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JOHN HEMPHILL has sometimes been compared to John Marshall.[1] Their work was similar, in that each was called on to lay the foundations of an enduring jurisprudence for a newly-born government. While the questions decided by Hemphill, as Chief Justice of Texas, do not approach in breadth and scope the problems to which Marshall devoted his legal acumen and statesmanship, still from a technical standpoint these questions were at least equally difficult; and in scholarship, clarity of expression, logical force, and human sympathy, Hemphill's opinions compare favorably with those written by any judge.

Hemphill and his associates faced unusual perplexities. Until 1840, all rights in Texas of a civil nature, and thereafter many important ones, were determined by the civil law of Spain or Mexico.[2] The proper adjudication of these rights required a knowledge of this law, which involved among other things an ability to understand the Spanish language. Even in the fields where the common law of England was adopted, modifications were made by statute that required interpretation in application. Nor was the environment one which we would regard as conducive to the best judicial work. Living conditions in Texas generally and particularly in Austin were primitive; there was constant danger from Indian raids and Mexican invasions.[3] Access to texts and decisions

* Associate Justice, Supreme Court of Texas.

[1] LYNCH, THE BENCH AND BAR OF TEXAS 69 (1885); DAVENPORT, THE HISTORY OF THE SUPREME COURT OF TEXAS 15 (1917); 8 DICTIONARY OF AMERICAN BIOGRAPHY 520 (1932); FULMORE, HISTORY AND GEOGRAPHY OF TEXAS AS TOLD IN COUNTY NAMES 200 (1915).

[2] Butte, *Early Development of Law and Equity in Texas*, 26 YALE L. J. 699 (1917); Phillips, *Historical Introduction*, 1 TEX. JUR. 1-1ii (1929).

[3] In the Austin City Gazette for January 15, 1840, p. 2, col. 4, immediately following

of other courts was limited, even in situations where helpful precedents might be expected to exist. In such an atmosphere and under such handicaps, it is truly remarkable that Hemphill and his colleagues turned out opinions whose general excellence has probably never been equalled by any other court in Texas history.

Hemphill did not come to Texas until 1838, about two years after Texas had won her independence. Like his predecessor, Thomas Jefferson Rusk, and many other leaders in Texas in that day, Hemphill was a native of South Carolina, where he was born on December 18, 1803.[4] Both of his parents were of Northern Irish stock, his mother being a relative of Robert Fulton. Hemphill was educated in the public schools and at Jefferson College, in Pennsylvania, where he graduated in 1825 second in his class. After teaching school for several years, he studied law in the office of D. J. McCord of Columbia. In 1829 he was admitted to practice in the courts of common pleas and in 1831 he was admitted to practice in the equity courts. In 1836, Hemphill participated in a military expedition against the Seminoles in Florida, where he contracted malaria, which apparently permanently impaired his health.

When he came to Texas, Hemphill settled at Washington on the

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the report of the first meeting of the Supreme Court on January 13, appears the following item: "A courier is rumored to have arrived from San Antonio de Bexar announcing the arrival at that city of a delegation from the Comanches, who have come in for the purpose of treating with the government for peace. They offer, among other conditions, to return all the white prisoners in their possession."

For personal recollections of Austin, including a description of Hemphill's residences and domestic life, see Terrell, *The City of Austin from 1839 to 1865*, 14 QUARTERLY OF TEXAS STATE HISTORICAL ASSOCIATION 122 (1900).

[4] Biographical notes on Hemphill, from which many of the facts stated in this article have been taken, include the following: 8 DICTIONARY OF AMERICAN BIOGRAPHY 520 (1932); Gaines, *John Hemphill*, GREAT AMERICAN LAWYERS 3 (1908); THRALL, PICTORIAL HISTORY OF TEXAS 551 (1879); BIOGRAPHICAL DICTIONARY OF THE AMERICAN CONGRESS 1774-1927, 1085 (1928); BIOGRAPHICAL ENCYCLOPEDIA OF TEXAS 151 (1880); BIOGRAPHICAL DICTIONARY OF THE TEXAS CONVENTIONS AND CONGRESSES 99 (1941); FULMORE, HISTORY AND GEOGRAPHY OF TEXAS AS TOLD IN COUNTY NAMES 200 (1915); BAKER, TEXAS SCRAP-BOOK 300 (1875); King, *A Biographical Sketch of John Hemphill*, THE DOCKET (San Antonio, Texas), vol. 1, no. 2, p. 1 (June 1896); LYNCH, THE BENCH AND BAR OF TEXAS 69 (1885); DAVENPORT, THE HISTORY OF THE SUPREME COURT OF TEXAS 15 (1917); BROWN, ANNALS OF TRAVIS COUNTY AND THE CITY OF AUSTIN, Chapter XXII—1862, 43 (no date); MONUMENTS COMMEMORATING THE CENTENARY OF TEXAS INDEPENDENCE 184 (1938).

Brazos. Realizing the necessity of learning the Spanish language so as to understand the Texas law, he is said to have gone into retirement until he mastered Spanish.[5] He practiced law at Washington until some date prior to May 3, 1839, and thereafter practiced at Bastrop[6] until January 20, 1840, when he was elected district judge.[7] He had previously declined an offer by President Lamar to appoint him Secretary of the Treasury.[8]

We do not have much information about Hemphill's work on the district bench, except that we know that as *ex-officio* associate justice of the Supreme Court he participated in one case in which he joined in a concurring opinion,[9] and he wrote two opinions of the court.[10] However, we have accounts of his experiences of a more exciting nature. While Hemphill was holding court at San Antonio in 1840, a white girl by the name of Putnam who had been held captive by the Indians was returned by them, and Hemphill was in the party that rode with the child to join her relatives near Gonzales.[11] On March 19, 1840, Hemphill had a part in the Council House fight with the Comanche chiefs at San Antonio. It appears that Hemphill started out merely as a bystander, having consented that the courtroom might be used for the parley. Violence soon followed bargaining, however, and Hemphill's roll is thus described in the official report of Col. McLeod, who was in command of the Texans:[12]

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[5] 8 DICTIONARY OF AMERICAN BIOGRAPHY 520 (1932).

[6] The Telegraph and Texas Register (Houston, Texas), June 5, 1839, p. 3, col. 2, reports that John Hemphill was appointed as the chairman of a committee of the Bastrop bar at a meeting held on May 3, 1839. In the July 3, 1839 issue of the same paper, p. 3, col. 4, appears the announcement, dated June 15, 1839, of the dissolution of the firm of Crosby, Hemphill and Raymond at Washington, and an announcement of the formation of a new firm of John Hemphill and Charles H. Raymond, Hemphill to have his office at Bastrop and Raymond at Franklin.

[7] Gaines, *John Hemphill*, 4 GREAT AMERICAN LAWYERS 3 (1908).

[8] Hemphill's letter, dated March 3, 1839, declining the appointment, is published in 2 PAPERS OF MIRABEAU BUONAPARTE LAMAR 480 (1922).

[9] Winfried v. Yates, Dallam 363 (1840).

[10] Harvey v. Patterson, Dallam 369 (1840); Allen v Ward, Dallam 371 (1840).

[11] BROWN, INDIAN WARS AND PIONEERS OF TEXAS 52 (no date).

[12] Quoted in BROWN, INDIAN WARS AND PIONEERS OF TEXAS 76 (no date), and Gaines, *John Hemphill*, 4 GREAT AMERICAN LAWYERS 3 (1908). See, also, Huson, *District*

"John Hemphill, then District Judge and afterward so long Chief Justice, assailed in the council house by a chief and slightly wounded, felt reluctantly compelled (as he remarked to the writer afterwards) to disembowel his assailant with his bowie knife, but declared that he did so under a sense of duty, while he had no personal acquaintance with nor personal ill-will toward his antagonist."

On December 5, 1840, Chief Justice Rusk resigned and John Hemphill was elected to succeed him. Hemphill's leading opponent was James Webb, former Attorney General. The vote in the joint ballot in Congress was very close, each candidate receiving seven votes in the Senate and Hemphill gaining 21 votes to 19 for Webb in the House of Representatives.[13] A contemporary news report stated that Webb was defeated by the circulation of a false rumor to the effect that as Attorney General he had approved the claims of the empresario, Nixon, whereas in fact he had ruled directly to the contrary.[14] While deploring the defeat of Webb on this ground,[15] the same correspondent declared that, "Judge Hemphill, during the period he has resided in the country, has acquired a high reputation, both for legal acquirements and moral attributes."[16] There is nothing to show that Hemphill had anything to do with the circulation of the false rumors about Webb. Apparently Hemphill had a high opinion of Webb. Later, when Webb was serving on the district bench, Hemphill as Chief Justice paid him the unique compliment of adopting his opinion as District Judge as the opinion of the Supreme Court.[17]

Judges of Refugio County 22 (1941). On May 30, 1840, Hemphill wrote to Judge A. B. Shelby of the First Judicial District at Houston, requesting his aid in apprehending cattle thieves, who had stolen cattle from "the President and other gentlemen high in office in the new Republic of Rio Grande, and were brought through New La Bahia before the faces and at the defiance as it were of these gentlemen." The letter is published in the Telegraph and Texas Register (Houston, Texas), Oct. 28, 1840, p. 4, col. 2.

[13] Telegraph and Texas Register (Houston, Texas), Dec. 16, 1840, p. 1, col. 4.

[14] "This mischievous report, which could not be contradicted until after the election, probably decided the vote against him [Webb]." *Ibid.*

[15] "Such is the fate of elections by joint ballot; passion, prejudice, secret lies, party spirit and sectional interests are brought to bear against the most unimpeachable characters." *Ibid.*

[16] *Ibid.*

[17] State v. Jones, 18 Tex. 874, 883 (1857).

Hemphill's reported opinions as Chief Justice of the Republic are all contained in the single volume of Dallam's Decisions. As might be expected, a number of these decisions relate to questions of procedure, which naturally would be more unsettled at the beginning of the court's history than thereafter. Hemphill took occasion to remind the bar that "our system of proceedings in civil suits differs from that known in England and adopted in most of the states of the United States."[18] In another case he referred to the "technical distinctions of the system of pleading under the common law" and observed that, "under the simplicity of the system adopted by the statutes of this republic, they must surely be unknown."[19]

He had frequent occasion to use his knowledge of Spanish in examining texts and codes. He first used Spanish in his opinion without translating it,[20] but in later opinions he followed quotations of the Spanish text with English translations.[21] He also thought it proper to remind counsel that they should search for authorities in the Spanish or Mexican law, where it controlled, rather than relying on common law precedents. In *Scott v. Maynard*,[22] he said:

> "Before awarding final judgment, the court will take occasion to express its sense of the important assistance afforded them by the able and zealous efforts of the gentlemen of the bar, when their investigations are directed to the system of laws by which the matters in controversy must be decided. But when their arguments are based on some other system, which, however admirable for its justice or exalted for its wisdom, can exercise no other authority than that derived from the force of reason, their labors serve to perplex and confound, rather than remove the embarrassments which shroud the important principles involved in the controversy. The court appreciates the difficulty arising

[18] Fowler v. Poor, Dallam 401, 403 (1841).

[19] Tinnen v. Matthews, Dallam 491, 492 (1842).

[20] *See* Mills v. Walker, Dallam 416, 418 (1841).

[21] *See* Garrett v. Nash, Dallam 497, 499 (1843) and Scott v. Maynard, Dallam 548, 551 (1843).

[22] Dallam 548, 552 (1843).

> from the scarcity of books or authorities on questions arising under the former laws of 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."

It is obvious from Hemphill's opinions that he diligently and laboriously searched the authorities to ascertain the rule of Spanish law applicable to the case before him, but he was conscious of the inadequacy of the available sources. In *Smith v. Townsend*,[23] he remarked:

> "In considering the first objection, we have to regret that the want of authorities, in relation to the former laws of the country, prevents us from attaining—on some of the points involved in this case—to conclusions which are altogether satisfactory. Guided, however, by the feeble and confused lights with which we are furnished, we proceed to decide this controversy, confining our opinion to the points which must necessarily be adjudicated."

Hemphill was not left to perform his judicial labors undisturbed. In 1842, General Vasquez invaded Texas from Mexico and captured San Antonio. The threat to Austin caused its virtual abandonment as the capital, Congress removing its sessions to Washington on the Brazos. It was said that only those remained in Austin who were unable to leave.[24] The business of the Supreme Court was very dull; in fact, the Court held no sessions from the end of the January term, 1842, to the beginning of the June term, 1843.[25] Hemphill joined General Somervell's expedition to the Rio Grande, as Adjutant General.[26] However, the expedition soon was

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[23] Dallam 569, 570 (1844). *See, also,* Scott v. Maynard, Dallam 548, 550 (1843): "Having no access to the works of Febrero, we are compelled to glean such extracts from that author applicable to this subject, as may be found on examining the reports of Louisiana."

[24] See BROWN, ANNALS OF TRAVIS COUNTY AND THE CITY OF AUSTIN, Chapter IX—1842, 9 (no date): "The streets [of Austin] grew up in weeds and bushes and became the undisputed haunts of wild animals and such Indians as saw fit to visit them."

[25] Gaines, *John Hemphill*, 4 GREAT AMERICAN LAWYERS 3 (1908). The opinions for the January term, 1842, end on page 492 of Dallam and the opinions for the June term, 1843, begin on the next page.

[26] Telegraph and Texas Register (Houston, Texas), Oct. 26, 1842, p. 3, col. 3, Nov.

abandoned, and Hemphill and most of the others returned to their homes, thereby escaping the fate of the Mier prisoners.[27] In the June term, 1843, we again find him sitting as Chief Justice.[28]

In addition to the other handicaps under which he worked, Hemphill's pay for his judicial work was highly uncertain. In the Texas State Archives, in Hemphill's handwriting, is a memorial[29] to the Congress, requesting most respectfully that he be paid his salary as district judge, from March 20 to December 5, 1840, in the sum of $2125.00, and as Chief Justice from December 5, 1840, to January 3, 1842, in the sum of $3250.00. To show his urgent need, Hemphill pointed out that he owed "seven hundred fifty Dollars in par funds," all of which debt having been contracted "since Judicial Office was conferred upon me." Later he and Judge R. E. B. Baylor joined in a memorial[30] in which they respectfully represented to the Congress that "they have exhausted their private resources and have to some extent involved themselves in pecuniary liabilities to sustain the Judicial Department of the Government," and that "under such circumstances it will be impossible for the undersigned longer to hold the Courts of the Country unless Congress should adopt some measures for their relief."

While Hemphill was proposed as a candidate for President in 1843 and 1844, he declined to run because of ill health.[31] Hemp-

2, 1842, p. 2, col. 5, and Dec. 16, 1842, p. 1, col. 5; Hendricks, *The Somervell Expedition to the Rio Grande, 1842*, 23 SOUTHWESTERN HISTORICAL QUARTERLY 112, 116 (1919).

[27] Hendricks, *supra* note 26, at 135; Northern Standard (Clarksville, Texas), Feb. 4, 1843, p. 3, col. 1.

[28] See opinions beginning Dallam 493 (1843).

[29] Memorial, endorsed "No. 37," Texas State Archives. In 1842, Hemphill voluntarily resigned his place as Chief Justice and was re-elected, in order that the retrenchment bill, which reduced his salary from $3000 to $1750 per year, could be applicable to him. Telegraph and Texas Register (Houston, Texas), Feb. 2, 1842, p. 2, col. 2, and Feb. 9, 1842, p. 1, col. 4. The message of President Houston, dated January 22, 1842, stating that Hemphill's resignation had been received and accepted, is published in 2 THE WRITINGS OF SAM HOUSTON 438 (1939).

[30] Memorial, endorsed "No. 76," Texas State Archives.

[31] King, *A Biographical Sketch of John Hemphill*, THE DOCKET (San Antonio, Texas), vol. 1, no. 2, p. 1 (June 1896); Northern Standard (Clarksville, Texas), May 18, 1843, p. 2, col. 4, Oct. 28, 1843, p. 2, col. 1, Jan. 13, 1844, p. 2, col. 1, and Feb. 24, 1844, p. 2, col. 1 and p. 3, col. 2.

hill was an advocate of annexation,[32] and when the convention was convened in Austin on July 4, 1845, to draft the ordinance of annexation and the constitution for the state, Hemphill, as a delegate from Washington County,[33] was recognized as one of the leaders. He was appointed chairman of the Judiciary Committee,[34] which was charged with the responsibility of drawing the judiciary section of the constitution.

Hemphill's draft of the judiciary section of the constitution was presented to the convention on July 11, 1845.[35] It provided for a three-judge Supreme Court, to be appointed by the Governor with the consent of the Senate. The main features of this draft were adopted with little debate. Upon some subjects, however, disagreement arose. One of these was a suggested amendment establishing separate chancery courts. Upon this matter, Hemphill expressed himself as follows, in a committee report dated August 8, 1845:[36]

> "That the present system of administering justice in the same court, according to the principles of both law and equity, or either, as the circumstances of the controversy may demand, has been long established, is well understood, and possesses too many advantages to be lightly abandoned."

While Hemphill was thoroughly convinced of the wisdom of applying law and equity in the same court, he unsuccessfully opposed the proposal that jury trials be granted in equity cases. Part of his observations on this matter were as follows:[37]

> "I cannot say that I am very much in favor of either chancery or the common law system. I should much have preferred the civil law to have continued in force for years to come. But inasmuch as the chancery

[32] Hemphill was a member of a corresponding committee of Washington County citizens supporting annexation. See letter published in Texas National Register (Washington, Texas), May 22, 1845, p. 4, col. 1.

[33] JOURNALS OF THE CONSTITUTIONAL CONVENTION OF 1845, 4 (1845).

[34] *Id.* at 17.

[35] *Id.* at 46.

[36] *Id.* at 191.

[37] DEBATES OF THE TEXAS CONVENTION OF 1845, 271 (1846).

system, together with the common law, has been saddled upon us, the question is now, whether we shall keep up the chancery system or blend them together. If we intend to keep it up as it is known to the courts of England, the United States, and many of the states, and United States courts will be established here, we should oppose this innovation; for I do not know any alteration which could be a greater innovation, than to subject all chancery cases to a trial by jury. It is well known that the trial by jury has been esteemed as highly in England, whence we derive it, as in any country in the world. A great deal of blood has been shed to preserve it; but I have never known or heard that it was ever thought of, to extend it to cases in equity, admiralty, or the ecclesiastical, what we call the probate court. It was never supposed that justice or right could be dispensed in these courts by the trial by jury. All our notions of the trial by jury and its benefits are drawn from England; yet there we find, that in courts of equity, admiralty, maritime jurisdiction, or the ecclesiastical courts, such a thing was never heard of."

Thomas Jefferson Rusk, the chairman of the convention, took a view contrary to Hemphill's, saying among other things:[38]

"The arguments which would go against a section of this kind, go against the right of trial by jury at all. They proceed upon the ground, that juries are incompetent to discharge the duties submitted to them by the law. Now, if they are incompetent in cases of equity they are equally so in suits at law. But is it in accordance with reason, that twelve men should be less competent to detect fraud, or to determine a matter of accounts between man and man, than one? And if a man's case is submitted to the jury before the court, whose duty it is to charge the law, and the twelve men determine against him, he does not go away abusing the organs of the law; he comes to the conclusion that he is in the wrong. Whereas, if one man sits and judges the entire matter, because it is a case in equity, I will venture the assertion, that nine times out of ten he will go away dissatisfied."

Rusk's views prevailed, the convention adopting a provision for jury trials in equity cases as well as those at law.[39]

Another interesting debate occurred in connection with the section providing for the adjudication of disputes by arbitrators. It

[38] *Id.* at 275.

[39] *Id.* at 267 and 275.

was in the course of this debate that Lemuel D. Evans, later Presiding Judge of the Supreme Court during the Reconstruction regime, made his famous statement that "the whole contrivance of courts of judicature is a fraud upon the community."[40] While Hemphill did not agree with Evans' argument, he did agree with his conclusion that much could be accomplished by arbitration. After recalling that under the Mexican law a litigant could not file a suit in court without making a certificate that he had unsuccessfully tried to have the matter settled by arbitration by *buenos hombres*, Hemphill remarked:[41]

> "Even since the introduction of the common law, it has never been supposed that the Legislature was prohibited or restrained from passing the laws necessary to decide differences by arbitration.... I would like to have a provision inserted, that the Legislature shall not have the power to take away the right of arbitration."

Following this debate the convention adopted a provision permitting the Legislature to provide for settlement of disputes by arbitration "when the parties shall elect that method of trial."[42]

Hemphill also took an important part in the debate upon the provisions of the proposed constitution relating to the property rights of married persons. He was particularly anxious to preserve the wife's rights under existing Texas law, as distinguished from the common law.[43] Among other things, he said:[44]

> "Under the common law, the husband and wife are but one person; the very being as [or] legal existence of the woman is suspended during marriage. By our law they are considered distinct persons at least so far as their estates or property are concerned....
>
> "I anxiously hope that some provision may be adopted by the convention by which the rights of the wife will be shielded under the immunities of the constitution. Should our present law be repealed, and the

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[40] *Id.* at 355.

[41] *Id.* at 357.

[42] *Id.* at 355 and 358.

[43] For Hemphill's majority report on this subject, see *id.* at 504.

[44] *Id.* at 594 and 597.

common law have effect, all slaves, money and every other species of property, lands excepted, which the wife brings with the marriage, or acquires thereafter, become the sole and absolute property of the husband. The whole may be absorbed in the payment of his debts before marriage; may be lost in speculations or at the gaming table, may be wasted and entirely destroyed, or may be given away in the presence of his deserted and beggared wife, to the most unworthy wretches, with the most complete impunity, without responsibility and without impediment interposed, or remedy afforded by law."[45]

After the admission of Texas to the Union, Hemphill was appointed on March 2, 1846, Chief Justice of the State Supreme Court, and was confirmed unanimously by the Senate. His associates, Abner S. Lipscomb and Royall T. Wheeler, had five and six votes respectively cast against their confirmation, which is said by Governor Lubbock to have arisen "from their connection with certain old land claims."[46]

Hemphill served as Chief Justice of the State for over eleven years, from 1846 until he was elected to the United States Senate in 1857, his opinions appearing in the first twenty-one volumes of the Texas Reports. The number of his opinions and the variety of the questions discussed in them[47] make it impossible here to do

[45] Compare Hemphill's statement in Wiley & Co. v. Prince, 21 Tex. 637, 639 (1858); "This is one of the numerous instances in which the folly, fraud or violence of husbands, and the rapacity of creditors, have extorted from the wife a mortgage of her property to secure the debts and speculations of the husband."

[46] LUBBOCK, SIX DECADES IN TEXAS 224 (1900).

[47] A partial list of the subjects involved in Hemphill's opinions, with sample cases, will indicate their diversity: appellate procedure, Harvey v. Patterson, Dallam 370 (1840); gambling contracts, Dunman v. Strather, 1 Tex. 89 (1846); admiralty, Brig Veruna v. Clark, 1 Tex. 30 (1846); arbitration, Edrington v. League, 1 Tex. 64 (1846); executors and administrators, Ansley v. Baker, 14 Tex. 607 (1855); state's liability to suit, Board of Land Commissioners v. Walling, Dallam 524 (1843); construction of Mexican colonization statutes, Heirs of Holliman v. Peebles, 1 Tex. 673 (1847); statute of limitations, Judd v. Sampson & Co., 13 Tex. 19 (1854); divorce, Wright v. Wright, 3 Tex. 168 (1848), 6 Tex. 3 (1851), *id.* 29 (1851); community and separate property, Scott v. Maynard, Dallam 548 (1843); rights of putative wife under Spanish law, Lee v. Smith, 18 Tex. 142 (1856); *fideicomiso* under Mexican law, Gortorio v. Cantu, 7 Tex. 35 (1851); Spanish law of contracts *in solido*, Hall v. Alcorn, Dallam 433 (1841); homesteads, Pryor v. Stone, 19 Tex. 371 (1857); notary's certificate, Hartley v. Frosh, 6 Tex. 208 (1851); criminal procedure, State v. Daugherty, 5 Tex. 1 (1849); exemplary damages, Cole v. Tucker, 6 Tex. 266 (1851); domicile, Hare v. Hare, 10 Tex. 355 (1853); presumption of validity of marriage, Lockhart v. White, 18 Tex. 102 (1856); property rights in slaves, Nations v. Jones, 20 Tex. 300 (1857); common carriers,

more than make certain general observations about his work and to refer to some of his opinions dealing with out-of-the-ordinary questions.

In form, Hemphill's opinions are dignified, direct, learned, closely reasoned, and carefully written.[48] Perhaps the most striking feature of his opinions to the present-day reader is his partiality to the civil law as distinguished from the common law. Hemphill repeatedly made this plain. For example, in *Giddens v. Byers' Heirs*,[49] Hemphill referred to what he considered a hypertechnical distinction as having "no effect anywhere except in the hard, naked regions of the Common Law." Referring to the common law procedure, he observed in *Neyland v. Neyland*[50] that "at Common Law the plaintiff and defendant are placed on the same footing of knowledge, or rather ignorance, by the pleadings." On the other hand, he spoke of the "strict equity which characterizes the Spanish jurisprudence";[51] and speaking of the two systems of law he said in *Means v. Robinson*:[52]

> "An investigation into, and a comparison of, the rules which pervade both systems, is not necessary to the decision of this case, although such collation would be wanting neither in interest nor instruction. One fact

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Chevallier v. Straham, 2 Tex. 115 (1847); ex post facto laws, De Cordova v. City of Galveston, 4 Tex. 470 (1848); proof of foreign laws, Martin v. Payne, 11 Tex. 292 (1854); mandamus, Bracken v. Wells, 3 Tex. 88 (1848); forced heirs, Parker v. Parker, 10 Tex. 83 (1853); riparian water rights, Haas v. Choussard, 17 Tex. 588 (1856); parole evidence, Mead v. Randolph, 8 Tex. 191 (1852); habeas corpus, *Ex parte* Thornton, 9 Tex. 635 (1853); prohibition, Browne v. Rowe, 10 Tex. 183 (1853); annulment of marriage, Robertson v. Cole, 12 Tex. 356 (1854).

[48] Hemphill rarely indulged in humor in his opinions, but occasionally he did so. *See* Norris v. Banta, 21 Tex. 427 (1858). His style of writing is ordinarily simple, but he could employ unusual words with good effect, as in State v. Daugherty, 5 Tex. 1, 4 (1849): "It will not be necessary to attempt to eviscerate from these really or apparently conflicting decisions the true rule of construction." He was frank in his statements, as in Hartwell v. Jackson, 7 Tex. 576, 577 (1852): "This record presents a tangled maze of anomalous proceedings, in the narrative of which no regard is had for their chronological order," and in Western v. Woods, 1 Tex. 1, 7 (1846): "We can not permit the imperfect and slovenly entry of the decree in this cause to pass without observation and reprehension."

[49] 12 Tex. 75, 83 (1854).

[50] 19 Tex. 423, 429 (1857).

[51] Saunders v. Eilson, 19 Tex. 194, 199 (1857).

[52] 7 Tex. 502, 510 (1851).

would be abundantly evident on such inquiry, viz: that the rules of the Spanish Monarch, whether we consider the sound philosophy on which they are founded, or their intrinsic equity, would, to say the very least, not suffer in comparison with those which in the Common Law are sanctioned by judicial wisdom and authority."

Hemphill emphasized the abandonment of the common law pleadings in civil cases. In *Holman v. Criswell*,[53] he said:

"The rules of pleadings as found in Chitty, and other elementary treatises, and as recognized in the decisions of Law Courts, have no conclusive authority in our system of procedure. Any allegations which would show with reasonable certainty the cause of action or ground of defense, will be sufficient, without reference to conformity with or departure from the rules of pleading as recognized at Common Law."

On the other hand, Hemphill deplored the retention of the common law rules of procedure in criminal cases. In prefacing his remarks in *State v. Odum*,[54] where the question was the sufficiency of the indictment for theft against the attack that it failed to state that a bolt of domestic was a chattel, Hemphill said:

"The spirit of reform which has pervaded our civil system of procedure, has not as yet reached our criminal pleading. Its excrescences still deform our jurisprudence; and I will proceed to consider, whether, under this ancient system, such as it is, the judgment under revision can be sustained."

Referring to the claim that the indictment did not sufficiently enable the court or the defendant to understand the offense charged, Hemphill said:

"To impute such incapacity to a Court, would be highly indecorous; and it could not exist in the defendant, without an imbecility which would render him, legally, incapable of crime."

In matters of the property rights of married persons, it is ob-

[53] 15 Tex. 394, 397 (1855).
[54] 11 Tex. 12, 13 (1853).

vious that Hemphill was proud of the rights accorded under Texas law to the wife. In *Wood v. Wheeler*,[55] he said:

> "Husband and wife are not one under our laws. The existence of a wife is not merged in that of the husband. Most certainly is this true, so far as the rights of property are concerned; they are distinct persons as to their estates. When property is in question, he is not a baron, nor is she covert; if by the former is meant a lord or master, and by the latter a dependent creature, under protection or influence. They are co-equals in life; and at death the survivor, whether husband or wife, remains the head of the family."

On the other hand, Hemphill was scathing in his comments on the rights of married women under the common law. In *Jones v. Taylor*,[56] he said:

> "The doctrine of the incapacity of the *feme covert*, as it exists at Common Law, can claim such merit as, even in error and wrong, may be attributable to systematic consistency and uniformity. If it be irrational and barbarous, it harmonizes and is in consonance with, and is the result of, rules equally unreasonable and equally tinged with the reading of the dark ages."

Hemphill's admiration for the civil law apparently grew out of a close study of it.[57] His familiarity with the Spanish and Mexican sources is evident in a variety of situations.[58] He frequently

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[55] 7 Tex. 13, 19 (1851).

[56] 7 Tex. 240, 246 (1851).

[57] Hemphill's characteristic thoroughness is indicated by his statement in White v. Gay's Executors, 1 Tex. 384, 388 (1847): "I have hereby alluded to these doctrines of the common Roman, French, and Louisiana laws, without intending to engage in their discussion or to derive any assistance from them in the determination of this case; nor is there any absolute necessity for the recurrence to the reason or principles of foreign laws for the solution of the questions growing out of this contract, as the provisions of the laws of Spain relative to such contracts, being full and distinct and embracing all the circumstances of the transaction, must control the action of the court."

[58] Rights under the Mexican and Spanish colonization laws were of great importance because of the fact that many land titles were established under these laws. This subject is discussed with great learning and thoroughness by Hemphill in a number of cases, including particularly Heirs of Holliman v. Peebles, 1 Tex. 673 (1847); Houston, President, v. Robertson's Adm'r, 2 Tex. 1 (1847); Houston, President, v. Perry, Executor of Stephen F. Austin, Deceased, 2 Tex. 37 (1847); Yates v. Iams, 10 Tex. 168 (1853); Hamilton v. Menifee, 11 Tex. 718 (1854); Donaldson v. Dodd, 12 Tex. 380 (1854); Edwards v. Beavers, 19 Tex. 506 (1857). The extent of the recognition of Spanish and

quoted Spanish texts at length, when they were available, and expressed regret that his researches were limited by the lack of a complete library. For example, in *Smith v. Smith*,[59] he said:

> "It should be remembered that we are in a great measure destitute of authentic collections of the former laws of the country.
> "The edition of the Partidas that is in common use is very incomplete, and we are altogether without the compilations of the laws introduced since the adoption of that code."

In matters where the common law controlled, he likewise expressed regret that most of the decisions of the courts of other states in the Union were inaccessible. For example, in *State v. Williams*,[60] Hemphill says:

> "The volumes containing full reports of these decisions are not before me; the substance can be gleaned only from such digests as are within the reach of the court."[61]

Hemphill frequently also regretted that the pressure of many cases prevented his writing his opinions as carefully as he would have liked. In *Cartwright v. Hollis*,[62] he comments that "the subject is by no means exhausted, and requires more extended investigation than the pressure of other cases now permits," and again in *Hamilton v. Menifee*,[63] "The case presents several questions of importance. The want of time, however, forbids the discussion of any but the most essential."[64]

Mexican land titles after the Texas Revolution is discussed in Trimble and Murphree v. Smithers' Adm'r, 1 Tex. 790 (1847). Other examples of the discussion of the civil law are: the rights of a putative wife, Smith v. Smith, 1 Tex. 621 (1847); Lee v. Smith, 18 Tex. 142 (1856); right of married women to sue, McIntire v. Chappell, 2 Tex. 378 (1847); the rights of inheritance of a widow who marries within one year after her husband's death, Garrett v. Nash, Dallam 498 (1843); the right of parents to inherit from their child, Reese v. Hicks, 13 Tex. 162 (1854); forced heirs, Parker v. Parker, 10 Tex. 83 (1853); Crain v. Crain, 17 Tex. 80 (1856), 21 Tex. 790 (1858); the construction and effect of a composition grant, Trevino v. Fernandez, 13 Tex. 630 (1855).

[59] 1 Tex. 621, 628 (1847).

[60] 8 Tex. 384, 386 (1852).

[61] *See, also*, Emmons v. Oldham, 12 Tex. 18, 26 (1854); Porter v. Miller, 7 Tex. 468, 473 (1852); State v. Williams' Executors, 8 Tex. 384, 386 (1852).

[62] 5 Tex. 152, 170 (1849).

[63] 11 Tex. 718, 742 (1854).

[64] *See, also*, Womack, Adm'r, v. Womack, 8 Tex. 397, 413 (1852).

Hemphill and his associates were generally in accord. Only occasionally did Hemphill write special concurring opinions, and a search of the reports has disclosed no case in which Hemphill dissented from the court's judgment. The method of the handling of cases by the court at that time, as reported by a source apparently reliable, is of interest:[65]

> "In the trial of a cause Judge Hemphill preferred submission by brief to oral argument, though he did not attempt to control counsel in their choice and always gave them the closest attention. In the consultation room there was no discussion, each justice announced the conclusion at which he had arrived, and, in case of disagreement, the matter was recommitted for further examination. Upon the concurrent agreement as to decision in any case, it was given to the justice to whom had been assigned the record therein, and he wrote the opinion of the court in his own way and assigned therefor his own reasons. The responsibility of the court was thus limited to the decision agreed on and was in no way committed to the views or arguments presented in its support. After Judge Hemphill left the bench this rule was changed."

In 1857, the matter of the election of a United States Senator in the place of Sam Houston came up before the Legislature. Houston was shelved by the Democrats, because in the Senate he had opposed the party policies.[66] John Hemphill was proposed as one of the candidates.[67] It is difficult to understand why Hemphill would have wanted to exchange his judicial career, for which he was so well suited, for the rough-and-tumble life of the Senate, except that he felt that duty compelled him to do so. At any rate,

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[65] King, *A Biographical Sketch of John Hemphill*, THE DOCKET (San Antonio, Texas), vol. 1, no. 2, p. 5 (June 1896). The statement that the concurrence of the members of the court was only in the result reached seems incorrect in view of the fact that Hemphill wrote several separate concurring opinions, where he disagreed with the reasons given in the main opinion. See Ward v. Boon, Dallam 561, 563 (1844); McCullen v. Guest, 6 Tex. 275, 284 (1851); Arberry v. Beavers, 6 Tex. 457, 476 (1851); Hancock v. McKinney, 7 Tex. 384, 459 (1851); Titus v. Kimbro, 8 Tex. 210, 218 (1852); Miller v. Miller, 10 Tex. 319, 334 (1853).

[66] LUBBOCK, SIX DECADES IN TEXAS 224 (1900); JOHNSON AND BARKER, A HISTORY OF TEXAS AND TEXANS 524 (1914); O. M. Roberts in 2 WOOTEN, A COMPREHENSIVE HISTORY OF TEXAS 41, 48 (1898).

[67] The Standard (Clarksville, Texas), Sept. 26, 1857, p. 2, col. 1, and Oct. 17, 1857, p. 1, col. 7.

Hemphill was elected over a field of several prominent opponents on November 9, 1857.[68]

Hemphill's election was generally approved;[69] but Hemphill, like other public officials, had his enemies and detractors. One of the defeated candidates was Anson Jones, last president of the Republic, a doctor by profession, and a bitter enemy of Hemphill, who wrote thus about the senatorial election and Hemphill to Oliver Jones, his cousin, on November 23, 1857:[70]

> "The result of the election for U. S. Senators was about what I expected, and what might reasonably enough have been calculated upon from a Legislature composed, as ours is, of *lawyers*—some sixty or seventy of whom, having various private expectations of their own, were able to control the matter entirely. The election of Hemphill appears to have given the country 'a chill,' or, at least, to have been received very coldly and the general expression, (so far as I have heard it) is that in his selection we have lost all, or more than all the advantages we gained by our triumph in August. In either instance, the only jubilant parties over the result are the South Carolina fire-eaters and nullifiers, the filibusters, the bogus *Jackson Democrats*, with the disaffected ones, and the K. N.'s generally, with Gen. Houston in particular, who has been laboring *hard* for Hemphill since February, 1851, and *moderately* since 1841. The worst feature of Know-Nothingism has achieved a victory, i. e., the *proscription*, not of 'foreigners and Catholics,' but of native citizens, men who happened, half a century ago or more, to have been *born North* of Virginia."

We can only conjecture as to whether Hemphill was happy in his work in the United States Senate. It certainly was not a happy time for the South, which was faced with the choice of Northern domination or secession. Most of Hemphill's time seems to have been taken up with routine matters. However, when it became

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[68] The Standard (Clarksville, Texas), Nov. 28, 1857, p. 2, col. 5.

[69] *Ibid.*

[70] JONES, MEMORANDA AND OFFICIAL CORRESPONDENCE RELATING TO THE REPUBLIC OF TEXAS, ITS HISTORY AND ANNEXATION 626 (1859). Jones goes on to attack Hemphill bitterly because of his personal habits and domestic life. Those wishing to investigate these matters may consult the papers in Cause No. 3074 in the District Court of Travis County, entitled Theodora Hemphill v. James Hemphill *et al.*, and No. 2954 in the same court, entitled R. S. Rust v. F. W. Chandler, Administrator.

apparent that the Southern states, including Texas, would secede, Hemphill prepared and delivered in the Senate on January 28, 1861, a learned and eloquent defense of secession, and particularly of Texas's part in it.[71] His speech reads in many parts like one of his opinions, being well supported by references to and quotations from historical authorities, such as congressional journals and *The Federalist*. His speech is undoubtedly one of the best reasoned expositions of the subject. Turning to Texas's role, he said:

> "I will notice but very briefly the charge of ingratitude against the State of Texas, should she attempt a separation from the United States. It must be remembered that the United States did not by the annexation of Texas, propose exclusively or mainly the benefit of the latter."[72]

After developing this theme, Hemphill concluded:

> "I have spoken to repel assault; but in no captious or querulous spirit. On the behalf of Texas, I disdain the language of complaint. I vindicate the truth of history; nothing more.
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> ". . . Texas will never forget the benefits she derived from the Union. . . . Texas appreciated the advantages she derived from Mexico, the immense grants of land, exemption from taxation, the mild administration of her laws. But for causes justified by the world, Texas was impelled to a separation; and now, on grounds deemed essential to her security and happiness, she will feel herself constrained to dissolve connection with this Confederacy; fling again her glorious and triumphant banner to the breeze, and establish on a secure basis the rights, the liberties, and the happiness of her people."[73]

Hemphill left Washington soon after delivering this speech.[74] He was offered but refused appointment as the Confederate States district judge for Texas,[75] but accepted election as one of the dele-

[71] CONGRESSIONAL GLOBE, 36th Cong., 2d Sess., 1860-61, Pt. 1, p. 591.

[72] *Id.* at 595.

[73] *Id.* at 596.

[74] Chief Justice Gaines, in *John Hemphill*, 4 GREAT AMERICAN LAWYERS 3 (1908), says that Hemphill resigned. The BIOGRAPHICAL DICTIONARY OF THE AMERICAN CONGRESS 1774-1927, 1085 (1928) says that he was expelled by a resolution of July 11, 1861.

[75] The Standard (Clarksville, Texas), March 30, 1861, p. 2, col. 5, and April 27, 1861, p. 2, col. 5.

gates to the Confederate Provisional Congress which met at Montgomery in 1861,[76] and was a member of the Congress which met at Richmond later in the same year.[77] He was a candidate for Confederate States Senator in that year, but was defeated by W. S. Oldham.[78] However, he was still serving as a member of the Confederate Congress at Richmond when he died of pneumonia on January 4, 1862.[79] His body was brought back to Austin, where he was buried on a wet and cold day, on February 10, 1862, in the State Cemetery. It is said that in spite of the weather "almost the whole population turned out to do honor to the distinguished dead."[80]

Hemphill's greatness as a judge seems to have been universally recognized by the profession. In 1869, George W. Paschal, who had been on the opposite side from Hemphill on the question of secession, wrote that Hemphill's opinions "evince that of all our jurists he best understood the sources of our law."[81] In 1883, ex-Chief Justice Roberts, who had served with Hemphill on the Supreme Court, in presenting a portrait of Hemphill to the Supreme Court, gave a masterly summary of Hemphill's work.[82] After pointing out the origins of rights in various systems of laws in Texas, Roberts said of Hemphill:[83]

> ". . . To consistently harmonize them required the calm, deliberate judgment, the extensive research, and the studious habits which characterized his whole life while on the bench. . . .
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> "As in other new countries, the statutes enacted in Texas were often

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[76] Dallas Herald, Feb. 13, 1861, p. 2, col. 3; The Standard (Clarksville, Texas), Feb. 23, 1861, p. 2, col. 4; Sandbo, *First Session of the Secession Convention of Texas*, 18 SOUTHWESTERN HISTORICAL QUARTERLY 162, 194 (1914).

[77] Dallas Herald, Aug. 7, 1861, p. 1, col. 8.

[78] Dallas Herald, Nov. 27, 1861, p. 1, col. 4; King, *The Political Career of Williamson Simpson Oldham*, 33 SOUTHWESTERN HISTORICAL QUARTERLY 112, 121 (1929).

[79] Texas State Gazette (Austin, Texas), Jan. 18, 1862, p. 2, col. 2; Dallas Herald, Jan. 22, 1862, p. 1, col. 2.

[80] LUBBOCK, SIX DECADES IN TEXAS 378 (1900).

[81] Preface, 28 Tex. vi.

[82] Preface, 59 Tex. vii-viii.

[83] *Id.* at viii.

crude in structure, and the acquisition of rights under the laws was attended with many irregularities. These things required extensive and accurate knowledge of the habits and pursuits of the people of Texas through a long series of years, combined with a politic conservatism on the part of the court of last resort, to prevent the continual unsettling of rights long deemed secure. This marks the course of the chief justice, generally sustained by a majority of the court. The favorite subjects selected for his own investigations were those arising under the institutions and laws of Spain and Mexico, for which he was well qualified by his knowledge of the Spanish language; under the laws relating to marital rights, to marriage and divorce; to homestead rights, and to other exemptions from executions. With most of these subjects the lawyers of the state were least familiar and authorities upon them were not generally accessible."

Of Hemphill personally he said:[84]

"He was one of the few judges that have been on the supreme bench who gave very especial attention to the literary excellence of his written opinions. In consequence of this, and on account of the great care and deliberation given to his subjects, he did not deliver as many opinions as either of his associates, he not having delivered more than about five hundred in the eighteen years during which he was chief justice, from 1841 to 1858.

"He presided in court with a rather austere dignity, and gave to those addressing the court a respectful and silent attention, rarely ever asking a question of the counsel in the case being presented. When he spoke at all on the bench, his words were few and his manner positive.

"In his intercourse with the members of the bar he preserved a reserved dignity, that, though hardly repulsive, did not invite familiarity; yet he was a man of kindly and friendly disposition generally, with remarkable uniformity in his manners and general bearing.

". . . His presence always commanded the respect due to his exalted position as chief justice."

From these contemporary estimates of Hemphill, as well as from his opinions, we can only draw the conclusion that he was truly a great judge. Texas was most fortunate in having him at the

[84] *Ibid.*

head of the court in the critical early days; his work furnishes an illustrious example which his successors may well strive to emulate.