

January 1999

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Recommended Citation

Frances Spears Cloyd, *Facets of Texas Legal History*, 52 SMU L. REV. 1653 (1999)
<https://scholar.smu.edu/smulr/vol52/iss4/9>

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FACETS OF TEXAS LEGAL HISTORY

*Frances Spears Cloyd**

FOR three hundred years Spain ruled vast areas in the Western hemisphere. She regarded these colonial possessions as being entirely the King's, for his use and benefit. She exploited them for royal profit through a tight trade monopoly and extended her laws into them. Her domination was approaching an end when the Anglo-Americans began to come into Texas.

Moses Austin got permission from the Spanish government to take a colony into Texas in 1821. He died before he was able to complete his project and bequeathed the responsibility to his son, Stephen.

In this same year Mexico and Spain were clashing. Iturbide led a powerful liberal movement based on unity of all classes, independence under a Bourbon prince with power limited by a constitution, and protection of the Catholic Church. Mexico proclaimed her independence from Spain and proceeded to the drafting of an extremely complex constitution.¹ It was completed and promulgated in 1824.

This constitution was based on the United States Constitution and was designed for highly individualistic self-government. Although it was not to last long, it was exactly the type of constitution under which the Anglo-Americans, who came into Texas, wanted to live. Their traditions of self-government went back centuries in English history. Their experiences in America had further prepared them for governing themselves.

In 1821 Spain relaxed her rigid exclusion of foreigners while she was still in control of Mexico. It was knowledge of that which caused Moses Austin to plan his colonization project. When Mexico gained her independence, she immediately began work on a liberal colonization law. It was not passed until 1823, and then was immediately revoked. But in 1824, a most liberal colonization law was passed, under which all but Austin's empresario contracts were granted. Austin managed to get his grant approved by a special act.

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1. See Letter from Stephen F. Austin to James E.B. Austin (May 22, 1822), in *THE ANNUAL REPORT OF THE AMERICAN HIST. ASS'N* at 517, 518 (Eugene C. Barker ed. 1924, 1928) (describing Iturbide's election to Emperor); Letter from Stephen F. Austin to Emperor Iturbide (May 25, 1822), in *THE ANNUAL REPORT OF THE AMERICAN HIST. ASS'N* at 518, 519 (Eugene C. Barker ed. 1924, 1928) (congratulating Iturbide on the "happy consumation of the independence of Mexico").

It is simply not possible to consider the Anglo-American colonization without turning to Stephen F. Austin. He was a diligent man. The records he left disclose his painstaking efforts for his colonists, his integrity, and his deep sense of responsibility. He worked hard for understanding between his colonists and the Mexicans. He made a study of the language, the laws, and the people, and endeavored to arbitrate wherever he could. We will look more closely later at some of the major events involving him. It is enough here to note that he assumed his father's project and received confirmation of his grant in August 1821.²

Mexico had been in a state of political unrest since 1810, culminating in her independence from Spain in the year of 1821. From that time on, she was to know many revolutions and changes of government. She was to pass important laws, and then revoke them. She was to have emperors and dictators and constant changes of authority. She was to have divisions within her states. She was to have nothing but political turbulence during the entire period of colonization of Texas, and far beyond.

The Texas into which the colonists were to come had lost most of the few signs of civilization it had ever had. There had been a few attempts at invasion by Gutierrez and Magee, James Long, and others, but they had come to nothing. The Spanish mission efforts had about collapsed. There was just apathy about Texas, until an occasional invader approached. Then there would be a slight flurry of interest, but Spain was too busy at home at this time to do much about Texas.

So Texas in 1821 was a vast wilderness, with only about four thousand non-native Americans. There was constant conflict between indigenous people and whites through the period of colonization and the Republic, and even far into statehood. Along with the native animals, there were many wild animals, herds of bison on the plains, wild horses and wild cattle descended from the Spanish importations.

This was the wild, uncivilized, vacant country to which Austin brought his colonists. Conflicts there were to be, but the greatest would be the conflict between the concepts of the civil law and those of the common law.

Austin's first experience with the hierarchical organization under Spanish law came when he learned that his grant had not been confirmed by the proper authority, and that he would have to travel to Mexico City himself, twelve hundred miles away, to get it confirmed. This was a tremendous blow to him. He had to leave his colonists and be away for a year, but he learned a great deal about Mexican law and customs and political instability. There were changes of congress and changes of executive, but he stayed until he got a final decree confirming his grant from

2. See Eugene C. Barker, *The Government of Austin's Colony, 1821-1831*, SW. HIST. Q., July 1917 to April 1918, at 223,225 (describing the government of the Eastern Interior Provinces at this time).

the supreme executive power,³ before he returned to San Felepe.

It was a shock to him that he would have to leave his colonists before they were established. Further, he had just received the news that the supply ship bearing seeds and supplies had been lost and “. . . she never was heard of more.”⁴ Actually, she was not lost. She just did not find the right bay. But the next two ships were lost, with the Karankawas appropriating the contents.

The colonists did suffer in the extreme without the needed seeds and supplies. They were reduced to game, wild honey for sugar, buckskin clothing, and the most primitive living. Word of their suffering reached the United States and colonization slowed. Some of them went back to the United States. But many did stay in spite of their difficulties. It is notable that out of 297 titles of Austin’s “Three Hundred” actually issued, only 7 defaulted. The grants were contingent on actual occupation and improvement of the land within two years after receipt of the deed.⁵

At the time that Austin first started his project Texas was one of four provinces known as the Eastern Interior Provinces, including Coahuila, Nuevo Leon, and Tamaulipas. Each province had a governor and a military commandment, and was divided into local municipalities, each headed by an *alcalde*.

Under Mexico some changes in the organization were made and Texas was united with Coahuila. The general commandant of the provinces lost his civil authority. The capital of Texas-Coahuila was established at Saltillo, and later at Monclova. The seat of government was, of course, at the capital, with the governor, supreme court, and the legislature all functioning there. Their organization, theoretically, was not too unlike the familiar one known to the colonists. As a practical matter, it could not have been more dissimilar. In practice, it was strongly centralized, with the authority of each official subject to a superior authority all the way up to the supreme executive.

Before Austin’s return, an attempt at organizing his colony was made. The Baron de Bastrop came and formed the typical civil organization, with a duly elected *alcalde*, and a captain of the militia.

When Austin returned he issued his first public proclamation of Texas. He said,

The title to your lands is indisputable—the original grant for this settlement was made by the Spanish government before the revolution; it was then confirmed, and the quantity of land designated by the decree of the Emperor Augustin Iturbide on the 18th day of February last, and the whole was again approved and confirmed by the sovereign congress of the Mexican nation on the 14th of April last,

3. See 1 LOUIS J. WORTHAM, L.L.D., *A HISTORY OF TEXAS FROM WILDERNESS TO COMMONWEALTH* 97-98 (1924).

4. 1 H. YOUAKUM, ESQ., *HISTORY OF TEXAS* 213 (1935). (Actually, she stopped at the mouth of the Brazos instead of the Colorado, and those on her landed there).

5. See RUPERT NORVAL RICHARDSON, *TEXAS THE LONE STAR STATE* 50 (2d ed. 1958).

after the fall of the emperor. The titled are made by me and the commissioner of the government, and are then perfect and complete forever, and each settler may sell his land the same as he could do in the United States I wish the settlers to remember that the Roman Catholic is the religion of this nation. . . . We must all be particular on this subject, and respect the Catholic religion with all that attention due to its sacredness and to the laws of the land.⁶

And thus began the Anglo-American colonization of Mexico.

The Constitution of 1824 was greatly acclaimed by the Texans because its principles were so familiar to them. Disillusionment lay ahead for them, but it was typical of the nineteenth century American to assume that anyone would be better off under the United States form of government. Early Americans could not envision the difficulty that the Mexicans would have in implementing the concepts of freedom and self-government.

The passage of a liberal colonization law by the Mexican government provided a basis for one to be passed by Coahuila and Texas on March 24, 1825. It opened the way for many empresario grants besides Austin's. However, no other empresario so faithfully looked after the welfare and interests of his colonists as did Austin. "My ambition . . . has been to succeed in redeeming Texas from its wilderness state by means of the plough alone," he wrote, "in spreading over it North American population, enterprise, and intelligence. . . . I deemed the object laudable and honorable, and worthy the attention of honorable men."⁷

Immediately after passage of the state colonization law in 1825, empresario contracts for the settlement of twenty-four hundred families in Texas were let by the governor of Coahuila and Texas. The national law restricted settlement within twenty leagues of the national boundary or within ten leagues of the coast without approval by both state and federal government. No individual could hold more than forty-nine thousand acres of land! Congress reserved the right to limit immigration from any particular nation. These restrictions applied to the state law, of course, but it was very liberal.

The panic of 1819 in the United States and a more stringent land policy there made the Mexican offer look awfully interesting. The first enthusiasm was not borne out by the actual emigration, however, but it did proceed steadily. Austin's colony was already settled by the time of the Act of 1825. Consequently, his colony was much better organized than any of the others. He was given the sole responsibility for governing it, with very few mechanics for establishing the necessary tools. He did, however, provide it with a code of laws, both civil and criminal, and got them approved by the political chief of Texas. He wrote the codes himself, and they had to suffice for his colony until five years later.⁸ In February,

6. WORTHAM, *supra* note 3, at 137-38.

7. *Id.* at 157-58.

8. *See id.* at 388 (providing the full text of Austin's civil and criminal codes).

1928, the first ayuntamiento, or municipal government, was established at San Felipe.⁹ Only then was Austin relieved of his responsibility.

The opening lines of his code show how he recognized the need for laws.

Charged by the superior authorities of the Mexican nation with the administration of justice in this colony until its organization is completed, and observing that much difficulty and confusion arise from the want of copies of the laws and forms which regulate judicial proceedings before the *alcaldes*—it having been impracticable as yet to obtain them with translations—I have thought proper, in order to remedy these embarrassments and to establish a uniform mode of process before the *alcaldes* throughout the colony, to form provisionally, and until the supreme government directs otherwise, the following regulations. . . .¹⁰

The code was simple in form. Austin was “judge of the colony.”¹¹ There was to be an *alguasil* (sheriff), and a constable for each district.¹² Method of petition was stipulated. The first five articles of his criminal code had to do with Indian depredations, since they constituted one of the colony’s major problems.¹³ He provided for the recording of all depositions in criminal cases, so that the transcript could be forwarded to the superior judge for final judgment, in accordance with Mexican law.¹⁴ He also provided for the right of appeal, and for trial by a jury of six men.¹⁵ This jury had no legal standing under Mexican law, but it represented fair trial to the colonists.

Undoubtedly, the colonists were so involved with the business of just getting established in these early years that they were not at first conscious of the extent of some of the problems they would have to face ultimately. Also, actual experience with a contrary system would be required to make them understand the real disparity between the two systems.

The barrier of language, coupled with the slow process of promulgating a law, kept them badly informed. Coahuila and Texas had a state legislature of twelve members, on the basis that the Texas population was small. At first, Texas was given one member. Later she got two, and finally three. Through this system Texas could not prevent the passage of laws that were inequitable and harmful to her.¹⁶ This was certainly a source of annoyance to the Texans.

Mexico had a background of strong monarchical control. Every report, every official opinion, had to go up from the lowest territorial division to the authority in the next highest, and so on, all the way to the top. Addi-

9. *See id.*

10. *Id.*

11. *Id.*

12. *See* WORTHAM, *supra* note 3, at 389.

13. *See id.* at 402-404.

14. *See id.* at 408.

15. *See id.*

16. *See* EUGENE C. BARKER, *MEXICO AND TEXAS 1821-1835* 24 (1928).

tionally, any decisions rendered by the Council of the Indies, serving for the King, or any political chief who had authority to render a decision in a particular matter, had to go right back down this chain of command. The system was slow and laborious, and entailed numerous delays. Of course, it required experience with the system for the colonists to realize that they could not adjust to the unfamiliar mechanism.

The centralized control to which Mexico was accustomed was not really set aside by the Constitution of 1824. It ordered the states to draw up their own constitutions, but they were not really to have any autonomy. Nevertheless, this constitution provided the colonists with much optimism. There, was at this time, controversy between the lawyers in Mexico as to whether the *Novísima Recopilación* applied in Mexico before and after its independence in 1821.

The Mexican Independence and rapid changes of government subsequently caused the issuance of many more laws and decrees. Many were contradictory. Many involved radical changes in the law. For many years, constant civil wars were to maintain this chaotic state of the law.

In the period of rapid colonization that followed the Act of 1825 many promoters appeared, and much that followed in the settling of Texas was scandalous. But Austin's integrity of purpose never changed. He never relaxed his requirements for prospective colonists. He appointed as secretary to his colony a man who had previously lived in Mexico and who had mastery of the Spanish language, insuring his colonists the best chance at co-operative handling of their affairs. He brought in more colonists than all the other impresarios together.

Texas now began to look more attractive to the United States and the idea of shifting the boundary line to include a considerable portion of Texas was again projected by the United States of the north. The manner in which the proposal was handled was very impolitic. The result was great distrust of the United States and of Anglo-Americans throughout Mexico.¹⁷

Austin had not contemplated the political development of the desire for the acquisition of Texas by the United States. It added to his problems because of the effect on the Mexicans with whom he had to deal, and on the colonists in general in Texas. He could not have, because he had considered the border question settled by the treaty of 1819. It had certainly not occurred to him that colonization methods could be twisted to look like an American scheme to seize Texas.

Points of conflict with Mexican law and the colonists needs began emerging. All the colonists wanted the Mexican laws translated and published. That was to be a constant source of friction.

Austin had a serious problem with reference to marriages. There were no priests to perform them, and Roman Catholicism was the religion of

17. See 1 GEORGE LOCKHART RIVES, *THE UNITED STATES AND MEXICO 1821-1848* 238-239 (1913) (suggesting that no evidence can be found that Mexico would ever have considered selling Texas).

the province. Austin asked for a priest who spoke English.¹⁸ A year later the priest had not arrived. Austin then asked permission to perform a provisional marriage.¹⁹ He then devised a marriage bond under which the marriage could be performed.²⁰ The religious ceremony could then be performed whenever the priest came. About 1831 a priest came to San Felipe, and proceeded to marry all those who utilized the marriage bond. Most of his applicants had five or six children by that time! The use of the marriage bond prevailed in Texas until the Revolution. Although this was a situation that the Texans disliked, it did not become a matter for an open clash.

The vital question of rights presented a problem that carried within it an irreconcilable conflict. Here is one of the great areas of disagreement and misunderstanding between the two legal systems. The Anglo-Americans in true Lockean thinking were convinced that all legal authority was vested in and derived from the people. Remote abstractions of civil law thinking from a distant and supreme authority held little meaning to them. They believed that they should govern themselves in a highly individualistic manner, under a written constitution. They believed that there should be a division of power between the state and the national government. They believed that there should be a balance of power between the branches of the federal government. These things were deep in the legal tradition of the Anglo-Americans. They had no understanding of any other type of legal or political order. They believed they had rights that were inviolable, and that among them was the right of revolution in defense of those rights. They thought that they had all of this in the Constitution of 1824.

On the other hand, the Mexicans were accustomed to the slow tempo of their system. Their way of life was one dependent on authority, and their interest in the ideas of the French and American Revolutions was academic rather than actual. The Constitution of 1824 never had a chance to work in Mexico. The only kind of government that would work was a centralized one.

One of the real sources of dangerous friction had to do with the right of public assembly. To the Mexicans, the procedure was simple. If an individual had a grievance, he submitted it to the local *ayuntamiento*. By 1828, Austin's colony had been organized into the typical *ayuntamiento* of the Spanish system, so that his colony too was subject to the Mexican procedure.²¹ If the local *alcalde* considered that a grievance existed he

18. See Letter from Stephen F. Austin to Colonists (Aug. 6, 1823), in *THE ANNUAL REPORT OF THE AMERICAN HIST. ASS'N* at 679 (Eugene C. Barker ed. 1924, 1928).

19. See Letter from Stephen F. Austin to Saucedo (June 20, 1824) in *THE ANNUAL REPORT OF THE AMERICAN HIST. ASS'N* at 836 (Eugene C. Barker ed. 1924, 1928).

20. See Letter from Stephen F. Austin to Saucedo (April 29, 1824), in *THE ANNUAL REPORT OF THE AMERICAN HIST. ASS'N* at 779 (Eugene C. Barker ed. 1924, 1928).

21. See GEORGE P. GARRISON, *TEXAS, A CONTEST OF CIVILIZATIONS* 62-63 (1903) ("Its local government was administered by a council known as the *cabildo* or *ayuntamiento*, composed of *alcaldes* (judges), *regidores* (town councilors), and certain other officials.").

framed a petition and sent it to his immediate superior, who would do the same. This would be repeated until the final political chief was reached. He would render an opinion and start it back down again. It would have to pass through every hand again until it reached its point of inception. To the Mexicans, this was totally logical. Further, the Mexican laws placed limitations on the right of public assembly for the purpose of submitting questions to the ayuntamiento except under certain conditions. There was a limitation on the number who could sign a request thus agreed upon.

There was never much chance that the Mexicans and the Anglo-Americans could understand each other on this point. The Texans were determined to hold conventions whenever they thought they needed to exchange ideas or ask for reforms. They felt that the right of assembly was absolutely inviolable. The Mexicans considered that perfectly legal means existed under their laws for petitions to be presented. They saw no reason for the Texans to hold conventions, and whenever the Texans did, the Mexicans considered it a lawless act. To them it appeared that the meetings were signs of the revolutionary tendencies of the colonists.

In his colony Austin tried to get his people to withhold from conventions as long as Texas was a part of Coahuila. But his colonists, also, persisted in conventions. Every time one was held, the Mexicans regarded it as treason. Every time the Mexicans protested, the Texans considered the Mexicans were showing the exercise of tyrannical power and total disregard of their rights. It became a critical point of friction even three or four years prior to the Revolution.

By 1830, outside political influences had convinced the Mexican government that their liberal colonization program was going to cost them Texas. It should be Texas for the Mexicans, not for the Anglo-Americans. So they passed a new law on April 6, 1830, which completely altered their policy. It proclaimed the intention of nationalizing Texas which they meant to do through sending in convicts at government expense. It prohibited further introduction of American colonists, and prohibited further importation of slaves. It canceled all but three of the contracts of empresarios, which left Austin's, De Witt's and De Leon's. When it placed the local government under the authority of the commandant of the eastern internal states it had the practical effect of placing Texas under a military government.²²

This brought into focus another of the major areas of conflict between Anglo-American and Mexican thinking. The use of the military in connection with the payment of customs duties was anathema to the Texans. They accused the Mexicans of military despotism. To them, the military authority should definitely be subordinate to the civil authority. That was in the tradition of the Americans. The rights of a free people under a

22. See *Decrees of the Supreme Government of Mexico—Law of April 6, 1830 (1821-1848)*, reprinted in 1 JOHN A. ROCKWELL, A COMPILATION OF SPANISH AND MEXICAN LAW 621 (1851).

constitutional government could not encompass an excess of power in the military. The Mexicans could not understand why the colonists were concerned about the division of civil and military powers. And regardless of the content of the Constitution of 1824, the Mexicans did not really appreciate the demands for individual rights.

Another major source of conflict had to do with the organization of the judiciary.²³ This will be developed in later chapters. Here was one of the major points of conflict by which the American and Mexican temperaments could be compared. "Speedy trial," cried the American. "There is no hurry," replied the Mexican. "Why should there be haste?"

In criminal cases, the Anglo-Americans were not likely to adhere to the Mexican procedure. If the crime were one that had aroused the community, lynchings took place. The procedure involved was simply unworkable. The colonists believed that the accused had a right to a fair and speedy trial, and that he had the right to defend himself. They thought that definite charges should be made before an accused should be arrested. They believed that witnesses should be produced and trial by jury provided. They also thought executive and judicial authority should be separated. They saw no need for a speedy trial. They did not have the concept of the right of habeas corpus. There was no right to demand redress on trial. For the Mexican residents of Texas, this system would have been workable. For the Anglo-Americans, it was one of the major sources of their inability to adjust to the Mexican government.

Apart from the differences involved as to what constituted rights of the accused, there were other causes of misunderstanding concerning the adjudication of cases involving private matters.²⁴ The Mexicans tended to avoid litigation. An important Mexican principle was that it was the responsibility of the *alcalde* to endeavor to settle a case outside of court, if it was at all possible. Only when settlement could not be made was he to accept the case.

The Mexicans were not sympathetic to the practical problems involved in this system. They believed most of them would be eliminated if the Texans would just live as they did, with strong buildings for jails and a military garrison.

The organization set up was the typical Spanish municipality which has its roots in Greek and Roman city-states. Its governing board was the

23. See EUGENE C. BARKER, *THE LIFE OF STEPHEN F. AUSTIN* 216-220 (1925) (discussing the organization of the judiciary).

24. For an elaboration of the Texan's dissatisfaction with the judicial system, even after constitutional government was established in Texas, see Barker, *supra* note 2, at 223-252; see EUGENE C. BARKER, *THE LIFE OF STEPHEN F. AUSTIN* 217-218 (1925) (Austin's address to the Central Committee to Convention (April 1, 1833)). Austin had difficulty forwarding transcripts to Saltillo on appeal. Sometimes they were returned several times for reform. The procedure involved so much trouble and delay that decisions were seldom reached. In civil cases it meant a denial of justice to the poor who could not afford to send lawyers to Saltillo to prosecute and appeal. Regarding criminal cases Austin said, "The formula required by law in the prosecution of criminals is so difficult to be pursued that most of the courts in Texas have long since ceased to attempt its execution." *Id.* at 218.

ayuntamiento, headed by the alcalde, or chief executive officer, with combined responsibilities. Regidores served with some legislative powers. The alcalde appointed a sheriff, or alguacil, and a secretary.

An excerpt from an appeal to the legislature of Coahuila and Texas, which later culminated in the passage of the "Jury Law," will disclose the general feeling of the colonists. The appeal was made by Thomas Jefferson Chambers, one of the most controversial figures of early Texas. Chambers was one of the very few men who had any familiarity with Mexican laws. He went to Mexico, became a Mexican citizen, and studied Mexican law. In Texas, he was a friend of Austin's. His presentation of the situation in Texas thus seems a more objective one than had it been given by one who knew only the Texas side. Further, he was a trained common lawyer before he took up the study of the civil law in Mexico.

Few of the decrees of the State ever come to the knowledge of the inhabitants of Texas, for they go locked up in a language which few of them understand, and for the acquisition of which time is necessary. But even this is not the greatest difficulty. The Judges being unlettered, as they are in the balance of the State, but without the same facilities for information, must of necessity, incur heavy responsibilities, or consult the Attorney-General at every step, upon matters of form. For five or six consultations which they must make in each cause, three or four years will be required. I have seen in various cases, respectable persons suffering imprisonment for nearly three years, whom I believed to be innocent of the crimes with which they had been charged, but victims of the persecutions of private malice or party spirit. And for this, under the present system, there is no remedy; in that remote part of the State the protection of the Government is unfelt and unknown. An absolute irresponsibility among the Judges and all the local authorities, reigns there. Their responsibility exists alone in the theory of the law—practically, there is none. What can the poor colonist do, who, by the injustice of some Judge, has been stripped of his all, which perhaps may not exceed five or six hundred dollars? Will he present himself in the capital to accuse the Judge before the Supreme Tribunal? He will exhaust all his means in the journey. But let us suppose him to have reached the Capital, what will he do then? Where will he find an interpreter? Where, with an exhausted purse, will he find an attorney? How will he maintain himself in the prosecution of this new suit of two or three years duration? Not at all. The only recourse of the unhappy colonist would be to return to his country, begging upon the road a mouthful to prolong his existence, execrating the Government which had invited and called him to the State, and denouncing as false the Constitution which he had sworn to support, but which had mocked him with the delusive declaration that 'the object of the Government of the State is the happiness of those who compose it, and that every man who inhabits the territory of the State, shall enjoy the imprescriptible rights of liberty, security, property and equality.

Would it be strange if in such a deplorable state of things, disgust and distrust towards the government and the laws of their adopted country should become more diffused among the sufferers, and they should turn their eyes back with a sigh towards the Government and laws under the shade of whose protection they were reared? I pray that your Honorable Body will excuse the liberty I have taken: to cure the ulcer, the probe must be inserted to the bottom.

These are some, though not all the abuses and evils under which the unfortunate people of Texas have suffered. And these abuses and this neglect on the part of the Government have been the principal causes of the discontent, and many of the alarming movements which have occurred amongst them.²⁵

As a result of the plans Chambers submitted with this petition, the Congress did reorganize all the branches of the government of Texas. The English language was legalized, which removed one of the mechanical difficulties that had so troubled the colonists. Trial by jury was granted to them, although it was Mr. Chambers' personal and unusual plan of having a jury of 8, with a vote of 6 controlling, instead of a requirement on unanimity. Nevertheless, in the Anglo-American concept, the right of trial by jury was almost sacred, and the granting of that right was of tremendous value to the Texans.²⁶

The Act reorganized the judiciary of Texas and the governor was empowered to appoint a Superior Judge provisionally. The Governor then proceeded to appoint Thomas Jefferson Chambers to that high post.

Freedom of conscience with reference to religion was also granted. Oddly, this question had never caused a great deal of trouble in the Texas-Mexico relations. It had definitely retarded colonization, but to those who did go, it was a not too important restriction.²⁷ Austin particularly objected to Methodists, because of their revivalist methods, but he had cured the religious problem that was the major source of friction, (marriage), and religion did not lead to conflict of consequence.

When the question of slavery is considered the great exercise in semantics of the Mexicans is confronted. There seems never to have been a time when any parallel between slavery and peonage occurred to most Mexicans. The American colonists considered slaves essential to their agrarian way of life. The Mexicans thought slavery was anti-thetical to the ideas of liberty they had gleaned from the French Revolution. They considered their laws gave some protection to the Indians, and thus they felt they could legislate against slavery. Laws prohibiting slavery were a

25. THOMAS JEFFERSON CHAMBERS, *Documents Referred to in the Testimony of J.R. Lewis and Manuel F. Valdez in MEMORIAL OF T.J. CHAMBERS* 70, 75-76 (1857).

26. See *Laws and Decrees of Coahuila and Texas, reprinted in H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897* 254 (Austin, Gammel Book Co.1898).

27. See BARKER, *supra* note 23, at 147. ("In practice, though the settlers were deprived of the ministrations of Protestant preachers, they were seldom subjected to those of the Catholic clergy, and, so far as one may judge from the documents that have come down to us, they reconciled themselves to the situation with very little complaint.").

source of irritation to the colonists, and a deterrent to immigration, but were not a major source of revolution.²⁸

Before Chambers' court was functional, a conflict arose between Saltillo and Monclova, as to which was to be the seat of government. Saltillo refused to recognize the Governor or Congress at Monclova, and Chambers felt that he could not take sides. Nevertheless, he did endeavor to hold himself out as a legally-appointed judge, and accepted grants of land in payment of his salary.²⁹

But all the influences had joined and revolution was at hand. Mexico had not been able to bring stability out of its sudden transition to extreme republican liberty. The Mexican rejection of its republican constitution of 1824 was most upsetting to the Texans. That constitution had embodied principles that were most familiar to them.³⁰

Austin's colony, undoubtedly due to his dedicated handling of colonial problems, was always less contentious than any other group of Texans. But when immigration into Texas accelerated, so did the dissatisfaction of the colonists with the Mexican regime increase. They organized a provisional government, declaring belief in the principles of the Constitution of 1824. The Mexicans could only interpret this move as complete defiance.

Article VI of the plan of the provisional government of Texas provided that "Every judge so nominated and commissioned shall have jurisdiction over all crimes and misdemeanors recognized and known to the common law of England."³¹ Art. VII provided that "[a]ll trials shall be by jury; and, in criminal cases, the proceedings shall be regulated and conducted upon the principles of the common law of England."³² Thus the desire of

28. See, e.g., BARKER, *supra* note 23, at 139 (discussing the fact that the governor instructed that all vagrants and criminals sentenced other than in Texas, be sent to the political chief of Texas for work on the public roads, military service, and to be hired as individuals. This was perhaps to supply the need for labor that the Mexicans knew would be created when they prohibited slavery. Mexican theoretical hostility to slavery was well-known.

Mexico had already prohibited commerce in slavery in an act of July 13, 1825. In March of 1827, a law was passed that freed children born of slaves after publication of the law, and prohibited further importation of slaves after six months. The situation became increasingly difficult, with much resentment among the colonists over tampering with their property rights.

The law of April 6, 1830, recognized existing slaves, but refused further introduction of slaves. Of course, the major provision of this law, against further settlements of immigrants from the United States, completely diverted the colonists from the slavery question. Further, colonization had proceeded quite rapidly, so that the fears of its being impeded had been proved groundless. See H.P.N. GAMMELL, *supra* note 26, at 121-133 (discussing the statutory means of obtaining labor, outside of slavery, by providing the colonization laws of March 24, 1825).

29. See BARKER, *supra* note 23, at 461-467.

30. See Journals of the Consultation held at San Felipe de Austin (1835) reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, 538 (Austin, Gammel Book Co. 1898) (discussing the Plan of Toluca, which in 1835, established a new and more centralized government. A new constitution was adopted by Congress on December 29, 1836, known as the Siete Leyes (Seven Laws). It remained in force until 1847).).

31. WORTHAM, *supra* note 3, at 425.

32. *Id.*

the Anglo-Americans to live under a type of legal order which was deep within their own traditions, is clearly stated at an early point in Texas history.

After Texas declared her independence and fought her war with Mexico to a successful climax, she became a Republic in 1836. From the time Austin brought in his first colonists in 1821 until the establishment of a republic in 1836 events had moved rapidly. In fifteen years the Anglo-Americans had accomplished what Spain had not done in three hundred years. They had peopled a wilderness and established a legal order under which they could live. On March 17, 1836, the Constitution of the Republic of Texas was completed and signed. It was adopted almost unanimously the same year.³³

The Constitution of 1845 was drawn on this same common law concept with inclusion of some phases of the civil law the Texans found to their liking. Those phases will be considered in more detail later.

It would be difficult to conceive an environment more exacting of a legal order than Texas provided in those turbulent years culminating in her statehood. The thing never to be forgotten is that there was never any doubt in the minds of either the Mexicans or the Texans that a legal order should exist. The difficulties in establishing a workable, acceptable system were multitudinous, but they were mechanical.

The civil law of Spain, with its mass of legislation and codification and its body of abstract principles, was not to come within the cultural knowledge of the Anglo-American colonists to any extent. Their own deep-rooted convictions of the traditions of the common law were to emerge.

It was perhaps inevitable that the common law would win out in Texas. The rapid settlement of the state by a predominantly Anglo-American population practically insured it. Austin's colony, however, made conscientious efforts to live under Mexican rule. Austin himself made prodigious efforts to establish a meeting of the minds between his colonists and the Mexican government. But even he came to recognize the impossibility of it. No one else in Texas worked as hard at trying to establish good relations as did Austin.³⁴ The other empresarios seem to have been more interested in land grants than in trying to co-operate with the Mexican government. There was simply no chance of the aggressive, tradition-bound Anglo-Americans adapting themselves to life under the Mexican legal order. One wonders why they ever thought they could.

All through this extraordinary period of Texas colonization, revolution, and the decade of the Republic of Texas, there was one vital force; the desire for a rule of law. At first, the colonists assumed it would be the civil law of Mexico. The Mexicans were making the same assumption! Nevertheless, the colonists tried to mold the civil law into something they could recognize. At this point, the Mexicans did try to understand what

33. See Republic of Tex. Const. of 1836, reprinted in 1 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822-1897* at 1069, 1084 (Austin, Gammel Book Co. 1898).

34. See BARKER, *supra* note 23.

the colonists thought they needed. Decree 277 of Coahuila and Texas authorized a court system and jury trial.³⁵

It is useless to speculate on what might have happened if Monclova and Saltillo had not begun to squabble immediately after the passage of Decree 277, or if the Mexican Constitution of 1824 had not been set aside. Chambers had to delay the establishing of his court as a result of the conflict.³⁶ As a result, the concessions of the Mexicans were never given a fair trial. However, in all probability, the story would have had the same ending, but at a later time.

The idea of revolution was much in the minds of the colonists. The United States had fought a successful revolution and had established a constitutional government that from the beginning had the support of the people. John Locke had planted the seed deeply—a government violated its contract with the people, they had the right to revolt. The dramatic ideas of the French Revolution were greatly admired in America at this time. It would seem there could be no logical outcome except revolution to the great urge of the Anglo-Americans in Texas for a legal order familiar to them, operating under a constitutional government familiar to them.

Inexorably, the conflict moved to its violent conclusion. Numerous historians have recounted the many factors contributing to the revolution in Texas. But it is submitted that the primary motivation for the revolution was this vital need for a rule of law. At that moment in history, the popular way to achieve a satisfactory legal order was through revolution. It is to be hoped that men can recognize that peaceful means must be utilized to work out the problems that arise from the impact of great ideas.

Here our interest lies in observing some of the tremendous hazards to which the concept of the rule of law was subjected, and its triumph. The legal systems met in the wilderness that was Texas, and pushed mightily against each other until one of them gave. But it did not give completely. It left its imprint on Texas law. Spanish concepts of community property, some of the law, and the method of pleading were incorporated into Texas law by constitutional provisions or express statute. Ancient Spanish laws provided a background for Texas' revered homestead laws. Texans like to think the homestead exemption is uniquely Texas. But those who do have failed to read of Stephen F. Austin's study of Spanish laws, as a result of which he got a sweeping homestead exemption law passed a

35. Decree No. 277 (1834) Laws and Decrees of Coahuila and Texas, *reprinted in* 1 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822-1897* (Austin, Gammel Book Co. 1898).

36. *See* CHAMBERS, *supra* note 25 (with reference to the conflict between Monclova and Saltillo for the site of the capital, Thomas Jefferson Chambers said, "Thus two persons contend at present for the exercise of the Supreme Executive power of the State, and both of them are illegitimate and unconstitutional. . . . In this state of affairs a most interesting question presents itself for the consideration of the local and inferior authorities, those fragments and remains of the great political machine that has just been broken by the shock of revolution. What is their situation with respect to the new Government? What are their powers and obligations? Can they choose between the usurpers, recognize one of them, and continue the discharge of their ordinary functions as if nothing had occurred?").

decade before the more familiar one of 1839.³⁷

To understand the acid test to which the concept of the rule of law was submitted in Texas, it is necessary to consider the actual conditions in the state, with emphasis on their effect on the solution of legal problems and crimes. Protection of property and person must be insured. This can only be done under a rule of law. There is no other way. The rule of law does require some mechanical devices for successful achievement of its goals. The devices must be agreed upon and must be workable. Frontier conditions in Texas made the establishing of the mechanics of a legal system most difficult, but the need for order under law is so fundamental and so important that it was always the end towards which the colonists were working.

When Austin's colony had been in Texas only a short time, the governor of the province divided it into two districts. He appointed an alcalde for each, one on the Brazos and one on the Colorado. These men were not versed in the law. They had no established procedure as a guide, nor even knew the extent of their authority. Austin realized that the efforts of these men, however conscientious they might be, would never suffice for Anglo-Americans. His civil code provided a workable basis in the simple beginnings of the colony, but his lack of jurisdiction to establish adequate methods to handle crime was a serious problem. Five years were to pass before the colony was to be organized under constitutional government.³⁸ When the reorganization of the provinces took place and Texas and Coahuila were made into one state, the seat of government was at Saltillo.

In all of Texas there was no tribunal for trial of murder cases. The village blacksmith was called in after a case was heard, to put the prisoner in irons. There he had to stay until Saltillo acted on his case. This procedure never had a chance at ultimate acceptance.

When a criminal had sentence passed on him the problem of enforcement was most difficult. No jail or guards were available. Instructions to employ criminals on public works, while the sentence was pending, were impractical due to lack of guards. Austin's colony was fortunate in having him to try to ascertain the Mexican laws. But the other colonies were in a state of near anarchy.

This is not because the inhabitants in general are of bad character, but they have no knowledge of the language, of the laws, of the customs of the country; nor of the different position which they occupy here with respect to the government and their right as inhabitants from that which they had in their native country.³⁹

37. See BARKER, *supra* note 23, at 222, 226.

38. An election of an ayuntamiento within the limits of Austin's colony was authorized in 1827, and the first constitutional election held in 1828.

39. Letter from Stephen F. Austin to J.A. Padilla (Aug. 12, 1826) in *THE ANNUAL REPORT OF THE AMERICAN HIST. ASS'N* at 1413 (Eugene C. Barker ed. 1924).

The practical result of the Mexican system of appeal to Saltillo, under the law of 1827 defining the *alcalde's* jurisdiction and establishing an appellate procedure, was "a total interregnum in the administration of justice in criminal cases."⁴⁰ The least time that could be involved through this procedure was four months. It usually required six to eight months. The colonists established jury trial, but it had no legal sanction for years.

The act of 1827 afforded a temporary feeling of security to the colonists. They thought it indicated some hope of an improved judiciary. Thus, for a few years, the colonists were busy with just getting established physically in the new country.

Mexico, however, was becoming increasingly distrustful of the Anglo-Americans, both in Texas and in the United States. The flood of emigration from the United States to Texas had to be stopped. So the law of April 6, 1830, was passed.⁴¹ There is no doubt that it was intended to stop further Anglo-American settling. It offered inducements to Mexicans to settle. It restricted slave ownership in Texas by forbidding further introduction of slaves. It contained other provisions that were objectionable to the colonists. General Manuel de Mier y Teran, Commandant General of the Eastern Interior Province, was responsible for the enforcement of the law in Texas.

Mier established military garrisons throughout Texas. He assumed that Mexican settlements would be built up around them in traditional manner. But counter-colonization did not ensue. Even though the liberal offer of the government was circulated among the poor and the criminals in jail, there were no takers.

Many chroniclers insist that most of the colonists were perfectly happy under Mexican government because of the liberality they had enjoyed with reference to land and taxes is given as the cause for this. But it would seem that their satisfaction with the fertility of the soil and the progress in establishing homes created that illusion. They were not thinking of severing relations with Mexico yet, but the basic problems were there. Texas wanted to be a separate state from Coahuila. She wanted to organize herself in a familiar manner, and incorporate her own legal traditions. She did not want to continue an alliance with the Mexicans of Coahuila. The Mexican government could be the final authority, but there would be no more attempts to reconcile the varying customs and problems of a dissimilar people. Therefore, in 1833, Austin was sent to Mexico with a memorial for approval of a provisional constitution for the State of Texas, and in protest of parts of the law of April 6, 1830.

A letter that Austin wrote caused his arrest in Saltillo and imprisonment in Mexico for two years.⁴² His experience in jail in Mexico caused him to lose faith in Mexican justice. He wrote in his diary,

40. BARKER *supra* note 16, at 218.

41. See BARKER, *supra* note 23 at 60.

42. See BARKER, *supra* note 23, at 436.

[w]hat a system of jurisprudence is this of confining those accused or suspected without permitting them to take any steps to make manifest their innocence or to procure proofs for their trial. . . . I do not know of what I am accused—How can I prepare my defense? . . . This system may be in conformity with law, but I am ignorant of which law, or of what rights the party accused has, but it is very certain that such a system is in no wise in conformity with justice, reason, or common sense.⁴³

When he was finally released and returned to Texas, Austin unhesitatingly supported the idea of a provisional local government, but still championed the Constitution of 1826. Mexican affairs were complicated, as always. Santa Anna posed as a liberal and a reformer working for the reforms desired by the provinces. An anomalous situation thus developed, with Austin at last disillusioned with Mexican federal government just as the federal Congress began to pass laws highly favorable to Texas.⁴⁴ But Mexican politics had no stability, and Santa Anna changed from a liberal to a dictator. The Constitution of 1824 was set aside, and trouble was inevitable.

Many Texans glamorize the Texas Revolution. They remember only San Jacinto and not the loss of the other battles of 1836. Santa Anna led a force of 6000 soldiers into Texas. His victories at the Alamo and Goliad sent the Texans into retreat. It was reported that the Mexicans were waging a war of extermination, so the colonists fled for their lives. There were so few wagons that household goods had to be left behind. Many women and children had to walk. Even the delegates from the convention joined the Runaway Scrape (as the retreat was called), when news of the fall of the Alamo came.

Houston's retreat was condemned by his own officers, who accused him of cowardice. Whether he was lacking in nerve or was a supreme tactician may be in doubt, but the results precipitated him into the position of hero of San Jacinto and the Second President of the Republic of Texas. Houston had about eleven hundred men against Santa Anna's superior forces. Bad luck hit him when nearly three hundred of his men caught measles and mumps. The results of the battle are well-known, and incredible. The Texans killed six hundred Mexicans and wounded two hundred more. Only nine Texans were killed and about thirty wounded. And Santa Anna was a prisoner of war.

Texas immediately entered into the business of operating its government as an independent Republic. Again, there was no doubt but that a rule of law must be established. The Texans had won their freedom to govern themselves in whatever manner they chose. Although they were faced with many immediate problems. The government quickly began to function again. The people returned to their homes. Burnet negotiated a public treaty with Santa Anna ending hostilities, and a secret one to re-

43. *Id.* at p. 441-442.

44. See BARKER, *supra* note 16, at 130.

lease Santa Anna if he would use his influence on the Mexican government to execute the treaty concerning hostilities and to execute another one fixing the Texas boundary at the Rio Grande, and acknowledging her independence.

The political history of the Republic of Texas is not the concern here. Problems were many; with the United States, with Mexico, with the Indians, with foreign countries, with financial matters. But the judiciary was organized and it began to function. It had handicaps, of many kinds. Its judges were sometimes well-grounded in law and sometimes not. But they were mostly conscientious. If they were untrained as a group, they endeavored to administer justice to the best of their ability. Texas was fortunate in having some very learned lawyers here early in her history. But she was a vast state, and in her early days men often had to serve in more than one capacity.

Noah Smithwick was typical of the judges who were not trained in the law, but applied common sense. He showed his practical approach when he described his attitude to his responsibilities.

[p]eople were all poor and struggling for a foothold in the country and I disliked to see them wrangling and wasting their slender substance in suits at law, so my usual plan was to send out my constable, Jimmie Snead, and have the contending parties brought before me, when I would counsel them to talk their difficulties over between themselves and try to arrive at a satisfactory settlement, a plan which was generally agreed to, thereby throwing the burden of costs on the judge and constable.⁴⁵

From her earliest days of colonization Texas had some trained lawyers. When the impresario grants became numerous more began to come to Texas. And her early days as a Republic, many more came. Austin, himself a lawyer, complained about some of them. The colonists were inclined to be contentious, and Austin thought a few of the lawyers were encouraging the litigiousness. Though there may have been many suits started or contemplated, only a few reached the Supreme Court in the early years of the Republic.

The Constitution of the Republic of Texas provided that, "[t]he judicial powers of the [G]overnment shall be vested in one supreme court, and such inferior courts as the [C]ongress may, from time to time, ordain and establish."⁴⁶ It provided for judicial districts, with judges for each. These district judges were to compose the associate judges, who with the chief justice, would comprise the supreme court.⁴⁷ The Supreme Court was to have appellate jurisdiction only.⁴⁸ Counties were to be established, with county courts and justices' courts.

45. NOAH SMITHWICK, *THE EVOLUTION OF A STATE* 170 (Austin 1935).

46. See Republic of Tex. Const. of 1836, reprinted in 1 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822-1897* at 1069, 1073 (Austin, Gammel Book Co. 1898).

47. See *id.* § 7, at 1074.

48. See *id.* § 8, at 1074.

The Constitution further provided that “[t]he [C]ongress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases, the common law shall be the rule of decision.”⁴⁹ And then, “[t]hat no inconvenience may arise from the adoption of this constitution, it is declared by this convention that all laws now in force in Texas, and not inconsistent with this constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitation.”⁵⁰

Thus, the task the Supreme Court confronted is as follows: interpret the statutes to be passed by Congress, then determine which law was in effect at the time of the litigation involved, and finally apply the civil law, if applicable, or the common law. And, of course, they had to determine their jurisdictional fitness.

Four chief justices were appointed during the period of the Republic, but only two served actively. Among them, John Hemphill was a particular student of the civil law.

The experiences of these early judges would fill volumes. The “circuit-riding” judges managed to cover their circuits in spite of roads that were frequently impassable, and under the constant threat of Indian attacks. The United States had caused more and more of the hostile Indians to come into Texas, and this became the period of the greatest Indian hostility. With their surprise tactics, the Comanches, , were greatly feared and their depredations were tremendous.

One can only be lost in admiration at these early Supreme Court opinions. The Justices’ opinions exemplify the deep veneration for the law, the responsibility entailed in determining the law, and the difficulties caused by inadequate access to Spanish law; these shine through the opinions of the Justices.

“Since we have embodied in our law that ever-to-be-prized system of jurisprudence, ‘trial by jury,’ this discretion of damages has been taken from the judge, in whom it existed under the Spanish law, and thrown very properly into the hands of jurors.”⁵¹

Under the recognized canons of international law, the laws of an antecedent government remain in effect until constitutional change or abrogation, or specific statutory declaration cause them to be superseded. Thus, at the time of the Republic, the civil law, under Section 1 of the Schedule to the Constitution, was in effect in some areas.⁵² Texas considered that she had conquered Mexico and proceeded to construe her laws accordingly. Mexico, of course, viewed Texas as a rebellious province, and refused to recognize Texas’ independence until almost the end of the Republic. “The declaration of independence established the sovereignty

49. *Id.* § 13, at 1074.

50. *Id.* schedule § 1, at 1077.

51. *Edwards v. Peoples*, Dallam 359, 360 (Tex. 1840).

52. *See supra* note 50 and accompanying text.

of Texas and gave the government entire control over its vacant domain."⁵³

A glance at a few excerpts from the Supreme Court opinions will show the feeling of the judges concerning the institutions of the common law and some of their problems under the civil law.

The institution of jury trial has perhaps seldom or never been fully appreciated. . . . Its immeasurable benefits, like the perennial springs of the earth, flow from the fact that considerable portions of the communities at stated periods are called into the courts to sit as judges of contested facts, and under the ministry of the courts to apply the laws. There the constitution and principles of the Civil Code are discussed, explained and enforced, and the jurors return into the bosom of society instructed and enlightened, and disseminate the knowledge acquired. . . .⁵⁴

Our system of proceedings in civil suits differs from that known in England and adopted in most of the states of the United States. There the writ generally precedes the declaration. No injustice is committed by taking out the attachment in the first place, because long before the trial the declaration will inform the defendant of the nature of the plaintiff's demand. . . . The mode of conducting proceedings in civil suits by petition and answer is so highly appreciated by the legislative power of this [R]epublic, that at the last session of [C]ongress it was expressly enacted, "that the adoption of the common law shall not be construed to adopt the common law system of pleading; but the proceedings in all civil suits shall as heretofore be conducted by *petition and answer*." (*Vide* Laws of the 4th Congress, p. 88).⁵⁵

It is our opinion, then, that the convention intended only to adopt the common law, to use their own language, "as the rule of decision" in criminal proceedings; and no more of the forms and peculiar writs of that code than might be found necessary to carry out the objects contemplated by that adoption. And surely the convention never intended, when they inserted in the constitution a provision creating an appellate court in criminal as well as civil cases, to deny the accused who might wish to appeal from the district court to the supreme court the right of having the facts of his case, as well as the law, opened to re-examination.⁵⁶

To the legal abilities and the discriminating judgment of the court has been wisely committed the more difficult task of expounding the law to the jury; and to the judgment of twelve honest men, however unlearned, that of finding the facts and applying the law, under the charge of the court, to the facts thus found. It is when each is confined within the limits of its respective sphere, as established by the constitution and laws, and in strict conformity also with the great land-marks of that science, which has been justly called the perfec-

53. Board of Land Comm'rs of Milam County v. Bell Dallam 366, 369 (Tex. 1840).

54. Bailey v. Haddy, Dallam 376, 380 (Tex. 1841).

55. Fowler v. Poor, Dallam 401, 402-403 (Tex. 1841).

56. Republic of Texas v. Smith, Dallam 407, 410 (Tex. 1841).

tion of "human reason," and the maxims and rules of which constitute the most stupendous fabric of intellectual grandeur ever reared by the mind of man, that the boasted trial by jury can be properly appreciated.⁵⁷

Since the texts of some laws were unavailable, administration of these laws became increasingly difficult.

One of the difficulties that have prevented a decision of the cause in this court is that the resolution of the Mexican government of April and August, 1828, referred to in the 32nd section of the decree of Coahuila and Texas, No. 272, of March 26, 1834, cannot be found to be consulted.⁵⁸

It was a favorite object of the constitution to have introduced the body of the English common law as being in the language of our people and a code to which mostly they had been accustomed. It was at length introduced so far as consistent with the constitution, our statutes, condition and institutions; but the act of adoption was concurrently qualified by another, abolishing the common law system of pleading and requiring suits to be by petition and answer, as theretofore; thus, on the subject of the pleadings, leaving us to find principles and criteria in a language generally unknown to us . . . and hence the written averments of the cause of action, of the defense of what pertains to a presentation for determination of the matters in controversy, and those only, are not to be regulated by the common law, but referred to the doctrines and jurisprudence coming to us through Coahuila.⁵⁹

The lack of adequate research facilities greatly disturbed Chief Justice Hemphill.

But on a careful examination of the limited number of books and authorities on the subject of Spanish laws and jurisprudence to which we have access, we are of opinion that the law is repealed, and the passage in *Febrero* contradicted, or perhaps explained more fully by himself and other commentators of established authority. The *Recopilacions* are not within the reach of this court; and we are compelled to decide upon the provisions of the laws of Spain, not from a personal examination, but upon the authority of text writers and commentators.⁶⁰

Justice Hemphill then refers to *Aso and Manuel's* Institutes of the Civil Laws of Spain. Actually, that was a good source. In the civil law countries, the doctrine of the legal writers is one of the primary sources of the law. Of course, the codes and statutes must be looked to.

In one particular case, Hemphill chides the lawyers for failing to present the civil law to the lower court.

The court appreciate [sic] the difficulty arising from the scarcity of books or authorities on questions arising under the former laws of

57. McKinney & Williams v. Bradbury, Dallam 441, 442-443 (Tex. 1841).

58. Hiram & Donaho v. Coit, Dallam 449, 450 (Tex. 1841).

59. Whiting v. Turley, Dallam 453, 454 (Tex. 1842).

60. Garret v. Nash, Dallam 498, 499 (Tex. 1843)

the country. But it is clearly the duty of the attorneys to exhaust all which may be accessible to them before they turn for assistance to the common or any other system of law. Throughout the progress of this cause in the court below, as well as before this tribunal, there has been a strange compound of error, and a mixture of the different systems of jurisprudence springing originally from the belief that the lot sold was the separate property of the wife. The errors which appear in the charge of the court below originate from this mistake; and from the conduct of the argument in this court, it is manifest that the principles of law which governed the case were not discussed before the district court.⁶¹

The common law of England had to be scrutinized to see wherein it could be considered applicable in Texas, and the Texas courts were in no hurry to accept it without question.

In deciding on the proper practice to be pursued under our laws and the organization of our courts, we derive but little assistance from an examination of the practice of the common law courts in England; nor has that practice by the introduction of the common law become of force in this country, and the decisions therein are no further binding here than as they are applicable to the structure of our courts of justice.⁶²

One of the areas of Spanish law, which was to be continued into Texas law through constitutional and statutory provisions, was that of community property.⁶³ It is so eminently fitting that the Spanish concept of com-

61. *Scott & Solomon v. Maynard*, Dallam, 553, 558 (Tex. 1843).

62. *Bradley v. McCrabb*, Dallam 504, 508 (Tex. 1843).

63. When the English common law was adopted in 1840, the Spanish community property rules were retained in Texas law. The schedule to the Constitution of 1836 had provided for their continuance, but in 1840 Texas expressly retained the community property system as to land and slaves. See GAMMEL, *supra* note 26, at 177.

In the Constitution of 1845, Art. VII, Sec. 19, the community property system was again preserved; however, it extended to all property, with provision that laws be passed to clarify the article. The legislature then defined the community as all property acquired by either husband or wife during the marriage, but making the customary exclusions as to property separate before the marriage or acquired subsequently by gift, descent, or devise, in Texas Laws of 1848, Ch. 79, §§ 2 and 3. The Constitution of 1876 further preserved community property in Article XVI, § 15. Thus community property principles in Texas are guaranteed by the Constitution and cannot be set aside by legislative action. See *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925).

The Texas definitions of separate and community property closely resemble those of the Spanish law. . . . In Texas today, as under the Spanish law, each spouse retains separate ownership of the property owned at marriage and of the property received by gift or inheritance during the marriage, but property acquired during the marriage by the personal efforts of either spouse is community, and the revenue from the separate property of both spouses goes into the community.

William O. Huie, *Some Principles of Texas Community Property Law*, in *COMPARATIVE STUDIES IN COMMUNITY PROPERTY LAW* 116 (John P. Charnatz & Harriet S. Daggett eds. 1955).

For an extensive collection of the Spanish laws on community property, including the visigothic, see CALIFORNIA STATE LIBRARY, THE LLOYD M. ROBBINS COLLECTION ON COMMUNITY PROPERTY (1933).

munity of property of husband and wife should have been accepted in Texas law that a glance at the background is justified.

The Visigothic Codes and their importance in Spanish legal history have been considered earlier. It is from the customary law of the Visigoths that Spain derived her community property laws.

The Visigoths were the original sons of freedom. They demonstrated democratic precepts in the manner in which they chose their king. He was elected from among them, and if he did not fulfill his duties adequately, he would be replaced. At a very early period, they established rather representative councils, the Councils of Toledo. Long before Euric and his son, Alaric, had the first written codes published, the germanic tribes had been recognizing community of ownership of property between husband and wife they acquired during marriage. Perhaps this concept goes back to their days of invasion, when husband and wife went into battle together, the wife exhorting her husband on to victory, and upon victory, they shared the spoils equally. They endured vicissitudes equally; they would share their profits.⁶⁴

Thus the concept of equal ownership of acquests and gains came into Texas through Spanish and Mexican law. The Texans found it to be a system of marital rights that they liked, over the common law principles, and expressly retained it in their legal system.⁶⁵

The women of Texas had not joined the armies of Texas to go fight with their men, but they had suffered just as many hardships. It is an eternal tribute to the framers of the Texas Constitutions and early statutes that they accorded recognition to their wives by accepting them as individuals who were to share equally with them the property they would acquire jointly during marriage. They retained responsibility as administrators of the community, but they also were charged with the responsibilities of the administrator.

Under old Spanish law, if they failed in their duties, the wife had recourse. True, she had to obtain her husband's consent to file suit to protect her rights, but if he refused it, she could apply to the court for right to file suit.⁶⁶ This was the background for the recognition of the individuality of the wife, and protective measures given her by the law.

The living conditions in early Texas were appalling, particularly to the women. Austin's colonists suffered greatly when their supplies were lost on three successive ships. The mortality rate was high. Tools were of the most primitive. Buildings were frequently windowless, with dirt floors. Exigency required the use of rawhide for many purposes. And the ever-present threat of the Indians held terror. The Mexican soldiers that were sent in were customarily drawn from convicts.

64. See Decree No. 277, *supra* note 35.

65. See GAMMEL, *supra* note 26, at 177.

66. See *Bailey v. Haddy*, Dallam 376 (Tex. 1841); *Fowler v. Poor*, Dallam 401 (Tex 1841).

In spite of all these unpleasant factors the Texas women stayed with their men. Even after the horrors of the runaway Scrape, and having to flee for their lives sometimes with an unfinished meal on the table, they returned to their homes. They knew that the Mexican armies were not all gone from Texas, and that the Indians were frightfully stirred up and infinitely more dangerous. But they went right back to what was left of their homes and helped to build Texas. It is inspiring to think of their courage, and of the wonderful relationship between them and their husbands shown by the rejection by the drafters of the early Constitution and statutes, of the common law concept of marriage.

Now far back in English history, England, too, had had the influence of the customs of the Germanic tribes. Still, when the Norman invasion took place, the Norman nobles introduced the feudal system into England and contemporaneously rejected the Germanic concept of community property in Normandy.⁶⁷ About 1200 the English property law of movables was placed under the jurisdiction of the England church tribunals. Canon law, based on Roman law, was applied to movables. It did not contain the concept of community of property. These two developments lost the community property concept to the development of the English law. The feudal system was hostile to the traditional idea of equality between man and wife.

Brissaud, in discussing the position of women under the English common law, says "[m]arriage is for the women a sort of civil death."⁶⁸ Upon marriage, the woman lost her individuality, and a sort of merger took place. "The husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover she performs everything."⁶⁹ Of course, the Married Women's Property Acts of the late 19th century have raised the English wife from her subordinate position. But those reforms came after Texas had established her choice of community property.

There has been much misunderstanding of the community property concept by both lay and legal minds. This has simply been the result of lack of information about the foreign legal system from which it is derived. Language was a barrier at first. But the hostility still continues, except among students of comparative law who are familiar with the historical background of the concept, and the democratic principles of equality and freedom it embodies.⁷⁰

67. See 2 FREDERICK POLLOCK & FREDERICK W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 402 (Cambridge, 2d ed. 1968).

68. 3 JEAN BRISSAUD, *A HISTORY OF FRENCH PRIVATE LAW* § 543, at 783 (1912).

69. 1 William Blackstone, *Commentaries on the Laws of England*, Book I, at 442 (Callaghan & Co., 4th ed. 1899).

70. The failure of the bench and bar to familiarize themselves with the Spanish laws of the community has caused the hostility and confusion arising within this field of law. For example, Book X, Tit. 4, Laws 1, 2, and 3 of the *Novísima Recopilación* clearly defines what is to be community property. See WILLIAM Q. DEFUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* 65 (1st ed. 1943). Property which is not community must therefore be

Here, we are only concerned with the concept of community property reception in Texas, but the French brought it into Louisiana. The other Spanish border states adopted it in varying degrees, but Texas accepted it more wholeheartedly than any other. The civil law has carried the concept over a great part of the Western world. But here in Texas lack of understanding has led to confusion and distortions of the original concept, even to the point of legislative attempts to alter the constitutional provisions.⁷¹ Attempts to analyze problems concerning the community without a knowledge of its civil law background can only lead to confusion. Common law principles can not be applied properly. Too frequently, the lawyers encountering the problems are trained only in the common law, and the laymen who deal with them have only common law traditions.

A principle that has survived since before Christ, and was included in the oldest legal codes of Spain and elsewhere in the civil law, is certainly worthy of deep consideration before discarding it or permitting it to be lost.

Since the United States is primarily of the latter type (democratic), the existence of the community system, even though found in only some of our states, is much more natural to our way of life, to our habits and customs, than is a system or concept of marital property rights coming to us from privileged and aristocratic classes, who, indeed rarely cling to the community system.⁷²

Another area in which Spanish law inevitably affected Texas law was the field of property law, other than community property law.

It took a long time for Texas to settle her boundaries.⁷³ It was not until Santa Anna was defeated that Texas claimed the area between the Neuces River and the Rio Grande. Until then, that area was part of the Mexican state of Tamaulipas. It contained some vast ranches that held title by land grants from the King of Spain. The King at all times retained mineral rights to land. When Mexico gained her independence from Spain she succeeded to those rights. Thus, when Texas became independ-

separate. Unfamiliarity with this clear-cut concept has led to much needless confusion. "The confusion in the decisions of the California courts (with respect to the wife's interest in community property), has undoubtedly arisen from the fact that the courts have been attempting, in their opinions, to apply the terminology of the common law to community property, which embodies a legal concept wholly foreign to the common law and to which the terminology of the common law cannot be applied with accuracy and precision." 34 Op. Atty. Gen. 395 (1924).

By properly understanding that under the common law theory viewed the wife as a chattel and the civil law theory viewed the wife as an individual with obligations to her husband and to third persons, much uniformed hostility to community property would be eliminated and would recognition of its adaptive possibilities to 20th century society would be accorded.

71. For a discussion on this subject, see Huie, *supra* note 63, at 115.

72. DEFUNIAK, *supra* note 70, § 11, at 21.

73. The Treaty of Guadalupe Hidalgo, between the United States and Spain in 1848, made the Rio Grande the international boundary, thus ending Mexican claims to territory north and east of the river. Texas gave up her claims to New Mexico in the Gadsden Purchase of 1853. Not until then were Texas boundaries fixed.

ent, she became the owner of those rights. Long afterwards, the Texas legislature relinquished those mineral rights to the titleholders of the properties. Tamaulipas, also, gave many land grants in the area after Mexican independence.

A real area of conflict developed with reference to interpreting the laws relevant to titles in the part of Texas that had been in Tamaulipas and the part that had been in the state of Texas and Coahuila. Under the civil law system in effect in Mexico the state legislature had the power to interpret federal laws, and the judiciary did not. The legislatures of the two different states placed different interpretations on the federal law, the General Law of Colonization of August 18, 1824. These different interpretations were a source of the conflict.

Federal law prohibited any grants of land within certain littoral or coast leagues, without the previous consent of the federal executive of Mexico.⁷⁴ The Tamaulipas legislature construed this law as prohibiting only the settlement of foreigners in the coast leagues without federal approval. The Coahuila and Texas legislature interpreted the same law as applying to both Mexicans and foreigners.⁷⁵

Texas courts have distinguished between these two interpretations, and have held that in the case of land formerly within Tamaulipas the grants to Mexicans did not require approval by the federal executive;⁷⁶ whereas in the area subject to the laws of Coahuila and Texas, approval by the federal executive was essential.⁷⁷

The Spanish concept under the Siete Partidas was that the stream beds belonged to all people.⁷⁸ Texas accepted that as to the beds of navigable streams. The Partidas included laws on ownership in case of sudden change of channel.⁷⁹ These problems of ownership of land, minerals, water, and riparian rights are in themselves subjects for exhaustive study. They are being noted here merely as areas of the influence of Spanish law.

Problems were to arise from lack of lay understanding of Spanish law as to coastal areas. Title 28, Law VI, regards rivers, harbors, and public highways as belonging to all in common. Texas courts are in agreement that title to the bed of the sea or of the river remained in the sovereign under Mexican law, where land was granted contiguous to the sea or a

74. See General Laws of Colonization, art. IV, reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 97 (Austin, Gammel Book Co. 1898).

75. See GAMMEL, *supra* note 26, at 97.

76. See Cavazos v. Trevino, 35 Tex. 133 (1871); State v. Balli, 144 Tex. 195, 190 S.W.2d 71 (1945).

77. See Wilcox v. Chambers, 26 Tex. 180 (1862); Goode v. McQueen's Heirs, 3 Tex. P. 241 (1848); The Republic v. Thorn 3 Tex. 499 (1848), 3 Tex. 499; Edwards v. Davis, 3 Tex. P. 321 (1848); Wood v. Welder, 42 Tex. 396 (1874). The United States Supreme Court recognized this law from Coahuila and Texas as having become a rule of property in Texas; see Christy v. Pridgeon, 71 U.S. 196 (1866). These cases illustrate one small point in which Spanish law must be considered in connection with its imprint on Texas law.

78. See LAS SIETE PARTIDAS, Tit. 28, Laws III and VI (Samuel P. Scott trans. 1931).

79. See *id.*, Law XXXI.

river.⁸⁰

Texas became the owner of vast public lands when she gained her independence. Her legislators were extremely generous with their grants. The successive laws, giving liberal grants to her veterans and to her settlers, are well known. The complications arising from them are perhaps less well known. Only Stephen F. Austin had kept careful records of land grants. In most of the rest of Texas there were conflicting claims. Many people merely moved in and settled down, claiming squatter's rights. Others, like Thomas Jefferson Chambers, claimed a number of grants as payment for various services.

These complications, plus faulty records, and loss of records through fire or carelessness, have given Texas over a century of title problems. The legislature has acted at times in an effort to quiet some of the titles most in conflict.⁸¹

What, then, have we proved? We have not attempted to compare the civil law to the common law. We have not tried to take any one of the many areas of the law to trace it to its source. We have not analyzed the philosophical bases of any of the concepts of either of the systems. We have not even considered any of the twentieth century developments. What have we done?

We are not the archaeologist, looking to fossils to indicate the past of Texas to us. We are not the theologian, assuming the impact of the church and its history. We are not the historian, chronicling the facts of historical development. We are not the scientist, readjusting to the entry of theories of uncertainty into the scientific approach. We are not sociologists, looking to the ethnic origins of the people of Texas.

Each of these groups has thought of the glories of Texas in his own way. The archaeologist has his Folsom man and his dinosaur's footprint in the Paluxy river bed. The theologian has his Catholic tradition or his Protestant revivalism. The historian has his Alamo, and its fallen heroes. The scientist has his seismograph, recording the presence of oil and its fabulous wealth. The sociologist has his cannibalistic mores, and the customs of the primitive Indian tribes.

What, then, have we? We have a heritage for our sons. We have a moment in history to which we can point and say, "[M]en found no situation so impossible that the rule of law was not their goal." True, they found the human handicaps of language barriers and misunderstandings. But never did they contemplate giving up the rule of law, only how to achieve it.

From this, what do we glean? Perhaps it is a message for the future. Men must have a rule of law acceptable to them. Something in them

80. See *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71 (1945); *State v. Grubstake*, 117 Tex. 53, 297 S.W.2d 202 (1927); *Manry v. Robinson*, 122 Tex. 213; 56 S.W.2d 438 (1932).

81. Congress attempted to cure the problems of the border leagues by "An Act to Quiet the Land Title within the twenty frontier Leagues bordering on the United States of the North," GAMMEL, *supra* note 26, at 641-643.

demands it. We are only observers. The traditions of the two great legal systems of the western world are powerful indeed. At the time they met in Texas the idea of revolution to achieve reforms in government was popular.

Today, the struggle is not between the civil law and the common law, but between two great ideologies, one of which is predicated on a rule of law, and one of which is not. Do we of the twentieth century value the rule of law as our nineteenth century predecessors did?

Perhaps there we have the key to the future. The nineteenth century frontiersman believed deeply in the traditions of the concept of the rule of law. True, he had to be his own law frequently. But he never denied the need for an established system of law. On the contrary, he plead for it. He was willing to revolt to gain it.

Here, in the twentieth century, we have the chance to prove that revolt and violence are not necessary, when legal systems or ideologies are in conflict. But first, we need to look at what we have and decide whether or not it is good. For the last quarter of a century there has been a steady decline in our respect for our institutions. We are contemptuous of our Supreme Court and derisive of our legal processes. We, who agreed upon more fundamental human rights than any other people in the history of the world, have allowed skepticism to enter our thinking.

What a travesty it would be if we who live under the protection of the rule of law repudiated it! Texas soil would vibrate from the rumblings of the Old Three Hundred and the other Texans who saw that living cannot be good except under a legal order acceptable to all! The challenge of the future is for men to study legal concepts when they meet in conflict through peaceful means, and achieve peaceful adjustment.

It will not be easy, but peaceful determination will eventuate. This is my message to my sons. There is nothing in the Communist ideology that is as powerful as the ideal of due process of law. It cannot be destroyed with an explosion or a revolution. Proof of its power surely lies in the more than thirty thousand letters and telegrams sent to Justice Medina on conclusion of the trial of the eleven Communists who were found guilty after being accorded every privilege of our judicial process.⁸² And what was the tenor of those letters? It was appreciation of the importance of a fair trial for those defendants, and that under our system they had received one: six months and sixteen thousand pages of testimony in the trial court with five lawyers of their own choice to represent them, and a judge of pre-eminence and integrity to conduct the trial.

The people spoke, to accord a great judge appreciation for his protection of the right of a fair trial for all. And of particular significance here is the fact that Texas was named first in the list of the three states that sent in the predominance of the letters!⁸³ Those letters are a cross-sec-

82. See HAROLD R. MEDINA, JUDGE MEDINA SPEAKS 299 (Maxine B. Virtue ed. 1954).

83. See *id.*

tion of American thought. They establish that the waning respect for legal institutions must not be accepted as defeat. In a situation where reverence for the legal order is needed, it will appear. And Texas will be in the forefront. She always has been!

Wherefore that here we may briefly end: of Law there can be no less acknowledged, that that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power: both Angels and men and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy.⁸⁴

84. ISAAC WALTON, *THE WORKS OF THAT LEONARD AND JUDICIAL DIVINE MR. RICHARD HOOKER*, Book I, § 8, at 285 (7th ed. 1947).

