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LEWIS V. AMES — AN ANCIENT CAUSE REVISITED

by James R. Norvell*

Old abstracts of title and causes tried long ago possess a peculiar fascination to those who happily possess some imagination and a sense of history. To a proof reader an abstract of title may be no more than pages of misspelled words, misplaced commas, and sentences without continuity; but to the imaginative title examiner the copy of a patent from the State of Texas to one William Hampton dated in the year 1847 may suggest a pioneer farmer, his loyal wife, and sturdy family, as they face the western frontier and make their contribution to the foundations of empire. What joys, trials, and sorrows were their lot upon this homestead tract which appears by pro-saic section and block number in the abstract? Or, the translation of an *expediente*¹ may be found, recounting the visit of the Spanish viceroy to a small outpost of Imperial Spain along the Rio Grande about the time of the American Revolutionary War. One can envision him as a proud duke or marquis, perhaps a young man designated for this particular duty because of ancient family ties to the royal house. He may be one to whom luxury is no stranger. What emotions did he experience in this primitive village as, in the name of his sovereign, he awarded lands to deserving veterans of colonial wars and to the ancient settlers of the community? And what passed through the mind of the old soldier when he received his grant, and in accordance with custom gave thanks to his God and to his king and seized rocks and broke twigs to demonstrate his ownership of the land?

And so it is with the reports of cases in our libraries. These are often chronicles of human tragedies, sufferings, and vindications. For the most part they represent the result of careful and considered

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¹ An expediente is the historic record of the proceedings related to a grant of land by the sovereign. *State v. Sais*, 47 Tex. 307, 315 (1877).

attention given by a group of judges to some human problem or erroneous judicial decision. Many of these recorded opinions are truly great, written by sensitive, experienced, and learned men. Some contain forthright and challenging statements of those rights upon which human dignity is based. Others chronicle or reflect important times of crisis and historical events. Some cases are of interest primarily because of the light which they throw upon the human qualities of the persons involved. Often, however, the appellate opinion contains few details from which the personalities of the litigants may be reconstructed and the larger portion of the picture remains submerged like an iceberg in a murky sea. While much information is contained in the court's opinion, this situation is to some extent reflected by the report of the case of *Samuel K. Lewis and Edward McGinnis v. Charles and Harriet A. Ames*,² decided by the Texas Supreme Court in 1875.

I. THE CASE

The action was one in trespass to try title involving lands in Marion County which at one time were owned by Robert Potter³ as a portion of a league and a labor⁴ to which he was entitled under a headright certificate issued by the Republic of Texas. The contest was between Mrs. Ames and Lewis and McGinnis who had purchased the property at a sale made by the administrator of the estate of Sophia A. Mayfield, deceased. Robert Potter died on March 2, 1842, and the controlling issue in the case was whether or not Mrs. Ames was Potter's legal wife at the time of his death. This question was important as bearing upon numerous phases of the case, such as whether the family which Potter claimed when he applied for his headright certificate consisted of Mrs. Ames and the

² 44 Tex. 319 (1875). The opinion in *Lewis v. Ames* was written by Chief Justice Roberts, a distinguished Texan who had served on the court immediately prior to the Civil War. Roberts had been president of the Secession Convention and a Confederate Army officer. After the war he returned to the court as chief justice in 1864. In 1866, Roberts was chosen by the Legislature as a member of the United States Senate, but that body refused to seat him. He again returned to the court as chief justice upon Richard Cole's election as governor in 1873. After his tenure on the court, Roberts served as governor of the state for two terms and then became a professor of law at the University of Texas.

³ Potter County in the Panhandle of Texas (Amarillo is its County seat) was named for Robert Potter, who is described in the *Texas Almanac* as a "signer of the Texas Declaration of Independence, Senator and one-time Secretary of the Navy, Texas Republic." *Texas Almanac* p. 690 (1956-57 ed.). This county is a considerable distance from Potter's Point in Marion County where Potter was killed. Potter County was created in 1876 (the year after the supreme court decision in *Lewis v. Ames*) and organized in 1887.

⁴ A square league contains 4428 acres. *United States v. Perot*, 98 U.S. 428 (1878). A labor contains 177 1/7 acres. See *Ammons v. Dwyer*, 78 Tex. 639, 15 S.W. 1049 (1890), in which "a league and a labor" is referred to as containing 4605 acres.

children born to her and Potter, or the children whom Potter had by his first wife in the State of North Carolina; whether Mrs. Ames, after the death of Potter, could qualify as a claimant under color of title as prescribed by the three-year real property statute of limitations; and whether Mrs. Ames could assert a community interest in the property. In addition, there were numerous contentions made with reference to jurisdiction of various probate courts over the parties and the decedents' estates involved, namely, those of Robert Potter and Mrs. Mayfield.

The case was tried in April of 1872 before Honorable J.D. McAdoo, district judge. The following year McAdoo became a member of the Reconstruction Supreme Court, commonly known as the Semicolon Court. He awarded one section of land to the Lewis and McGinnis claimants but denied all recovery against Harriet A. Ames insofar as the two remaining sections were concerned. The supreme court, however, reversed that portion of the judgment favorable to Mrs. Ames and rendered judgment for Mrs. Marshall Ann Lewis (the widow of Samuel K. Lewis, an original plaintiff) and Edward McGinnis for all three sections involved. The supreme court at the time of decision (1875) was composed of Roberts, Chief Justice, and Reeves, Moore, Gould, and Ireland, Associate Justices. The opinion was written by the Chief Justice; Justices Reeves and Moore took no part in the consideration of the case.

Judge Roberts' opinion fills twenty-five pages in the official reports. Much of it is concerned with jurisdictional questions which arose by reason of a number of changes in the boundaries of counties situated in Northeast Texas.

The Mayfield claim asserted by Lewis and McGinnis as purchasers from the administrator of the estate of Sophia A. Mayfield was based upon a deed dated February 8, 1842, (recognized by judge McAdoo in his judgment) whereby Robert Potter conveyed section 12 to Mrs. Mayfield, and a will executed by Potter three days later, on February 11, 1842, wherein he devised to Mrs. Mayfield the section described in the deed, and also section 13 and fractional section 24 on which his residence was located.

As to Robert Potter, it appears from the opinion that he came from North Carolina. His first wife had divorced him, but two children had been born to this marriage. Further, Potter (to quote the opinion) "had been a midshipman in the Navy of the United States, had suffered imprisonment for more than two years in the State of North Carolina for the commission of an offense

of extraordinary character against two persons, which, throughout the whole Southern States, made him notorious and gave to the newly coined word 'Potterizing' a terrible significance; his wife had been divorced from him on account of his said offenses and his treatment of her; he had come to Texas, engaged actively in its struggles for independence, and was appointed Secretary of the Navy"⁵

As to Mrs. Ames, it appears from the opinion that she met Potter in the spring of 1836. At that time she was the wife of Solomon C. Page. In September of 1836, according to her testimony, she and Potter were married by bond and lived together until his death in March of 1842. Thereafter, she continued to live upon the premises and apparently was occupying them at the time of the trial. Some time after Potter's death she married Charles Ames who died before the trial of the case.

The opinion contains little information as to Mrs. Sophia A. Mayfield and sheds no light as to why she was named in Potter's will. She died in 1852 and within a few months thereafter her husband, Col. James S. Mayfield, also died, leaving six surviving children, four of whom were minors. Her estate was administered in Fayette County and the three sections involved were sold to Lewis and McGinnis, in order to effect a partition of the estate among her heirs.

The case turned upon the effect of remedial statutes validating irregular marriages contracted under Mexican sovereignty and in the early days of the Republic. In his opinion, Judge Roberts said:

During the dominion of Spain and Mexico over this country the opinion was entertained by the settlers from the North American States that marriage could not be legal unless the rites of matrimony were celebrated by a Catholic priest. So strong and prevalent was this opinion that many of such persons, who had long been married before their emigration, were married again here by a priest, for the purpose of the better security of their citizenship and as a merit in the acquisition of lands. It is part of the history of Eastern Texas that Father Maldoun, an Irishman and priest, made himself agreeably useful in this business. Most of those settlers were Protestants in education at least, and had a prejudice against being married by a Catholic priest when marriages were sought to be contracted here by single persons; and if it had been agreeable there were priests to be found only at a few towns, at a remote distance from many of the settlements of the Americans, as the early settlers were called. Under these circumstances many marriages were contracted by bond, entered into to bind the consciences of the parties, though deemed null in law. (See form of bond in the case of *Sapp v.*

⁵ 44 Tex. at 343.

Newsom, 27 Tex. 538.⁶) Others were married by Protestant ministers, with or without bond. Texas being then and afterwards a place of refuge for unfortunates, persons came here and lived as husband and wife, leaving behind a living husband or wife; and persons lived here together as husband and wife having in this country a living husband and wife. Such persons sometimes entered into bonds as a means of fixing their relation in this country. There were also persons living together under agreements, whether written or unwritten, to terminate at the pleasure of either party, which, however, it is believed were not as frequent in this country as it was said to be in portions of Louisiana, with which Eastern Texas had much communication in those early days of its history.

Society in this country was not sufficiently organized (the mass of people being sparsely scattered over the country and strangers to each other upon coming here) to frown upon these irregularities in reference to the marriage state, as might have been done in older countries.

In order to properly construe and understand the evidence of recognition and common repute, as well as the acts of the parties, as tending to establish the relation of a man and a woman who lived together, we must cast our minds back to the contemplation, as well as we now can, of their true import in the state of society as it then existed.

The character and relative condition of the parties must also be taken into consideration in interpreting their conduct towards each other, and this would apply to all states of society, whether in Europe or America, when any doubt is cast upon the relation of the parties claimed to be husband and wife, or the contrary.

These marriages in Texas, deemed null in law, were of such pressing consideration and consequence as to demand the attention of the Anglo-Americans even in the very first initiatory stage of their assumption of superior power in Texas.⁷

Judge Roberts, however, held that the remedial acts of the Texas Congress did not operate to validate the arrangement between Potter

⁶ The marriage bond set out in *Sapp v. Newsom* is as follows:

State of Coahuila—Department of Texas July the 23rd, 1830.

Know all men by these presence [sic], that I, Robert Con, of the said state and department, do promise and agree to take Delila Allen to be my true and lawful wife, to live together [sic] after the holy ordinances of God, love, honor, keep her in sickness and in health, forsaking all others and cleave unto her alone so long as we both shall live.

I, Delila Allen, of the above state and department, do promise and agree to take the said R. Con to be my lawful husband, to live together [sic] after the holy ordinances of God, to love, honor and obey, keep him in sickness and in health, forsaking all others, cleave unto him so long as we both shall live.

Robert Conn, [L.S.] [sic]
Delilah Allen [sic]

Signed in the presence of

Michael Dailey
Elizabeth Dailey

⁷ 44 Tex. at 338-39.

and Mrs. Page (later Ames) because the evidence was not sufficiently clear to establish a marriage intent. It was said:

. . . But if we give these laws the broadest scope of construction in reference to the marriages under bond as healing acts, they cannot be held to have created a marriage against the consent of the parties which was never intended by them or either of them. A marriage is a mutual agreement of a man and woman to live together in the relation and under the duties of husband and wife, sharing each other's fate or fortune for weal or woe until parted by death, which, in organized society, is subject to certain impediments, and legalized by compliance with certain forms of law. The relation itself is natural; the prescribed impediments and the forms of law for its legal consummation are artificial, being the work of government. What was known as and called 'marriages null in law' was a real marriage according to nature, and so intended by the parties, deficient only by the existence of some legal impediment or the want of compliance with the forms of law in contracting it. Our laws relieved against the impediment and the want of legal forms, but did not make an attempt to make concubinage marriage. The true question then in this case is, the impediment and the forms of law being relieved against, did this natural relation of marriage exist in good faith between Potter and Mrs. Page during the time they lived together, from September (when she says they entered into bond) until Potter's death in March, 1842, nearly six years, or was their living together a merely conventional arrangement for illicit intercourse and mutual assistance in living, she being the willing mistress and he the protecting paramour?—as it is evident their association and relation commenced in Galveston in the spring of 1836, and continued in Shelby County, (afterwards Harrison,) in Texas, up to September of that year. . . .

Is such a marriage in good faith shown clearly by the evidence in this case? Without discussing the evidence minutely, it is proper to consider that the terms of the alleged bond are not specified, or it spoken of as ever having been seen or heard of but by the defendant, who is contradicted in many other respects by numerous witnesses; that the evidence of recognition and common repute to establish a marriage is conflicting, and more easily reconcilable against than for it, when viewed in the light of the attendant circumstances and the history of the times; . . . his protestation to his old acquaintances that he never would marry any woman; their failure to marry after Page's divorce removed all obstacle; his naming her in his will as Mrs. Harriet A. Page, and giving her a portion of his property by that name; her acquiescence in the probate of the will, and her recognition of Smith's executorship, which treated her as Mrs. Harriet A. Page, and not as Mrs. Potter; when all these things, with many others tending to the same conclusion, are maturely considered, it can hardly be held that it has been clearly

shown that a real marriage in good faith has been established, as the facts appear in the record.⁸

While the case relates to a bond marriage, it still remains a leading case bearing upon the problem of common-law marriage and supports the proposition that people do not get married as a matter of law just by living together, despite the apparent idea of some police officers and newspapermen, who occasionally refer to a defendant or corpus delicti in a criminal case by the use of that inaccurate and overworked euphemism, "common-law wife" (or husband, as the case may be). In the main, Judge Roberts' definition or catalogue of the essentials of a valid marriage were carried forward and reaffirmed by the leading cases written by Chief Justice Brown almost forty years later, viz., *Grigsby v. Reib*,⁹ *Berger v. Kirby*,¹⁰ and *Schwingle v. Keifer*.¹¹

However, as to this particular case, Chief Justice Roberts and his court hardly had the last word. After the man whom Harriet Ames claimed as her husband was killed at Potter's Point, she continued to reside there for many years without being disturbed and then, after being dispossessed of the property, lived with a daughter in New Orleans until she reached the age of 84. Being an articulate and intelligent woman, she served as her own "Court of Last Resort," so to speak, and prepared a narrative of her life and relationship with Potter which has led many to believe that if *Lewis v. Ames* was not an actual miscarriage of justice it exemplified an instance wherein the law, operating in accordance with its fixed standards and rules, failed to approximate justice in the abstract sense. The Texas career of Mrs. Ames was unusual, spectacular, and marked by violence. It was made the subject of an historical novel¹² by Elithe Hamilton Kirkland, a gifted Texas writer who, religiously adhering to her primary sources, viz., Mrs. Ames' narrative and the record of the testimony in *Lewis v. Ames*, reconstructed a brilliant and highly interesting account of life in the early days of the Texas Republic.

To Judge Roberts, however, in his capacity as a jurist, there remained the stubborn fact that at the time of her reputed marriage to Potter, Mrs. Page (later Ames) had a living husband and that Potter in his will had referred to her as "Mrs. Harriet A. Page."

⁸ Id. at 341-43.

⁹ 105 Tex. 597, 153 S.W. 1124 (1913).

¹⁰ 105 Tex. 611, 153 S.W. 1130 (1913).

¹¹ 105 Tex. 609, 153 S.W. 1132 (1913).

¹² Kirkland, *Love Is a Wild Assault* (1959).

II. THE CAREER OF ROBERT POTTER

Perhaps no more violent and contradictory man than Potter ever appeared upon the Texas scene. He was characterized by General Sam Houston as the "notorious Robert Potter . . . whose infamy was wider than the world, and deeper than perdition."¹³ Yet another contemporary says that, "He was one of that galaxy of intellectual, practical, brainy men like the Austins, Houston, Rusk, Wharton, Jack, Bakers and others who laid the foundation of the great State of Texas."¹⁴

The "Potterizing" episode mentioned by Judge Roberts in his opinion consisted of the emasculation of two of his wife's cousins, one a Methodist minister and the other a seventeen-year-old boy. This grew out of an apparently unfounded charge of unfaithfulness which he levied against his wife.¹⁵ Potter, at the time of this occurrence, was a member of the Congress of the United States and, strange to say, while serving a term in a North Carolina prison for his crime,

¹³ See Shearer, *Robert Potter, Remarkable North Carolinian and Texan*, Introduction p. x (1951). This is the best and most complete biography of Potter that this writer has seen.

¹⁴ *Ibid.*

¹⁵ Robert Watson Winston in his short biography of Potter entitled "Robert Potter, Tarheel and Texas Daredevil," which appeared in 29 *So. Atl. Q.* 151 (1930), gives this account of Potter's crime:

Potter was not reelected to Congress in 1831. In truth, in August of that year he committed a crime, the enormity and savagery of which have never been paralleled, perhaps, in American civilized life. August 28, 1831 fell on Sunday. Potter was at home that day with his wife, a good woman, of good North Carolina and Virginia stock, a Miss Pelham [sic]. Mrs. Potter had two cousins who often visited the home, Reverend Louis Taylor, a minister of the Methodist Church, about fifty-five years old, and Louis Wiley, a youth of seventeen. Potter had conceived a dark, malignant hatred for these two men and had charged his wife with criminal intimacy with both. That day, Sunday August 28, Taylor came out to Potter's on a visit, not knowing Potter's feeling toward him. Potter laid the charge of adultery on Taylor and after a few angry words, pounced on him like a wild beast, beating him senseless. He then whipped out his keen sharp blade and castrated the man, "Potterized" him. Putting him to bed, he told him that if he kept quiet, his disgrace would not get out. 'I have been very merciful and kind to you.' Potter vouchsafed, 'I have spared your life.'

Potter then set forth in search of Wiley, who lived three or four miles nearer Oxford than Reverend Mr. Taylor's home. Finding Wiley at home, Potter sprang upon him like a tiger, treating him as he had Taylor. Returning to his home, Potter found Taylor doing well and Mrs. Potter sitting in her bedroom alone. That night Mrs. Potter's brother and a Colonel Gilliam, together with Dr. Taylor, arrived on the scene. Potter informed them what he had done, and told them to go in the bedroom and see Mrs. Potter and ascertain from her if his suspicions were not correct. This one or more of them did, and on returning stated, so Potter claims, that Mrs. Potter had confessed her guilt. The parties always stoutly denied this, declaring that Potter was a downright liar.

(Note: The maiden name of Potter's first wife was Taylor. Pelham was the maiden name of Mrs. Potter's mother. The names of the children whom Potter had by his first wife, Susan and Robert, were changed to Pelham after the divorce. See Shearer, *op. cit.* supra note 13, at 33).

Harriet Ames records that she was convinced that Potter's first wife was innocent of any wrongdoing. After she had gone through a marriage ceremony with him, Mrs. Ames

or within a few months thereafter, he was elected a member of the legislative branch of the state government.¹⁶ He was, however, expelled from that body after engaging in an altercation growing out of a game of cards. This was perhaps a subterfuge, as a majority of the members may have concluded that it would be more pleasant or safer to complete the legislation session without the presence and services of Potter. As a result, Texas gained an active and vigorous citizen at a crucial time in her history. Potter arrived in Nacogdoches in the summer of 1835, and it is said that shortly after he dismounted from his horse he was elected to the Texas Constitutional Convention.¹⁷ He signed the Declaration of Independence and because of his five years' service in the United States Navy prior to his entry into the North Carolina political wars, he was chosen as Secretary of the Texas Navy, consisting of some four or five vessels. Potter was one of the delegates who desired to adjourn the convention and respond to the call for assistance issued by Travis from the Alamo. On this issue, as well as other policies advocated by Houston as Commanding General and President, Potter found himself in opposition. After the defeat of Santa Anna and the establishment of the Republic, Potter located his headright certificate at Potter's Point on Ferry (Caddo) Lake in old Red River County, and there lived with Mrs. Page (or Potter) and their children. Upon becoming a candidate for the Senate of the Republic, he became embroiled in a bitter feud with Captain William Pickney Rose, "The Lion of the Lakes," who strongly opposed his election and re-election to Congress. The Potter-Rose quarrel rather assumed a Regulator-Moderator pattern similar to that of the Shelby County War. After his re-election, Potter succeeded in persuading the Congress to adopt a resolution of outlawry against Rose and a reward of \$500 was posted for his apprehension. Potter, at the head of a group of men, attempted to capture Rose but Rose escaped by hiding under a brush pile which he ordered his negroes to set on fire to avoid suspicion. It then be-

learned that Potter had had a wife in North Carolina. As to the "Potterizing" episode, she stated that:

It seemed that while a member of Congress in Washington, Col. Potter became infatuated with a beautiful heiress in that City, and finally became engaged to her. How to get rid of his wife in order to marry the heiress was then the paramount question in his mind. When he returned to North Carolina, he found a 'protracted meeting,' or as some call it a church revival in session. His own wife was one of the converts, and hearing that a young minister had been praying with her, he seized upon this to attempt to create a scandal about her, that might lead to a legal separation. But he only succeeded in bringing distress and misery into several homes and political trouble and imprisonment upon himself.

¹⁶ Shearer, *op. cit.* supra note 13, at 34.

¹⁷ *Id.* at 46; Sonnichsen, *Ten Texas Feuds, Old Rose and Senator Potter*, 59 (1957).

came Rose's move. He and a group of men surprised Potter in his house and the account of the events subsequent thereto was chronicled by that celebrated reporter, Charles Dickens, in his "American Notes" from an inaccurate though spectacular account which appeared in a Texas newspaper:

Terrible Death of Robert Potter.—From the Caddo Gazette of the 12th inst. we learn the frightful death of Col. Robert Potter. . . . He was beset in his house by an enemy named Rose. He sprang from his couch, seized his gun, and in his night-clothes rushed from the house. For about two hundred yards his speed seemed to defy his pursuers; but, getting entangled in a thicket, he was captured. Rose told him that he intended to act a generous part, and give him a chance for his life. He then told Potter he might run, and he should not be interrupted until he reached a certain distance. Potter started at the word of command, and before a gun was fired he had reached the lake. His first impulse was to jump in the water and dive for it, which he did. Rose was close behind him, and formed his men on the bank ready to shoot him as he rose. In a few seconds he came up to breathe; and scarce had his head reached the surface of the water when it was completely riddled with the shot of their guns, and he sank to rise no more.¹⁸

III. THE NARRATIVE OF HARRIET A. AMES

Mrs. Ames first appeared upon the Texas scene as the wife of Solomon C. Page. She and her husband came to Texas from New Orleans, Louisiana, shortly before the outbreak of the Texas War for Independence. Mrs. Page had operated a small store in the Upper Faubourg district in New Orleans. According to her narrative, Page gambled away all of their meager personal belongings shortly after their arrival in Brazoria County and then left to join General Houston's army, leaving her and two small children wholly destitute. For Page, she had utmost contempt and records that when he left, she cried: "If you go off and leave us to starve, I hope that the first bullet that is fired will pierce your heart, and just leave you time enough to think of the wife and children that you left to die of starvation in this wilderness."¹⁹

Shortly after Page's departure, the episode referred to as the "Run-away Scrape" occurred in Brazoria County. Santa Anna's Army was reported approaching and the country abounded in terror and rumor. There was a wild scramble to the east and it was during this

¹⁸ Dickens, *American Notes*, Chap. 17 (1842).

¹⁹ Ames, *The History of Harriet A. Ames*, 4 (1893). The Ames narrative has never been published. The citations herein are to the pages in a typewritten manuscript of the narrative which was loaned to the writer by Mr. Mahlon L. Walters. A copy of the manuscript is in the State Archives at Austin.

flight of refugees that Mrs. Page met Colonel Potter. Having recently come from New Orleans, her clothes and appearance were noticeable to the others who were fleeing from the invading army. In referring to herself at this period, Mrs. Ames in her narrative said: "I was young, and even I could not help but acknowledge, very pretty, so that the gaze of so many strangers was more embarrassing than I can well describe."²⁰

After Potter met Mrs. Page in the "Runaway Scrape" he took her children to Galveston, where the ships of the Texas Navy were located. Her little girl died, and Mrs. Ames recorded that, "I was left to grieve for my little one, and miss her clinging arms and her pretty baby ways."²¹ She remained aboard a ship until after the Battle of San Jacinto and then went to New Orleans with the idea of going to Kentucky and joining her grandmother. However, Colonel Potter was with her and, instead of going to Kentucky, Potter (by design) went to Alexandria, then to Shreveport, and thence to the Sabine.

In her narrative Mrs. Ames records that after leaving New Orleans she learned that the boat on which she was traveling was on its way to Texas, and she demanded that she be placed ashore at Alexandria, Louisiana, so that she could make her way overland to Kentucky, but, to use her words:

Colonel Potter went on shore, and after remaining some time, came back to say that it was a very dangerous project to go overland from Alexandria on our proposed journey, and so that was not feasible, he had secured an old man and his family who would go with us to Shreveport, where we could get wagons and go on our way homeward. The family which he brought wishes, he said, to return to Colorado,²² their former home.

Again I was satisfied, and though we were disappointed at the ever increasing length of our journey, we set out for Shreveport, thinking that at last we could expect to go home. At Shreveport, Col. Potter got wagons to take the whole company to the Sabine, and when we reached there, and Kentucky seemed no nearer, I asked him when we were to start for our home. Then he told me that the old man who had come with us liked the Sabine Country better than Colorado, and had made up his mind to relinquish his intention of returning to Colorado, and settle where he was. That was a great surprise to us; it had never occurred to me, and did not then, that he was weaving a net around me that it would be impossible to break. That all the changes and disappointments of our trip had been planned by him. He often asked

²⁰ *Id.* at 7.

²¹ *Ibid.*

²² The place intended by the reference to "Colorado" is not entirely clear. Mrs. Kirkland's belief is that Colorado, Illinois was intended.

me to marry him, but I always refused telling him that I respected him very highly but that I had never been legally divorced from my first husband and on that account he ought not to urge me to marry again.

One day he came up to the house and said that he had some important questions to ask me if I would answer them, and when I assented he inquired whether my marriage with Page had been solemnized by a priest. I explained how the ceremony had been performed. We were not married by a priest. 'Very well,' he answered, 'Your marriage with Page was not legal, because in Texas a marriage not solemnized by a priest is not valid. Therefore you are just as free, according to the laws of Texas, as if you had never married.'

So one evening, according to the custom of the country, the little assembly gathered to see us wedded; the ceremony was a very simple one in those days in that country, but it was just as binding as [if] judge and clergy were present. The only guests at our piney woods wedding were Joe Miller, George Torents, Paddy Boling and Martha Moore.

Col. Potter was always a devoted husband to me, and never did anything to distress me until the time when he made his will in Austin; and I have always believed that he thought I would never hear of his action then, because the first thing he told me on his return was that he had introduced a bill into the Senate making all marriages like ours legal.²³

There are certain discrepancies in the account contained in the narrative and Mrs. Ames' testimony as disclosed by the statement of facts in *Lewis v. Ames*. This is not surprising in view of the passage of years. Upon the trial Mrs. Ames testified that she heard that Solomon C. Page, her husband, was killed at the Battle of San Jacinto or in the "Grass Fight," and thereafter on September 5, 1836, in Shelby County she and Colonel Potter entered into marriage by bond in writing. This bond could not be located at the time of the trial but was according to her testimony witnessed by "one Davis, one Miller and another." They had intended to be married in New Orleans, but "Col. Potter said it would be best to be married in Texas, as the laws in force in Texas did not regard marriages celebrated in the U.S. as legal and as required under the colonization law, the ceremony had to be celebrated by a Catholic Priest."²⁴

She testified, however, that she subsequently learned that the report of Page's death was untrue, but that after September 25, 1836, when she and Potter were married by bond, "they never celebrated their marriage otherwise or attempted to do so."²⁵ She had notice of

²³ Ames, *op. cit.* supra note 19, at 9.

²⁴ *Lewis v. Ames* (Dist. Ct. Marion County 1872), p. 208. The record is a handwritten document which includes what we would call a transcript and a statement of facts today.

²⁵ *Id.* at 210.

Soloman C. Page's suit for divorce in 1840, but Potter "advised her to give herself no trouble about the matter, but leave it with him and he would attend to it."²⁶

In the narrative, Mrs. Ames wrote that she saw Page when he came to the ship where she was staying in Galveston Bay and attempted to induce her to return to him. In her testimony, she said she did not see Page "after he went off as a soldier to San Antonio"²⁷ and denied any knowledge of Page's coming to Galveston.

Mrs. Ames' account of Potter's death varies greatly in detail from that of the *Caddo Gazette* as reported by Charles Dickens. She states that William Pickney Rose, whom she referred to as "Old Rose," had killed a young man and that when the Sheriff (of Panola County) had attempted to arrest him, Rose killed the Sheriff. Colonel Potter went to Austin and prevailed upon Lamar, the President of the Republic, to issue a proclamation calling upon all good citizens to aid in bringing "Old Rose" to justice. Potter was a member of the "Moderator" faction and sought to secure "Old Rose" (presumably a "Regulator") and imprison him until he could be tried by law in the County Courthouse. After Rose had escaped by hiding in a brush pile, Potter rather assumed that Rose would give himself up without further trouble. Mrs. Ames, however, was apprehensive and in her narrative recounts that:

When darkness had settled down over the forest and the angel of peace had brought sleep to weary eyes, evil spirits were going to and fro plotting murder. Old Rose felt sure that if he could compass Col. Potter's death no one else would dare molest him. I felt anxious as night advanced and presently the barking of the dogs warned me that some stranger was at our house.²⁸

Rose and his partisans approached the house. Several shots were fired and Colonel Potter awakened. He believed the house was surrounded and that his best chance of escaping lay in reaching the lake, as he was an excellent swimmer. Harriet reminded him that they had a cannon and plenty of firearms and urged him to stand his ground, saying, "We can defend ourselves, I will stand by you as long as we both live. If you will just kill Rose, and Scott [Rose's son-in-law] the difficulty will be at an end."²⁹ Potter, however, refused to follow this course and ran for the lake. To use Harriet's words:

²⁶ *Id.* at 210-11.

²⁷ *Id.* at 209.

²⁸ Ames, *op. cit.* supra note 19, at 17.

²⁹ *Id.* at 18.

He ran down the hill and along the beach under the cliff, unhurt by the bullets which whistled after him. We had cut steps down the steep bank to the spring and, at the foot of these grew three magnificent Cypress trees. Leaving his gun against one of these trees, my husband sprang into the lake, and dived out of sight of his pursuers. Scott ran down the bank behind him, while Old Rose levelled his gun at me and ordered me to go into the house. What careless spirit could have entered my husband's mind, and caused him to leave his gun on the shore is more than I could ever comprehend. Scott seized it [and] as Col. Potter's head rose out of the lake, he fired. Old Rose still with his gun drawn on me, tried to force me to go in but I told him that I would not move a step, nor did I. Presently Scott came up the bank and said to Rose, with some indignation, 'What are you abusing Mrs. Potter for? She has never done you any harm; come on and let's go, we have done what we came to do.'

I thought they were just talking to annoy me, now that my husband had escaped them. But before he would go, Old Rose determined to wound me in some way. Turning, he said with a cruel sneer; 'Now what do you think of your pretty Bobby?' Our small cannon, loaded with buckshoot stood beside me, but I had been unable to find the matches to fire it with. When Old Rose spoke to me, I exclaimed, 'If only I had a match to touch off this cannon, I would shoot your tongue down your throat.' What the wretch would have done, I do not know, but Scott said I was too brave a woman to kill, and took him away.³⁰

Shortly after Potter disappeared beneath the surface of the lake a severe thunderstorm took place. His body was recovered the following day and buried upon a knoll in front of the house at Potter's Point. Then began the long and ultimately unsuccessful attempt to bring the slayers of Potter to justice.

Rose, Scott, and others were finally arrested as a result of the efforts of Mrs. Ames, but she records that: "After much trouble, the trial was over, the lawyers employed by Rose managed to break the suit, and in order to have the prisoners punished I would have had to begin another suit against them. I was harrassed and worried over all the cruel things that had been said about my dead husband and myself and anxious to get back to my children."³¹ Then her little daughter, Lakean (or Lake Ann) by Potter was scalded to death by boiling soap, and Mrs. Ames finally gave up the attempt to hold Rose and his faction responsible for Potter's death.³²

³⁰ Ibid.

³¹ Id. at 21.

³² An account of the Rose-Potter feud and the death of Potter as told from the viewpoint of the Rose faction is contained in the "Reminiscences of Rev. John McLean" beginning at page 15. Dr. McLean was a noted itinerate Methodist preacher and at one time

Some time after Potter was killed, Harriet married Charles Ames and records that this union was a happy one.³³ They continued to reside for the most part at Potter's Point until the death of Ames in 1866. Then, as a result of the decision of the supreme court in *Lewis v. Ames*, she was dispossessed of this property and went to New Orleans to live with her children. With bitterness and not without some satisfaction she reports the failure of the purchasers of the Mayfield claim to derive any financial benefit therefrom:

The man who deprived me of our farm tried to sell it but in vain. He has never prospered in his sin, and even now the place is a wilderness. I often wondered whether the wild beasts walk over the graves of my dear ones. The usurper's animosity could not go so far as to disturb them I am sure; and were he to think of such a thing, I believe that he would be afraid lest the dead should rise up in judgment against him, for Col. Potter and Chas. Ames had been fast friends. . . . Had Potter's Point been left in my hands I would have settled it up with a good class of people and made a thriving place of it, but things have been otherwise ordained.³⁴

Near the end of her narrative Mrs. Ames recounts that:

I am eighty-three years of age now, and I live in my youngest daughter's comfortable home in New Orleans. My daughter's husband, Dr. Marrero, is one of the best men that ever lived, and belongs to one of the most prominent families in the South. I am very proud of my two sons; Dr. E. Y. Ames and William P. Ames. . . . It has seemed to me that my life has been spared these many years in order that I might write this history, and let the truth be known about much that has been falsified and misrepresented. In spite of the hardships and sorrows that I endured in Texas, I love the State yet, for there, too, my happiest hours were spent.³⁵

the head (regent) of Southwestern University at Georgetown. He was a grandson of Captain William Pinkney Rose. Dr. McLean gives this account of an incident which occurred upon his visit with Mrs. Eli Moore of Jefferson at page 72 of his book:

I visited her on a certain occasion while in this district, and a sprightly little girl of about six came running to me and I took her in my lap and asked her to tell me her name, she replied in a happy tone of voice, 'Ella Potter,' and Mrs. Moore began to laugh, knowing our past family histories, and said to me that this child was a granddaughter of Colonel Bob Potter and sitting in Captain Rose's grandson's lap. We are happily at peace, although our ancestors in the early forties were in arms against each other. Time, as well as grace, is a great peace-maker.

³³ Based upon her research concerning the Ames family in preparation for her book, *Love is a Wild Assault*, Mrs. Kirkland places the number of the children born to Charles and Harriet Ames at thirteen. As she had two children by Page and three by Potter, the total number of children born to her was eighteen.

³⁴ Ames, *op. cit.* supra note 19, at 24.

³⁵ *Ibid.*

IV. CONCLUSION

While the strange and contradictory career of Robert Potter has been the concern of much investigation and more speculation, there remain many puzzling and unexplained circumstances relating to his life and death. For instance, the ruse by which Rose escaped the Potter posse by hiding under a brush pile which he ordered set afire was a dangerous one. Certainly Harriet's apprehension of counter-measures on the part of Rose was well founded. Why was it that a man of Potter's mettle was caught almost unaware and then chose to flee rather than fight when the former course was the more dangerous of the two desperate chances which were open to him?

Why was Mrs. Mayfield selected as an object of Potter's bounty? Mrs. Ames, in her narrative, indicates an obvious conclusion in referring to the will which devised her home to another woman.

I thought of the will made in Austin, which gave my home to a strange woman, if I submitted to it, and of my husband's unfaithfulness to me. When he would write me, ever week, long affectionate letters full of love for his children and myself, and yet he would be riding about Austin with a married woman. I remembered the home he had ruined there and the sorrow I must suffer because of it, and decided I would let the case drop, and cease to prosecute his murderers. He had always been kind and loving to me when he was at home, but, Oh, how he had deceived me; and I would (could) not forget it.³⁶

But this "obvious conclusion" does not entirely make sense. The will recited as a reason for the devise, "my deep sense of the personal worth of Mrs. Sophia Ann Mayfield, my gratitude for her friendship and the happiness I have derived from her converse." Language practically identical was used in connection with a similar devise of two full sections and a fractional section to Mrs. Mary W. Chalmers. Potter bequeathed to Col. James S. Mayfield his favorite horse "Shakespeare" and named Dr. John G. Chalmers as residuary legatee and devisee of the estate. It was Dr. Chalmers who presented the will for probate. Apparently as long as Mrs. Mayfield and her husband lived, they made no effort to disturb the possession of Charles and Harriet Ames in and to the Potter's Point property. From the standpoint of 1842, it seems that anyone could have reasonably foreseen that Mrs. Mayfield, a resident of Austin, would derive little or no benefit from a devise of this property located in the remote northeast and Indian-infested portion of the Republic.³⁷ Certainly the

³⁶ *Id.* at 23.

³⁷ The record of the administration of Sophia A. Mayfield's estate was introduced in *Lewis v. Ames*. It discloses that one prospective purchaser failed to make good his bid of

property was much more valuable to Harriet Ames, who resided upon it, than it was to Mrs. Mayfield. However that may be, when Mrs. Mayfield died in 1852, ten years after Potter's death, she and Colonel Mayfield were apparently living together, although they had moved to La Grange. Seemingly, there was no broken home. There is some suggestion in Mrs. Ames' narrative that when the will was made, Potter never contemplated that it would become effective, but intended to revoke it, but this appeared to be simply another conjecture like the hypothesis that the will was not the result of his regard for Mrs. Mayfield but rather was occasioned by some temporary displeasure with Harriet. Perhaps the only explanation, if such it can be called, for the unusual will lies in the strange mixture of moods, motives, emotions, and desires that constituted the personality of Robert Potter. Mrs. Kirkland, in her novel, has perhaps given an accurate estimate of Robert Potter through the lips of Judge Amos Morrill,³⁸ whom she quotes as saying:

It is my observation that every man is many men. In some men and women, the better self remains triumphant with only an occasional battle; in others, evil flourishes—while in most of us the war of the souls is forever raging. But in none have I ever seen the battle so awesomely balanced, both extremes so manifest, as in Robert Potter. My friend was a man of shining intelligence and cultural attainment. He comprehended the elements of hope and beauty in the arts, in religion, in philosophy—knew the warmth of kindness, recognized the responsibility of leadership. And yet, he acted as a criminal, a coward, a traitor, long practiced in evil deeds, as a primitive untouched by culture or compassion—depraved, mad.³⁹

Lewis v. Ames rather offends one's sense of justice because of the long-delayed assertion of the Mayfield claim, coupled with circum-

fifty-five cents per acre. The appraised value of the land covered by the Mayfield claim (two sections and a fractional section) was \$2500.00. Samuel K. Lewis and E. McGinnis purchased the property for \$1305.00, represented by a promissory note which was marked paid by the administrator. There is one circumstance in connection with the administration of the Mayfield estate which is not without interest. One John Crutcher purchased two negro slaves from the estate for a figure somewhat above the appraised valuation. However, the note which he gave for the purchase price was credited with claims of \$800.00 and \$103.80 for services performed as guardian for the Mayfield minors. One may speculate as to whether the Mayfield estate was administered primarily for the benefit of the minor children involved or for the benefit of those who eventually acquired the Mayfield property.

³⁸ Amos Morrill was a lawyer and a friend had served as a counsellor to Potter and had aided Harriet in an effort to bring Rose and Scott to trial. He also was a witness in *Lewis v. Ames*. After the Civil War, Morrill served as chief justice of one of the Reconstruction Courts, known as the Military Courts, and thereafter had a distinguished career as United States district judge at Galveston. See Lynch, *The Bench and Bar of Texas, 159 (1885)*; Norvell, *The Reconstruction Courts of Texas 1867-1873, 62 S.W. Historical Q. 149 (1958)*.

³⁹ Kirkland, *op. cit. supra* note 12, at 450.

stances which rendered Mrs. Ames' limitation claims ineffective. Purchasers of claims to land long in the possession of others seldom arouse kindly feelings. Even Mrs. Mayfield and certainly her children would have commanded a more sympathetic ear than did Lewis and McGinnis, who did not secure and bring suit upon their administrator's deed until 1857—fifteen years after Potter's death. The case remained pending in the district court for another fifteen years and judgment was not rendered until 1872. The supreme court finally disposed of the case at the Tyler term in 1875, some thirty-three years after Potter's death. Yet, because Mrs. Mayfield was a married woman and under disability of coverture at the time of her death in 1852, Mrs. Ames could not claim under the ten-year statute of limitations.⁴⁰ She was reduced to a claim under the three-year statute,⁴¹ which contains the technical requirement of a claim "under title or color of title."⁴² This claim was based upon a certain nunc pro tunc order of the county court of Cass County purporting to partition the community property of Harriet and Robert Potter between Harriet as the surviving widow and their son, John Potter. The order was entered in the May term of 1853.⁴³ The only supposedly adverse party named in the proceedings which culminated in this order was Robert W. Smith, the executor named in Potter's will which had been offered for probate by Dr. Chalmers. None of the devisees or legatees in Potter's will were made parties, and consequently it was held that the entry of this judgment was not an adjudication binding upon them as to Harriet's rights as Potter's surviving widow. The claim under "color of title" thereupon failed.⁴⁴

The correctness of Judge Roberts' decision can hardly be gainsaid either upon the legal insufficiency of the evidence to support a finding of a valid marriage or upon the closely related limitation features of the case. On the other hand, Harriet Ames could have well believed that her connection with Potter constituted a valid marriage

⁴⁰ Tex. Rev. Civ. Stat. Ann. art. 5510 (1958).

⁴¹ Tex. Rev. Civ. Stat. Ann. art. 5507 (1958).

⁴² Tex. Rev. Civ. Stat. Ann. art. 5508 (1958) contains the following definitions of "Title" and "Color of Title":

By the term 'title' is meant a regular chain of transfers from or under the sovereignty of the soil, and by 'color of title' is meant a consecutive chain of such transfers down to such person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of head-right, land warrant, or land scrip, with a chain of transfer down to him in possession.

⁴³ Lewis and McGinnis filed suit in 1857, consequently Mrs. Ames could not prevail under the five-year statute even if this order could be considered a sufficient basis of claim. See Tex. Rev. Civ. Stat. Ann. art. 5509 (1958).

⁴⁴ See Judge Roberts' discussion of the three-year statutes, 44 Tex. at 348-51.

or at least was an arrangement which could be validated by some action of the Congress, as had been represented by Potter. There can be little doubt but what Harriet Ames was a courageous woman who faced the early Texas frontier dangers with fortitude and fearless determination. The final judgment of the supreme court undoubtedly caused additional hurt to her and apparently bettered no one.

But sometimes such are the operations of the law. The cause of *Lewis v. Ames* is illustrative of a class of cases a judge may wish to avoid. On one hand lies individual hardship and suffering, while on the other lies uncertainty and even chaos in the law with all its attendant evils. The choice between the two may not have been an easy one for Judge Roberts. While he followed the dictates of the law, the opinion indicates that moral judgment at least should be weighed and considered in accordance with the standards and conditions of the times. Texas in 1842 was not the same as Texas in 1875, or in 1959 for that matter. But this choice between individual hardship on one hand and following prior established rules of law possessing general application on the other will always present difficulty, particularly to the sensitive judge, acquainted with the ways of men and women moving across the stage of human experience. Yet in the chronicles of the law, while disasters, failures, and heartaches are often portrayed in all their tragedy, if one will but look for them, he may also discern instances and occasions which mark the brave careers and solid persevering qualities of those who have met the challenges of life in their time and thus have contributed their strength and purpose to the greatness of an enduring commonwealth.