Republic of Texas in 1842. In 1846 he went into a partnership with Alexander H. Phillips of Victoria and D. C. Van Derlip of Bexar. He married Elizabeth A. Royall April 2, 1848 in Matagorda County, Texas. Denison was living at Indianola in January 1854.

> By 1860, he is shown as practicing law in San Antonio. He was living there when General Reynolds appointed him to the Texas Supreme Court. He died in San Antonio February 6, 1873.

Tarlton Law Library is grateful to Stephen Pate, Trustee of the Texas Supreme Court Historical Society, for his extensive research.

Judge Denison wrote a Dissenting Opinion in *Ward v. McKenzie*, 33 Tex. 300 (1870), a case involving the ability of an out-of-state judgment holder to set aside a conveyance by the judgment debtor allegedly in fraud of the creditor's rights. The Majority Opinion by Judge Lindsay is rich with citations to a wide range of legal precedents and authoritative writings. The Dissenting Opinion is laid out with clear logic.

7. Precedential Value. In *Taylor v. Murphy*, 50 Tex. 291, 295 (1878), Chief Justice Moore wrote this about the Military Court:

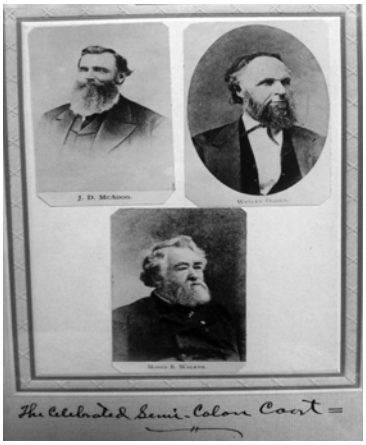
> In reply, I have to say, in regard to the first of these cases, that, in my individual opinion, the court by which that case was decided did not exercise its functions under and by virtue of the Constitution and laws of the State of Texas, but merely by virtue of military appointment. And while I am as far as any one from desiring to bring in question the validity of its acts in adjudicating the cases which were disposed of by it, or from detracting from the respect properly due to its opinions, by reason of ability and legal learning of the eminent gentlemen who constituted the court, and who were no doubt selected on this account to discharge the important duties intrusted to them by the general under whose direct control all the functions of government with us were then conducted, nevertheless I cannot regard the opinion of this tribunal 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.

This sentiment was quickly followed by Associate Justice Bonner in *Peck v. City of San Antonio*, 51 Tex. 490, 492 (1879), where he wrote that the military court, "not having been organized under the Constitution and laws of the State, 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." However, the Fort Worth Court of Appeals, in a Per Curiam Opinion in *Mandel v. Lewisville Indep. Sch. Dist.*, 445 S.W.3d 469, 477 (Tex. App.–Fort Worth 2014, pet. denied), wrote:

> During this period of Reconstruction, the supreme court was composed of justices, including the author of the Clark opinion, the Honorable Andrew J. Hamilton, appointed by the military commander in charge of Texas at the time and referred to collectively as the "Military Court." *See* Hans W. Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and "Redemption"* (1866–1882), 40 ST. MARY'S L.J. 17, 50–72 (2008). Justice Hamilton, Alabama--born, had a distinguished career, having previously practiced law in Austin for years, served in both the legislature and Congress and as Texas's first provisional governor. See *id*. at 54; see generally 5 Louis J. Wortham, A HISTORY OF TEXAS FROM WILDERNESS TO COMMONWEALTH 5–75 (1924). While that court's opinions are not considered "precedential," they may still be considered persuasive. Jim Paulsen and James Hambleton, *Confederates and Carpetbaggers: The Precedential Value of Decisions from the Civil War and Reconstruction Era*, 51 Tex. B.J. 916, 918–19 (Oct.1988); *cf. TAC Americas, Inc. v. Boothe*, 94 S.W.3d 315, 321 (Tex. App.--Austin 2002, no pet.) (noting in dicta that *Clark* is of dubious "precedential" value and generally cited only for the proposition that the mere omission of the hour of service will not be fatal (citing 3 Roy W. McDonald and Elaine A. Grafton Carlson, TEXAS CIVIL PRACTICE § 11:66 (2d ed. 2001))).

A review of the Opinions written by the Justices of the Military Court are no lower in quality than the courts before or after. There is an effort to justify decisions based on legal precedent, which is what you would hope would be the case for an appellate court of last resort. The Court had to address some unprecedented issues that arose out of Texas' withdrawal from one Union, joinder in a new Union, the collapse of the new Union, the imposition of military rule instead of civilian control of government, widespread lawlessness, and the transition of slaves from slavery to citizenship forced upon an unaccepting population from the outside.

C. CONGRESSIONAL RECONSTRUCTION. The Congressional Reconstruction Constitution was adopted in 1869, empowering the governor to appoint a chief justice and two associate justices to staggered nine-year terms. Republican Governor Edmund J. Davis appointed Lemuel D. Evans as Chief Justice, and Moses B. Walker and Wesley B. Ogden as Associate Justices. Evans stepped down in 1873, Justice Ogden became Chief Judge, and John D. McAdoo replaced Evans.



"The Celebrated Semi-Colon Court" - Chief Justice Ogden, Justices McAdoo and Walker, 1874-1874. Photo: Texas Supreme Court Archives.

The case of *Ex Parte Rust*, 38 Tex. 344 (1873), involved a contest of wills between the Texas Supreme Court and District Judge Henry Maney, who served as judge of the 22nd District Court of Guadalupe County from 1858 to 1860, and was reappointed by Governor Edmund J. Davis to that court as a Reconstruction judge from 1876 to 1878.[29] As explained in the August 23, 1989 Seguin Gazette-Enterprise newspaper, "Maney permanently alienated himself from his fellow lawyers after he became Reconstruction Judge. A 1% Republican school tax which became an issue threatening to cause Civil War in Seguin resulted in a legal battle which put all the Seguin area lawyers in jail for contempt, and split the Supreme Court itself into a contest over the office of Chief Justice. It started with Judge Maney fining several local lawyers $100 for contempt of court for filing a brief saying that they refused to appear and argue at a hearing set by Judge Maney during vacation time to dissolve injunctions prohibiting the collection of the one percent school tax. The brief stated as grounds that Judge Maney had recently presided over a meeting in Seguin which passed a resolution saying:

> Resolved, That we hereby utter our 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. We call on the people of the State to rise in their might, and rebuke in thunder tones those who would enthrall the mind of the rising generation in darkness and ignorance, for the purpose of continuing their despotic rule; for where learning and intelligence reign, independence and republicanism reign supreme.'

The brief continued:

> And while it is not our purpose to discuss the merits of said resolution, nor make commentary on the action of your honor, yet we deem it our duty to say that as your honor neither entered your protest nor vacated your posi- [*346] tion, that resolution must have met with your approval. We therefore decline to argue the cases, believing that the dignity of the profession demands that course, in view of the fact that the judgment of the court seems to have been concluded upon a great question of constitutional and statutory law by a partisan meeting, and because at the forum, while we spoke to the judge, we could not fail to see the politician under the ermine.
>
> (Signed)
>
> "Wm. M. Rust,
> "John Ireland [State Senator, later Texas Governor Jan. 1883 - Jan. 1887]
> "W. E. Goodrich
> "John P. White
> "Alex. Henderson
> "W. H. Burgess
> "W. P. H. Douglass"

38 Tex. at 345-46.

After seeing the brief, Judge Maney held the lawyers in contempt of court and fined each $100, ordering that if they failed to pay the fine they would be incarcerated. Texas Supreme Court Chief Judge Lemuel D. Evans granted a writ of habeas corpus to release the lawyers because the contempt order had been issued during the district court's vacation time. Judge Maney then issued a writ of scire facias to the lawyers to appear during term time to show cause why they should not

be fined as before. Lawyers White and Ireland applied to the Supreme Court for issuance of a contempt citation against Judge Maney for ignoring the Supreme Court's earlier habeas corpus mandate. They alleged in their application that Judge Maney had verbally directed the issuance of execution to seize and sell their property to pay the fines he had levied. Chief Justice Evans refused the application to cite Judge Maney for contempt. Rust and the other attorneys later filed another petition for writ of habeas corpus, saying that they were being held in custody pursuant to a verbal order by Judge Maney. The writ of habeas corpus was granted, but Chief Justice Evans published a Dissenting Opinion:

> I am clear in my opinion that the respondents were rightly adjudged guilty of a contempt of the District Court of Guadalupe county. ... I feel constrained to say that the whole conduct of the respondents towards the court, since the original filing of the brief, displays a determined purpose to maintain an attitude of disrespect towards the court.
>
> * * *
>
> The country has not recovered from the shock of a great war. There are impediments to the administration of justice to be found in the prejudices which grow out of and are fostered by the contests of political, parties. There are, doubtless, cases of indiscretion, resulting from inexperience or other causes, on the part of those who have been called to the discharge of judicial duties. This is to be lamented. But the duty of the members of the bar is á plain one. Their learning and professional training should supplement, if need be, the inexperience of the bench.
>
> They should never allow themselves to be betrayed by passion or resentment into the formation of combinations to destroy or impair the authority of the bench.
>
> I cannot concur in the judgment of the court.

The lawyers then filed a motion for the Supreme Court to order to Judge Maney to show cause why he should not be held in contempt for failing to follow the mandate of the Supreme Court. They asserted that Judge Maney would not permit them to appear for their clients until their contempt of court had been purged, and that he refused to allow the mandate and Opinion of the Supreme Court to be read into the record. 34 Tex. at 363. In July of 1872, the Supreme Court issued a writ of scire facias, to which Judge Maney responded that trial courts are the exclusive judge of whether a contempt of court has been committed, and further that Supreme Court jurisdiction existed only to issue writs to enforce its appellate and original jurisdiction. 34 Tex. at 367. The Supreme Court's resulting Opinion was written by Justice Ogden. The Court held Judge Maney in contempt of its prior mandate against enforcing the contempt order issued in vacation time, and fined him $100 for contempt of court. The Court also ordered Judge Maney to cease further interference with the lawyers' right to practice law in any Texas court. The lawyers filed again in March of 1873, saying that Judge Maney continued to restrain them from practicing in his court. The Supreme Court issued an order holding Judge Maney in contempt of court fining him $500, and ordering that he be held in the Travis County jail for fifteen days and, if he failed to pay the $500 fine plus the earlier $100 fine, and the sheriff was ordered to bring Judge Maney before the Supreme Court. Judge Maney continued to refuse to allow the lawyers to practice in his court until they had purged his contempt holding. Lawyers Rust and Ireland filed with the Supreme Court requesting that Judge Maney be cited for contempt. On July 2, 1873, citation was issued and served on July 5. On July 7th, Maney issued an order instructing the Sheriff of Travis County to summon Judges Wesley Ogden and M.B. Walker, of the Texas Supreme Court, to appear in Judge Maney's district court, to show cause why they should not be held in contempt of his court for unlawfully confining him for contempt of the Supreme Court. Judge Maney failed to appear as directed on his show cause order, so an attachment was issued for his arrest, which was executed by the Travis County Sheriff. 38 Tex. at 370. On July 28, a writ of habeas corpus was issued by Judge L.D. Evans "as Chief Justice of this State," for the body of Henry Maney, but it was not executed by the Travis County Sheriff "being officially informed that Wesley Ogden is Presiding Judge of the Supreme Court of Texas." 38 Tex. at 370. [Endnote: "At the time it was claimed by a majority of the Supreme Court that Judge Evans' term of office had expired."] Judge Evans issued an order for the Sheriff of Travis County to appear to answer for contempt in failing to obey his writ of habeas corpus. Judge Maney asked to delay his court appearance on the ground that he needed to obtain certified copies of fourteen judgments rendered in Guadalupe county. In the meantime, when the Sheriff of Travis County failed to appear as ordered by Chief Justice Evans, he signed and filed an Order saying "There being no return made to the rule on George B. Zimpelman, sheriff, and having no proper officer at my command to receive and execute a process against said Zimpelman, sheriff, this matter is adjourned sine die." 38 Tex. at 370. On September 3, the Supreme Court issued a Per Curiam Opinion:

> We have sought in vain for mitigating facts or circumstances upon which to reduce the punishment to be awarded in like cases, but have found none; and we are fully satisfied that the conduct of the respondent throughout has been in contumacy of the dignity of this court and in bold defiance of its authority. It is therefore ordered and adjudged, that the said Henry Maney be held in contempt of this court for willful disobedience of its process, issued on the second day of July, 1873, in the case of the State of Texas at the relation of John Ireland et al. against the said Henry Maney, Judge of the Twenty-second Judicial District, and that he, the said Henry Maney, be and hereby is sentenced to the county prison of Travis county, there to be kept and confined for the term of ten days; and he is hereby adjudged to pay a fine to the State of Texas of five dollars, and all the costs of this proceeding, for which, if not paid in ten days, execution may issue.

Judge Maney filed this statement in the Supreme Court:

> To the Honorable the Supreme Court of the State of Texas:
>
> "In the unfortunate controversy out of which has grown my present imprisonment, I have acted throughout from a sense of duty, and in the belief that my course was sanctioned by the law. I still so believe.
>
> "But the Supreme Court — the highest tribunal in the State, and from which there is no appeal — having decided against me, I feel that a further contest on my part would be fruitless. Having done all that I conceive my duty requires in the premises, and being overruled by the Supreme Court, I yield to its superior power and authority. * * *
>
> "Henry Maney."

While that closed the legal proceeding, the story did not end there. In the First Session of the Fourteenth Legislature, January 13 - February 9, 1874, Senator Wood submitted a resolution to remove Judge Maney from the trial court bench on ten different grounds, involving the controversy with the lawyers outlined above.[30] An impeachment proceeding was conducted on March 31 and April 1, 1874, and both houses voted to remove Maney from office.[31] Governor Richard Coke, on March 31, 1874, "addressed a note to the Hon. Henry Maney, at Seguin, in Guadalupe county, removing him from the office of Judge of the Twenty-second judicial District, and declaring said office vacant." The note read as follows:

> Hon. Henry Maney, Judge of Twenty-second Judicial District, Seguin, Guadalupe county, Texas:
>
> Sir: The Legislature of the State of Texas, by a two-thirds vote of each House, have adopted and transmitted to me an address, requiring, for causes spread upon the records of said two Houses, of which you have been duly notified, your removal from the office of Judge of the Twenty-second Judicial District of Texas. I therefore as Governor of Texas, in pursuance of the duty devolved on me by this action of the Legislature, do hereby remove you from the office of Judge of the Twenty-second Judicial District, and declare said office vacant.
>
> Very Respectfully,
> [Signed.] RICH'D COKE, Governor.[32]

The record of marriages in Guadalupe County reflects that Maney resurfaced as County Judge in 1876-1877.[33]

1. **Evans.** Lemuel Dale Evans (1810-1877) was Chief Justice of the Texas Supreme Court, 1870-1873.

Evans was born in Tennessee where he was admitted to the Bar. Evans moved to Texas in 1843, and settled in Fannin County. He was Fannin County's representative to the Constitutional Convention of 1845. He served in the U. S. Congress from 1855 to 1857, but lost election to the following term. He was a collector of internal revenue in 1867, and a member of the Texas Constitutional Convention in 1868. He was Chief Justice of the Supreme Court 1870-1871, and Presiding Judge until he resigned in 1872. He became U.S. Marshall for the Eastern District of Texas in Galveston. He died in Washington, D.C. in 1877 and was buried in the Congressional Cemetery.

Lemuel Dale Evans was appointed by Governor E.J. Davis as Chief Justice of the "Semicolon Court." Evans was a member of the Constitutional Convention of 1845, and was a Congressman in the thirty-fourth Congress. Evans also served in the failed 1868-69 Constitutional Convention that resulted in U.S. military officials imposing a new constitution on the state. Evans resigned from the Court in September 1873.[34]

His biography is set out in Section III.B.6 above.

2. **Walker.** Moses B. Walker (1819-1895) was a Judge of the Texas Supreme Court, 1870-74.

Walker was born in Ohio in 1819. After attending Augusta College in Kentucky, Yale College (now Yale University) and Cincinnati Law School, he read law in Springfield, Ohio. He served in the Ohio Senate from 1850-51. He volunteered for the Ohio Infantry and was wounded three times at the Battle of Chickamauga. He participated as a soldier in the federal military occupation of Texas in 1868. When the Military Constitution of 1869 took effect, General Joseph J. Reynolds[35] appointed Walker as District Judge. In November of 1969 Walker was appointed associate justice by Governor Edmund J. Davis to replace Justice Albert Latimer. Walker remained on the Court until 1874. His most notable opinion was in the Semicolon case, *Ex Parte Rodriguez*, 39 Tex. 705 (1873), invalidating the election of 1873. The decision was effectively nullified when President Grant refused to send federal troops to support the defeated Governor Davis, allowing Governor-Elect Coke to take the reins of state government. Justice Walker harbored strong feelings about Texas's secession and the brutality of the Civil War, as exemplified his Opinion in *Bender v. Crawford*, 33 Tex. 745 (1870), involving the reinstatement of a new statute of limitations on all claims that expired during secession and military occupation:

> It might be foreign to the object and duty of the court to enter into any detailed history of the times within which the statute of limitations has been suspended by the forty-third section of the twelfth article of the constitution. But they who talk about vested rights in the bar of limitations should at least remember the times in which we have been living; and those who think our constitution is not republican, nor in accordance with the great republican conception of our institutions, should remember that from the second of March, 1861, to the twenty-ninth of March, 1870, we had no republican government in Texas. Four years of that period were one of bloody and unrelenting war. From 1865 to 1870 we were a military government; he who gained a vested right in the statute of limitations during at least a portion of that period, gained it only because inter arma leges silent. Vultures and wolves gain vested rights when armies are slaughtered, if these be vested rights.

Walker wrote the highly controversial Opinion in *Ex Parte Rodriguez*, 39 Tex. 705 (1874). After the victors in the 1873 election installed themselves in office, Walker was removed from the Court and he returned to Ohio. Years later, Texas Supreme Court Justice James R. Norvell described Walker as "a lawyer of ability [who] possessed some literary talent. Even the Semicolon decision demonstrated that he was a skilled technician."[36] Walker died in 1895.

3. Ogden. Wesley Benjamin Ogden was Associate Justice of the Texas Supreme Court, 1870-1873; Presiding Judge, 1873-1874.[37]

Ogden was born in 1818 in New York, taught school and read the law in Akron, Ohio, was admitted to the Ohio Bar in 1845, and practice law in New York until 1849. At that time he moved to Port Lavaca, Texas. His wife died leaving him with three children. He remarried and had five more children. Union gunboats shelled Port Lavaca on October 31, 1862. Ogden was living in New Orleans for unknown reasons, one might imagine to avoid being drafted into the Texas Infantry to fight for the Confederacy. Ogden returned to Port Lavaca after Robert E. Lee surrendered the Army of Northern Virginia. See *Letters from Exile, 1864-1865: A Family View of Judge Wesley Ogden*, an article written by Ogden's great-grandson, recounting some letters between Wesley B. Ogden "exiled in New Orleans" and his wife, who was living with their children int Port Lavaca, Texas.[38]

During Reconstruction, Governor Hamilton appointed Ogden as District Attorney for the 10th Judicial District.[39] Ogden was later appointed state District Judge of the 10th Judicial District of Texas. Ogden was appointed by Governor Edmund J. Davis to be associate justice of the Texas Supreme Court in 1870, taking the spot of Lemuel D. Evans. Ogden was Chief Justice when the Court decided *Ex parte Rodriguez*, 39 Tex. 705 (1873), which held that the election of 1873 was invalid. Ogden wrote the Opinion in *Hollis v. Chapman*, 36 Tex. 1, 1872 WL 7486, *3-4 (Tex. 1871), saying that some

contracts are "apportionable," and permitting a carpenter to recover for wood-work he had done in a brick building before the building was destroyed by fire. Ogden's portrait was dedicated in the Supreme Court courtroom on January 11, 2018. His great grandson's speech at the dedication ceremony is at <https://www.youtube.com/watch?v=NoWeoZfZmc4>.

4. McAdoo. John David McAdoo was a Judge on the Texas Supreme Court, 1873-1874.

McAdoo was born in Tennessee. He attended the University of Tennessee from 1846 to 1848, and then entered University of Tennessee. He was admitted to the Bar in 1852. He served in the Confederate army, then was district judge. In 1873, Governor Edmund J. Davis appointed McAdoo to be an associate justice of the Supreme Court. McAdoo served on the Semicolon Court. McAdoo was the attorney for the plaintiff/appellee in the contract case of *Hall v. Morrison's Adm'r.*, 20 Tex. 179 (Tex. 1857) (Roberts, J.), in which the Court upheld a jury verdict based on testimony from a witness who packed goods for shipping that they were so well-packed that they could only have been injured by negligence in transport. McAdoo was the trial judge in *Stone v. Edwards*, 35 Tex. 556, 1872 WL 7441 (1871) (Walker, J.), in which the Supreme Court affirmed his ruling that Texas courts did not have the jurisdiction to enforce U.S. patent laws. The Supreme Court mandamused McAdoo, as district judge, to set aside an order granting a new trial and to enter a judgment on the verdict, in *Lloyd v. Brinck*, 35 Tex. 1 (1871) (Ogden, J.).

In *Tucker v. Carr*, 39 Tex. 94 (1873), Justice McAdoo wrote that where a husband uses his separate property to buy land taken in the name of the wife, a presumption of gift arose. When the wife loaned the husband $1,000 of her separate property funds, secured by a mortgage in his separate property, and the mortgage was discharge by the husband using his separate property to buy land in the wife's name, there was "a clear, distinct tracing of her separate funds directly into this property." *Id*. at 98.

5. The Semicolon Case. The Supreme Court of Texas under the 1869 Constitution sat between 1970 and 1873. In the notorious case of *Ex parte Rodriguez*, 39 Tex. 705 (1874), the Supreme Court held that the state general election of December 2, 1873 was invalid, resulting in the elections to state officials from Governor to Supreme Court to lower officials being nullified, leaving the incumbents to remain in office until the next election. In retrospect the case was probably concocted to get before the Supreme Court on an immediate basis in order to give the pro-Governor Davis a chance to void the election.

VI. THE SUPREME COURT AFTER THE ADOPTION OF THE 1876 CONSTITUTION. In the Constitutional Convention of 1875, Texans met to replace the Military Constitution of 1869. At the convention, 75 members were Democrats and 15 were Republicans, including 6 African Americans. 41 delegates were farmers. None had been delegates to the failed 1869 Constitutional Convention. The Constitution was adopted by voters on February 15, 1876, by a vote of 136,606 to 56,652. The judicial article of the Constitution of 1876 provided that the Supreme Court would consist of three judge, elected by popular vote for 6-year terms. An appointed Court of Appeals was also established, with 6-year terms. The Texas Supreme Court was vested with appellate jurisdiction in civil cases only.

1. Roberts. Oran M. Roberts ran unopposed for Chief Justice of the Texas Supreme Court and was elected in 1876. He resigned from the Court to become Governor of Texas in 1878. Roberts' biography is set out at Section II.2 above.

2. Devine. Thomas Jefferson Devine (Divine) (1820-1890) was born to Irish parents in Halifax, Nova Scotia on February 28, 1820. In 1840 he began formal law studies at Transylvania University in Lexington, Kentucky and graduated in 1843. In 1844 he moved to LaGrange, Texas where he married, settled in San Antonio and opened a law practice. In 1845 he was elected city attorney and remained there until 1851 when he was elected district judge of the Bexar County Court District where he remained until 1861. He participated in the Secession Convention and served on the Public Safety Committee until he was appointed judge for the Confederate Western District of Texas and in 1864 he represented the Confederate States of America on a diplomatic mission to Mexico City relating to cotton transport. Following the war, Devine moved to Mexico to avoid taking the oath of allegiance to the Federal government but returned to San Antonio a few months later. He was arrested on high treason charges and imprisoned in Fort Jackson Barracks in New Orleans. Devine became ill with pneumonia and was released in January 1866, without a trial. He was pardoned and his citizenship restored on June 17, 1867. In 1874 Devine was appointed associate justice of the Texas Supreme Court by Governor Coke but resigned the following year due to his wife being ill and the fact that he preferred private practice. Devine died at his San Antonio home on March 16, 1890 at the age of seventy.

3. Moore. George F. Moore was appointed in 1878 by Governor Oran M. Roberts to replace himself as Chief Justice of the Texas Supreme Court. Moore was elected Chief Justice in 1878, where he ran as a Democrat. Moore resigned in November in 1881. Moore's (1826-1904) biography is set out in Section III.A.1 above.

4. Ballinger. William Pitt Ballinger (1825-1888) was born in Barboursville, Kentucky, on September 25, 1825, into a family in which politics was a tradition. His grandfather had been an early settler in Kentucky, and served as the first clerk of Knox County and as a Kentucky state senator. His father spent much of his life as the clerk of courts in Knox County and served as a member of the Kentucky Legislature. Ballinger attended public schools and received two years of college at St. Mary's College near Lebanon, Kentucky, followed by training in his father's office. In 1843 he moved to Galveston at the invitation of his uncle, Judge James Love, and studied law in his office.

Ballinger served in the Mexican War, rising to the rank of adjutant of Albert Sidney Johnson's regiment. He was admitted to the Texas bar in 1847 and joined the practice of Jones and Butler, the largest law practice in Galveston. In 1850 he was appointed U.S. attorney for the District of Texas.

Ballinger's reputation as a leading trial lawyer and his expertise in tort and railroad law were known nationally, and among his clients was railroad magnate Jay Gould, who in 1881 traveled to Galveston in his private railcar to meet with Ballinger for legal advice.

William Pitt Ballinger was appointed to the Texas Supreme Court in 1874, but he declined the position preferring to stay in private practice. He died on January 20, 1888.

5. Gray. Peter W. Gray (1819-1874) was appointed Associate Justice of the Texas Supreme Court by Gov. Richard Coke in February of 1874 to fill the vacancy left by the resignation of William P. Ballinger.

Associate Justice, Texas Supreme Court, 1874

Peter W. Gray was born December 12, 1819 in Fredericksburg, Virginia. He moved to Texas in 1838 with his family to join his father, William Fairfax Gray, who had arrived in Houston in 1835. The elder Gray was an attorney, had served as clerk of the House of Representatives of the Republic in 1837, and was district attorney of Houston. Peter Gray studied law in his father's law office.

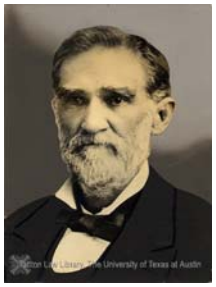
Gray served as a captain the Texas army and fought against the Shawnee Indians in 1839. In 1841 Gray's father died. President Sam Houston appointed him to his father's position of district attorney of Houston, where he served until statehood. Gray was a second-lieutenant in the Milam Guards and fought during the Mexican invasions of 1842. He married in 1843.

Following annexation, Gray served in the First Legislature of the state of Texas. As a legislator, he was the principal author of the Practice Act of 1846, which reformed and clarified the system of pleading and procedure in Texas' courts. A proponent of education, Gray was a founder of the Houston Lyceum, which became the Houston Public Library, and was reputed to have had one of the best law libraries in Texas. He served in the Senate of the Fourth Legislature (1854) and then as judge of the Houston District until the Civil War started.

Gray, who had supported annexation, nonetheless was in attendance at the Secession Convention, where he voted in favor of secession. He represented Houston in the first Confederate House of Representatives, serving on several committees. He lost a bid for reelection in 1863, then became an aide to Gen. John B. Magruder, and served in the Battle of Galveston. After the Civil War, Gray resumed a successful law practice in Houston. Gray was elected the first president of the Houston Bar Association in 1870.

Gray was appointed associate justice of the supreme court by Gov. Richard Coke in February 1874 to fill the vacancy left William P. Ballinger resigned. His health was failing, however, and he resigned the position in April, just two months after his appointment. He died of tuberculosis October 3, 1874 in Houston, at the age of fifty-five, and was buried in Houston's Glenwood Cemetery.

6. Gould. Robert Simonton Gould was an Associate Justice of the Texas Supreme Court, 1874-1881; Chief Justice, Texas Supreme Court, 1881-1882.



The Tarlton Law Library website has this biography of Gould:

> Robert Simonton Gould, who [along with Oran M. Roberts] would become one of the two law professors hired when the University of Texas officially opened in 1883, was born "of sturdy New England ancestry" December 16, 1826, in Iredell County, North Carolina. His father, a Presbyterian minister, died when Robert was seven, and he subsequently moved with his mother to Alabama. Mrs. Gould ran a boarding house for many years, and provided her two sons with college educations. Robert Gould entered the University of Alabama at the age of fourteen and graduated in 1844 when he was seventeen. Following his graduation he taught mathematics at the university for several years and studied law. He was admitted to the bar in 1849 and began practicing law in Macon, Mississippi, where his law partner was former Mississippi governor, J. L. Martin.
>
> In 1850 Gould moved to Texas and settled in Centerville, the county seat of Leon County. There he practiced law, was elected district attorney for the Thirteenth District in 1853, and was married in 1855. He and his wife had a son. In 1861 Gould attended the Secession Convention. Like the majority of Leon County citizens he represented, he was a secessionist.
>
> Gould was elected judge of the Thirteenth District in 1861, but soon resigned the post to participate in the war effort. He enlisted in the Confederate Army as a captain, raised a battalion that became known as Gould's Battalion, and later was colonel of a regiment. His horse was shot under him and he was wounded at the Battle of Jenkins Ferry in Arkansas in 1864. Following the war Gould returned to Centerville and was reelected judge in 1866. He was removed from office as an "impediment to Reconstruction" along with numerous other officials when Texas came under federal military control in 1867.
>
> In 1870 Gould relocated to Galveston. He was appointed to the Texas Supreme Court by Gov. Richard Coke in 1874 after Peter Gray resigned his position on the bench due to illness. Gould was then elected to the position in 1876. In 1881, Gov. Oran Roberts appointed him chief justice. Gould was not elected to the post the following year.
>
> In 1883 Robert Gould and Oran Roberts were appointed the first two law professors (at an annual salary of $3,000) of the new University of Texas.[40] Gould served as professor of law for the next twenty years until resigning in the spring of 1904 due to poor health. He died in Austin June 30, 1904 at the age of seventy-seven. He was remembered as a hard-working and gentle man of simple tastes and as a sympathetic and respected professor.

Court Opinions

Associate Justice Gould's dissenting opinion in *Ex parte Towles*, 48 Tex. 413 (1877) was considered among his most important and best delivered opinions.[41] He wrote in part:

> "SEPARATE OPINION OF ASSOCIATE JUSTICE GOULD. I do not concur in so much of the opinion as holds that part of the statute giving to any legal voter of the county the right to contest the result of the election in the District Court to be unconstitutional. Whilst this difference of opinion would not, of itself, have led me to give it expression on the record, or in a dissenting opinion, I feel it to be a duty to do so in this case, because I regard the opinion of the court as substantially overruling former decisions on the subject of contested elections, and because the constitutional questions involved are of such importance as to justify the fullest examination."

7. Ireland. John Ireland was appointed associate justice of the Texas Supreme Court 1875 and held the position until 1876, when the constitution of that year reduced the court from five to three judges. Ireland had an unsuccessful bid against Richard Coke for a U.S. Senate seat, and he ran unsuccessfully for the U.S. House in 1878. In 1882 he was elected governor of Texas and was reelected in 1884; he served in that position from January 1883 to January 1887. As governor he called a special session of the legislature and later called in the Texas rangers to restore order during the Fence-Cutting War of 1883, which pitted ranchers who relied on open ranges against those who fenced their ranchland, denying access to food and water sources on lands that had once been accessible. Governor Ireland was responsible for the current state capitol's exterior appearance. He refused to sign a contract for the building, under construction during his terms as governor, unless native stone was used rather than importing stone from out of state; the capitol's distinctive pink Texas granite façade is the result of his determination. Following his service as Governor, Ireland returned to legal practice in Seguin. Ireland never forgot his humble beginnings, and was remembered for providing financial assistance to many good causes and to young people struggling for success. He died of heart disease in San Antonio on March 15, 1896 at the age of sixty-nine.

ENDNOTES

1. The Texas Almanac for 1864, p. 25.

2. June 8, 1865 is the day that the last entry was made in the financial ledgers for the fiscal department of the State of Texas. EDMUND THORNTON MILLER, A FINANCIAL HISTORY OF TEXAS ch. 5 (1916). The state treasury was looted on June 11, 1865. *Id*.

3. Justices of Texas 1836-1986. <https://tarltonapps.law.utexas.edu/justices/profile/view/114>.

4. Justices of Texas 1836-1986. <https://tarltonapps.law.utexas.edu/justices/profile/view/87>.

5. *James Hall Bell* <https://tarltonapps.law.utexas.edu/justices/profile/view/5>.

6. *Bell, James Hall* <https://www.tshaonline.org/handbook/entries/bell-james-hall >.

7. The quoted language is from William Shakespeare's *Julius Caesar*, Act 2, Scene 2.

8. Sir Walter Scott, *Rokeby: Canto I (1813)*.

9. Percy S. Shelley, *The Revolt of Islam* (1817).

10. William Shakespeare, *Romeo and Juliet*; Act 5; Scene 3.

11. Justices of Texas 1836-1986. <https://tarltonapps.law.utexas.edu/justices/profile/view/86>

12. Justices of Texas 1836-1986. <https://tarltonapps.law.utexas.edu/justices/profile/view/71>.

13. Justices of Texas 1836-1986. <https://tarltonapps.law.utexas.edu/justices/profile/view/15>.

14. Justices of Texas 1836-1986. <https://tarltonapps.law.utexas.edu/justices/profile/view/29>.

15. Justices of Texas 1836-1986. <https://tarltonapps.law.utexas.edu/justices/profile/view/117>.

16. Justices of Texas 1836-1986. <https://tarltonapps.law.utexas.edu/justices/profile/view/101>.

17. George E. Shelley, *The Semicolon Court of Texas*, 48 Southwestern Historical Quarterly 449 (April 1945).

18. George W. Paschal, *Preface of Texas Reports*, p. vii (1860).

19. By Mathew Brady http://www.picturehistory.com/product/id/15886, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=9891113>

20. Robert B. Gilbreath, *The Supreme Court of Texas and the Emancipation Cases*, 69 TEX. B.J. 946, 948 (2006), quoting George E. Shelley, "Semicolon Court of Texas," 48 SOUTHWESTERN HISTORICAL QUARTERLY.

21. Frank X. Tolbert, *When Texas Was a Republican State*, D MAGAZINE (Oct. 1975).

22. Justices of Texas 1836-1986. <https://tarltonapps.law.utexas.edu/justices/profile/view/65>

23. Albert Hamilton Latimer (1800-1877) <https://tarltonapps.law.utexas.edu/justices/profile/view/64>.

24. Colbert Coldwell, *Setting the Record Straight: Colbert Coldwell's Quest for Justice* <https://elpasobar.com/system/bar_journal/document/57/Septemberproof8.pdf>.

25. *The Texas Reconstruction Constitutional Convention of 1868-1869* by Betty Jeffus Sandlin, B.S., M.S., A Dissertation in History. <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi4qdXuz_LuAhWOHM0KHfbiBZo4ChAWMAF6BAgDEAM&url=https%3A%2F%2Fttu-ir.tdl.org%2Fttu-ir%2Fbitstream%2Fhandle%2F2346%2F19373%2F31295000497114.pdf%3Fsequence%3D1&usg=AOvVaw1cOPp7wSZteMgvdMPNdeQE>.

26. *Justices of Texas 1836-1986*. <https://tarltonapps.law.utexas.edu/justices/profile/view/16>.

27. The principle of law stated "[w]here the reason of the law ceases, the law itself ceases," is stated in the Reporter's Comments to *Scranton v. Conlie*, 29 Tex. 240 (1867). The maxim "cessante ratione legis; cessat ipsa lex," traces back at least to Lord Coke in *Milborn's Case*, 7 Coke 7a (K.B. 1609).

28. David A. Furlow, *The Confederacy's Collapse, Juneteenth, and Houston;s Reconstruction*, <http://appellatelawyerhba.org/the-confederacys-collapse-juneteenth-and-houstons-reconstruction/>

29. *Guadalupe County History* <http://sites.rootsweb.com/~txguadal/guada.html>.

30. *Senate Journal, Resolution to Remove Judge Henry Maney* <https://lrl.texas.gov/scanned/members/Senate_Journal/14/Maney_Henry_14RS_SJp130.pdf>.

31. *Senate Journal: Impeachment of Judge Henry Maney* <https://lrl.texas.gov/scanned/members/Senate_Journal/14/Maney_Henry_14RS_SJp654a.pdf>.

32. *Correspondence of Governor Richard Coke* <https://lrl.texas.gov/scanned/govdocs/Richard%20Coke/1874/message03311874.pdf>.

33. *Guadalupe County Marriage Records* <http://sites.rootsweb.com/~txguadal/vitals/marriages/marriage6.html>.

34. BIOGRAPHICAL DIRECTORY OF THE TEXAS CONVENTIONS AND CONGRESS (1832-1835) (1941) p. 81.

35. The American Yawp Reader, "Report of Brevet Major General J. J. Reynolds, Commanding Fifth Military District" in Annual Report of the Secretary of War (Washington: 1868), 704-705. <https://www.americanyawp.com/reader/reconstruction/general-reynolds-describes-lawlessness-in-texas-1868>.

36. Randolph B. Campbell, "Walker, Moses B.," *Handbook of Texas Online*, accessed February 18, 2021, <https://www.tshaonline.org/handbook/entries/walker-moses-b>.

37. *The Confederacy's Collapse, Juneteenth, and Houston's Reconstruction* <http://appellatelawyerhba.org/the-confederacys-collapse-juneteenth-and-houstons-reconstruction>.

38.William W. Ogden, *Letters From Exile, 1864-1865: A Family View of Judge Wesley Ogden* <https://www.texascourthistory.org/Content/Newsletters//TSCHS_Journal_Spring_20141.pdf>.

39. *New York Times Sept. 9, 1865* <https://www.nytimes.com/1865/09/09/archives/from-texas-gov-hamilton-calls-a-convention-qualifications-of.html> .

40. Hans W. Baade, *Law at Texas: The Roberts-Gould Era* 86 THE SOUTHWESTERN HISTORICAL QUARTERLY 161 (1982).

41. *Justices of Texas 1836-1986*. <https://tarltonapps.law.utexas.edu/justices/profile/view/39>.