TEXAS SLAVE CASES

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Preface (incomplete)

My client was charged by indictment with murder. Specifically, he was accused of intentionally and knowingly causing death by "firing a gun" into the head of the deceased. The prosecutor who drafted the indictment for the grand jury obviously had meant to say "firing a bullet" into the head of the deceased. Aware of her mistaken language, she proposed to correct it by simply crossing out "gun" and writing in "bullet." I objected. The judge set the matter for a hearing.

My view was that only the grand jury could amend the indictment. My research of Texas law led me to a case from 1860. It supported my view and I persuaded the judge to set aside the indictment and let a new grand jury accuse my client (they declined).

I was struck by the title of that 1860 case: *Calvin, a Slave v. The State*. Calvin was accused, according to the opinion, of murdering "a negro woman, a slave, named Vina." I set aside the legal issue and began to wonder about the real history of the case. The casual obliteration of this man's full identity was on full display, yet so was his victory. The district court appointed two attorneys to represent Calvin, and they appealed his case to the Texas Supreme Court where Calvin won. Here was a case involving a Texas slave that established law benefitting people (in this case, an innocent man) over 150 years later. What was going on in Texas in 1860 at the intersection of slavery and the law?

How many Texas cases involving slaves were there? A quick computer check revealed almost a thousand cases with the word "slave" somewhere in the body of the opinions. I began to scroll through them. Slowly, the cases revealed stories and for me, surprises. In the end, I reviewed 973 cases that mentioned the word "slave."

I had mounting questions about what I was encountering. I suspected I might be oblivious to context, missing narratives, deaf to the undertones of the case. Ordinarily, these matters are irrelevant for the lawyer reading case law. But as I progressed in my reviews, those matters I only sensed nagged me. I eventually realized that my legalistic approach was too narrow. I thought I had been importing history into law, but I had it backwards. These summaries are better suited to be delivered from law into history.

Lawyers are historians only in a very limited sense. When lawyers make factual assertions in briefs or in court, they back up those assertions with citations or proof. Facts in law are artifacts displayed by records or splayed upon the courtroom in testimony and exhibits. Facts, as understood in the legal world, form the foundation of everything that every court rests its decision. The immediate facts of the case are all we care about.

Historians tell a larger story. They take the snapshots of the summaries I prepared and weave them into the greater whole of historical knowledge, without the conceits of the legal profession or other disciplines and arts. Hopefully, these legal historical records can contribute to the richness of Texas history by giving historians this legal dimension to slavery in Texas.

Slaves under Spanish and Mexican Law

Williford Cartwright v. Pink Cartwright, 18 Tex. 626 (1857)

Williford and Pink Cartwright married in 1834, when Spanish law governed. Before he married, Mr. Cartwright owned Jane and her child, Mary. By the time of their divorce in 1853, Jane had given birth to Tamer (18 years old), Harriet (16 years old), Sarah (14 years old), and Clarissa (11 years old). Her daughter, Mary, had a two-year-old and an infant.

The wife accused her husband, among other things, of having "lived in improper intimacy with the negress Jane, etc." He, in turn, accused her of having been married to a man in Alabama. The jury sided with the wife and awarded her half of Jane's children and half of Mary's children, except for Jane and Mary, themselves, who had belonged to him before the marriage.

The Texas Supreme Court reversed and awarded all the slaves to Mr. Cartwright. The issue before the Court was whether "under the laws of Spain, in force at the time of the marriage, the children born since the marriage, of female slaves, who were the separate property of the husband, became a portion of the community, or were the separate property of the husband." Acknowledging law to the contrary, the Court nevertheless decided that the children of slaves belong to the owner of the mother, "especially when it is considered that Mexico attempted an abolition of slavery, and though it continued to exist in Texas[.]"

Guess v. Lubbock, 5 Tex. 535 (1851)

In 1836, Adam Smith acquired a slave-woman named Margaret Guess, though it was "not clear whether she paid for herself or was paid for by Smith." For the next ten years, they lived together as husband and wife. Smith treated and spoke of her as a free woman; she owned and managed a boarding-house, including its finances.

At some point, they separated. She left with a slave girl, Puss, and a letter signed by Smith, that said: "The bearer, Margaret, a negro woman, about thirty years of age, is free and at liberty to go and do the best she can to make an honest livelihood in the world. Given under my hand this 19th day of March, 1840. (Signed) Adam Smith."

Smith later died without a will, and the administrator of his estate took all the property, including the girl. Guess sued and lost, but the Supreme Court reversed because the jury was not asked to decide the key issue, i.e., whether she was free. A new trial in which the date of her emancipation would determine her fate, as the Supreme Court explained:

> The ninth section of the general provisions of the Constitution of the Republic of Texas contains on the subject of slavery the following provisions: "All persons of color who were slaves for life previous to their emigration to Texas, and who are now

held in bondage, shall remain in the like state of servitude: Provided, the said slave shall be the bona fide property of the person so holding the said slave as aforesaid."

It was manifestly the intention of the convention in framing this provision to remove all doubt and uneasiness among the citizens of Texas in regard to the tenure by which they held dominion over their slaves. The legislation of Mexico had been so fluctuating and unsettled upon this subject as to give rise to great uncertainty as to what might ultimately be adjudged on the subject of their legal titles. Although the owner might honestly believe that his legal title had not been destroyed or impaired by such legislation, he could not feel secure as to the result. Various laws and decrees had been passed by Mexico, showing a disposition to interfere with this description of property.

In 1829 the President of Mexico, Guerero, by virtue of what he assumed to be his extraordinary powers, issued his decree abolishing slavery. The constitutionality of this decree was always questioned, and on that ground, as will be seen, was subsequently abrogated.

It appears from a report made by Lucas Alamand, the Secretary of State of Mexico, to the Congress of Mexico on the 4th March, 1830, that such was the opposition to the laws in relation to slavery in Texas that any attempt to enforce them would be fruitless; that in consequence of so much dissatisfaction their operation had been suspended so far as they related to Texas. This report of the Secretary of State no doubt produced the 10th section of the law of Mexico of the 6th of April, 1830, as follows: "No variation shall be made in the colonies already established, nor in relation to the slaves which may be in them. But the General Government and the Special Government of each State shall, under the strictest responsibility, require the fulfillment of the law of colonization, and that no slaves be thereafter introduced." This would seem to be a full sanction of slavery so far as they had been introduced.

By a law of 15th February, 1831, of the Congress of Mexico the decree of 1829 abolishing slavery was abrogated, thus giving again another sanction to the existence of slavery, which, in point of fact, had never ceased for a moment to exist de facto, if not de jure. In this state of uncertainty the question of slavery continued until the formation of the Constitution. That the true object and meaning of the provision in the general provisions was to fix and establish the title of the master, whatever may have been the legal effect of Mexican legislation to impair that right and to nullify all Mexican legislation on the subject, there is no doubt. It conferred the absolute and legal right upon the master to his slave then held in bondage, free from any litigation as to his legal right under the previous laws of Mexico.

It also fixed the status of the person then so held in bondage. This status was not to be affected in any degree by the proviso. That was introduced either to reserve the

right of an individual who claimed superior right and title to the slave who was not in possession of him, but in the possession of an adverse claimant, or out of abundance of caution the term bona fide was used to distinguish the claim by which the person so held in bondage was claimed by his master from legal title; that if the master held him by a title that he believed to be right and good, although it might not as a legal title stand the test of Mexican legislation, that bona fide title should be confirmed and made legal. To give the proviso any other than one of these two interpretations would make it destroy not only its own effect, but the preceding sentence to which it is appended. It cannot by any known rule of construction be contended that the term bona fide was used as synonymous to legal.

It will be seen from the record that to establish the condition of the plaintiff to have been the slave of Smith a period is referred to as the commencement of the relation of master and slave anterior to the formation of our Constitution. Although he may have been at one time her master, if he disclaimed that relationship and did not claim to be her master, holding her in bondage when the Constitution was adopted, her status is not affected by it in any way prejudicial to her claim of freedom.

If such was her position, we may inquire if the paper given by Smith, although at a period long subsequent, had not, as a matter of evidence, a tendency in law not only as an estoppel in pais to those claiming under him, but further, to create a presumption that she had been liberated by him before any legal impediment had been interposed to his doing so. And this leads us to the consideration of another charge given by the judge, or rather his response to a question propounded to him by the jury.

The judge, in declaring the law to the jury, told them that "before the 17th March, 1836, there were three modes by which a person could manumit a slave: 1st, by writing, with five witnesses to it, (this might be done before a judge, or elsewhere;) 2d, by verbally manumitting him in the presence of five witnesses; 3d, by will duly executed."

And he might have added another: by marrying his slave he emancipates her; for such is the Spanish law. These means of emancipating a slave are taken from Partidas, and no doubt it is the Spanish law, and was in force in Mexico so long as it was comprised in the dominions of the King of Spain; because slavery was established in all of the American dominions of the King of Spain, and it was the policy of the king to sustain it by his laws, not only for the purpose of cultivating the soil, but because the trade in slaves was a most cherished and lucrative branch of his commerce.

It was not the policy of the crown to encourage emancipation, and its exercise was regulated by law. Whether these laws were borrowed from Roman jurisprudence or

originated from any other source is not material to us. They were made the law by the royal ordinances of Spain, and continued to be the only means by which a master could manumit his slave. As soon, however, as Mexico had established her independence of the crown of Spain, a different policy was proclaimed. It was the policy to put an end to slavery within the shortest possible period of time.

Under this change of policy, is it not perceived that the reasons for continuing in force the laws of the King of Spain on this subject had entirely ceased to exist, and indeed are repugnant to the new policy adopted? And although there may not have been a direct action of the Legislature abolishing those laws, it is an old maxim, so old that, as an acknowledged truth it is almost affectation to repeat it, that where the reason of the law ceases the law itself ceases. It would be absurd to suppose that under such circumstances a man would be told that you can only surrender the dominion you have over your slaves as property by the strict observance of old laws, ordained and promulgated under circumstances so very different.

But the absurdity would be still more glaring to say to the person in whose favor the master has abandoned voluntarily his rights as owner: It is true your master will not own you as his slave, and treats you as free, and has shown this his determination by acts and words, in hundreds of ways. You are still his slave, whether he owns you or not. If he will not own you, your status is not changed. You owe a vagrant allegiance to some master, because your old master has not conformed to some antiquated law that it would be as unreasonable to require the observance of as that of the Mosaic law to effect the same object.

We believe, then, that in Texas, prior to the 17th of March, 1836, a master could let his slave go free without pursuing either of the modes declared by the judge. The court will not presume anything against this right until it is shown to be against law. (Jones v. Laney et al., 2 Tex. 342)

The jury asked the judge if a person destroyed all evidence that the slave was his property, if it would make such slave free. The judge responded that it would not. The question was put so broad and general that the answer would not be considered erroneous.

But if it had been: Suppose the master destroyed all such evidence with an express avowal at the time, or afterwards acknowledges, that it was to enable his slave to go free. It is believed that in Texas, before the 17th March, 1836, (that being the point of time conceded by the pleadings at which the Constitution took effect, *) it would have been sufficient to make the slave free. And this conclusion is derived from the policy of the Government of Mexico, manifested by her various acts and decrees. Whether valid as laws operating on slave property in Texas or not, these laws and decrees show conclusively a determined hostility to the institution of slavery.

> The legal effect, then, of the paper referred to, would tend to raise the presumption that he had released the slave, if she ever was his, from slavery. If she had paid the purchase-money for herself, it would be another ground to support this presumption.
>
> From the record as presented it is doubtful whether the relation of master and servant did ever exist between the plaintiff and the defendant's intestate. The legal deduction from the acts and declarations (verbal as well as the written are referred to) of Smith was in favor of the freedom of the plaintiff below; and whether such presumptions are explained or rebutted was a question for the jury. For the errors we have noticed the judgment must be reversed and the cause remanded.

This opinion all but ensured that Margaret Guess would prevail.

Freeing Slaves

Jones v. Laney, 2 Tex. 342 (1847)

In 1811, Laney was born a slave owned by Chickasaw Indians, James and Molly Gunn, "in the old Chickasaw nation, now in the State of Mississippi." In 1814, James Gunn manumitted her "by a writing under his seal, recorded in the Chickasaw agency." The writing stated:

> Chickasaw Agency, 28th of January, 1814. To all who shall see these presents, Greeting:
>
> Be it known to all persons, that I, James Gunn, of the Chickasaw nation, being in my proper senses, and owing no individual person any just debt, have thought proper, of my own free will and accord, to enfranchise a mulatto female child, named Laney, two years and nine months old, which girl was born and raised my own property, no other person having any claim to the said girl but myself. I hereby give to Laney her freedom from this date. She is no longer a slave. Given under my hand and seal, the day and date above written.
>
> James Gunn. [Seal.]
> Present: Thomas McCoy, James Robertson.
> U.S.C.A. Indorsed, recorded in the Chickasaw Agent's Office, January 13th, 1844.
> A. M. Upshaw, C. A.

Laney, being a toddler, continued to live with her mother, who was a slave of the Gunns. Laney had not lived or been treated as a slave.

In 1823, James Gunn died. Laney was not mentioned in the will. Laney then went to reside with Susan Colbert, also a Chickasaw woman, residing in the Chickasaw nation, and later in the Choctaw nation, until November, 1846. By this time, Laney had children and grandchildren.

James Gunn's daughter, Rhoda Potts, and his wife, Molly, sold Laney and her children to Jones. James Colbert sued on behalf of Laney and her offspring.

Jones argued that Gunn had lived in a part of the Chickasaw nation where the laws of Georgia applied, laws which were violated by Gunn's deed of manumission, relying on the 1805 treaty of cession from Georgia to the United States. James alternatively argued the law of Mississippi similarly applied if the laws of Georgia did not.

The Court affirmed that only the law of the Chickasaw nation applied. The Indian law and custom was that a slave could be freed by her owner and that there was no law within the nation against manumission. The jury believed the authenticity of Gunn's manumission and Laney, her children and grandchildren were declared free.

Purvis v. Sherrod, 12 Tex. 140 (1854)

William T. Weathersby died in Harrison County and included two contested clauses in his will:

> "3d. I give to my negro woman Charlott and her child Julian their freedom, because of Charlott's faithful services in aiding me to make all the property which I own in the world. I also give my boy George Washington, his freedom, because of affectionate regard for him. And I wish the above three negroes to be left under the charge of my sister Lucinda Sherrod, to be settled near her and under her charge; and if the State of Texas, or any of my relations, should object to their freedom on these conditions, I give my sister full power to send them to a free State, or to Liberia, as she and the negroes may agree."
>
> "4th. I give my negro woman Charlott, my horse Charley, two cows and calves, one plough and gear, and meat for one year, and I give three hundred dollars to enable her to fix her comfortably. In case this will should be contested by any of my legal heirs, then in that case I give the above three negroes, Charlott, Julian, and George Washington, to my sister Lucinda Sherrod, believing she will carry out my will in the premises. And I further bequeath to my sister Lucinda, sixteen hundred dollars, in case this will should be contested by any of my legal heirs, for the purpose of carrying out my will."

The State objected to their freedom. The relatives objected to the bequeathment of property to Charlott, but agreed that his sister could use the $1600 to send the slaves to a free state or Liberia, but they were entitled to the remainder of the money. The Supreme Court approved of this arrangement, concluding that "the trust to Mrs. Sherrod in favor of the testator's slaves, to be executed beyond our territorial limits, is not repugnant to the law or settled policy of this State, and that it is a good and valid trust [.]"

Hillard v. Frantz, 21 Tex. 192 (1858)

Mr. Fitzgerald gave his slave girl (and daughter) to Caroline Hillard with "the understanding that she would raise the said slave, who was of tender years" until she was old enough to be taken to a free state and emancipated. Fitzgerald died without a will, and the administrator of his estate, Conrad Frantz, successfully sued for the return of the slave.

The Texas Supreme Court reversed in light of Fitzgerald's intent that the slave be a gift to Hillard. More interesting is Frantz's argument:

> It is against the policy of the law and against the interests of the state to permit a colored population in our midst, quasi free, without the salutary restraints of absolute

> ownership upon them – a colored class entitled to a prospective freedom. Here was an infant child to be raised up till she became able to support herself. Suppose the person with whom she is placed grows tired of the duty, or dies, what is the condition of the child? What shall become of her? Slaves are a class of people whose own interests and happiness require that they should not be thus abandoned.
>
> But the effects upon the domestic slave population are even more to be considered. The case of a single small girl will not serve to illustrate these. We must consider the principle involved. If manumission of an infant child to remain in the state until she can support herself be valid, what conditions, what provisions will not be? They may remain here until they acquire a fund to transport them to Liberia – until they acquire a fund to purchase a house in the western reserve in Ohio, etc.
>
> And this provision may be made not for one, but for a great number; and suppose a large planter on Caney should manumit a great number of slaves to remain in Matagorda county until they earned a sum for one of these objects, what an example would they afford to the slave population? What influence might they not exert? What contagion might they not spread? Shall there be in our cities, and among our slaves, a class of population in this quasi free condition, remaining here to fulfill the period or execute the objects preparatory to removal from the state, which the caprice or benevolence of slaveholders may prescribe?

The Texas Supreme Court reversed because the gift from Fitzgerald was a valid trust to Hillard.

Philleo v. Holliday, 24 Tex. 38 (1859)

Abram J. Hill's will gave his slaves to his wife, Martha, and when she died, the slaves would be freed. However, his will did not direct the slaves be taken to a free state. Hill died and Hill's brothers and sisters and their children sued to prevent the slaves' freedom. The Texas Supreme Court held that the slaves were not entitled to their freedom:

> It is not questioned, that the bequest of freedom is void, for the reason that no provision is made for the removal of the slaves beyond the limits of the state. It has ever been the settled policy of our law, to prevent the inhabitancy of free negroes within the state. The constitution of the republic, in express terms, forbade it; and forbade the owner to emancipate his slaves, unless he should send them without the limits of the republic. (Const. Rep. General Prov. §9.) The law forbids their emigration to the state, and requires all who are in the state to leave it, on pain of being reduced to slavery. (Hart. Dig., Art. 2546-2556.) Hence it has been considered, that a bequest of freedom to slaves, where provision is not made for their removal from the state, but which looks to their remaining here in a state of freedom, is in contravention of the plainly declared policy of the law, and consequently void.

Under property law, each party was entitled to one-half the slaves.

Hunt v. White, Tex. 643 (1860)

William Bracken died in Jackson county, leaving a written will. The administrator of his will was W. Hunt. S.A. White was the next friend of Bracken's three slave children, Charles, Amanda and Harriet. Bracken's will failed to mention that he had "emphatically directed his executors to purchase said Charles, and to take him, and his two sisters to a state of the United States where they can be emancipated; that they provide for their education, and that when they are of legal age, they should have an equal share of his estate, with his other children; such portion remaining until that time, in the hands of his executors." The probate court sought to carry out these wishes, but the Supreme Court reversed because Bracken had failed to include them in his written will.

Free Negroes of African Decent who Sold Themselves

Westbrook v. Mitchell, 24 Tex. 560 (1859)

John B. Westbrook sued William L. Mitchell, Jr., for the recovery of an unnamed "free negro of African descent" (most likely Lewis John Redrolls) Mitchell had "enticed" away from him. Westbrook claimed that the man was a free negro who sold himself to Westbrook in 1855 and agreed to be Westbrook's slave for life.

The Court reviewed the law on slavery:

> We are informed by the Institutes of Justinian, that slavery could originate, under the Roman law, in three ways, viz., by birth, when the mother was a slave; by captivity in war; and by the voluntary sale of himself, as a slave, by a freeman, above the age of twenty, for the sake of sharing the price. (2 Kent's Com. 274.) Amongst all the states of antiquity, in which slavery existed, captivity in war was recognised as one of the sources from which it might originate. (Cobb on Slavery.) We are informed by Mr. Cobb, in his chapter on the origin and sources of slavery in this country, that a few of the slaves in America are the descendants of conquered Indians; and he says, that "the foundation of their enslavement is the right of conquest, which has been recognised in all countries, as one of the sources of slavery."
>
> We do not propose to consider, at any length, the sources from which slavery may originate; and we have only noticed the fact, that conquered Indians have been enslaved in this country, to show that the fact has not been overlooked. The individual who is claimed as a slave in the petition before us, is described as "a free negro of African descent." So far as we have been able to inform ourselves, the

> slavery of negroes of African descent, has its origin in this country, in one way only, and that is, by birth of a slave mother; except where other modes of originating the condition of slavery, as to such persons, have been prescribed by statutes, from considerations of public policy.

Texas passed the Act of January 27th 1858, which authorized "free negroes" "to choose masters." The Court noted the Act's requirements:

> [A]ll the proceedings [must] be of the most public and formal character. The District Court must have supervision of the matter. The court must be satisfied that there is no fraud; that the proposed master is a person of good repute, and that no good reason exists, why the relation of master and slave should not be formed in the particular case.
>
> This caution of the legislature will suggest to the intelligent mind, that there are reasons of public policy, why the courts of the State should not recognise the right of free negroes to sell themselves into slavery. The recognition of such a right might lead to its exercise for bad purposes. It would be impossible to prevent frauds.
>
> Sometimes the negro might be the only sufferer, but at other times, the public might feel the bad effects of permitting negroes to reside amongst us, under the nominal protection of designing men. We are not inclined to initiate any new rule, not heretofore recognised in the jurisprudence of the country, but to leave the subject to be regulated by the general and well known law of the land, that the slavery of the negro in this country depends upon birth, and subject to such further regulations as the legislature, in its wisdom, has thought proper to prescribe.

The court dismissed Westbrook's suit because the unnamed free negro could not sell himself before the 1859 Act, so the 1855 transaction was not recognized. Westbrook could not "recover" him because he was otherwise free.

John B. Westbrook, Stephen Westbrook and Thomas M. Westbrook v. State, 24 Tex. 563 (1859)

The Westbrook brothers, Thomas M. and Stephen, were prosecuted for enslaving Lewis John Redrolls, a free negro who agreed to sell himself to John B. Westbrook as a slave and was so treated. After they were convicted, they appealed, arguing the jury instruction was erroneous.

The jury was instructed: "[A] contract made with a free African person, by a white person, for the sale of such free African, is null and void, and shows no title, or shadow of title, to the said free African; the said African having no power to sell himself."

The jury was further instructed: "[I]f the jury believe from the evidence, that there was such

a contract between the defendants and Redrolls; and that the defendants exercised acts of ownership over the said African, and enjoyed his service for a considerable length of time, believing, in good faith, that they had a right thereto, they are not guilty, as charged in the bill of indictment, and ought to be acquitted." The Court found no error, relying on *Westbrook v. Mitchell*, 24 Tex. 560 (Tex. 1859).

Contracting with or Buying from Slaves

Sanders v. Devereux, 25 Tex. 1 (1860)

Widower Sarah Devereux sued Mr. Lorenzo Sanders for refusing to honor her arrangement with her slaves. She had given cotton seed to her slaves so that they could grow and sell their own cotton separately and independently. Sanders requested 20,158 pounds of cotton seed from the slaves and agreed to pay $2 per hundred pounds from the slaves. They delivered, but Sanders' overseer refused to pay. Devereaux, on behalf of herself and her slaves, sued and won. However, the Supreme Court reversed, holding the contract void because slaves "can acquire nothing by contract."

S. M. Kingston v. The State of Texas, 25 Tex. 166 (1860)

On January 1, 1857, Kingston bought five Shanghai chickens from a slave, who took the chickens to town in a wagon. The slave was accompanied by his owner's teen-aged son who was aware that the slave sought to sell the chickens. At the time, it was a crime to buy from a slave "any cotton, corn, meat, or other valuable produce, or article whatever" without the consent of the master, mistress, overseer, or employer. Because the statute specified "valuable produce, or articles" the State was required to plead and prove the value of the chickens.

Assaulting, Cruelly Treating, Killing and Executing Slaves

David Chandler v. the State, 2 Tex. 305 (1847)

David Chandler was indicted for murder, but convicted of committing manslaughter of David Conner's slave, Claiborne. The court instructed the jury:

> The relation between a white man and a slave is different from that between white men; that if a slave raises his hand against a white man, the white man has then a right to use force sufficient to put down the opposition. And if the slave be unintentionally killed by the white man, it is not the crime of murder.

The court further instructed the jury "that a white man could be guilty of the crime of manslaughter upon the body of a slave." Because slaves are treated as persons for purposes of criminal law, a defendant can be found guilty of murder or, in the absence of malice, manslaughter. Accordingly, the Supreme Court affirmed Chandler's conviction.

Nix v. State, 13 Tex. 575 (1855)

J.D. Nix was found guilty of assaulting Mrs. McRea's slave, Lucy, assessed ten days in the county jail and fined $25. Nix appealed on the grounds that it wasn't clear who her owner was. The Texas Supreme Court affirmed the conviction and sentence, reiterating that "slaves are persons within the meaning of the statutes concerning crimes[.]"

The Court said that unless otherwise provided in law, "the statutes enacted for the punishment of crimes, and especially crimes committed by violence to the person, apply equally to crimes committed by or upon the person of a slave. ... The interest of the master, as well as the dictates of humanity, require that they should be within the protection of the law, and so they have ever been considered in this State."

The Court concluded: "There is no warrant to be found in the law or in the institution of slavery for the assaulting and cutting, or beating and wounding an unoffending slave, the property of another, by a free man, having no lawful provocation, and no authority to inflict chastisement upon the slave. The present appears to have been a case of wanton, unprovoked, lawless violence, committed in a fit of drunkenness, upon an unoffending slave, without any pretense of authority, provocation, or excuse."

State v. Stephenson, 20 Tex. 151 (1857)

John Stephenson and Edwin S. Cabler were indicted for assault and battery of Linsay P. Rucker's slave, Malissa. They challenged the indictment on the grounds that it failed to allege an offense. The defendants argued that the act of whipping a slave is not *per se* criminal, and that a slave is "property only, as a horse or any other domestic animal." The trial court agreed and dismissed the indictment. The Supreme Court reversed, recognizing that "the uniform decisions of the States, where the institution of slavery prevails, it has been decided that slaves are to be regarded as persons in respect to the criminal law."

Grinder v. State, 2 Tex. 338 (1847)

In Fannin County, William G. Grinder's slave was convicted for the murder of "a white man" and executed. The district court ordered Grinder to pay for the expenses of his slave's prosecution. The Supreme Court reversed and dismissed the order. The district court had no such authority.

Furthermore, the Court observed:

> The common law, in criminal cases not provided for by legislative enactment, was introduced by the Constitution of the Republic, and is still the law. The State, in the prosecution of the slave belonging to the appellant, sought no pecuniary compensation; all that was asked was satisfaction for her violated laws – and this not at the hands of the owner of the slave, but from the person of the offender. Public justice was satisfied in the person of the slave, by the highest and most solemn atonement the majesty of the law could demand – the life of the offender.

Callihan Ex'r v. Johnson, 22 Tex. 596 (1858)

Collin Johnson sued James Callihan and George Hollamon for killing Johnson's slave, Humphrey. Callihan saw that Humphrey had a pistol and told him to give it to him. Humphrey refused, drew his gun from his pocket and displayed it to Callihan. Callihan told his son to get him his shotgun and he fired at Humphrey who had retreated. Callihan then fired his sixshooter at Humphrey and killed him. The Supreme Court held that while Humphrey displayed "the most flagrant insubordination," his murder was a wrongful act and Johnson was entitled to the value of his slave.

Brady v. Price, 19 Tex. 285 (1857)

Tempe Price hired Charles U. Brady for $300 to act as overseer to her ten or twelves slaves on her San Augustine County plantation. He pointed out that he might have "difficulty in managing them" because he would be the only white person there. Price told him that he could call upon her sons who lived a few miles away. Soon, Brady had problems.

While in the horse lot, Brady told one of the slaves to take a yoke of oxen, but the slave Miles "spoke up and said something impudent[.]"

Brady "told said Miles to hush and go about his business," but Miles "said something impudent in reply."

Brady picked up "a part of a fence-rail and struck at said negro Miles, but did not get a fair lick at him, or he would have knocked him down [.]"

The two began to fight, with Miles choking Brady. The other slaves pulled off Miles, who ran off. He later got on his horse and ploughed a field. Brady, meanwhile, had retrieved his gun and went looking for Miles, but didn't find him.

The next morning, Brady, armed with his double-barreled shot-gun, "having first drawn out

the load of buckshot and loaded both barrels with squirrel shot," went to find Miles. He found him on horseback ploughing a field. Brady told him to stop, but Miles ignored him.

Brady followed Miles until he came near another slave ploughing in the opposite direction. Brady told him to take Miles' horse, but the slave refused.

Miles ran off on foot as Brady shot at him, hitting him twice. Miles ran another fifty yards as Brady overtook him.

Miles had a knife in his hand, and Brady drew his knife and told him to put up his knife, which he did. Miles took his horse towards the house with Brady following.

Before they had reached the house, Brady had loaded his gun in such a way that "if it had hit the negro Miles, would have stopped him from ever running again." As they got near the horse lot, Miles "slipped around the corn-crib and ran away."

He had fifteen to twenty holes in his back made by the squirrel shot, some so deep, the doctor did not attempt to extract him. While he had been healthy, able-bodied and worth $1000, he was unable to work after having been shot, and "was of little or no value."

While there was some evidence that Miles was "impudent, malicious and rebellious," there was other evidence "tending to the conclusion that he was merely self-willed." Price fired Brady and sued him for "damages" to Miles. She was awarded $516.67, and Brady appealed.

The Supreme Court affirmed. Under the law, an overseer has the "right to exact obedience to his lawful commands in and about the business he is employed to superintend, and to use such restraint, coercion and chastisement as is necessary to make the slave obedient to his orders." However, the right does not include the right to use deadly force or to inflict serious bodily harm because of the slave's disobedience. If he does, he is liable to the slave's owner for any damages to the slave.

Bumpus v. Fisher, 21 Tex. 561 (1858)

Jacob Fisher charged James Bumpus with "laying violent hands on a negro slave, Alfred, a man, and unmercifully whip[ped] and abuse[d] said boy." Justice of the peace Dupree issued a warrant and Bumpus was arrested. A jury ultimately found him guilty and assessed a $40 fine. The judge ordered Bumpus into custody until his fine and other costs were paid. Bumpus sued Fisher and the justice of the peace for false imprisonment and malicious trespass. He lost in the trial court and appealed.

The Texas Supreme Court affirmed. Any "white person may be indicted for an assault and battery upon a slave," while the law regarding "cruel treatment" applies only to persons in control

of a slave. A justice of the peace had jurisdiction to hear and determine cases of assault and battery (with no deadly weapon allegations). However, if the charge was that Bumpus had "cruelly or unreasonably treat[ed] or abuse[d] a slave," then his jurisdiction was limited to binding the defendant over for the district court. In either case, Fisher was not liable because he did nothing further than file a complaint. The justice was also not liable because he had the power either to try or bind over Bumpus and was presumed to have acted on a charge of assault and battery.

Testimony of Slaves

Doty v. Moore, 16 Tex. 591 (1856)

"This suit was brought by the defendant in error against the plaintiff in error, to recover damages against the plaintiff in error, for falsely and fraudulently representing a negro, hired by the said plaintiff in error, to him the said defendant in error, to be a first rate striker in a smith shop, and a pretty fair smith, and honest and of good character; which representations were all false, and well known to the plaintiff in error to be false; that he was in truth no workmen, as a smith, and of bad character; that he had burned the fence of the defendant in error, and had burned the smith shop of him, the defendant in error, and committed other trespasses, and was a runaway, &c., to the great damage of the said defendant in error, the plaintiff in the Court below."

The Texas Supreme Court reversed because there was no evidence to support the suit: "In referring to the facts, it is manifest that illegal and incompetent evidence was received, as the basis of the liability of the defendant below. It was the confession of the slave that he had committed the trespasses and outrages complained of. By reference to Art. 723, Hart. Dig., it will be seen that negro testimony is inadmissible, in all cases, except for and against each other."

Losing Slaves

Hedgepeth v. Robertson, 18 Tex. 858 (1857)

On April 17, 1853, Felix W. Robertson's slave, John, drove his master's team of oxen and wagon full of six bales of cotton on the road from Washington County to Houston County. The Brazos River had overflowed, and during the night, John and his wagon and team became bogged down next to the fencing of Colonel Jared E. Kirby. John pulled down a portion of the fence to get his wagon out of the mud, but failed. By then, it was dark and John decided to wait until morning to repair the fence.

However, Kirby's overseer, H. B. Hedgepeth, "coming along, and seeing the fencing pulled down, made a great fuss about it, and attempted to chastise John. Witness told Hedgepeth that the pulling down of the fence was done innocently; that it should be put up, and that it was a small thing to make a fuss about.

"In the meantime John ran off a little piece, and stopped for a few moments. As he ran off, Hedgepeth said, You may go, God d–n you; but I will kill you or whip you before you get home.

"Hedgepeth then jumped off his horse, put a negro boy on him, and commanded him to go immediately after his double barrel gun and dogs. The negro boy obeyed, and returned in about fifteen minutes with the other two defendants, Kirby and [Joseph H.] White. Kirby as he rode up, asked Hedgepeth what was the difficulty. Hedgepeth informed him what had taken place.

"Kirby then asked who the boy John belonged to. Hedgepeth then asked Kirby what he should do. Kirby told him to pursue the boy John, handing him, Hedgepeth, his gun, and telling him to stop the boy, and not to let him go home.

"Hedgepeth and White, with the gun and dogs, immediately followed after John, who had fled back towards the river; after which witness, A. W. Hood, soon heard guns firing and dogs running in the direction they went. In an hour afterwards Hedgepeth returned, and said he had seen nothing of John. John was never heard of afterwards. He was an expert swimmer."

"Witness turned the team loose in the range; the cotton was left, three bales on the wagon, and three thrown off in the bog by the wagon. John was an unusually valuable boy; between twenty-five and thirty years of age; worth from twelve to thirteen hundred dollars; services worth $ 180 per year. A witness for plaintiff testified that the damage done to the cotton, the team and the wagon, and the trouble and expense of collecting the team would amount to about one hundred and fifty dollars."

There were two witnesses, A. W. Hood and Robert L. Hood, who had crossed the Brazos River at Baldridge's Ferry at the same time as John. They saw John had gotten bogged down and was pulling down the fence. A.W. told him not to pull down the fence and instead should tie up the oxen until morning. According to the Hoods, John "replied that he be d–d if he didn't know Col. Kirby, and Kirby knew him, and that he would pull down the fence and go out of the bottom that night; after pulling down the fence he made several attempts to make his oxen pull the wagon into the field, but, failing to do so, he finally concluded to camp."

The Hoods tied up their oxen on the outside of Kirby's fence, but John tied his oxen on the inside of the fence, chained together to a stump I on the field. The next morning, A.W. Hood saw Kirby's field hands working and told John to go them and get help, and to tell the overseer that he had pulled down the fence. John returned with "two stout negro men. As soon as he returned I told him to throw off some of the cotton, and I think they had about three bags off the wagon, when Hedgepeth, one of the defendants, rode up to me and asked me by what authority" was the fence pulled down.

Once Hedgepeth understood that John had pulled down the fence, he said to John, "I'll whip you, God d–n you." He told John, "pull of your coat, I mean what I say, sir."

John replied, "I spects you does sir."

When Hedgepeth "spurred his horse around," John ran.

The overseer ordered "the two negroes who were aiding him to unload" to catch him. One began to make the effort, but John warned him not to lay his hands on him. John then ran about thirty yards down the road towards the ferry and stopped." Hedgepeth called out to him, "you can run, God d–n you, but I'll whip you or kill you before you get home, you d–d son of a b–h."

Hedgepeth leaped from his horse ordered one of the slaves to get Kirby's gun and dog. A.W. Hood, meanwhile, went to John and "asked him if he intended to leave; he said that he did, and I then told him that he had better come back, for Col. Kirby would come down, and if they whipped him at all, they should not whip him much[.]"

John refused and ran off towards the river.

About an half hour later, Col. Kirby arrived and asked about the wagon.

Hood told him it belonged to "Capt. Felix Robertson's, of Independence. Kirby then said that Robertson was an old friend of his, and that he disliked to see his wagon left in that fix. Hedgepeth then said that he would overtake the boy and bring him back, but after getting about twenty yards off he turned around and said, 'Col. Kirby if you will give me your gun I'll make the d–d rascal come back; Kirby handed him his gun and he went off towards the ferry."

A.W. Hood heard a gun shot at the ferry, but no one else heard it. About a half hour later, Hedgepeth returned alone. Hedgepeth said that "John had been to the ferry, and the ferryman refused to put him across the river, and that he did not know what had become of him."

Thomas J. Wells testified that he overheard Robertson remark a couple days later that he had tracked John where "said negro left the road at the ferry, down the river for half a mile or more, and that there were no signs of any persons pursuing said slave from the road, and that he did not believe that any one had shot the negro."

Robertson was awarded $1300 for the lost slave and damages. The Supreme Court affirmed. It was irrelevant whether John was alive or dead; the only issue was whether the slave had been lost to Mr. Robertson due to the wrongful acts of the defendants. Found the pulling down of the fence to be a "necessary and justifiable act" "done by the slave necessarily, in the performance of his master's service[.]"

The Court found the damage to the cotton "trifling" not justifying "the occasion of a desperate resolve to whip or kill the slave of a neighbor, who had not delegated to them his power and authority over his slave[.]" They had no right to drive or frighten the slave away from his master's employment, and the care of the property entrusted to him, by threats and violence; nor had they any right to go after and bring him back by force. ... Their interference with the negro, under the circumstances and in the manner of it, was not a trespass merely, but an outrage upon a neighbor's

property and rights, for which all concerned are alike responsible, civilly, for the injury thereby occasioned."

Stealing and Enticing Slaves

Hill v. M'Dermott, Dallam 319 (1841)

In 1834, Whitfield Sledge had deeded his slave Priscilla to John S. D. Byron "to secure $69 at three months," then deeded her to John Chafin "to secure to him on the 1st January following $342, with 12 1/2 per cent. interest, the Byron debt, with 5 per cent. per month, and $25 borrowed by Pace." In 1835, Mr. Sledge and his wife, Elizabeth, moved to Brazoria County, Texas from Georgia and brought Priscilla, who then gave birth to Sylvia. Mr. Sledge died that year.

In the spring of 1836, Chafin, with force, took both slaves from Elizabeth and carried them away. Elizabeth married William McDermott and they sued William G. Hill, who had somehow come into possession of the slaves. In 1840, a jury found the slaves to be the property of the McDermotts and assessed "$900 as their value, and $350 the damages for their services; and a judgment for them for those sums with their costs." The Supreme Court affirmed.

Ingram v. Linn, 4 Tex. 266 (1849)

Thomas Poage's slave, Nat, persuaded Linn's slave, Jerry, to go to the Guadalupe River where Jerry drowned. Linn sued Ingram, the administrator of Poage's will, for $1000, the value of Jerry. The issue before the Supreme Court was whether an owner is liable for his slave's "willful and unauthorized trespass" against another owner. Quoting from a Tennessee opinion, the Court observed, "Either we must look upon the slave as occupying the same relation to the master as the servant does in England, or we must regard him in the light of property, and hold the master liable as he would be for mischief which might be committed by a vicious domestic animal." The Court decided that the law governing masters and servants governed, holding that "the master is not answerable for a willful and unauthorized trespass committed by his slave, and that therefore the present action cannot be maintained."

Langford v.State, 8 Tex. 115 (1852)

Langford was prosecuted for having stolen an unnamed negro woman, the property of one John Carpenter. The jury found him guilty and he was sentenced to a year in prison. He appealed. The Texas Supreme Court reversed because while it was alleged that she had a value of five hundred dollars, there was no proof she had any value at all.

Horton v. Reynolds Adm'rs, 8 Tex. 284 (1852)

In 1840, a Justice of the Peace in Mississippi, Hannibal Good, issued an arrest warrant against George W. Reynolds for allegedly stealing 27 slaves from Mississippian Abram F. Smith. (Oddly, the same judge had previously issued an arrest warrant against Smith for stealing Reynolds' slaves.). Austin County Sheriff H. Catlin, together with "an armed party," which included Alexander Horton. arrested Reynolds.

Reynolds and the group made a deal: Reynolds gave them 20 slaves in exchange for releasing him from civil and criminal prosecution. Reynolds was warned that "if he did not deliver up the negroes, they would take him in irons to Jasper County on the charge of negro stealing."

Reynolds later sued Horton for two slaves, Tom and Ephraim, on the grounds that he had made the deal under threat of his life. A San Augustine jury found in Reynold's favor (to the administrators of his will, Reynolds having died during the suit). The administrators were awarded $838 and "fifty-six and eleven-twelfth cents," which was the value of the slave services, and $400 for Tom and $300 for Ephraim, the latter of which could be discharged on the return of the slaves. The Supreme Court affirmed.

Alexander v. State, 12 Tex. 540 (1854)

Mr. Coleman suspected that J.B. Alexander was enticing and stealing his slave and caught them both just after sunset heading from Jefferson to Marshall. Alexander was convicted, but the issue on appeal was the punishment.

Under the 1836 Act, "Every person who shall steal or entice away any slave out of or from the possession of the owner or owners of such slave shall be deemed guilty of felony, and, on conviction thereof, shall suffer death." However, the law was changed in 1840 and the death penalty was replaced with "thirty-nine lashes on the bare back," and one to five years in prison.

The law was again changed on March 14, 1848 "substituting confinement therein with labor, for the odious, degrading, and cruel punishment of stripes and branding, with imprisonment in a county jail; and by the act of the 20th of March thereafter, providing the punishment of all simple grand larceny not otherwise specially provided for – which the present undoubtedly is – by confinement with labor in the penitentiary not less than one nor more than five years." Because Alexander was punished by the law enacted on March 20, 1848, the Court affirmed the judgment.

Lovett v. State, 19 Tex. 174 (1857)

Samuel Lovett was tried and convicted of attempting to steal and entice a slave, and sentenced to three years in prison.

Lovett told Brown's slave, Sam, that he would take him and another slave, Jack (apparently owned by Mr. Shepperd), "away from the country." Shepperd and Brown took Jack to the defendant's ferry on the Sabine river. They gave Jack $10.75 and told him to show it to Lovett and ask him to count it, while Brown and Shepperd hid in a ravine about twenty feet away.

Lovett counted the money and said that "all he had been waiting for was money to carry them off; Jack said that another boy, Mart, had lots of money, and it was agreed that Lovett, Jack and Mart should meet at the river the next Saturday night, to make some arrangement about leaving the next spring." As Jack and Lovett headed to the boat, Shepperd and others arrested Lovett.

The Supreme Court reversed Lovett's conviction because the defendant never actually made an effort to steal or entice the slave, but had only made preparations.

Wiley Bruton v. The State, 21 Tex. 337 (1858)

Bruton was convicted for theft of a slave, Frank. Bruton's accomplice, Dixon, testified against him and explained their scheme to steal the slave, sell him in New Orleans and return with a mulatto girl. The Supreme Court affirmed the conviction.

Barnette and others v. Hicks, 6 Tex. 352 (Tex. 1851)

An arrest warrant was issued against Luke Presnell charging him with "decoying a certain negro woman, by the name of Matilda, from the possession or premises of William H. H. Barnett." The Justice of the Peace summoned Hicks and others to appear before him to give evidence on behalf of the State against Presnell. Apparently, Hicks sued Barnette and others, and the latter lost. In their appeal to the Supreme Court, they complained that the court erred by excluding the arrest warrant and precluding the defendant from reading it to the jury. The Supreme Court affirmed because the evidence was irrelevant:

> [I]t neither amounted to a defence, nor did it show anything in mitigation. It was not a defence, because the warrant charged no offence known to the law. If it had been for enticing away a negro woman slave, from her master or owner, it would have amounted to a felony. (Hart. Dig. Art. 2536.) Or if it had been for harboring a negro woman slave of Wm. H. H. Barnette, it would have been an offence known to our laws. (Hart. Dig. Art. 2544.) But the charge, as contained in the warrant, constituted no offence. And had Presnell, who was arrested under the warrant, brought suit against the Justice of the Peace, the Constable, and all who assisted, the warrant would not have afforded them any justification. (Hawkins v. Johnson, 3 Blackf. R. 46; Moore v. Watts, 1 Breese 18; Burlingham v. Wylee, 2 Root, R. 152; Duckworth v. Johnston, 7 Ala. 578.) It might, however, void as the warrant was, if the parties acted in ignorance, believing that it was a valid and legal warrant, have been received

> in mitigation of damages. But when this warrant is offered as evidence in a suit, not by Presnell, who was named in it and against whom it issued, but in a suit by one not named in it, so far from being a circumstance to mitigate and lessen the damages, it would justly be an aggravation. It would show that the legal process, or what was intended to be such, had been perverted and prostituted, and made an instrument of oppression, by depriving a citizen of his liberty. There was no offer, accompanying this warrant, to prove that the parties had been mistaken, and being authorized to arrest one man, had arrested another. The warrant, then, under such circumstances, could neither afford a defence nor a mitigation of the arrest; and its being ruled out by the Court, furnishes the appellants no ground of complaint or for reversal.

The defendants also complained about the trial court's exclusion of evidence that they had been summoned by the Deputy Constable to assist in the arrest. But they didn't arrest Presnell; they arrested Hicks. The Supreme Court found that had they arrested Presnell, the evidence would have been relevant. But "the only authority the special Constable had, if it had been valid, was not for the arrest of the plaintiff, but for another man. They were therefore left without the smallest shaddow of excuse." According the Supreme Court, all the defendants knew that there was no authority to arrest Hicks. The Court noted that some of the defendants stated they didn't think they had any authority to arrest Hicks "and asked what would be the consequence if Hicks were to shoot some of them. Asbell, the Constable, proposed going back to get authority. S. Slade Barnette then replied that if his friends of Bighead Village would not go with him, he would get others who would. For he would be damned, if he did not take them. The defendants then all went on towards Mr. Hicks'."

Affirming the judment, the Court stated, "It is unfortunate that they were influenced by their devotion to their village and their excited leader. Had the more moderate counsel prevailed, it would have kept them all out of trouble."

Fowler and Clepper v. Stonum, 6 Tex. 60 (1851)

Fowler and Clepper sued Stonum for trespass because he took and carried away some of his slaves. Stonum claimed the slaves were his and that he obtained them peaceably. The plaintiffs said he seized the slaves with force and arms. ????????

Loaning Slaves

Mims v. Mitchell, 1Tex. 443 (1846)

In 1842, Isaac N. Mitchell agreed to pay Henry Mims for two months' use of his slave, Mehala, described as "between fifteen and sixteen years old, sound and well conditioned," and afterward have her return "in like condition." She died on her way back to Mims' residence. Mims sued Mitchell for $200 (the value of her services) and $500 (the value of Mehala).

Mitchell's "overseer," Roundtree, "testified to having chastised the girl himself on two or three occasions, about the time of the last account we have of her in the possession of the defendant, and of also having seen the defendant correct her; but, as he says, 'not in a manner to injure her;' that he and defendant (about the time he chastised the girl) left for the army (being the time when the country was invaded by General Woll [Mexican general]). That defendant, on starting, addressed a note to the plaintiff, which he left with a Mr. Larkey, to be sent by the girl; that Larkey was left in control of the plantation of defendant. There was proof of the hiring, and testimony that the girl was sound, 'active, and sprightly, and headstrong.'"

The jury found in Mitchell's favor, but the Court reversed because not only did Mitchell failed to offer an account about how the girl died, but "absolutely sought to conceal the cause of her absence by objecting to testimony conducing to show the fact and manner of her death. It is impossible to resist the belief that the facts connected with the disappearing of the slave were more accessible to him than to" Mims. After another trial (below), Mims won again.

Mitchell v. Mims, Adm'r, 8 Tex. 6 (1852)

Mims sued Mitchell after his slave died in Mitchell's care on her way back to Mim's residence "some miles distant." Mims won. The issue for the jury was "whether the treatment of the negro had been such as a prudent and humane master would observe towards his own slave; and whether the loss of the negro had been occasioned by the want of ordinary care and diligence on the part of the defendant."

Young v. Lewis, 9 Tex. 73 (1852)

Mr. Young loaned his slave girl to Mr. Lewis for a $12 per month in San Antonio in 1849. Cholera broke out in the city, with hundreds dying. Fearing that the girl would contract cholera and die, Young demanded the return of the girl about six weeks after Lewis took possession of her. Within six days after Young's demand, she died of cholera. He sued for $500, the unnamed girl's value. Lewis prevailed based on property law. The owner in a month-to-month contract could only demand the return of his property at the end of the month. Lewis was therefore not required to return her to Young. Furthermore, there was no proof that he failed to care for her as a "reasonable and prudent master would use with his own slave."

Mills v. Ashe, 16 Tex. 295 (1856)

John B. Ashe and his wife loaned their slave Henry to the owners of the steamboat J.H. Bell, which ran from Galveston to Columbia on the Brazos river, to act as a boat hand. On December 30, 1854, Henry drowned while making an effort to "sound" a rough bar at the mouths of the Galveston Bay and the Brazos river. Ashe sued for the value of Henry and won. The Supreme Court affirmed

because Henry was borrowed only to be a boat hand and not act as a pilot.

Echols v. Dodd, 20 Tex. 190 (1857)

John Echols, the administrator of Henry J. Munson's estate, sued Andrew Dodd for the loss of a slave boy he had loaned him. Dodd owned a saw-mill, and Williams was the manager. While Dodd was away, Williams chastised the boy for some misconduct. The slave died as a result of his beating. He was worth $800. The trial court found in favor of Dodd, but the Supreme Court reversed:

> There is no evidence that the overseer intended to take the life of the slave; or that he intended to do more than to chastise him for misconduct, as he was authorized by his employment to do. It only appears that he was engaged in doing his master's business; but for the want of due and proper discretion, skill or care, or from some other unknown cause, he did it so very illy as to cause the loss to the plaintiff of his property. For that loss the defendant is responsible. If it were otherwise, there would be no case where the master would be responsible for an injury occasioned by the want of proper care, skill and circumspection in his servant to whose care and conduct he had intrusted the property of another.

Tucker v. Willis, 24 Tex. 247 (Tex. 1859)

In March, 1853, Joseph Tucker married Malvina Gaddie in Kentucky. Gaddie owned a female slave her father, Jesse Gaddie, had given her as a wedding gift. They moved to Texas where Malvina died. They had no children. Joseph and Margaret Willis had possession of the slave, but claimed that she belonged to Jesse Gaddie. Gaddie intervened, claiming he had merely loaned the slave to his daughter. He proved that he only loaned the slave, and therefore prevailed.

Miscellaneous Prosecutions

Rawls v. State, 15 Tex. 581 (1855)

Elijah Rawles was prosecuted in Travis County for letting his slave go at large for more than one day a week. His conviction was reversed and dismissed on jurisdictional grounds.

Greer v. State, 22 Tex. 588 (1858)

In 1850, the Texas Legislature had passed an Act that made it an indictable offense for "any owner, overseer or employer of slaves, under his control or in his employment, to permit such slave

or slaves to carry fire arms of any description, or other deadly weapons, at other places than on the premises of such owner, overseer or employer." However, it repealed the law in August, 1856.

Stephen Greer was indicted by a Brazos County grand jury of permitting his slave to carry firearms off his own premises on New Year's Day, 1856. However, the indictment was returned in September, 1856, a month after the new law went into effect.

The Supreme Court reversed Greer's conviction and dismissed the indictment:

> [W]hen a law, defining an offense and prescribing its punishment, is repealed, and there is no law in force recognizing the offense, and providing for its punishment, then no one can be punished for that offense, although the act, constituting the offense, was done at a time when the law defined the offense, and prescribed its punishment; and this, for the obvious reason that no one can be punished except by virtue of a law in force as to the offense in question, at the time of the trial of the offender.

Smith v. State, 24 Tex. 547 (1859)

Williamson County "captain of the patrol," A.H. Chalmers, found a slave, Isaac, owned by J.W. Allen near James A. Smith's store with a pint of whiskey.

Smith admitted he drew the whiskey and gave it to Isaac, but that a Mr. Little paid for it. Little said he bought the bottle of whiskey because he owed another man's "boy" fifty cents for riding a wild horse for him, and did not know how Isaac got it.

Another witness said that Little had asked Smith for money to pay his boy, but Smith refused. Little then bought the whiskey to give to this other slave.

Smith was prosecuted for giving or selling liquor to a slave. It was undisputed that Smith had sold the whiskey to Isaac without Allen's written permission or consent. The issue was whether Smith sold the liquor to Isaac or Little. If Smith had sold it to Little, he was entitled to an acquittal, but was guilty if he sold it to Isaac.

The Court reversed the conviction because the jurors were not instructed to acquit if they believed Smith sold the liquor to Little.

"The object of the law is, to prevent persons engaged in the business of selling liquor, from unlawfully selling or giving it to slaves. (O. & W. Dig. 542, Art. 668.) It contemplates, in case of sale, a dealing with the slave, by the person selling. If a white man should intervene, and buy it, not colorably or collusively, but really and in good faith, and then give it or pay it to a slave, that would not be dealing with the slave, by the first seller, but with the white man; and he would not be

responsible for the use made of the liquor, thus bought from him by a white man."

John M. Allen v. The State, 14 Tex. 633 (1855)

Allen was convicted of selling liquor to a slave. The Supreme Court reversed because the trial court authorized conviction even if the defendant had merely given liquor to a slave. "A sale to a slave means the same as a sale to a freeman, and is by no means identical with a gift. A consideration is essential to the one, but not to the other." Only selling to a slave was a crime.

Smelser and Fraulis v. State, 31 Tex. 95 (Tex. 1868)

The Brazoria District Attorney prosecuted John Smelser, a white man, and Mary Ann Fraulis, a freed woman, for living together in a state of fornication. "There was proof that the parties lived together in the same house, but occupied different rooms. There was no other proof to sustain the verdict, except that the woman had been the other defendant's slave, was nearly white, and wore short hair." The Supreme Court reversed finding the evidence to be insufficient to support a conviction for fornication.

Anderson v. State, 20 Tex. 5 (Tex. 1857)

J. M. Anderson was prosecuted and convicted in Guadalupe County for letting his slave hire out his own time. Relying on a case from the Texas Republic, the Supreme Court reversed the conviction and dismissed the indictment because permitting a slave to hire out his services was no crime.

State v. Wupperman, 13 Tex. 33 (1854)

> Wupperman was indicted for buying of any produce of a slave "without the written consent of his or her master, or mistress, or overseer," the slave alleged as "the property of one Andrew Herron," "without first having the written consent of said Herron, or any one having charge of said slave." The indictment was dismissed because "having charge of" was vague: a person "may be said to have charge of a negro in various senses, as owner, hirer, overseer, or as having some agency representing him not properly included in the terms employed," none of which were specified.

Webb v. State, 24 Tex.Ct. App. 164, 5 S.W. 651 (Tex.Crim.App. 1887)

Dan Webb and Hannah Staines were jointly indicted for adultery. Webb lived with Hannah and Ann Staines in a two-room house on the Upshur County plantation of W.H. Hart. They had

several children who called Webb "father." The house they occupied had two rooms.

In 1885, Dan and Hannah moved to another house close by and lived together, but a mile and a half away a plantation where Webb's wife, Clarissa Webb, lived. Dan Webb was convicted of adultery.

The Court of Criminal Appeals reversed. There was no evidence that he ever married Clarissa Webb or had lived with her. "The only evidence that he was married is that he, at the time of the alleged adulterous acts, had a living wife, a woman with whom he had lived during the war, but from whom he had separated some time since the war, but at what date is not shown. There is not a particle of evidence that he ever *married* said woman, nor is there any evidence that they ever lived together as married persons. The witnesses say she was his *wife*, but none of them say he was married to her, or that he lived with her as married persons." If Dan and Clarissa were emancipated slaves, "they became lawfully married to each other at the date when the Constitution of 1869 took effect," but there was no proof these circumstances.

Carter v. State, 20 Tex. 339 (1857)

Richard Carter was convicted of knowingly permitting his slave to carry fire-arms. His conviction was reversed because the trial court erroneously instructed the jury to presume that every man knows "the habitual or usual acts of his own slave."

State v. Schoofield, et al, 29 Tex. 501 (Tex.1861)

By article 668 of the penal code, as it was in the days of slavery, it was declared, that "if any person who deals in intoxicating liquors, either by wholesale or retail, shall sell to a slave, without the written consent of his master, mistress, overseer or employer, any intoxicating liquors, or shall give to any such slave, and without such written consent, any intoxicating liquors, he shall be fined not less than $50, nor more than $200." O. & W. Dig. p. 542.

The indictment alleged that "William D. Schoolfield and William Evans and James O. Wiley, being then partners in the sale of intoxicating liquors by retail, and persons who dealt in intoxicating liquors by retail, did, on the 1st day of July, 1859, in the aforesaid state and county, sell to one Taylor (who was then and there a slave, and the property of Mrs. Alphia L. Hightower) intoxicating liquor, without the written consent of the aforesaid Mrs. Alphia L. Hightower, who was then and there the mistress of said slave." There was another count, alleging that they gave the liquor to the same slave, etc.

The demurrer to the indictment was general, that it was "insufficient in law." The court sustained the demurrer and quashed the indictment, from which the state appealed. There was no appearance for the appellees. Judgment reversed and cause remanded

Elizabeth, a Slave, v. The State, 27 Tex. 329 (1863)

Ned and Elizabeth, both slaves, were indicted in Robertson County for the murder of James Threatt's three-year-old son, Daniel. Elizabeth was charged as a party to the crime.

> From the evidence it appeared that the deceased, who was a child about three years of age, was missed from his home on the evening of the 29th of June, 1863, occasioning great anxiety and distress to his family. Neighbors being sent for, they arrested the two negroes, Ned and Elizabeth, who belonged to Mr. Threatt, who inflicted punishment upon them with a rope, for the purpose of obtaining a disclosure of the fate of the child. Both before and for a time after their punishment, the girl Elizabeth persistently denied any knowledge upon the subject. But upon Ned's stating that Elizabeth had put the child in the well, she tapped one of the witnesses upon the shoulder and said, "he (meaning Ned) tells a lie; I can show you the child." Witness replied that that was what they wanted, and Elizabeth then walked up a ravine which was close to Mr. Threatt's house. Passing one hole of water, she said, "it is not in here," and walked on to another one close by, which was larger and deeper than the first, and there said, "it is in here;" and thereupon she walked into the water and brought out the child. She walked straight to the spot in the water where she picked the child up. The child was greatly bruised, and had a hurt on the neck and side of the head, from which the witnesses present thought it might have been killed before having been thrown into the water; but its limbs were stretched out as though it had struggled after being thrown in. The boy Ned had belonged to Mr. Threatt only some two or three weeks; the girl Elizabeth for two or three years. There was no other evidence against the appellant.

The jury having returned a verdict of guilty, the defendant's counsel (appointed by the court) moved for a new trial. The motion was overruled, and an appeal taken.

The Supreme Court acquitted her because the evidence was insufficient to prove anything more than her knowledge of the location of the body.

Warren, a Freedman, v. The State, 29 Tex. 369 (1867)

Warren, a freedman, was indicted for theft, specifically $10 from T. A. Engleke. The proof:

Engleke had become aware that some one was in the habit of entering his store and

robbing it. He placed two witnesses in the store to watch at night. Some person entered by a trap-door and opened the money-draw. They struck a light, and the intruder fled.

One of the witnesses ran rapidly to Engleke's house, four hundred yards. A few moments after his arrival, the negro, who was Engleke's servant, entered out of breath, and said to Engleke, "two white men have broke into the store." Engleke charged the defendant with being the thief. They carried him to the store.

Several persons soon entered with six-shooters, and the negro was taken into the counting-room. He said to Engleke, that if they would not hang him, he would confess the whole business. Engleke having given this promise, he confessed to the habit of entering the store, and that, at different times, he had taken out, in all, as much as $75, besides some calico and tobacco; and he offered to work it all out.

Engleke identified a broken piece of coin, which he had left in the drawer that night, and which was found on the person of the defendant. His shoes were also found where the prisoner told them to look for them. Perhaps it ought to be recorded, in favor of humanity, that under the slave code, while it existed, it was declared, that "the confession of a slave should never be used in evidence against him, when made after whipping or other chastisement has been inflicted or threatened, on account of the offense of which he is accused." Pas. Dig. art. 3128.

And it had generally been the rule to exclude all confessions made by a slave after his arrest. In this case, however, the offense was perpetrated when the same rules of evidence were applicable to the colored and to the white man. Pas. Dig. art. 5382.

The court instructed the jury as follows:

> "If you believe, from the evidence, that the confessions of the prisoner were made through fear, or in anticipation of violence, and, to relieve himself from such anticipated danger, he made such confession, the jury will disregard such confession, and not receive the same.
>
> "If the jury believe, from the evidence, that the confessions made by the prisoner were not free, and made by him to relieve himself from anticipated danger, although such danger did not really exist, they must disregard such confession, and make up their verdict on the other testimony. If some of the facts confessed were found to be true by other evidence, the jury may consider them all true."

The jury found the defendant guilty, and assessed his punishment at two years'

> imprisonment in the penitentiary. He moved in arrest of judgment and for a new trial, which being overruled, he appealed.

The Texas Supreme Court reversed and remanded for a new trial. Warren was entitled to the benefit of the law regarding confessions of persons in custody:

> The confession shall not be used, if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court, in accordance with law, or be made voluntarily, after having been first cautioned that it may be used against him, or unless, in connection with such confession, he make [a] statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property or instruments with which the offense was committed.

Penal Code, art. 662; Pas. Dig. art. 3127, 2d ed. The Court held that Warren, who was not a slave and not in the custody of an officer, was nevertheless "in custody, and the testimony very clearly shows that confession cannot be regarded as having been made free from restraint."

Value of Slaves

Carroll v. Carroll, 20 Tex. 731 (1858)

> In this Navarro County will dispute, the opinion includes:
>
> Property after marriage: 320 acres land on Aquilla creek, part H. R. of Wm. Ward, value $1, $320; 320 acres land, H. R. of Evan Roberts, same creek and Hill county, Texas, $320; 160 acres land, part H. R. John Ward, on same creek and county, $160; 160 acres land, part of H. R. Benj. Roberts, on same creek and county, $160; 320 acres of land, H. R. John Barkley, situated on Brazos river, (tax title,) $10; 47 1/2 acres land, part H. R. Jesus Ortez, in Navarro county, $475; 840 acres land, part of the Harper 1280 acres, in Navarro county, near Trinity river, $1,680; one negro boy named Harrison, value $400; one negro woman named Cresy, value $550; negro man named Dick, value $850; one negro man named Moses, value $1,100; one mule, $100; one yoke oxen and wagon, $110; lots Nos. 1, 2 and 9 in block 12, and appurtenances, house, tavern, value $1,800.

Blakely's Adm'r v. Duncan, 4 Tex. 184 (1849)

> In Mississippi, Mr. Tyler paid his debt to Mr. Duncan by delivering three slaves, Jenny,

Nicey and her child Isaac, to Mr. Blakely, Tyler's attorney. Instead of delivering the slaves to Duncan, Blackley instead took the to Texas. Duncan sued and won in the trial court. However, the Supreme Court reversed because the Fort Bend jury did not individually identify the value of each slave. The jury's verdict was:

> We find for the plaintiff the negroes in the petition named: a woman named Jenny, worth three hundred dollars, Nicey and her child, worth five hundred dollars, if the negroes can be found; otherwise we find for the plaintiff eleven hundred and nine dollars and thirty cents.

As the Court explained:

> Suppose the defendant might wish to surrender one of these two so jointly assessed: neither the verdict nor the judgment would furnish a basis of the valuation of the one so surrendered. It is presumed that the jury made the amount assessed in the aggregate by putting together the aggregate of their valuation and damages for detention. But in doing so they have presented the same obstacles, in the event of a part being so surrendered; because that it is not a fair presumption that the damage for detention was equal on each several slave.

Slaves as Gifts

Alexander v. Kennedy, 19 Tex. 488 (1857)

Thomas Kennedy and his wife gave six slaves as a gift to their daughter shortly after her marriage to Lorin C. Alexander. After she became ill, Alexander and his wife, together with the six slaves, moved into the Kennedy's residence. Mrs. Alexander died with a will and Alexander, overcome with grief, left and went to Fort Belknap "upon the frontier" for some years, then returned and demanded his portion of the slaves (one half), whose value was then $3500. The Kennedy's refused, and he sued. The jury sided with the Kennedy's, but the Supreme Court reversed. After a lengthy discussion of property rights, the Court concluded:

> Upon the whole, though the neglect of the plaintiff to claim an account and division, for nearly four years, is a presumption of abandonment of his rights, yet, as the property was left by him with those who might, in a certain sense, be regarded as standing in the relation of parents, and there being no evidence of any such acts of ownership as would, by reasonable diligence, apprise him of there being an adverse claim, and as the defendants did not take the possession, but they came into it by the voluntary act of plaintiff, reposing, as we must suppose, a high degree of trust and confidence in their fidelity and just regard to his rights, we must hold the verdict unwarranted by the evidence; and the judgment is therefore reversed and cause remanded.

Defective or Worthless Slaves

Blythe v. Speake, 23 Tex. 429 (1858)

William T. Blythe, Executor of Amos Ury's will, sued John Speake and Clinton Willard for breach of warranty, and fraud, in the sale of a slave. Blythe sought $1000 (the value of the slave) and $900 in damages (the amount expended for medical aid, medicines and care of the slave) and $2,000 for the breach of warranty. At the time of the sale, the slave had a chronic disease which manifested itself shortly after the purchase.

Blythe described the slaves suffering in his pleadings: "prostration, sickness affecting the stomach, shortness of breath, swelling of the body, palpitation of the heart and difficult respiration, so that he was unable to perform any kind of service, and was confined to his bed in a sick and languishing condition."

The trial court dismissed the suit because Blythe's petition failed to identify the disease. The Supreme Court reversed.

The question for the Court was whether the representations in the bill of sale constituted a warranty. The bill of sale stated in part:

> [The sellers] grant, bargain, sell, convey, and confirm unto Amos Ury, his heirs and assigns forever, a negro man, slave for life, by the name of Sam, about twenty-eight or thirty years old, sane and healthy (except one finger stiff) in mind and body, to have and to hold the above bargained and sold negro slave, unto the said Amos Ury, his heirs and assigns forever; and we, the said Speak and Willard, for ourselves, our heirs, assigns, etc., and against all and every other person or persons whomsoever, do and will warrant, and forever defend, by these presents.

The Court found no merit that Blythe couldn't name the disease; it was enough that his pleadings described the affliction in detail. And because the bill of sale specified "healthy ... in ... body," the defendants could be liable, so the Court awarded a new trial so that the issue could be litigated.

Whatever the disease, Sam was described as "worthless."

Murphy's Administrators v. Crain, 12 Tex. 297 (1854)

On February 18th, 1850, Thomas Murphy sold Crain "a negro girl of dark complexion, aged about seventeen years, named Catherine, and her child named Elizabeth, aged about eight months, for the sum of eight hundred dollars, warranted sound in body and mind and slaves for life." Catherine (who appeared to one doctor to be fourteen or fifteen years old) was pregnant and had

suffered from severe pleurisy.

"[A]s a general rule, the pleurisy leaves permanent consequences of the disease in the system, and after an attack the person is predisposed to a return of the same disease; in consequence of the premature pregnancy she was unable to endure the usual hardship and labor incident to slave labor [.]" After a trip to get tan bark in late March, 1851, her pleurisy returned. "[S]he partially recovered, relapsed and died, May, 1851; child died after the mother, was delicate but not diseased previous to the mother's death; in his opinion the child inherited the weakness and infirmities of its mother."

Mr. Whitford testified that Murphy remarked a few days after he sold the slaves to Crain, that "the negro girl he had let Crain have in part payment of the property was of no use to him."

In his defense, Murphy called witnesses who saw the slave walking in the snow with her child after an expedition with Crain to get "tan bark" about four miles outside of Marshall about two months before her death. Another witness saw her ride Crain's horse. They remained at their camp five or six days, and Catherine complained she was sick. Murphy called one of his slave managers from Tennessee who testified that before her sale to Crain, he had seen her "grubbing," that she was in good health and was seventeen years old.

Crain rebutted the defense by establishing the weather had been warm when they sought the tan bark, "the leaves were put out," she had plenty of clothing and dry cover, and others got the bark while she cooked.

Crain sued for $800 and won, but the Texas Supreme Court reversed with "no difficulty as to what must be the disposition of this case."

The Court found it well-established that "a breach of warranty of soundness, in case of the death of a negro from disease, it must be proved that the negro was unsound at the time of the sale, and that the unsoundness then existing was the occasion of his death."

The Court then expressed its incredulousness about the verdict:

> There not only was no evidence of any unsoundness at the time of the sale; but, on the contrary, the only evidence directly to that point proved the contrary; that, though the negro had had an attack of pleurisy previously, she had recovered from the attack, and was sound and well of that disease.
>
> Even if the effects of the disease remained in her system, of which there was no evidence, and could be but a mere inference, from the opinion of the witness to the effect that, having had one attack she would be more liable to have another; and that, "as a general rule the pleurisy leaves permanent consequences of the disease in the system," it can scarcely be seriously contended that the evidence warranted the conclusion that that was the occasion of her death; or that the sickness of which she

> died was superinduced, or even remotely occasioned by her former attack, of which the witness testified; or, indeed, that she died of any disease or unsoundness existing at the time of the sale.
>
> After so great a lapse of time, and under the circumstances immediately attending her last sickness, the supposition that her death was the effect of the natural progress, or even that it was the remote consequence of any disease or unsoundness existing at the time of the sale, is quite too improbable to be seriously entertained. There might have been more reason perhaps for such a supposition, if her last sickness were not traceable directly to an immediate, natural, and adequate cause; that is, her exposure to the inclemency of the weather, for five or six days, during which there was rain and snow, attended with a change from warm to extremely cold weather, with no shelter or protection from its extreme inclemency but a frail leaky camp; and though taken sick at the camp, having to walk and carry her infant through the snow several miles to her master's residence. This was followed by a severe attack of pleurisy; of which after a partial recovery and relapse she died. And there could have been, it would seem, no doubt, and should have been no hesitancy on the part of the jury in coming to the conclusion, without the aid of professional opinions, as the only natural and probable inference to be drawn from the facts that the disease of which she died was thus contracted.

Nations v. Jones, 20 Tex. 300 (1857)

James Nations bought a slave, Henry, from John G. Jones who warranted the slave to be of sound mind. Nations refused to pay because he claimed the slave was mentally infirm. Jones sued and won.

Three weeks before trial, a physician examined Henry and concluded "that the boy had but little mental development; that his mind was of a low grade, not an idiot, but between uncommon stupidity and idiocy; that he had but little intellect, but that little was sound; it was not the result of disease, but of mental imbecility or want of development."

Some thought he was an adequate worker and that he was worth the $1000 Nations paid for him.

Before the sale, Jones told Nations "that the boy was a fool-headed negro; that he was a chuckle-headed fool, and would not suit; that he had sense enough to do any thing he was told. To which the defendant immediately replied, 'That was the kind of a negro he wanted;' and that the defendant then went and examined the negro."

The Texas Supreme Court affirmed, noting that Henry was perhaps not as dumb as Jones claimed or Nations wanted.

Ables v. Donley, 8 Tex. 331 (1852)

Donley sued Ables for selling him an "unsound and worthless" slave. A few days after he bought her, she had chills and fever and died two months later, presumably of typhoid fever. After Donley won, Ables moved for a new trial with new evidence. The slave had been sold in 1850 in New Orleans for $80 as "a sickly and unsound negro," then sold to a man in Mississippi who then moved to Texas. Another witness later saw the slave, who appeared "lame" and "defective." Because this newly-discovered evidence would not have changed the outcome of trial, the judgment was affirmed.

Title to Slaves

Manley v. Culver's Heirs, 20 Tex. 143 (1857)

On April 22, 1844, A.J. Smith had given Ben, a slave, as a gift to William and Eliza Culver's children, Martin, Marion and Martha. Ben was valued at $1200 in 1841 and 1851, and he could be loaned for $15 or $20 a month. William and Eliza Culver sold Ben to Manley for $600 on September 3, 1846 because Ben had become "diseased" and his value had plummeted.

The children sued A.P. Manley to recover the value of Ben. While Culver delivered Ben to Manley, he did not have title. The Supreme Court affirmed their award of $650 and damages at the rate of $145 a month since the illegal sale.

William Todd v. E. B. Dysart, Administrator, 23 Tex. 590 (1859)

William Todd sued his father's estate for the recovery of "two negro slaves, named Frank and Sarah." Todd contended that his father conveyed the slaves to him in 1851, while he was living on the Sabine River. Todd moved to his father's residence until 1853. He moved to a farm about a mile from his father's house. The father died the next year and the administrator seized the slaves.

Todd's brother claimed Todd conveyed the slaves back to their father because he couldn't afford them. He also claimed that Todd acted as his father's overseer and heard their father "several times, after the execution of the deeds, in 1853, claim the negroes; had heard him speak of selling Frank, if he did not behave himself; and that the deceased simply gave permission to let the negroes wait on the plaintiff's family at night, after they removed to the neighboring farm, but requiring them to work on his plantation in the day-time." He also said that Todd complained "that he had no negroes to wait on him, nor would his father let him have any."

At trial, the estate prevailed, but the Supreme Court reversed because the trial court excluded the testimony of a relative who heard the father say that Todd had bought Frank.

Avery v. Avery, 12 Tex. 54 (1854)

James S. Avery married his wife, Mary, in Georgia. At the time, she owned a slave. Avery became indebted and "becoming a good deal embarrassed, he ran the said slave" to Louisiana to prevent the slave from being sold to pay his debts. However, he got out of debt and "whilst in the State of Louisiana, he proposed to his wife that he would exchange one of his own slaves for one that would suit his wife better than the one he had acquired by his marriage with her." He bought her John.

The Avery family then moved to Cherokee County, Texas where Mr. Avery died. The widow Avery her husband's estate for the recovery of John. The estate sought to sell the slave to pay Mr. Avery's debts. A jury awarded the widow $80 in damages and the slave.

Under Georgia law, a wife could not own separate property; her property became the property of the husband at the time of marriage. Under Louisiana law, however, a wife could own separate property, which was the state where John was purchased. The Supreme Court affirmed, in part because none of Mr. Avery's creditors were seeking the slave.

Warren v. Dickerson, 3 Tex. 460 (1848)

In the summer or fall of 1840, Mr. Warren and his wife, Nancy, arrived in Texas with Frank, a slave. In 1843, Mr. Warren sold the slave to Richard B. Tutt for eighteen cows and calfs. Only Warren claimed or exercised ownership of the slave, but there was some "rumor" that the slave belonged to Mrs. Warren.

Mrs. Warren produced her father's will which stated, "I give to my daughter, Nancy M. Warren, a negro boy named Frank, the same which I have already loaned to her, and which with her husband, John Warren, she has already in possession. The same I give to my daughter, Nancy M. Warren, and her heirs forever."

Warren sued to get her slave back, but lost because her husband failed to record the property in Houston County, depriving Tutt, and Dickerson (presumably his creditor) of notice.

Case v. Jennings, 17 Tex. 661 (1856)

Erastus F. Jennings and Charles W. Henderson sued Sherman Case to recover a slave, Celia, or her value. All were partners in raising stock, but the partnership dissolved in 1855. Jennings gave Case some stock (horses and mules) to sell for Jennings as part of the dissolution. Case apparently traded some of the stock for Celia, and concealed her from his former partners who then sued him. Case admitted he obtained the slave from James McLaurin, but had sold her to Augus McLaurin for

a $600 note which had been later to L. C. Cunningham. The judgment against Case was affirmed.

Calvit v. Cloud, 14 Tex. 53 (1855)

In 1834, Adam E. Cloud's grandfather deeded him a slave, Emily, and her child in Brazoria, in the Mexican State of Coahuila and Texas. In 1847, "under color of some legal process," F.J. Calvit took possession of the slaves.

In 1848, Cloud sued and, in 1853, Cloud won, recovering $800 (Emily's value), $200 (value of her child), as well as $780 for the six years of their service at $130 a year. Calvit had argued that the transaction between Cloud and his grandfather was invalid because it occurred under Mexican law, which abolished slavery. The opinion does not reveal what happened to Emily and her child.

McGreal v. Wilson, 9 Tex. 426 (1853)

Wilson sued Peter McGreal for his services (together with U.S. marshal E. F. Lenard and seven or eight others) in seizing and delivering about seventy slaves to McGreal in Brazoria. It took five days to deliver, and some considered the mission dangerous. McGreal was apparently acting as receiver in a pending federal case. Wilson also proved that McGreal "contracted to let him have the use of two of the best negroes in the lot[.]"

State v. Jones, Tex. 383 (1849)

The State sued Jones for a $500 penalty for refusing to return corn and cotton for assessment for taxation. Jones argued that the corn and cotton were the produce of his plantation for the previous year. The trial court sided with Jones, and the Supreme Court affirmed.

> The word "property" used in the statute imposing taxes is certainly comprehensive enough to embrace corn and cotton; and were the question to be decided on the import of that term in the abstract, it would be destructive of the defense set up. But such construction of the term "property," when taken in connection with the Constitution and law imposing taxes for the purpose of raising a revenue, would be so unequal, unjust, and oppressive to the planting interest of the State that it cannot be supposed that such was the meaning of the law. A single view of the subject will fully show that it was not.
>
> The planter's slave is assessed at his full value as a slave for life. Now, it would be difficult to conceive of any intrinsic value in the slave. He is only valuable as possessing a capacity for usefulness. He is capable of producing corn and cotton when employed by the planter.

> Now, if the slave has been taxed in proportion to his value, and the corn and cotton produced by him again taxed, it is, in effect, levying another tax on the slave. Under the tax law the slave is assessed annually at his full valuation, what it is supposed he would sell for. And so are the mules or teams.
>
> If the products are to be taxed, it surely could not be required that the slaves and teams should be assessed at a higher valuation than for one year's use. A tax is imposed on money at interest, and yet the interest so accruing is not taxed until it is let out to interest. If the corn and cotton should be exchanged for other property, that property would be subject to taxation. So the interest accruing on money loaned; if that interest is invested in a loan, it becomes subject to taxation.
>
> It would seem that the law did not intend to embrace such property, because it had already been taxed. If it had been sold before the 1st day of January following the year it was made, the corn and cotton would not have been subject to taxation, nor the proceeds, if in money, and not at interest. To tax it, then, would look very much like imposing a penalty for not getting it to market before the 1st day of January. I am satisfied that it was not intended to tax such products, and that the law, when taken altogether, does not include them as taxable.

Garrett v. Gaines, 6 Tex. 435 (1851).

This case involved a breach of warranty of the title of a slave. It includes the recitation of a Louisiana case, *Edwards v. Martin*, 19 La. 284.:

> In that case the plaintiffs were colored persons, children of a colored woman named Polly Edwards, who was sold as a slave, the 24th April, 1802, by Joseph Andrus, to Andre Martin, the ancestor of defendants, for six hundred and twenty-five dollars. The plaintiffs were all born after this sale, and while their mother was held, as a slave, by Martin.
>
> He afterwards sold her to one Foreman, against whom she asserted her freedom, alleging that she was free born. She had judgment, declaring that she was free, and that she was born free.
>
> Foreman had judgment over against Martin, on his warranty, for six hundred and sixty-five dollars; who had alike judgment against Andrus; and who had, also, judgment against the widow and heirs of Ed. King.
>
> Martin, being now sued by the children of Polly Edwards, for their freedom, called Andrus in warranty, as the vendor of their mother, and judgment was rendered, declaring them free and assessing their value as slaves, at $4,800; and the heirs of the

vendee, Martin, had judgment for that sum against Andrews, the vendor. The judgment was so amended, by the Supreme Court, as to allow to the heirs of Martin, instead of $4,800, only the sum of $625, the price paid for the mother of the said children. The cause was twice elaborately argued.

McDonald v. McGuire, 8 Tex. 361 (1852)

Mrs. McGuire was given a "negro boy named Washington," on September 20, 1841 from Burwell J. Thompson. Person's unknown took the slave. In 1847, he sued a relative, Alexander McDonald, for damages after she heard that Washington was on his plantation on the Trinity River in Huntsville. McGuire's husband loaned the slave to Elisha Roberts.

The slave then was possessed by Roberts' son-in-law, McDonald. McGuire moved from San Augustine County to Montgomery, making frequent inquiries about the whereabouts of the slave. When they heard that he was in McDonald's possession, McGuire's brother went to the Huntsville plantation and discovered the slave had been moved to another plantation in Houston County, in the bend of the river, remote from settlement, about fifteen or twenty miles from Huntsville. The defendant, however, asserted the statute of limitations and the case was dismissed.

Gabriel Moore's Adm'r v. Mary Minerva and her Children, 17 Tex. 20 (1856)

In 1841 or 1842, Alabama resident Gabriel Moore took his slave, Mary Minerva, then between twelve and fourteen years of age, to Cincinnati, Ohio, and left her there at school, declaring at the time, in Cincinnati, his intention to educate and emancipate her. In 1842, he returned to Cincinnati and executed and recorded a deed of manumission.

In 1843 or 1844, Moore took her to Texas. He died in 1844, and Moore's heirs regarded her as a slave and hired her out to William A. Hill. Minerva sued for her freedom and the freedom of her four children through her next friend, Obadiah Hendrick, as well as damages for being enslaved. She won her suit and the Texas Supreme Court affirmed.

B. J. Pridgen v. F. M. Buchannon and others, 24 Tex. 655 (1860)

Wiley W. Pridgen, a minor, loaned several of his slaves to DeWitt County farmers F. M. Buchannon, Lemuel Stubbs and Benjamin Cage for $345. One was a slave named Biddy, who died while in their possession.

Pridgen sued, alleging that the farmers took her out of De Witt County and "in the fall of the year, to county, on Caney creek, and there causing her to be employed in picking cotton, and in performing other labors in the swamps and sloughs between the Colorado and Brazos bottoms, a

region of country notorious for being unhealthy, and particularly so to persons unacclimated to that section of country," thereby failing to use ordinary care, diligence and attention in administering to the common wants and necessities of a slave. Buchannon, Cage and Stubbs won and Pridgen appealed. The Supreme Court reversed because the trial court instructed the jury that there was nothing wrong in the removal of the slave from the county, despite the evidence that "the removal of the slave to Old Caney, at that time, greatly increased the risk of her life [.]"

Bufford v. Holliman, 10 Tex. 560 (1853).

In 1814, Yancy Thornton died in Tennessee. His will left his property – "the house and lot where she lived, several negroes, among whom was one named Phoebe, cattle, hogs, &c." – to his wife, Amelia during her natural life, and then to his own children upon Amelia's death. Amelia moved to the Republic of Texas in January, 1843, and "still had Phoebe, one of the slaves, with her increase, in her possession[.]"

After Amelia died, "Phoebe, with her children and grand-children," had remained in possession of Eliza Holliman, Yancy Thornton's only surviving child. His other three children Harriet, Patsy and Alfred had all died. Harriet and Alfred died in 1830, unmarried, without wills and without children. Patsy died in 1821, but had children. When Patsy's husband, William Bufford, died in 1844, their surviving children sued Eliza Holliman, claiming they were entitled to "one-half of the said slave Phoebe and her increase."

The trial court dismissed the suit, but the Supreme Court reversed and let the trial proceed because when Patsy died, all her interests vested in her children.

Love v. Robertson, 7 Tex. 6 (1851)

Jonathan Robertson married Mary Love in 1837, but Jonathan died seven years later. He had two slaves, Peter and Finn. His minor son, Felix claimed them in right of his father. At At the time of the marriage, Jonathan had made a sale of his patrimony at $1,030. He used these proceeds to buy Peter and Finn ($700 for Peter and $330 toward the $800 price for Finn). At the time of his death, there was an unpaid debt due to T.D. Robertson who gave it to Felix. Because the slaves were hired, the probate court decided the slaves were Jonathan's separate property and awarded them both to Felix. The Supreme Court reversed, holding that Peter was Jonathan's separate property, but Finn was not.

Hill v. Fairfax, 38 Tex. 220 (1873)

Anna Hill and Solomon Fairfax were slaves until emancipation and in 1865, began living together and holding themselves out to be husband and wife. However, in 1869, Solomon left Anna

and married another woman. Before he left Anna, they improved two lots. If their pre-emancipation marriage were not recognized, the property would be equitably divided. But if it were recognized, then Anna would be entitled to the same interest in the property that other married women would take, i.e., community property.

Article 12, Section 27 of the Texas Constitution of 1869 provided:

> All persons who, at any time heretofore, lived together as husband and wife, and both of whom, by the law of bondage, were precluded from the rites of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married; and the issue of such cohabitation shall be deemed legitimate. And all such persons as may be now living together, in such relation, shall be considered as having been legally married; and the children heretofore, or hereafter, born of such cohabitations, shall be deemed legitimate.

However, the trial judge instructed the jury:

> If plaintiff and defendant, both being negro slaves, lived together during slavery after the manner of man and wife among slaves, but were not, after emancipation, married or agreed to marry, followed by actual marriage, then such previous cohabitation was not, under the law, legal marriage. If the relation which existed between plaintiff and defendant was meretricious, then no right of property could begin or arise out of that relation; no length of cohabitation in condition of concubinage constitutes marriage.

The Court held that "[a]ctual marriage ... is not necessary to entitle a woman to the rights of a wife, whose case falls within the provision of our Constitution on this subject," and reversed.

The attorneys' arguments are noteworthy:

> Suppose that issue are born of the mere lascivious connection of a free white man and a bond woman becoming free. He then disclaims the illegal and unnatural connection and takes an honest colored woman in lawful marriage, and issue are born. Without the bona fide relation of "husband and wife," in substance if not in form, here insisted upon, the concubine or the mistress and the illegitimate children would exclude the lawful wife and legitimate children.
>
> Suppose, again, he prefers to take a white woman in lawful marriage and issue are born. Still the concubine or the wanton and the bastard progeny would exclude the lawful wife and the lawful offspring. This reasoning would equally apply to slaves exclusively, becoming free. They, too, might change their mode of life, form a lawful connection, have children, and then bear the same fatal results. For example, the case at bar.

> These consequences might be traced ad infinitum, until collectively they would appall the devil himself.
>
> It has been contended, somewhat boldly, that the provision of the Constitution does not apply to cases where both parties were slaves, however confidently assumed. The ground seems to be that the only preclusion of "the rites of matrimony" was an express statutory enactment, but that that precluded the white and the free from "the rites of matrimony," with the black and the slave. Therefore the former were alone precluded; therefore the provision, moving upon a preclusion of matrimonial rites, contemplates the former only; therefore the free white man and the slave can alone enforce its obligations, or claim its benefits.
>
> The provision moves only upon that class of cases. But if this be so, the provision does not and cannot apply to the case at bar, both being slaves. This point is respectfully submitted to the consideration of the court.

Coleman v. Vollmer, 31 S.W. 413 (Tex.App. 1895)

In 1863, slaves Jack Coleman and began living together as husband and wife. She died in 1894, but had executed various deeds to the property. John Vollmer claimed ownership, while Jack Coleman that the property (including the homestead) was the community estate. Because they were slaves before June 19, 1865, Vollmer argued, "under the laws of bondage, were prohibited from a valid marriage contract[.]" The Court found that the fact that they had been living together continuously for 31 years, they were validly married. While they were incapable of forming or entering into the marriage contract when they were slaves, they ratified their marriage after emancipation.

Other Property Disputes

Hagerty's Ex'rs v. Scott, 10 Tex. 525 (1853)

In 1830, Benjamin and Rebecca Hawkins, natives and members of the Creek Nation of Indians (in the Territory of Arkansas), married and had two children, William and Louisa. In 1833, Benjamin and Rebecca Hawkins, along with Louisa, moved to Texas. In 1833 [there is a typo "1863" in the opinion], William died in the Creek Nation. According to the laws of the Creek Nation, the slaves became the sole property of his sister, Louisa. But in 1838, Benjamin died, and Rebecca remarried to Spire M. Hagerty who assumed control over the slaves and their "increase." Litigation ensued. *See also Hagerty v. Harwell*, 16 Tex. 663 (1856).

Smith v. Walton, 82 Tex. 547, 18 S.W. 217 (Tex. 1891)

Peter Allen, "a free man of color," moved to Texas and in 1835 enlisted in a volunteer company which became a part of the army of the Republic of Texas, and that he fell with Fannin at Goliad in 1836, where he was killed. He had no children, but a wife, Mary Allen. He married her when she was a slave. Allen's brother (John Allen), and two sisters (Sarah Wilkins and Mary Adams) obtained "a headright for 1476 acres, dated May 21, 1851; a bounty for 1920 acres, and a donation for 640 acres" which were issued to Allen for his service in the army. Mary Allen sued and won.

The lawsuit involved a famous musician who was killed in a massacre at Goliad. From the Handbook of Texas:

> The night before the massacre, Capt. Jack Shackelford, commander of the Alabama Red Rovers, recalled that the musicians of the troop, which would have included Peter Allen, played the tune "Home, Sweet Home" on their flutes as tears "rolled down many a manly cheek." The next morning, Palm Sunday, March 27, 1836, the men were awakened at dawn by their Mexican guards, split into four divisions, and marched outside the fort. Each group proceeded in a different direction. Some minutes later, Shackelford heard shots and the screams of men as they were being executed. Later that day, the mangled corpses of his comrades were burned by the Mexican soldiers.
>
> Peter Allen's widow, Mary, lived the remainder of her life in Huntsville, Alabama, and died in that city in 1885. Her second husband, John Cook, preceded her in death. Mary's obituary recounted Peter's service in the Texas Revolution and his refusal to save his own life when offered his freedom in return for again playing "Home, Sweet Home," this time at the request of the Mexican commander. The Huntsville Independent recalled Peter Allen's determination to remain with his comrades and share their fate when he replied to the Mexican commander, "No, I'll not play, but I'll just go along with the rest of the boys."

John Ford's Adm'r v. Clements and Wife, 13 Tex. 592 (1855)

Tarpley Oldham owned Narcissa in Tennessee and died in 1824, leaving a widow and his daughter, Miranda. In 1827, the widow of Oldham conveyed Narcissa to Miranda, who was a child at the time. The widow then married John Ford, and the four of them moved to Mississippi. Miranda was still a child at the time of the marriage to Ford. In 1844, Miranda married Mr. Eastwood. In 1845, Ford sold Narcissa her liberty and the liberty of one of her children. In 1848, Narcissa paid Miranda's new husband, Mr. Eastwood $100 and his expenses to carry her and her children to Ohio. A year later, Eastwood died. Miranda remarried Mr. Clements and moved to Texas.

Miranda sued Ford for the value of Narcissa and her children on grounds that he had concealed her title to Narcissa and her children and had been told that she would share in the value of the proceeds of the sale of Narcissa and her children. She won a $1000 verdict, but it was reversed on statute of limitations grounds.

Thomas B. Howard v. Lettie Marshall et al., 48 Tex. 471 (1878)

"B. G. Marshall, being a cripple and a single man, never married, lived on his plantation, in Fort Bend county, having with him no relatives or connections, and having no family, unless Duncan Marshall and wife Lettie, his former slaves, who, with their children and grandchildren, lived with him in the same house, managed his domestic affairs, and ministered to his infirmities, having his confidence and friendship as faithful servants, constituted such family. In 1871, B. G. Marshall died, leaving a will, the material part of which is as follows:

> I give all of my property to my former true and faithful servants, Duncan Marshall and his wife, Lettie Marshall, during their lifetime, and at their death, but not until the death of both of them, to their grandchildren, Henry Marshall and Benjamin Green Marshall, the children of their daughter Ann Marshall, and Robert Willis and Fredonia Willis, the children of their daughter Lucy Willis. I would like my plantation to be carried on, that my former servants might have a home so long as they deported themselves correctly and made good hands. Of course, my debts will have to [be] paid; but I hope to live long enough to pay every cent I owe, and at my death I hope to owe nothing.

"The will was written in 1867, several years before his death, and in the interim Duncan Marshall had died. B. G. Marshall died largely indebted, and the will having been probated, T. B. Howard, one of his creditors, was appointed administrator of the estate, with the will annexed. The appellee, Lettie Marshall, alleging that she was the principal devisee under the will, and a constituent member of the family, moved the court to set aside to her all such property as was exempted from execution or forced sale by the Constitution and laws of the State. This application, in which she was afterwards joined by her grandchildren, was resisted by the administrator, who denied that they were constituents of the family."

The jury found in favor of Lettie, but the Supreme Court reversed, finding that "family" was confined to family "husband, wife, and children," for purposes of the homestead exemption.

Schwarz v. Allen et al., 37 S.W. 986 (Tex.App. 1896)

Alfred Allen and his brothers and sisters sought to recover land in Austin County as the heirs of Ephraim Allen, their father. Under the law, they have a right to the land so long as they are "legitimate" children. They would have no such right if their mother, Mattie Smith, and father were

not lawfully married.

While never married, they held themselves out to be married, which would be a common-law marriage under Texas law. They would also be considered married if they had gone to the Freedman's Bureau and had a marriage ceremony performed. The Allens won, but the court of appeals reversed because the trial court instructed the jury it could consider "the practices and customs of slaves and their practices and customs after the emancipation."

Smith v. Anderson, 39 Tex. 496 (Tex. 1873)

This opinion involved a suite to recover slaves brought in 1853. The Court said, "However much of the original importance attaching to this suit may have been lost by lapse of time and the events of the war, we find it necessary to reverse and remand the case for at least two errors apparent upon the record."

John Guffey v. James W. Moseley, 21 Tex. 408 (1858)

The evidence in a suit for damages for killing a mare was stated:

> Be it remembered that on the trial of this cause the plaintiff introduced Joseph McCarly, a witness, by whom he proved that defendant, on or about the time stated in petition, came to his house and agreed with witness to go fire-hunting; that witness took no gun, but that defendant Moseley left his gun at witness' house and took in its place witness' gun; that they went on by one Corns, where Moseley insisted on a negro boy slave of J. T. Tinnin going with them; that the slave at first refused, but at Moseley's persuasion at last consented; that they, witness, slave and Moseley went out to hunt, Moseley carrying the gun, and the slave the fire-pan; that negro said he shined a pair of eyes; that Moseley gave him the gun, and told him, the negro, to shoot, which he did, and plaintif's [sic] mare was killed by the shot.

Ansimus Duffell and Wife v. Jameson S. Noble, Adm'r, 14 Tex. 640 (Tex.1855)

Ansimus and Martha Duffell sued Jameson S. Noble, administrator of Lydia Loving, for the recovery of a 14-year-old slave girl, Missouri, also called "Puss."

The Duffell's son testified that Missouri was born in Alabama in December, 1838 at his parent's house. Her mother was a slave named Nelly who was owned by Lydia Loving. He frequently overheard Loving, say that she had given the girl Missouri to his mother (Martha Duffell) at the time of Missouri's birth. Loving lived with the Duffells, but when she moved out, the child would remain with the Duffells while Nelly would leave with her owner, Loving.

However, "the mother of the child, who was an obstinate and high-tempered old negro, made a great fuss about it, and declared she would not leave the child; and his grandmother [Loving] and mother [Duffell], after consulting about the matter, it was concluded that the child and mother should go together with Mrs. Loving, (his grandmother.)" Loving moved to Texas about a year later, then died in 1850 or 1851.

Four witnesses who knew Loving testified that she indicated that Missouri was owned by Mrs. Duffell. One witness, Mrs. Meadow, noted that Mrs. Duffell sent clothes to Missouri from Louisiana, about 150 miles from where Loving lived. Mrs. Meadow "had frequently heard Mrs. Loving speak to the girl about sending her to her Miss Martha Duffell. Such expressions were frequently made when she was fretted."

The Duffells lost. While Missouri was intended as a gift, it is effectively "cancelled" when Loving took control over the slave.

Lyman Brightman v. J. M. Word, Administrator, etc., 37 Tex. 310 (Tex. 1873)

"The property in the negro woman and child did not pass absolutely under the mortgage, but taking a mortgage over other property than the land sold, released the vendor's lien. When the slaves were emancipated, they were still the property of the mortgagor, and the maxim *res perit domino* must apply; but the court erred in decreeing a vendor's lien. The judgment of the District Court must be reversed and the cause remanded."

*Holland v. Swille*y, 268 S.W. 758 (Tex.App. 1925)

> The land was pre-empted by George Reubin, who, appellant claims, was her grandfather, in the '80's. Proof of occupancy was not filed in the general land office until after the death of George Reubin, and then patent was issued to the heirs of George Reubin, January 22, 1894. George Reubin was a slave and belonged to a man named Sevan Broussard. While a slave he lived with a negro woman, who also was a slave, but belonged to a different master, another Broussard. Her owner removed from Texas to Louisiana before the Civil War, and she went to Louisiana with him. George Reubin never lived with this woman after she went with her master to Louisiana. He had a daughter by this woman named Lesau, who was the mother of appellant. After the war George Reubin married a negro woman by the name of Sallie, and they lived together on the land in controversy until she died. She died before George died, not leaving any children. While George Reubin lived with his wife, Sallie, he brought his daughter, Lesau, to his home, and she lived with him for a time on the land in question. At that time Lesau was a little girl some eight or ten years old. She continued to live with him and his wife, Sallie, until Sallie died, and for some two or three years afterwards, when she went away, and then he left, and no one lived on the place after that, and the house rotted down. When George Reubin

left the place he went and lived at the home of a white lady named Mrs. Walter Taylor, where he continued to live until he died, in 1892. Mrs. Taylor administered upon the estate of George Reubin, and the land in controversy was sold under this administration for the payment of debts owed by Reubin. Appellant W. S. Swilley purchased the land at administrator's sale, and received deed thereto.

When the Civil War Began, Slavery Ended and Confederate Money

Stephen Bishop et al. v. Jones & Petty, 28 Tex. 294 (1866)

In 1857, a company sold a thousand acres of land with a saw and grist-mill for $18,800. The buyers (Stephen Bishop, Benjamin Lyman, and N.M. Brice) put up $6000, and secured the rest with a mortgage of sixteen slaves. The note was eventually sold to another company, Jones & Petty on January 16, 1861.

On March 8, 1861, Jones & Petty sued Bishop, Lyman and Brice. The defendants, in turn, claimed that "Jones & Petty were not the real owners of the note, but in truth held it for the use and benefit of alien enemies of the United States of North America" and that the United States had been in a state of war "against the Confederate States of North America, of which the defendants are citizens [.]" The court ruled against the defendants.

The defendants appealed on April 27, 1861, but "the case rested until the war ended." The Supreme Court ultimately affirmed. The following is verbatim from the opinion and reflects, as much as a judicial opinion can, the mood and nuances of the day:

> One of the plaintiffs fell in battle; the other commanded a regiment, and won the renown of a soldier, although he had most earnestly opposed the whole movement. The judge who tried the cause and two of the counsel of the defendant made their war records. The war ended not in the rejoicings which this record indicates. The order to sell the sixteen slaves needed no reversal. Before the supreme court which had been created under the new constitution pronounced this decision these chattels had become free citizens. The war had been fought upon the theory that a rebellion was being conquered. Every movement in the direction of reconstruction was upon that hypothesis.
>
> Moore, C. J. On the 8th day of March, 1861, the appellees, who were citizens of Bastrop county, brought suit in the district court of said county against the appellants, on a note payable to Cunningham & Crocheron or bearer, and to enforce a mortgage and vendor's lien, which they claimed to hold for the security of the amount due on said note. On the 16th day of April, 1861, the appellants filed an amended answer, in which they alleged that the appellees have no right, title, or interest in said note;

that they hold the mere possession of the same, and have the naked legal title to it for the use and benefit of alien enemies; that said usees and beneficiaries of said note reside in and are citizens of the United States of North America; that said United States is, and at all times since the institution of the suit against them had been, in a state of war against the Confederate States of North America, etc.

On the trial of the cause, appellants proposed to prove by one of the appellees that they were not the real owners of the note, but held merely the naked possession thereof for the use and benefit of parties who were, and had been since the institution of the suit, resident citizens of the United States of America.

The evidence was excluded by the court, because the appellants had not proved the existence of war between the United States and the Confederate States, notwithstanding it was insisted by the appellants that the court should take judicial notice of the existence of such war; and for the purpose of showing it to be a matter within the judicial knowledge of the court, they referred to, and proposed to read as evidence to the court, the current newspapers of the day.

Appellants, on the 17th day of April, the day after judgment was rendered against them, asked for a new trial on the ground of newly-discovered evidence. This newly-discovered evidence consisted solely of New Orleans and Galveston newspapers, which reached the town of Bastrop (where the trial of the cause was had) after its conclusion, in which was contained an announcement of the demand by General Beauregard for the evacuation of Fort Sumter, and its subsequent bombardment by the order of the secretary of war of the Confederate States, together with the other transpiring events of that period.

The motion for a new trial was refused. This ruling of the court, and its exclusion of the testimony offered on the trial to which we have adverted, are relied upon as the leading grounds for a reversal of the judgment.

The right of prosecuting suits by citizens of one friendly power in the courts of another is a well-established rule of international comity. This, however, is, and in the very nature of things can only be, a rule for peace. War terminates all friendly intercourse between the citizens of hostile states. There cannot be, as has been frequently said, “a war for arms and a peace for commerce.” To suffer individuals to carry on commercial or friendly intercourse while the two governments are at war, would be placing the act of the government and the acts of individuals in contradiction with each other. Certainly such antagonism by the citizen to his government cannot receive the sanction or encouragement of its courts, much less will they become instrumental in giving aid and protection to its enemies. It is therefore not to be disputed, as a general rule, that the resident citizens of one belligerent cannot bring or prosecute a suit in the courts of the other.

There are, however, certain exceptions to this general rule, as well established as the rule itself. Although the ruling of the district court was not based upon this ground, it may not be amiss for us to inquire if the present suit did not come within the exceptions to the general rule, if indeed the court should have taken judicial notice that war existed between the United States and the Confederate States when the question was presented for decision in the district court.

As we have seen, the general rule depends upon and grows out of the fundamental principle, that when the sovereign power of a state declares war against another state, it implies that the whole nation declares war, and that all the subjects or citizens of the one are enemies to those of the other; and all intercourse and transactions with those who are enemies of the state is illegal, and should be condemned, because it contravenes the object and policy of the government, embarrassing the operation of war, and lessening the ability and efficiency of the government in its prosecution.

But when the sovereign sanctions the act, or such sanction must necessarily be inferred from his act, this principle is not applicable, and the rule is not enforced. Thus, ransom bills and bills of exchange drawn by a prisoner of war in favor of an enemy for his necessary support while detained as a prisoner are held to be valid contracts. Antoin v. Morehead, 6 Taunt. 237. So, also, when a particular trade or intercourse is carried on under a special permit from the sovereign; and likewise when an enemy remains in the country, or comes to reside therein by special permission of the government after the breaking out of hostilities. In such cases he is unquestionably entitled to protection in his person and property, and may seek redress for an injury to either in the courts of the country wherein he is thus residing pending the war. Sparenburgh v. Bannatyne, 1 Bos. & P. 163; Wills v. Williams, 1 Ld. Raym. 282; 1 Lutw. 34; 1 Salk. 46. And it has even been held, when an alien continued to reside in the country after the commencement of hostilities, that the courts will presume he does so by permission of the government.

It is also said that it may now be regarded in accordance with universal public law, that aliens who have come to reside in the country during peace shall be allowed a reasonable time after the inception of war to wind up their business and remove from the country with their property and effects, and during the time they thus remain they are entitled to protection in their persons and property, and may either sue or be sued. Clark v. Morey, 10 Johns. 72. It is also to be observed, that the act of congress of the 6th of July, 1798, authorized the president of the United States, in case of war, to direct the conduct to be observed towards the subjects of the hostile nation, being aliens, and within the United States, and in what cases and upon what security their residence may be permitted; and in reference to those who are to depart, it declares that they shall be allowed such reasonable time as may be consistent with public safety and according to the dictates of humanity and national hospitality, “for the *recovery*, disposal, and removal of their goods and effects, and for their departure.”

The statutes of the United States, passed before the secession of the states forming the Confederacy, were as obligatory on these states subsequently to that time as they had been prior thereto, if not inapplicable on account of their changed political condition. It might, no doubt, have been justly urged, in view of the attitude of the government of the United States towards the Confederate States, that there would have been no just ground of censure against the Confederacy if the immunities of this statute had not been extended to citizens of the United States residing in the Confederacy.

But this in no way militated against the power of the president of the Confederate States to exercise the functions conferred by this law, if, indeed, he was not authorized to do so by an act of the provisional congress of the Confederate States; especially as it is, as we have seen, nothing more than the generally recognized public law upon the subject. Nor should the court have presumed, in advance of the action of the government, that this general usage of civilized nations would be violated by the Confederate States. To have done so would have been very wrong in theory and false in fact. The action of the Confederate authorities went to the full extent of the rule by which the most enlightened and liberal nations are guided. The president of the Confederate States, by a proclamation issued shortly after the commencement of the war, fixed the time within which alien enemies should leave the country. Until the expiration of that time, they remained with the consent and under the protection of the government, and could therefore sue and be sued.

It may be insisted that, as the beneficiaries in this suit are alleged to have been resident citizens of the United States, it is to be presumed they were not at that time in the Confederacy, and therefore they are not protected by the proclamation, which applied only to such persons as were within its jurisdiction. To this it is sufficient to say, that the parties by whom the suit is brought were here. They did not come in violation of belligerent obligations into the country after the commencement of the war. The reason why a suit cannot be sustained by a citizen for the benefit of an alien enemy is, to prevent fraud upon the court, because what cannot be done directly should not be permitted indirectly. If, then, the principal might have recovered the property to which he was entitled by suit in his own name, for the purpose of removing it from the country, we see no reason why this could not be done by his agent.

The question upon which the case was decided in the court below seems to be equally well settled against the appellants. Could the court say, as a matter of judicial knowledge, on the day the motion for a new trial was overruled, that war existed between the Confederate States and the United States? We answer this question emphatically in the negative.

Viewed in the light of subsequent events, we may and do in the popular sense speak

of the war as having commenced at a period anterior to that on which this case was acted upon in the court below. But when we thus speak, we may and generally do attach a very different signification to the word from that which must be given it by law. War does not exist merely on the suspension of the usual relations of peace. Commerce may be interdicted without producing it. Reprisals and embargoes are forcible measures of redress, but do not, *per se*, constitute war. Hostile attacks and armed invasions of the territory or jurisdiction of a nation, accompanied by the destruction of life and property by officers acting under the sanction and authority of their governments, however great and flagrant provocations to war, are often atoned for and adjusted without its ensuing. War in its legal sense has been aptly defined to be "the state of nations among whom there is an interruption of all pacific relations, and a general contestation of arms authorized by the sovereign." It is true, it may and has frequently in latter times been commenced and carried on without either a notice or declaration. But still, there can be no war by its government, of which the court can take judicial knowledge, until there has been some act or declaration creating or recognizing its existence by that department of the government clothed with the war-making power. In the Confederate States, congress was invested with this power.

Until it acted, however great the provocation, or imminent its probability, the courts could not say that amicable relations might not be restored without actual war. If congress, when it acts, should declare the war to have existed anterior to its declaration, the courts will follow the declaration; and, if the question should be subsequently brought before them, the courts will follow the declaration, and take judicial notice of its existence from the time thus fixed. But for them to attempt to declare its existence as a matter of legal knowledge, before any action has been taken by the war-making power, would be a most flagrant violation of duty. This was not done by the congress of the Confederate States until subsequently to the time when, it is urged, the district court should have said, as a matter of judicial knowledge, that the war had commenced.

We have answered the question here presented, as it was discussed, as if the late war had been between two independent powers, and there being, on this hypothesis, no error in this ruling, we have not deemed it necessary to inquire whether the character of the government of the United States and the relationship of the states of the union to it require the application of different principles from those by which it should have been decided if the Confederate States had succeeded in their attempt to sever their connection with the United States. But we may well say, if there were any error in the ruling of the court, though, as we have seen, there was none, it has not and cannot work any injury to the appellants. Their plea was merely dilatory, and would only have stayed the appellees' suit until the termination of the war.

Though it should be upheld and sustained in cases to which it is applicable when properly presented, yet it is called in the books an "odious plea" (Clark v. Morey,

> *supra*), and it will not, therefore, be aided by construction. To reverse the judgment on account of the action of the court in this matter would be to send the case back to the district court, not now to correct its ruling, but to render again the very judgment which it has already given. The error, if one, is now immaterial, and the judgment, it seems, should not therefore be reversed.

Garrett v. Brooks, 41 Tex. 479 (1874)

William Garrett sued John H. Brooks on a promissory note dated April 1, 1865 for the right to Mills, a slave. Brooks claimed the date was erroneous and that it was executed on the 5th July, 1865. The court instructed the jury that if it believed the note was signed on July 5, 1865, they would find for the Brooks. They did and the Supreme Court affirmed. In affirming, the Supreme Court considered Garrett's contention that slavery was not abolished until the adoption of the 13th Amendment, which occurred on December 18, 1865:

> This view is correct if we limit our consideration to what was the written law. The existence at the time of the contract of the law of force is, however, to be considered in our inquiry into what was received by Brooks, or what valuable consideration passed from Garrett to him for the execution and delivery of the note sued on. The President of the United States, by proclamation dated January 1, 1863, had declared all slaves within the limits of the Confederate States from that date free, with the exception of several counties in Virginia and some parishes in Louisiana, and had pledged the power of the Federal Government to the carrying out of the same. This proclamation was not entitled to, nor did it receive, the slightest respect or consideration from the Government or people of Texas. Throughout the Confederate States it had neither respect nor force, only so far as the success of the federal forces and their occupation of the territory of the Confederate States gave it vitality. The surrender of the trans-Mississippi department, on the 27th of May, 1865; the proclamation of President Johnson, May 29, 1865, and the publication of what is known as "General Granger's Order No. 3," dated June 19, 1865, (see Pas. Dig., arts. 222 and 223,) may be considered as so many evidences that property in slaves had been abolished, and no longer existed in Texas. The date of General Granger's order or declaration of the proclamation of Abraham Lincoln has been considered as the definite period from which the destruction of the right to hold slaves in Texas is to be dated. The appellant's brief contends that, as slavery was not legally abolished in Texas until the adoption of the 13th amendment to the Constitution of the United States, in December, 1865, this must be considered a valid contract. Ordinarily this would be so, but the military power of the Federal Government had silenced or struck down (before the date of this contract) the laws of the State and the rights of its citizens; and appellant's title to the ownership of "Miles" was as valueless as it would have been had "Miles" ceased to exist. Slavery was in fact completely abolished in Texas. Miles was *de facto* free, and has remained so. The appellant had, therefore, no interest to convey at the time, and consequently no consideration for the

note was given by appellant.

Smith v. Nelson, 34 Tex. 516 (1871)

This case involved whether people who bought and sold slaves were entitled to be paid in Confederate money. The language is interesting:

> This court has uniformly held, heretofore, that Confederate money had no value in law. That the pretended government which issued it had no existence *de jure*. That it was uttered in violation of law, and in aid of a treasonable rebellion, the object of which was to overthrow the rightful government of the United States; that it was issued in aid of, and became a means of continuing the rebellion; and that to give it any legal standing whatever in the courts, as the means by which executory contracts are to be carried out, is to acknowledge so far the legality of the pretended government by which it was issued.
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> And it is no answer to this argument to say that private wants or public necessity required its utterance and use. The truth is, the main purpose of its utterance was the purchase of the material of war, and the payment of troops engaged in fighting against their government. At the beginning of the war, there was the ordinary amount of legally authorized bank paper, of gold and silver, in circulation in the state of Texas; and it never has been shown, nor will it ever be, that this was not abundantly sufficient for the ordinary wants of the people. So that these contracts cannot be put upon the ground of public necessity.
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> A very large number of the people of Texas never did recognize the necessity of Confederate money, and it is fair to presume that by far the larger portion of the people would have utterly refused to have anything to do with it, if they had been left to their own choice; for it is notorious that early in the war it became necessary to force it upon the people, by the orders of military commanders, and many who took it in payment of debts did it in duress *per minas*, and with the bayonets of provost guards at their breasts. We hold now, that to give any legal sanction to transactions of this kind is to sanction, *pro tanto*, the rebellion itself.
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> To those who argue that this so-called money was a necessity or a blessing to the people of Texas, we say, go and look at the ruined homes, the blasted fortunes and the wasted estates, and the long list of bankrupts it has left among us. This would not have been the case if the people of Texas had used no other circulation than that which the law supplied them *ante bellum*. Had they resorted to barter and exchange of commodities, the state would have prospered rather than become bankrupt. She would have saved the public lands of which she has been plundered, and it is very doubtful whether the people could have been forced into that war which has proved

so disastrous to the moral and material interests of the whole country.

There is no weight in the argument that Confederate money had an appreciable value, and could at different periods of the rebellion be used in the purchase of property; for, long before the surrender of the Confederate armies, the logic of events had taught every man that the last holder of the Confederate bill would find it utterly worthless in his hands; and if it were legally worthless in his hands, it was equally so in the hands of every prior holder.

The United States has declared that the Confederate debt shall not be paid. Const. U. S., XIV amendment. All of the insurgent states have agreed to this as a condition on which they have been readmitted to the union; and we hold that every enforcement of the payment of one dollar of this Confederate money is, *pro tanto*, a payment of the Confederate debt, and is so far a violation of the law of the land.