I. Court Reform and the New Capitol, 1882-1892: Fire, Toil and Trouble.

Governor Oran M Roberts and other prominent officials watched in stunned amazement as the State Capitol shot flames and cinders into the autumn sky. Roberts and his entourage of building commissioners were out of breath, having just escaped the burning edifice. Ironically, only minutes before, Roberts and his entourage, composed of a “Capitol Board” and the building commissioners and superintendent it had appointed, were poring over plans for a proposed new capitol. Those drawings, submitted by architect E.E. Myers of Detroit, called for a much larger capitol to be built on a site one block north of the existing building. The old 1853 Capitol, while small and inelegant, was serviceable, and Roberts and his commission foresaw no problem continuing to run the government from within its walls while construction proceeded, but even the best laid plans often go awry. As the governor and his commissioners discussed these plans in a room of the old Capitol, it, according to a local newspaper:

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was being set on fire a few feet from them through the carelessness of a department clerk, and the ignorance of a mechanic who run (sic) a stovepipe against the paper and plank sides of a room full of books, instead of into a flue, as he supposed he was doing.1

Although the mechanic provided the source of ignition, the clerk, who smelled smoke from near a book filled closet, fanned the smoldering paper and planks into a full conflagration by throwing open the door. While many of the state’s luminaries stood waiting for the Austin volunteer fire brigade or someone else to appear and take action, an African-American man charged into the building in an attempt to save something of the state’s records storehouse, now serving as fuel for the growing inferno. He managed to retrieve only a desk and a few bundles of papers, which were then promptly scattered by the strong north wind that had been fanning the flames. The man gave up and the old Capitol, which some contemporary newspaper accounts described as an eyesore anyway, burned on.²

While other buildings near the Capitol were damaged, The Texas Supreme Court building one hundred yards or so to the northeast was never in danger. The same northerly wind that fed the flames at the Capitol simultaneously deflected them away from the courthouse upwind. Fortunately, the Supreme Court was not in residence, in any event. On this November afternoon in 1881, its three members, Chief Justice Robert Simonton Gould, and associate justices Micajah Bonner and John W. Stayton, were two hundred miles away, deep in the piney woods of East Texas, holding session in Tyler as provided by law. Within ten years Tyler would host no more such sessions, and the entire judicial branch of government would be completely overhauled by a set of constitutional amendments necessitated by rapidly modernizing economic and social life. Yet, the Court itself would serve as a remarkably stabilizing influence, its justices generally adhering to precedent, but occasionally modifying the existing regime of common law rules to the extent new realities demanded.

² Ibid and Texas Siftings (Austin) 12 November 1881; Texas Siftings (Austin) 13 November 1881.
The three justices probably heard about the fire in the evening, at their boarding houses, after Austin telegraph operators began tapping news of the disaster down a web of wires running along an ever expanding network of steel rail lines. Each additional mile of track made the court’s circuit riding easier between legislatively mandated quarterly sessions in Tyler, Galveston, and Austin. And the new track spread ever westward. The increased travel it spurred, together with the associated population growth, pulled Texas away from its southern past and toward the New West.

When word of the loss of the thirty-year-old state building reached them, the reactions of the members of Texas’ highest court were bound to have been somewhat diverse. The Chief Justice, Robert Simonton Gould, a bearded, white-haired ex-Confederate officer, was doubtless relieved at the narrow escape of Governor O.M. Roberts, his close friend and political mentor. Only nine days before the fire, it was Roberts who had elevated Gould from associate justice to chief, and when Governor Richard Coke originally appointed Gould associate justice back in 1874, it was Roberts who sat in the chief’s chair, leading three other ex-Confederates colleagues on what would come to be known as the “court of the redeemers.” Two years later, Roberts and Gould had worked together writing the judicial section of Texas fifth and final Constitution in 1876.

In 1881, recently appointed Chief Justice Gould may well have wondered how the fallout from the fire and confusion in Austin might affect his run for reelection the following year. While the general election was a full twelve months off, Gould knew that any serious challenger would surface at the Democratic Party nominating convention in the summer. Gould had reason for concern. No one had opposed him in his first election
to retain his seat in 1876. Now, with his sponsor Roberts retiring and another convention and election looming, things might well be different, and Gould was more scholar than politician.\(^3\)

Like Roberts, Gould was, as one close associate described him, “an ardent Southern man.” However, as former colleague R.L. Batts put it, the two friends “had little in common save a common patriotism.” While Roberts was “an astute politician,” Batts thought, Gould “was in all relations of life frank and ingenuous.” He was the classic ex-Confederate conservative and as another colleague put it, that conservatism was “displayed in all his work…based upon an abiding respect for allegiance to constituted authority. He most earnestly believed that legislation was not the province of the judiciary.” Gould was a reasonably successful lawyer and judge, modest, unassuming, and possessed of a classical education that might well have caused him to comfort himself in the face of electoral uncertainty with lines penned by Ovid centuries before:

> And now my work is done, which neither the anger of Jove, nor fire, nor sword, nor the gnawing tooth of time shall ever be able to undo.\(^4\)

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His final campaign would be one of a respected old soldier-scholar who felt deserving of public confidence. But in the new Texas of the 1880s, it was no longer sufficient recommendation to have served as an officer in the Confederate Army or comported oneself as a gentleman. Gould would soon discover that other more energetic candidates wanted his job. While the disastrous fire of 1881 had left him unscathed, the election of 1882 was not so kind. Within a year, Gould would lose his bid for reelection.

Associate Justice Micajah H. Bonner probably reacted less nervously than did Gould, although he was more passionate by temperament. He had been appointed in 1878 by departing Governor R.B. Hubbard. Like Gould, he was a Confederate veteran, and before the war had practiced law in East Texas in partnership with J. Pinckney Henderson, the firebrand secessionist U.S. Senator. Before he was elevated to the high court, Bonner served as the district judge in Tyler for five years. By the time of the November 1881 fire, he was almost fifty-four years old and probably in declining health. He retired in 1882 and Governor Roberts replaced him with Charles S. West, a candidate symbolic of the transition from Old South to New Southwest. While Judge West was another ex-Confederate lawyer and statesman, he had a somewhat more distinguished legal practice, and he represented, among others, the economic hegemon that would come to replace the Confederacy as the source of conservative political respectability, the railroad industry. Bonner returned to Tyler and died the following year.\(^5\)

\(^5\) Handbook of Texas Online, s.v., “Bonner, Micajah Hubbard” by Jeanette H. Flachmeier; Handbook of Texas Online, s.v., “West, Charles Shannon” by Roy L. Swift.
Associate Justice John W. Stayton’s surprise at news of the fire was mixed with a
trepidation different from Gould’s. He had no election to worry over, since he had been
appointed by Roberts to one of the two Associate Justice positions on the Court only a
week before. Nonetheless, as his new judicial career stretched before his imagination, he
must have wondered at its inauspicious circumstances, and Gould’s impending electoral
defeat doubtless only heightened his uncertainty. If he harbored much in the way of such
fears, he worried needlessly. As the Capitol fire burned and Stayton began learning the
Court’s daily routine in Tyler, he could not have foreseen that his career would span
thirteen years on the court, half of them as its chief, and that his scholarship would
become legendary. Having practiced law in Pleasanton south of San Antonio and then in
Victoria near the Gulf Coast, Stayton was said to have read forty pages of law every day
of his adult life, excepting only Sundays. His grandson, Robert W. Stayton, became a
distinguished law professor at the University of Texas, served on the Commission of
Appeals, and authored a definitive treatise and formbook for use by Texas lawyers in the
early twentieth century. It was the elder Stayton’s reputation as a calm and scholarly
small-town lawyer that resulted in his appointment to the high court by Governor
Roberts, even in the absence of prior judicial experience. Fortunately, even in the face of
unexpected adversity, Stayton was not one to panic.  

It was fortunate as well that five years earlier the post-Reconstruction
Constitution of 1876 had already allocated three million acres of land to fund the
construction of a new capitol building, and in 1879 the legislature possessed the foresight
to pass two laws providing for the building of a new State Capitol. One of these acts

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6 Handbook of Texas Online, s.v., “Stayton, John William” by Craig H. Roell; “In Memoriam of John W. Stayton” 87 Tex. Reports v-xvii.
provides a useful introduction to the procedure for legislative appropriation of public lands that would fund so many public improvements and produce so much litigation in the latter part of the nineteenth century. It provided that certain state owned lands in West Texas should be surveyed and then sold to private parties at a minimum price of 50 cents per acre. The survey itself would be rather expensive, the lands being so vast, and it too would be paid for in the same way, by sale of some of the land surveyed.7 The second act provided for a Capitol Board authorized to contract for the erection of the building itself. This board was composed of the Governor, Attorney General, Comptroller, State Treasurer, and Land Commissioner.8 It was this Board and the building commissioners and superintendent it had appointed to help plan and execute the new structure who stood with Governor Roberts in November 1881 watching the Capitol burn.

While it seems a bit odd by modern standards, the most valued source of funds possessed by the state at this time was not the right to tax its inhabitants, but the unsurveyed and unsold lands of the unsettled western part of the state, most of which had only recently been depopulated of their Indian inhabitants. By the terms of Texas’ annexation to the U.S., the title to these lands was vested in the state of Texas. Particularly after the Civil War, whenever the legislature needed substantial funds, such as for universities, to fund other public education projects, or to attract railroads, it arranged to identify some of this vast expanse by survey and then sell it off or barter it in

exchange for some perceived public good. Obviously, as Malthus might be the first to point it, this form of public finance could only last so long.

Back in Austin, temporary quarters had to be found for many state offices, and the Supreme Court was only rescued by an April 1882 act of the legislature authorizing part of the Brueggerhoff Building to be rented for three months at a time.\(^9\) By early 1883, Chief Justice Gould had been replaced on the Court by his successful opponent at the 1882 Democratic convention, Asa Hoxie Willie. Moreover, the Brueggerhoff Building was vacated in favor of a temporary capitol quickly constructed on the west side of Congress Avenue, across Eleventh Street from the official capitol grounds, pursuant to another emergency law passed by a special session of the legislature in May of 1882. Asa Willie’s Supreme Court had to wait some time before moving in, however. To compound the Court’s toils and troubles in the early eighties, it was only four more months before a rainstorm caused this temporary capitol to collapse while still under construction. The building was finally completed at just in time for Chief Justice Willie’s inauguration in early 1883, although the Austin Statesman lamented that “it will never be more than a very cheap affair.”\(^{10}\) The Willie Court would occupy it from that point until the completion of the permanent Capitol in May 1888, after substantial delays, cost overruns, and labor difficulties.\(^{11}\)

All of this was perhaps more frustrating than Willie had anticipated when maneuvering in 1882 for the party’s nomination for Chief Justice. A former Confederate

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\(^9\) Act of April 1, 1882. Also see O. M. Roberts, supra, pages 239, 249; and *Handbook of Texas*, s.v., “Capitol.”


\(^{11}\) *Handbook of Texas Online*, s.v., “Capitol”; O. M. Roberts, supra, pages 254, 263.
officer, he had previously been elected to the Court in 1866 but was removed by federal authorities in September 1867 as an impediment to Reconstruction. As such, he had what one legal historian described as “something of a sentimental claim on the office,” he had more than sufficient political backing, and most importantly, he aggressively worked the convention and its delegates. Judge Gould, as his grandson John later wrote, “had neither taste nor talent for politics and...he was at a severe disadvantage against a candidate who campaigned aggressively.” The retiring Chief Justice, however, held the view for the rest of his life that an altogether different factor accounted for his loss to Willie. The convention occurred during a time when eastern railroad tycoon Jay Gould was something of a bogey man to the Democratic Party, especially in the agrarian states of the South and West. Judge Gould came to believe himself the unfortunate victim of an inauspicious surname. Given more recent Supreme Court history, his self-justification is altogether plausible. But it is just as likely that his taciturn temperament both ensured his defeat and led him to an explanation consistent with his disdain for the rough and tumble of electoral politics.\(^\text{12}\)

His victorious rival, Asa Willie, came from an old Democratic Texas family. His elder brother James, with whom Asa practiced in Brenham from 1848-1857, was appointed by the Governor to codify, arrange, and digest state law. When James was elected Attorney General in the 1857 election that swept conservative Democrats into state offices at the expense of Sam Houston’s party of independent unionists, Asa joined his brother in Austin as an Assistant Attorney General. After his brief and disappointing service on the Reconstruction Court, he moved to Galveston and in 1872 was elected to

Congress, returning to Galveston after just one term “to devote himself to the law.” His mother’s brother, Asa Hoxey, was a prominent early Texan landowner and a signatory of the Texas Declaration of Independence. Willie’s political popularity is demonstrated by the fact that his 1882 vote total was the highest in Texas history to that date. He worked hard under adverse circumstances to alleviate the Court’s backlog, but to little avail. His public career, while full of promise, seemed always to place him at the wrong place at the wrong time. In fact, after serving only one term, watching repeated pleas for legislative relief of the Court’s workload rebuffed, and serving in temporary offices at a hastily constructed temporary capitol, Chief Justice Willie would retire to a lucrative private practice as a distinguished ex-judge.

Associate Justice Stayton’s service on the Court also enhanced his reputation as a lawyer’s lawyer, but he never succumbed to the temptation to return to private practice. And when the Democrats of South Texas nominated him in 1884 to run for Congress, he declined, acceding to unprecedented and urgent requests from the newly established state bar association that he not leave the Supreme Court. When Asa Willie resigned his bench on the eve of the dedication of the new Capitol in 1888, it was Stayton that Governor John Ireland elevated to take his chair as Chief Justice. Stayton’s replacement as associate justice was Stayton’s opinions, and those of his successor as Chief, Reuben R. Gaines, laid the groundwork for much of modern Texas law. Together, Stayton and Gaines would come to symbolize the professionalization of the bench and bar that occurred in the late nineteenth century. They witnessed the establishment of not only the

University of Texas School of Law (1883), but the Texas Bar Association (1882) as well.\textsuperscript{14}

Most of the founders of this Texas Bar Association were judges, including past, present, or future Supreme Court Justices Roberts (who had been Chief Justice prior to his election as governor), Gould, Stayton, Bonner, and West, as well as the Court’s longtime official reporter, A.W. Terrell. Also in attendance at the organizational meeting in Galveston on July 15, 1882 was the man who had just received the Democratic Party’s endorsement to replace Gould as Chief Justice of the Court, Asa Hoxie Willie. Each of these dignitaries had signed the “Call” for the convention in Galveston, one of the avowed purposes of which was “to promote reforms in the law.”\textsuperscript{15} At the first regular meeting of the association scheduled for December 12, 1882, the association planned to take up the resolution offered by W.S. Robson of La Grange that the association publish weekly the opinions of the “Supreme and Appellate Courts,” which were, until then, published only annually by the Courts’ official reporters, usually lawyers commissioned and contracted part-time for that purpose.\textsuperscript{16}

Before the meeting in December could turn to these previously scheduled agenda items, three separate resolutions were offered from the floor demanding constitutional amendments overhauling the Texas judiciary. W.L. Davidson’s motion captured the spirit of the bench and bar: “Owing to the increased business before our courts and the fact that our Supreme Court, as now organized, is unable to dispose of the business before it, a change in our judicial system is imperatively demanded.” The resolution ultimately

\textsuperscript{14} Handbook of Texas Online, s.v., “Stayton, John William” by Craig H. Roell; “In Memoriam of John W. Stayton” 87 Tex. Reports v-xvii.

\textsuperscript{15} “Proceedings of the Organizational Session of the Texas Bar Association,” Proceedings of the Texas Bar Association (Galveston: By Order of the Association, 1882) 8.

\textsuperscript{16} Ibid. 16.
adopted was one proposed by Judge X.B. Saunders that authorized the Bar president to appoint a blue ribbon committee to propose appropriate amendments for association approval at a special meeting scheduled the following year.¹⁷

The blue ribbon committee was headed by newly elected Chief Justice Asa Willie’s friend, William Pitt Ballinger of Galveston, the state’s premier railroad lawyer. This committee proposed reforms in court organization, which were rejected by the legislature, just as similar but less well-organized efforts by judges and lawyers had been rebuffed by the electorate in a constitutional referendum of 1880. These unhappy results were reported to the 1884 annual meeting by A. W. Terrell, who was both the Supreme Court’s official reporter and Chairman of the Association’s standing Committee on Judicial Administration and Remedial Procedure. He added the pessimistic prediction that there was

little hope of early relief from legislative action, nor do we believe that any important reforms, which a speedy administration of justice demands, will ever be made until a deeper interest is felt, and more concert of action shown by the Bar of the State. Former failures are chargeable to the disagreement and apathy of the lawyers themselves.¹⁸

He described the biggest problem as the Supreme Court’s backlog, still unresolved even after an experimental “Commission of Appeals” was created by the legislature in 1879 to hear Supreme Court cases whenever all parties to the suit agreed.

In the spring of 1888, Asa Willie submitted his letter of resignation to Governor John Ireland to be effective on the date of the new capitol’s opening, May 16, 1888. State offices officially began occupying the building on May 14th, and a huge celebration was

¹⁷ *Proceedings of the First and Second Annual Sessions of the Texas Bar Association* (Houston: By Order of the Association, 1884) 11-12.
held that entire week in honor of the dedication of the building. There was a parade and a huge turnout from across the state, but Willie had already taken the road home to Galveston, soon to become one of the most prestigious and wealthy private lawyers in the state. ¹⁹

Although some mystery has surrounded the timing of Chief Justice Willie’s resignation, the explanation seems rather straightforward. As Professor Baade so aptly noted in the previous chapter, appellate judicial service was a serious financial hardship on successful private attorneys. As he also described, the Supreme Court, at this time, split its sessions between three courthouses, one in Austin, one in Tyler, and one in Galveston. During Willie’s six years on the court, he could rest assured that he would spend most of his time with his family at home in Galveston, since a quarter of the year was spent with the court in recess and another three months with the court sitting in Galveston.

Prior to his appointment, Willie had been a prominent and politically influential Galveston attorney. Although he was elected to serve in the United States House of Representatives, he chose to serve only one term and then returned to Galveston where he resumed private practice and earned additional income as the City Attorney. Once the new capitol was completed, and with judicial institutional reform and backlog reduction already a hot topic, it was undoubtedly becoming clear to Willie that not only would further service on the Court continue to drain his financial reserves, but it would probably also require him to soon spend substantially more time away from his wife and family.

¹⁹ O. M. Roberts, supra, 269-270.
When he retired, Willie had been married for almost thirty years, and he and his wife Bettie had ten children, five of whom lived to maturity in Galveston.20

What may have cinched the argument for Willie was the death of his friend Ballinger in Galveston on January 20, 1888. At the time, Ballinger’s twenty-two year old son Thomas had only within the last few months been admitted to the bar and inducted into the Ballinger & Jack law firm as a junior partner. Tom Jack having died in 1880, the only other partners in the firm in 1888, were Marcus F. Mott and John W. Terry. Mott was a diligent and workmanlike fellow who had neither Ballinger’s prestige, nor his legal acumen and close client relationships. Terry had only come on board in 1882, and although Ballinger regarded him as a “first rate lawyer,” he was no William Pitt Ballinger.21 What the Ballinger family and the firm of Ballinger & Jack needed was a politically well-connected lawyer of statewide reputation with impeccable experience as a trial and appellate advocate. Ballinger’s practice was one of the busiest and probably the most lucrative in Texas. His firm, often in cooperation with Baker & Botts in Houston, represented most of the choice railroad clients in Texas, and he was so influential as to have been seriously considered by President Hayes for appointment to the U.S. Supreme Court.22

It is almost certain that someone from the firm contacted Willie about returning to practice in Galveston upon Ballinger’s death, since in the 1880s Ballinger himself was close enough to Willie not to flinch at visiting the Chief Justice privately, and to offer

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him and his colleagues on the court free railroad passes on his clients’ lines. For Willie, his friend Ballinger’s death and the dedication of the new capitol were watershed events in his personal and political life. From there, the path before him diverged, and he simply chose to take the fork in the road that would lead him back to home, family, and a good chance at tremendous wealth and economic security. It is therefore not surprising that his letter to Governor Ireland gave as the reason for his resignation only “lack of enough salary.”

The needed court reforms sought by Willie and his colleagues in the bench and bar would have to wait until several years after his departure. The movement for institutional judicial reform, for a streamlining of the judicial process, was national in scope, and the Texas reform movement didn’t achieve meaningful results until bolstered by national momentum and publicity. By 1887, Supreme Court Chief Justice Morrison R. Waite was demanding congressional action to relieve the increasing caseload of the federal judiciary, particularly the appellate caseload of the U.S. Supreme Court. In response, Congress enacted the 1891 writ of certiorari statute relieving some of the Supreme Court’s burden by allowing it latitude in refusing to even consider some appeals from lower circuit courts. The same session of Congress also abolished the old circuit court system, which involved an ad hoc amalgam of circuit riding Supreme Court Justices

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23 William Pitt Ballinger, “Diary 1883,” Box 2Q427, William Pitt Ballinger Diaries, Center for American History, The University of Texas at Austin (entry of 17 January 1883) 15. Ballinger recorded that “Botts (of Baker and Botts) wrote me enclosing pass over the Central, and wishing to know if the Judges S.C. would accept them-not wanting them declined- I spoke to Judge Willie, who said he would speak to the judges about the matter.” On the same day, Ballinger noted that he “called on Judge West—but didn’t find him in.”

24 92 Tex. XV, “Memorial to Asa Willie by R. S. Gould.” It is significant that former Chief Justice Gould was asked to speak in Willie’s behalf at the time of his memorial by the Galveston Bar, Willie’s longtime home bar association. See also Handbook of Texas Online, s.v. “Willie, Asa Hoxie” by Thomas W. Cutrer.


26 Murphy, supra, p. 300.
with federal district judges. It enacted the current system of circuit courts of appeal, thus expanding drastically the capacity of lower federal courts to reduce the Supreme Court’s appellate workload. Business lawyers’ resort to the courts for relief from economic regulation, increased urbanization and industrialization, and the rapid expansion of criminal laws and law enforcement are the three things that caused this mushrooming judicial caseload.  

In Texas, the situation was much the same. For example, in 1879, the Texas Legislature had created a “Commission of Arbitration and Award.” This system generated the first experimental “Commission” by use of which parties to an appeal from a Texas trial court, by agreement, could have their appeals heard by the Commission and avoid the Supreme Court or the criminal court of last resort, then known as the Court of Appeals. Texas is one of very few states to have a bifurcated structure of courts of last resort. The Supreme Court has only civil jurisdiction, while the “Court of Appeals” created in the Texas Constitution of 1876 originally had final appellate jurisdiction in all criminal cases and civil jurisdiction limited to appeals from probate and county courts.

Since the Civil War, California had also been struggling with rapidly growing caseloads due to an expanding population. In 1879, the California Supreme Court was increased in size from 5 judges to 7, and the court was also authorized to divide into three judge panels to hear cases separately. Illinois created its first intermediate appellate court in 1877 for the purpose of relieving Supreme Court caseloads. This had only a temporary

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effect. The Illinois Supreme Court's docket fell to an average of 240 opinions in 1880 and 1885, but by 1900 and 1905, as population grew, the caseload had climbed back to an average of 475 opinions per year. This was still better than the 600 cases a year heard in 1876, but not as much of an improvement as the legislature had hoped.\footnote{Murphy, supra, pp. 125-126.} In 1885, the California legislature adopted the same type of “commissioner” system started in Texas in 1879, and this did provide temporary relief by cutting the number of opinions actually handed down by the California Supreme Court (as opposed to those written by commissioners and merely rubber stamped) by 40 percent.\footnote{Murphy, supra, p. 125.}

It is logical to assume that the combined use of the writ of certiorari and the circuit courts of appeal reduced the United States Supreme Court’s caseload substantially. With respect to Texas, however, the situation is more muddled. In 1881, the Texas Legislature amended the original enabling statute to rename the Commission of Arbitration and Award as “The Commission of Appeals.” It further authorized the Supreme Court and the Court of (Criminal) Appeals to refer civil cases to the Commission of Appeals without the necessity of agreement of the parties. While this was of some help, in 1891 the Texas Legislature finally acceded to the bench and bar and acknowledged that the whole system was not working. Several constitutional amendments were proposed by the Legislature for public vote. These constitutional amendments continued to limit the Supreme Court’s appellate jurisdiction to civil cases only, and stripped the “Court of Appeals” of all civil jurisdiction, renaming it a “Court of Criminal Appeals.” Most significantly, the 1891 amendments also created subsidiary Courts of Civil Appeals. Each had final appellate jurisdiction within its geographical

\footnote{Murphy, supra, pp. 125-126.}  
\footnote{Murphy, supra, p. 125.}
region in all cases in which its opinion was unanimous and did not conflict with holdings of other Courts of Civil Appeals on the same question of law.\textsuperscript{31}

A statute passed in 1892 to effectuate the 1891 constitutional amendments stipulated the simultaneous phasing out of the Commission of Appeals system by 1893. By its provisions, all civil cases pending in the Supreme Court and Court of Appeals were transferred to the Courts of Civil Appeals. There were approximately twelve hundred cases transferred from the Supreme Court and three hundred from the Court of Criminal Appeals. All of these changes occurred during Stayton’s tenure as Chief Justice. He led the Court into the promised land of smaller dockets that his predecessor Asa Willie had only glimpsed from the wilderness.\textsuperscript{32}

The impact of the 1891/92 changes in the Texas appellate court structure was rapid. The transitional year was 1892, the last year under which pending civil appeals (other than probate and county court) were resolved only by the Supreme Court and the Commission of Appeals. By 1893, the newly created Courts of Civil Appeals had substantial dockets. The effect of these changes can be seen by comparison of the Supreme Court’s opinion docket during representative years.

\textsuperscript{31} “Interpretive Commentary,” \textit{Vernon’s Annotated Texas Statutes}, Constitution, vol. 2 (West Publishing Co.: St. Paul, 1993) 23; Davenport, supra. pp. 209-210; Kathy Cochran, “The Court of Criminal Appeals of Texas,” \textit{Texas Bar Journal}, March 2006, vol. 69, no. 3, pp. 218-223. On January 15, 1891, House Resolution #2 with respect to these amendments was introduced by Representative William F. Adkins of Columbus and referred to the Committee on Constitutional Amendments. \textit{House Journal}, Texas Legislature (22\textsuperscript{nd} Regular Session, 1891) 30. On April 2, 1891, Senate Joint Resolution 16 arising from the House resolution and proposing to amend the Constitution with respect to the judicial branch was reported to the House as having passed by a 26 – 0 vote. \textit{House Journal}, Texas Legislature (22\textsuperscript{nd} Regular Session, 1891) 806. This Senate Joint Resolution 16, pursuant to its terms, was submitted to the people and adopted at an election held on August 11, 1891. The vote was 37,445 for to 35,695 against. \textit{Ibid}.

Before the 1891/1892 changes, the commission structure was of only sporadic help in relieving Supreme Court dockets. Even after the 1881 legislative changes that allowed the Court to refer cases to the Commission without litigant consent, the Commission resolved remarkably few cases, perhaps because the Court was hesitant to use its new power of referral. For example, in 1887, the Supreme Court issued 334 published opinions in civil cases, while the Commission of Appeals issued only 50 opinions approved by the Supreme Court. In 1888, the Court issued a staggering 471 published opinions, to only 21 by the Commission. In 1889 the trend reversed direction again, with 331 Supreme Court opinions and 142 by the Commission.

Leaving aside the transitional years around 1891-92, later court records show the larger impact of the new Courts of Civil Appeals. In the late 1890’s, the Supreme Court’s docket of published opinions had dwindled by 60% to 75% compared with the 1880’s. In 1897, the Court issued only 118 opinions. In 1898 it issued 150 opinions, and in 1899 only 111. Clearly, the judicial reorganization of 1891 allowed the Supreme Court to render speedy decisions for at least the rest of the century. This undoubtedly contributed to the collegial and relaxed style of the post-1891 Stayton/Gaines court, whereas the Willie court from 1882-1888, like many other courts nationwide, was chronically behind in its docket and seriously overworked. By the early twentieth century, however, that unfortunate situation would return. The continued rise in the state’s population, in urbanization, and in business activity would gradually increase civil litigation to the point that it outstripped the late nineteenth century efficiency gains, and the question of appellate backlog would again have to be addressed.  

33 Leila Clark Wynn, ibid. 11.
Temporarily though, the Courts of Civil Appeals were far more effective in relieving Supreme Court congestion than either the voluntary or discretionary Commission system had been. The key was removing the Supreme Court and the litigants from any consideration of which cases the high court would take and which it would refer elsewhere. Legislative action circumscribing the Court’s power and mandating that most appeals would reach no further than the intermediate appellate level relieved the backlog. Evidently, even courts that complain of crowded dockets have a hard time voluntarily relinquishing discretionary decision-making power, even when provided by legislatures with tools with which to do so. Mandatory legislative curtailments of jurisdiction are required to wean judicial authorities onto a diet of fewer cases to decide.

These jurisdictional and organizational changes were mirrored by contemporaneous improvements in the high court’s facilities and clerical logistics. Alexander Terrell remained reporter of the court until 1884, when he was not reappointed. As early as 1882, Terrell could see the handwriting on the wall. William Pitt Ballinger, then abed in Galveston with a terrible urinary tract infection described a visit in his diary where, “Judge Terrell…brought me 56th Texas-Decidedly interested in keeping his place-Thinks Willie not favorable to him.” Terrell was evidently right.34

Terrell’s replacement as reporter, A.S. Walker, served until 1896, when he was replaced by Alfred E. Wilkinson. While the reporter of the court continued in his statutory responsibility to publish the Texas Reports at state expense, West Publishing

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34 William Pitt Ballinger, “Diary 1883,” Box 2Q427, William Pitt Ballinger Diaries, Center for American History, The University of Texas at Austin (Diary entry of 2 January 1883) 2.
Company, founded by John B. West in 1872, began also publishing Texas decisions in its new Southwestern Reporter in 1882.  

The court continued to sit in Tyler, Galveston, and Austin, until the constitutional amendments of 1891, which required the court to sit only at Austin, instead of “at the seat of government and not more than two other places.” This amendment corresponded with the establishment of the new State Capitol building, and it required consolidation of the office of Court Clerk. In 1892, the terms of the Galveston clerk, Daniel Atcheson, and the Tyler clerk, S.J. Reeves, expired and they were not reappointed or replaced. Charles S. Morse, the Austin clerk, remained with the new “Capitol Court” until 1902.

Whether in terms of institutional reform, constitutional change, change in personnel, or change in physical facilities, the years from 1888 to 1891 represented a significant transition for the court. The new chief justice, John W. Stayton, a man for whom, according to Chief Justice Gould, “the law of real estate … seems to have been a favorite branch of legal science,” would lead a court that would issue its opinions from within the halls of the impressive new granite edifice denied to Asa Willie and his colleagues. The opinions of that court, even after Stayton had yielded the chief justice chair to Reuben Gaines, would not vary significantly in judicial philosophy from those of the prior Willie Court, nor from the earlier court of the “redeemers” profiled in the previous chapter. Even in the midst of all manner of external change, the internal springs of judicial restraint and stare decisis would continue to drive the judicial department of the ship of state as it navigated the swirling currents of social conflict generated by new

35 Leila Clark Wynn, supra 22.  
37 Leila Clark Wynn, supra 21.
technology and a new urban landscape. Whether dealing with the longstanding issue of
the appropriate disposition of public lands, or the growing imposition upon farmers,
landowners, and accident victims of the railroads, or the growing presence of insurance in
people’s lives, the court would chart a steady course, but it would innovate when
necessary to adapt the old traditions to new economic, political, and technological
realities.  

II. Court Personnel and Historical Context, 1882-1900: Judges, Farmers, and Railroads.

Throughout 1882, Robert S. Gould was chief justice, with the same John W.
Stayton, and Micajah H. Bonner serving as associate justices. Gould wrote 42 opinions
including 3 on motions. Of these, 20 were reversals, usually on technical grounds such as
lack of standing or deficient pleading. These were most often in trespass to try title or
other real estate cases. Bonner wrote 52 opinions, of which more than 50% (28) were
reversals. He showed a heightened suspicion of any kind of large jury verdict,
particularly but not exclusively in railroad tort cases like Houston & Tex. Ry Co. v.
Fowler. His dissent in T. & P. Ry. Co. v. O’Donnell was also emblematic; in that he
wanted to reverse a jury verdict of substantial damages for death of a child hit on a track
on the grounds that the railroad owed no duty of care whatever to children trespassing on
the track. He was particularly miffed that the plaintiff, the child’s mother, was nearby and
should have known of the danger. He also reversed large damage awards in P.J. Willis
Bros. v. McNeil because evidence of the plaintiff’s circumstances in life “inflamed the

38 With respect to Stayton’s love for real estate law, see “In Memoriam to John W. Stayton” 87 Tex. V-
XVIII, specifically page XIII (quote from former Chief Justice Gould with respect to Stayton’s expertise in
real estate law).
39 56 Tex. 452 (Tex. 1882).
40 58 Tex. 27 (Tex. 1882).
41 57 Tex. 465 (Tex. 1882).
passions of the jury,” and similarly in *Glasscock v. Shell*, a breach of promise case incident to a divorce.

Stayton, on the other hand, the junior member of the court, was most likely to affirm jury verdicts. Out of 60 opinions, including 2 on motions, he only reversed the lower courts 15 times. He clashed with Bonner 5 times where he either dissented from Bonner’s opinion reversing a verdict, or where Bonner dissented from Stayton’s affirmance of a verdict below. In these cases, Gould was obviously the deciding vote. Some of these were real estate cases, where Bonner seems to have wanted the case decided on a more formalistic or legal basis than Stayton. The primary cases handled by the court were: real estate matters (trespass to try title, homestead claims, etc.), contract disputes (commercial transactions, bonds, suretyship, etc.), and railroad torts.

In 1883 both the composition and the output of the court changed dramatically. Gould, after his defeat in 1882, was offered a position joining his old friend and colleague O.M. Roberts as the founding faculty of The University of Texas School of Law in 1883. Meanwhile, when Bonner retired in the same year, he was replaced by Charles Shannon West. For most of its tenure, the itinerant Willie Court of the 1880s was composed of Willie, Stayton, and West. Each authored between 80 and 90 opinions. This was an increase in output of around 50% in one year, even by the standards of the court’s previous workhorse, Stayton. The largest single category by far was again real estate cases, including land titles, deeds, mortgages, and homestead rights. In addition, commercial sales and common carrier cases were on the rise, an indication of increased economic activity and a growing transportation industry.

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42 57 Tex. 215 (Tex. 1882).
Now, however, fully half of Stayton’s cases were reversals. This was caused by the growing interference of trial judges with jury verdicts. Some of Stayton’s reversals were for defendants, some for plaintiffs, but the common theme was vindication of jury verdicts overturned by lower court judges. Stayton had faith in juries and often reversed trial judges he felt overstepped their authority in taking the case away from the jury or in nudging the jury in one direction or another by overbearing instructions. For example, in Heldt v. Webster, 60 Tex. 207, (Tex. 1883) he reversed a verdict for a plaintiff in a malicious prosecution case where the judge instructed the jury that the plaintiff’s acquittal of criminal charges created a presumption in his favor that the prosecution by the defendant was groundless and thus malicious. He also reversed a summary judgment for the railroad defendant in Texas & St. Louis RR. Co. v. Young,43 where the trial judge found that the railroad had no duty to maintain the cattle guards on its line because a statute merely gave the landowner the right to construct and maintain such guards.


Justice West showed similar tendencies. He reversed a take nothing verdict for a railroad and against a widow and her minor son where the court took matters too much out of the jury’s hands. As West put it,

We think, also, under the facts of this case, that the court laid down the law in rather too strong and unqualified terms, when it informed the jury that as soon as the deceased "alighted in safety from the car or caboose in which he and his wife (the plaintiff) were carried, then the relation of passenger ceased, and from that time the defendants owed them no duty as passengers."46

43 60 Tex. 201 (Tex. 1883).
44 60 Tex. 194 (Tex. 1883).
45 62 Tex. 227 (Tex. 1883).
46 Ormond v. Hayes, Receiver, 60 Tex. 180 (Tex. 1883).
After 1883, the number of opinions generated by justices remained relatively constant until the 1890’s, increasing by only about 10 percent over that seven year period. In 1882 and 1883, only 10 to 13 percent of the opinions dealt with railroads or telegraph operators, whereas approximately 40 percent of all opinions dealt with real estate cases of one sort or another, including the interpretation of homesteads, deeds, mortgages, liens, and landlord/tenant relations. For example, in 1883, only 13% of all opinions dealt with railroads or telegraphs. These were disproportionately written by Justice Stayton, who wrote 20 of the 33 such opinions. As to real estate cases, the load was distributed more evenly, with Stayton, Willie, and West writing 34, 33, and 30 such opinions respectively. In addition to Stayton’s acknowledged expertise, the bar saw Willie and West as equally proficient in this area of law. Overall however, Stayton and Willie far outpaced the elder West in output. Stayton wrote 91 opinions, and Willie 87, while West authored only 67. Each judge recused himself in between 3 and 5 percent of the total of 245 cases. In Stayton’s case, these were almost always suits where his law firm had been counsel, or where real estate in Victoria or San Patricio Counties was involved.

In 1884, the number of cases involving railroad and telegraph companies mushroomed to about 20 percent, and it stayed at that level throughout the 1880’s and 1890s until it reached 25 percent in 1895. Railroad and telegraph cases continued to comprise about 25 percent of the court’s docket for the remainder of the nineteenth century.

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47 William Pitt Ballinger noted a conversation with the federal judge in Galveston, former Texas Supreme Court Chief Justice Amos Morrill where Ballinger called to Morrill’s attention a new book on trials of land titles, and in response, “the old fellow said he could name four men who knew all that is to be known on that subject Willie, West, himself, and myself!!!” William Pitt Ballinger, “Diary 1883,” Box 2Q427, William Pitt Ballinger Diaries, Center for American History, The University of Texas at Austin (diary entry of 3 March 1883) 55.
century. The new transportation and communication technologies, and the litigation they produced, were here to stay.

When Stayton became Chief Justice in 1888, another associate justice had to be appointed to take his previous seat. The same A.S. Walker who succeeded Alexander Terrell as official reporter was appointed to the office by Governor Ireland. Walker served less than a year, and was then replaced by John Lane Henry. Henry served for less than five years, previously having maintained a highly lucrative practice as a railroad lawyer. He also was active in conservative Democratic politics.\textsuperscript{48} Charles S. West retired due to ill health in 1885 and died less than a month later. He was replaced by Sawnie Robertson, who served less than a year before returning to private practice in Dallas. As witnessed by the retirements of Willie and others, it was common in those days for judges to serve briefly and then return to practice, bearing the gravitas of previous judicial experience. Only the wealthiest or the most frugal of nineteenth century lawyers could afford extended careers on the bench. Sawnie Robertson’s replacement, Reuben Reid Gaines, was more the latter than the former.

Gaines had first been elected to the bench in 1876 in Paris, Texas as judge of the sixth judicial district. He served for eight years and then returned to private practice in Paris. His respite from public office was cut short in 1886 when Governor Ireland appointed him to the Supreme Court, and he served for an exceptionally long time. When Judge Stayton died suddenly while visiting his daughter on the day after the fourth of July, 1894, Gaines was the logical choice to succeed to the chief justiceship in his stead. By the time of his retirement in 1911, Gaines served a total of twenty-five years on the

\textsuperscript{48} The Handbook of Texas Online, s.v. “Henry, John Lane” by Cecil Harper, Jr.
court, eight as associate justice and seventeen as Chief. His overall tenure on the high
bench remains the longest in the court’s history.  

One of Reuben Gaines’ closest associates on the bench, the man who was
appointed to replace him when he was elevated to chief justice in 1894, resembled the
amiable Gaines more than the studious Stayton. Dissents were extremely rare among the
opinions of the Stayton/Gaines court of the 1890s, and Leroy G. Denman of San Antonio
was no more likely to write one than the next associate justice, even though he was one of
only two justices appointed by James Stephen Hogg. Hogg was Texas’ first native born
governor, and the first to at least claim to be anti-big business. This, together with the fact
that Denman was younger than his colleagues and had played no role in the rebellion
against the North, caused him more partisan scrutiny and controversy than his more
politically orthodox fellow justices. He retired from the bench in 1899 to resume his
lucrative law practice in San Antonio.  

Even more controversial was the other Hogg appointee, Thomas Jefferson Brown,
who, according to a contemporary, “was among the ablest and most efficient of those
leading citizens of Texas who succeeded in curbing railroad aggression in several
directions…Several persons connected with corporations in Texas…did not welcome the
appointment of Justice Brown.” Governor Hogg must have savored the poetic irony of
Brown’s appointment in 1893 to succeed the conservative railroad lawyer John Lane
Henry. Brown had been a champion of the movement epitomized by the Grange and the
Farmer’s Alliance, and in 1888 was elected to the state legislature as an anti-business

49 See Handbook of Texas Online, s.v, “Gaines, Reuben R.,” by Randolph B. Campbell; Handbook of Texas
Online, s.v., “Stayton, John William” by Craig H. Roell; “In Memoriam of John W. Stayton” 87 Tex.
Reports v-xvii.
50 “In Memoriam of Leroy G. Denman,” 107 Tex. 672-676; The Handbook of Texas Online, s.v., “Denman,
Leroy Gilbert.” by Leroy G. Denman.
Democrat from McKinney near Dallas, a center of farm/populist sentiment in north Texas. In 1892, the year before his appointment, he was the first member to introduce a bill for the creation of the Railroad Commission.

By the end of his tenure, Brown would be handicapped by ill health and bent by old age. A white haired widower who grew a long beard and carried a gigantic walking staff which stabilized his tentative gait and compensated for failing eyesight, he is said to have been a venerated eccentric who resembled Father Time, and whom lay observers were apt to regard with general amusement. Yet both before and after his personal setbacks, he was a formidable and respected member of the Hogg populist/progressive wing of the Democratic Party. While neither Gaines nor Denman was known for being particularly religious, Brown was more reminiscent of Thomas Jefferson “Stonewall” Jackson than of their mutual namesake Thomas Jefferson. His Supreme Court memorium recalled that, “In a day of religious divide, for him there was no doubt; in a day when thousands are saying they do not know what lies beyond the grave, he, with an undimmed eye of faith, saw beyond its portals the Eternal City…” The length of his tenure on the court was second only to Gaines’ until well into the twentieth century. Although much different in temperament, these two sages, Brown and Gaines, inspired deep affection and much whimsical lore among the court’s staff.

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52 Handbook of Texas Online, s.v., “Brown, Thomas Jefferson” by David Minor.
54 “In Memoriam of Thomas J. Brown,” 107 Tex. 662 at 668.
55 Handbook of Texas Online, s.v., “Brown, Thomas Jefferson” by David Minor describes Brown’s health problems. In response to his memoriam presented to the Supreme Court, Justice Gaines was said by his friend and successor Justice T. J. Brown, to have been unselfish and impartial, “a devoted friend to those
Gaines was remembered fondly as an affable storyteller with a wonderful sense of humor, given to telling jokes, a gentleman of the old school, who had the habit of each morning calling to the court porter, Alec Phillips, to bring his carpet slippers, which he wore while working, replacing them with his shoes at precisely five o’clock every evening. When departing the building at this appointed hour he would sometimes say to the justices and clerks, “There will be lots of cases pending before the court when I am dead and gone, so why worry.” He was so popular among members of the bar that even when caught napping during oral argument, he was excused by counsel as having “more legal sense while asleep than most judges had while awake.”

After work ended precisely at five o’clock, Gaines visited the Austin Club almost every night where billiards, dominoes and cards were played. This resulted in his developing a habit of coming home late, which discomfited his wife Louisa. To emphasize her disapproval, one night she locked the judge out, and when he was required to knock to gain entry to their own apartment at the Driskill, she whispered “Is that you, John?,” to which, his name being Reuben, he responded “Who the hell is John?” However, his clerk who told this tale has assured posterity that the good judge, having enjoyed a happy marriage to Louisa for over fifty years, eventually returned to the same good humor as ever, even though this joke was on him. He was known to like his beer and his fishing, and his disposition was such that important matters never seemed to upset him, while small things would irritate him terribly. Most importantly, like Stayton before

with whom he associated, but he was not a bitter enemy to anyone. On the bench he was neither friend nor foe to any many in any way interested in the matter to be decided.” These remarks are different in tone than those offered in memory of the firm but fair scholar Stayton, or of Brown himself, who would die only a few months after Gaines.

him, Gaines never had a political opponent, and according to a contemporary report, “in no instance was he ever known to deliver a speech in his own behalf or that of others”\(^5^7\).

Justice Thomas Jefferson Brown, as has been noted, was not cut of the same cloth, and the courthouse folklore surrounding him was correspondingly different. He kept up with all the politics of his day, and as late as Woodrow Wilson’s administration would still write long weekly letters of advice to his friend Colonel E.M. House, soon to be Wilson’s closest advisor in Washington. House also managed the successful campaigns of every Texas governor since Hogg. Writing became a bit of a chore for Brown, although he continued doing it. In addition, he was not only losing his eyesight, but was also notoriously hard of hearing, which made for some rather unusual court conferences. He was a strong opponent of hard liquor and an accomplished Sunday school teacher, which in those days, was not at all inconsistent with his rather radical economic views. He arose at dawn each day to a cold bath, followed by a long morning walk. Despite his appearance and personal habits, he was not a stern person. The only time he is known to have taken a drink was on a camping trip with Gaines and some clerks from the court’s staff. When a norther blew through and began to soak the expedition (which had neglected to bring tents) with freezing rain, Brown was prevailed

\(^5^7\) Although prohibition was a major issue in Texas from the 1880s through the early twentieth century, Gaines and his wife were known to occasionally imbibe. In fact, Mrs. Gaines’ recipe collection encourages bakers to “pour a little rum” on fruitcake, and her papers include an enticing recipe for a champagne cocktail written on the Supreme Court stationary of R. R. Gaines, Chief Justice.” Box 2D186, *Louisa Shortridge Gaines Papers*, The Center for American History, The University of Texas at Austin. *Handbook of Texas Online*, s.v., “Brown, Thomas Jefferson” by David Minor describes Brown’s health problems. Leila Clark Wynn, “A History of the Civil Courts in Texas,” *The Southwestern Historical Quarterly* 60, no. 1 (July, 1956): 1-23; H.L. Clamp, Deputy Clerk of Texas Supreme Court, “In Retrospect” (Personal Memoir in the possession of the Texas Supreme Court Historical Society) (first quote); and J.H. Davenport, *The History of the Supreme Court of Texas* (Austin: Southern Law Book Publishers, 1917) 171-172 (last quote).
upon to take a shot of whiskey, and under the circumstances, finally did. When asked to explain, he remarked “circumstances alter cases.”

The division between those members of the court who drank spirits and those who politely declined was indicative of one of the issues dividing Texas politically in the early twentieth century. Prohibition was just one of the “new issues” that had arisen in the “new South.” Others included women’s rights, worker’s rights, railroad regulation, and monetary policy. Gaines, Brown, and Denman, from the collegial and undisturbed confines of the court’s chambers, had witnessed incredible change in the latter part of the nineteenth century, political, social, economic, and legal, yet the three of them, together with the late Judge Stayton, calmly accounted for over seventy percent of the court’s opinions from 1882-1900, and dissents in these cases, or rehearings of them, were almost unknown. Adding to them the work of Stayton’s predecessor, Asa Hoxie Willie, chief justice from 1882 to 1888, yields a total of approximately eighty percent of the court’s work over the same eighteen year period. These brethren steered a serene and steady course, even through uncharted seas.

The long tenures of these five judges, Willie, Stayton, Gaines, Denman, and Brown, provided remarkable stability in the state’s highest court at a time when social and economic change demanded adaptation of the state’s laws to new circumstances. Brown himself, on the occasion of Gaines’ memorial in the Supreme Court chambers in 1914, would remark that their “service came at a time when the state was in an era of development and change which brought to the court new questions that required the

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58 H.L. Clamp, supra 5. For E.M. House, see Handbook of Texas Online, s.v., “House, Edward Mandell” by Charles E. Neu.
ability to discern the issue, as well as learning to apply the law to the new conditions out of which the litigation arose.”^59

These five justices were all conservatives by modern standards. All were segregationist southern Democrats, and all but Denman served in the Confederate Army, but they were also respected and respectable lawyers, although Willie and Brown were substantially more politically active than the other three.^60 Stayton was the most reticent of the group. When Governor Roberts appointed him associate justice in 1881, for example, few lawyers had ever heard of him because Stayton was essentially a lawyer, not a politician. So when someone inquired, ‘Who is he?’…” The governor replied “You do not know him now, but when he serves on the court a while, you will know him without the necessity of an introduction.”^61 Moreover, although all were typical southern Democrats, Willie’s opinions were generally professional and well reasoned; Gaines was essentially an apolitical moderate who never drew an opponent; Denman raised some suspicions among railroad and business interests, and Brown raised even more. In fact, one of the symptoms of the rapid change of the late nineteenth century that manifested itself politically was a renewed partisan interest in the judiciary sparked by Governor Hogg’s appointment of Denman and Brown in the 1890s, as will be described shortly. Yet somehow, within its chambers, the Court insulated itself from the storms thundering all about it.

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^60 Willie’s older brother James was Attorney General of Texas and Willie himself was elected to Congress from his home district of Galveston in 1874, and after one term returned there, only to be elected city attorney. Brown served as a political consigliere of sorts within the state Democratic Party, and became so prominent within the party that Colonel House suggested he run for governor in 1901. Brown declined, preferring his position on the bench. See Handbook of Texas Online, s.v., “Willie, Asa Hoxie” by Thomas W. Cutrer; and Handbook of Texas Online, s.v., “Brown, Thomas Jefferson” by David Minor.
For example, unlike in 1882 when Stayton and Bonner disagreed occasionally, after 1883 and until 1900 there were no dissents or concurring opinions whatever for the entire period. During the 1890s, the variety of the court’s caseload, outside the railroad docket, increased. This was a result of a growing population and new urban and industrial life. An electric power plant was built in Austin in the 1890s and there were already telephone lines in place in 1886. Electric streetcars ran in downtown Austin from 1891 to 1940. Instead of a steady diet of property disputes, the court began handling a smaller but more diverse load of cases, including suits involving licensed professionals like physicians, limits on local and municipal government power, commercial sales, and strictly procedural matters such as jurisdiction, pleading, and interpretation of the new rules of appellate procedure necessitated by the 1891 changes.

Thus, one probable factor in the high court’s collegiality during this period was that after the constitutional changes of 1891, the court’s output was significantly reduced as the result of the immediate transfer to the new courts of civil appeals of several cases in 1892. Whereas the more productive justices of the 1880s authored near 100 opinions a year, that number fell to less than 50 per judge per year during the period from 1895 to 1898 when the court’s composition was static, composed of Gaines, Denman, and Brown. For example, by 1898 the 1891 constitutional changes had certainly become standard routine. In that year, Chief Justice Gaines wrote only 48 opinions, fully 13 of which involved railroads, including short dismissals of motions for rehearing or to dismiss for want of jurisdiction. Justice Brown wrote 49, 11 of which were in railroad cases, and Justice Denman only 45, 8 of which involved railroads.

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The calm within the Court contrasted starkly with the multifarious social change and political controversy of the era. Sometimes these controversies threatened to intrude into the Court itself. Brown and Denman both had to weather political challenges to their respective nominations for re-election at the Democratic convention of 1894. Hogg, the immensely popular “common man’s governor” was retiring after the customary two terms in office. He had made quite a reputation for himself as a populist by suing railroad companies. As governor, he supported the legislature’s creation of the Railroad Commission, but he had moderated in office, causing equal dissatisfaction among conservative “sound money” Democrats and his farm populist base. Two years earlier, in the campaign of 1892, the Democratic Party had split, with disaffected conservatives bolting to hold their own rump convention and running their own candidate for governor. At the 1894 Democratic convention, the conservatives, who returned to the party to influence the selection of Hogg’s successor, decided also to make trouble for his recent appointees to the high court, Denman and Brown.63

As was the custom, judicial nominations were placed before exhausted delegates at the end of the convention, after the platform and major political offices had been debated and decided, but this time a surprise was lurking. As O.M. Roberts would later report, “the nomination of judges for the Supreme Court and Court of Criminal Appeals provoked a scene so disorderly as to be disgraceful, and called forth a resolution (which did not pass) to hereafter have these judicial officers named in separate conventions.” While Chief Justice Gaines was nominated to succeed himself without opposition, several

candidates were named to run for the associate justiceships held by Denman and Brown. These included conservative attorney John C. Townes, who would later become dean of the University of Texas Law School, and Nathan A. Stedman, a district judge who later became general counsel for the International-Great Northern Railroad Company in Palestine. While the plot was unsuccessful, for veterans like Roberts, it represented a marked politicization of an informal nominating system based on the opinions of prominent attorneys throughout the state.  

Trust-busting Big Jim Hogg was not the only polarizing force in late nineteenth century Texas politics. These divisions were products of changes in the entire South. From an economic point of view, the Civil War represented the victory of industrialization and urbanization over agrarianism and rural living. In both North and South, “most urban populations grew rapidly as whites and blacks converged to work in war industries, hospitals, and supply depots…” It was the common wisdom that railroads and manufacturing plants were indispensable to the north’s victory in the war.  

This rapid growth in American industry, as well as massive immigration of both blacks and whites into northern cities, created substantial economic and social uncertainty. An economic panic in 1893 was emblematic of these dislocations. Rapid industrialization and speculation in railroads, banks, and other booming new industries culminated in a collapse caused by investors trying to take profits before the unsound nature of their investments was revealed. A three-year depression ensued marked by

65 James L. Roark, “Behind the Lines” in James M. McPherson and William J. Cooper, Writing the Civil War (Columbia, S.C: Univ. of South Carolina Press, 1998) 223.  
violent strikes, and an unemployment rate in excess of 15 percent. Deflation in farm prices was particularly acute, and thus Texas, still an agrarian state, was particularly hard hit by the recession/depression that followed from 1893 to 1896.67

While the panic of 1893 represented the bursting of a bubble, as early as 1886 social and labor unrest produced by rapid urbanization and growing industrial wealth and power had caused the Haymarket Riot in Boston and generated rapid growth of Populist parties throughout the United States, including in Texas. In 1890, the Sherman Antitrust Act “revealed the pervasiveness of popular dissatisfaction with many aspects of the new industrialism.”68 As Arnold Paul has argued in his book Conservative Crisis and the Rule of Law, this discontent began with the labor dislocations of the Reconstruction era, and soon spread to mid-western and southern farmers suffering through a decline in international farm prices exacerbated by the monopolization of the transportation and agricultural storage industries by railroads, banks, and grain elevators. As Paul concluded, “the social protests of the post Civil War era stemmed from the great pace of industrialization, and, more particularly, from the swift concentration of economic power in the large corporation.”69 This social unrest generated economic regulation by state legislatures in heavily agrarian states (such as Illinois, Wisconsin, and Iowa), and this fueled the Populist movement that ultimately resulted in the nomination for president of William Jennings Bryan on a Democrat/Populist “fusion” ticket in 1896. More importantly, this growing Populist movement and its ability to influence state and federal legislatures to enact regulatory controls on big business produced a counter-revolution

67 www.dallashistory.org/cgi-bin/webbs_config.pl?noframens;reedequals15399 [accessed March 26, 2006]
69 Ibid, 1.
within the most conservative branch of government, the bench, and within its adjunct, the bar.

The general parameters of this counter-revolution were circumscribed by *Munn v. Illinois* (1876), the onset of national attention to the need for pro-farmer economic regulation of industry, and *Lochner v. New York* (1905), the enunciation of the doctrine of substantive due process as a protection for business against economic regulation by state or federal legislative action. At the 1892 meeting of the American Bar Association, three speeches were made warning delegates of the dangers of overly democratic government with respect to the legislative expropriation of private property. In an 1893 speech to the New York Bar Association, newly appointed Supreme Court Justice David Brewer, an ideological ally of Justice Steven J. Field who was one of two dissenting voices in the otherwise pro-regulation *Munn* case, made his pro-business views known. Simply put, he believed that it was the job of a strong judiciary “to restrain the greedy hand of the many from filching from the few that which they have honestly acquired.” In 1905 a majority of the U.S. Supreme Court would agree with him in *Lochner*.

Texas in the 1880s and 1890s was no stranger to this national political and intellectual debate. Candidates of the proto-Populist “Greenback Party” far outpolled Republican state-wide candidates in the elections of 1886 and 1888. Throughout the period, the Republicans, connected in the popular imagination with defeat in the recent war, had little or no influence. In 1890, Attorney General James Hogg was nominated for governor by the Democratic Party and easily won election with widespread support from

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70 Paul, supra, 76.
farmers and reformers. In the 1890s, the Greenbackers gave way to the broader-based Populist Party, which reached the height of its power in the mid-90’s. The Populists advocated egalitarian economic policies, organization of farmers and labor, and serious regulation of railroads, insurance companies, and other big businesses. They polled 25% of the vote in the gubernatorial election of 1892 when the Democrats were split between Hogg and the conservatives. Yet, things only got worse for the Democrats, even after Hogg’s retirement and the reunification of the party. The Populists garnered 36% of the popular vote in the gubernatorial election of 1894, and the zenith of the movement was yet to come. In 1896, Texas Populists agreed to the “fusion” (joint Democratic and Populist) national ticket led by the Democrat William Jennings Bryan, but were so suspicious of moderate and business interests within the Democratic Party that they refused to endorse a fusion ticket for statewide office or even for vice-president, They ran their own Populist candidates in these races.72

The Texas Populists’ political instinct that they could compete statewide against the Democrats was validated when their gubernatorial nominee, Jerome C. Kearby garnered 44% of the vote. It was in the midst of this political controversy over private property and government regulation that the Stayton/Gaines court did its work. Its steadying hand helped defend and modernize conservative values in the face of more radical populist reforms. Soon the storm would pass. Populism would expend itself. Nationally, the election of 1896 crippled the Populist Party by skimming off to the Democrats much of the populist’s platform and popular support. This soon filtered down to the southern and western grassroots of the party. By 1900, only four years after their high-water mark in Texas, the Populists only polled 6% of the gubernatorial vote, and by

72 Randolph B. Campbell, Gone to Texas (Oxford: Oxford Univ. Press, 2003) 313-.
1902, the state was for all practical purposes again a one-party state controlled by progressive but increasingly pro-business and conservative Democrats.

But when Gaines took over as Chief Justice in 1894, the contest was still very much in doubt. While in the 1890’s the eastern state bar associations, the A.B.A., and the contributions of corporate and railroad lawyers to national law reviews were combining to launch the judicial counter-attack against legislative business regulation that would culminate in *Lochner*, the effort met serious opposition within the bars of the agrarian southern and western states like Texas. For example, at the 1896 Meeting of the Texas Bar Association, Seymour D. Thompson railed against “government by lawyers” and warned that the entire rule of law was in danger of collapse unless the bar ceased undermining public confidence in the system by merely serving as the tool of monied interests against ordinary people.73 This was a sentiment that Judge Brown, for example, could well understand. The judicial battlegrounds for this political war were civil cases seeking compensation for victims of new industries and constitutional cases challenging government regulation of big business.

Stayton and then Gaines were able to craft a consensus within the Court that would demonstrate that the law was flexible enough to deal with new economic realities, but no so flexible as to change the conservative foundations upon which it was based. Above all else, the institutional credibility of the judiciary had to be maintained, and to do so required walking this fine line. The methods for accomplishing this task included employing the doctrine of judicial restraint to deflect political criticism to the legislature and selectively deploying a few adjustments to the common law to provide remedies for

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injuries suffered by farmers and workers at the hands of a newly urban and industrial society.

III. Public Lands

The Willie/Stayton/Gaines Court would face much the same issues with respect to Texas’ public lands as previous courts had. Texas sustained massive population growth throughout the 1880s. O. M. Roberts recited some impressive statistics at the time of his last gubernatorial message to the legislature in early 1883. He claimed that during his four years in office, property tax rates were reduced by 40% and yet the state was still able to reduce its deficit by about 25%. This resulted from an increase in the value of the real estate tax base from 280 million dollars in 1877 to 410 million dollars in 1882.74

Incoming Governor Ireland’s 1883 inaugural address continued some of the same themes. He recounted that as late as 1870, the total population of the state was substantially less than one million persons. “Up to near that period we had no disturbing questions about public land … (and) the principal duty of the executive was to sign patents and to look to the frontier.” By 1883, the population of the state had more than doubled to in excess of two million inhabitants, and “the public lands are exciting that energy and calling forth that same spirit of gain that the gold fields of Australia and those of California did.” Ireland was adamant that “prominent among the subjects that will challenge the attention of the administration is the preservation of our common school fund, including the lands set apart for that purpose…”75

In a message delivered shortly thereafter, Ireland set before the legislature specific proposals for protecting uninhabited public lands. He suggested that minimum prices be

74 O. M. Roberts, supra, pages 252-253.
75 O. M. Roberts, supra, page 256.
fixed for the sale of such lands, as well as maximum sizes for plots to be sold. One of the major problems the state had in connection with these lands was that speculators would buy up patents to the lands and hold them with the expectation of an increase in value over time. This mitigated against the state’s policy of using the lands to encourage further settlement rather than mere economic speculation. It was important to Ireland that the law should “provide that the lands shall be sold in quantities so as to place them within reach of all.”

In this, Ireland indicated a policy somewhat more antagonistic to business investors and speculators than that of his predecessor, O. M. Roberts. Roberts was interested in quickly raising money from land sales to fund tax and deficit reductions, while simultaneously financing his brainchild, The University of Texas. Ireland, on the other hand, was enamored of the Jeffersonian ideal of the small-scale yeoman farmer/rancher. The earliest Anglo empresarios had acquired large amounts of Texas land from the Mexican government and then sold them, usually in smaller quantities for farming purposes. The availability of cheap land was crucial to the success of these empresarios’ colonization ventures. The vast majority of the Mexican grants prior to the Texas Revolution were in eastern and southeast Texas upon lands well adapted to farming. After the Revolution, untitled lands among or between individual grants were escheated to the state in the form of public lands. In addition to these were vast amounts of western and northern lands occupied only by Indian tribes. This “public domain” was the Texas government’s primary financial asset.

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76 Ibid., page 258.
77 Roberts, supra, page 247.
Annexation in 1845 and the Treaty of Guadalupe Hidalgo in 1848 settled the Texas border as regards Mexico to the south and other United States territories to the north and west. The annexation treaty between Texas and the United States confirmed Texas’ ownership of these vast expanses of public land. The proper policy with respect to the disposition of these lands had been controversial ever since. Some of them were segregated by the legislature and appropriated to the support of a public school system, others to the support of the two land grant universities, and still others to other purposes. Roberts claimed that the vast majority of these lands being in the western part of the state and not well adapted to farming, “to utilize those lands for stock raising, to which they were adapted, it was necessary to allow large tracts to be purchased by persons who had means to engage in that business in a dry country.” He preferred to sell the lands to help pay the public debt, rather than “continue donating them to railroad companies.” Roberts’ objection notwithstanding, the practice of donation to railroad companies as an incentive to have them build tracks in the state was rampant. Conditions were almost always placed upon such donations, and whether or not the conditions had been fulfilled would continue to be a matter of litigation.\footnote{Ibid.}

Roberts was successful in convincing the legislature to pass a law in 1879 to allow sales of the unoccupied western lands “without limit as to quantity to the purchaser.” He later saw to it that an act was passed granting to disabled Confederate veterans 1,280 acres of land apiece. This constituted a variance from the more homestead oriented land policies of the administrations before and after his. Roberts was cognizant of the criticism his policies engendered, particularly among small farmers that would become the Populist Party’s political base. In response, he could only argue that “the
experience of our past history in the land business was that, however careful the
government had been to prevent them, frauds would continually be perpetrated in its
management, which (only) conclusively demonstrated the impropriety of the
government’s undertaking to handle such property permanently.” Thus, Roberts’
argument was that selling the lands in large blocks to private investors was preferable to
allowing the government to keep fiddling with them. For him, the state’s fiscal burdens
and woes were sufficient to override any Jeffersonian mythology about building a state of
small-holding farmers and ranchers.  

Whether under the more pro-business policies of Roberts or the subsequent
agrarian policies of Ireland, land disputes would continue. Many of these would
ultimately be determined by the Supreme Court. At annexation in 1845, Texas’ public
lands were estimated to aggregate in excess of 170 million acres. The Texas
Constitution of 1876 contained provisions reflected the Jeffersonian yeoman model for
land policy. The paradigm was to use the land to encourage settlement by independent
heads of families. It was this model that Governor Roberts sought to depart from for
business and financial reasons. The legislature, after 1876, continued to face political
pressure from speculators who wanted to monopolize large amounts of public land for
their private use, just as Roberts had acknowledged. Article XIV, Section 6, of the 1876
Constitution guaranteed to every head of a family a homestead right of 160 acres of land
as long as the head of household occupied the land for three years and paid a slight fee.

79 Ibid.
80 For the remainder of this section, I have relied heavily upon Paul Kens, “Wide Open Spaces? The Texas
Supreme Court and the Scramble for the State’s Public Domain, 1876-1898” Western Legal History 16, no.
2 (Summer/Fall, 2003) 160-187.
81 Thomas Lloyd Miller, The Public Lands of Texas, 1519-1970 (Norman: University of Oklahoma Press,
1972), page vii; Wilson Elbert Doleman, “The Public Lands of Western Texas 1870-1900,” Diss. The
University of Texas at Austin, 1974, page 9.
82 Kens, supra, page 160.
In 1854, and again in 1878, the Supreme Court announced the rule that “actual settlers are favored by the law.”\textsuperscript{83}

Thus, prior to the financial pinch during the Roberts Administration, Texas courts had favored homesteaders and the Jeffersonian model of land policy as against the land speculators. The court created what Paul Kens has described as “a presumption in favor of those who settled on plots of land and made improvements with the intention of making it their homestead.”\textsuperscript{84} Occupiers were favored over adverse possessors, adverse claimants, or persons who had filed for a homestead right but had never actually occupied the land. The basic doctrine utilized to vindicate and protect titular claims of homestead occupiers was that occupation with an intent to claim the homestead right resulted in a presumption of legal ownership, and in an equitable interest in title to the land enforceable in court.\textsuperscript{85}

For example, in the 1884 case of \textit{Gammage v. Powell},\textsuperscript{86} the court had to evaluate Powell’s claim to 160 acres in Nolan County. Powell had settled on the land in 1880, but had failed to file an application for the homestead within thirty days of occupation as required by law. Within a few months, a man named Gammage claimed title to Powell’s homestead based upon a headright certificate that he held to a substantial block of land including the parcel claimed by Powell. A headright certificate was generally used to by the state to convey large chunks of land without the requirement of occupation. Only after Gammage received a patent based on his headright did Powell file his homestead

\textsuperscript{83} \textit{Cannon’s Administrator v. Vaughn}, 12 Tex. 399 (Tex. 1854); \textit{Summers v. Davis}, 49 Tex. 541 (Tex. 1878).
\textsuperscript{84} Kens, supra, page 163.
\textsuperscript{86} 61 Tex. 629 (Tex., 1884).
application, well beyond the statutory thirty day time limit. Meanwhile, Gammage’s patent from the state was prima facie evidence of legal title. While the Court acknowledged that a patent was generally proof of superior title, it nonetheless ruled that Powell, the yeoman in actual occupation of the land, obtained equitable title to it from the moment of his occupation. Equitable title was real ownership, enforceable against others and lacking only the formal requisites of full legal title. Under these circumstances, the speculator Gammage’s patent would have to give way to homesteader Powell’s prior equitable claim to title. Because Powell’s claim was prior in time, the decision in the case ripened his equitable title into full legal title.

Just because the court indulged a presumption in favor of homesteaders in possession, this did not mean that it would look kindly upon “constructive” possessors who saw an opportunity to momentarily “squat” on land and thus obtain it for free as a homestead donation. The statutory authority for homestead appropriation of unoccupied lands was that the homesteader could only earn the “gift” of 160 acres by continuously occupying the land for three years and devoting it to some form of productive agricultural use. When it became apparent that the court favored the Jeffersonian yeoman model of land use and Governor Ireland’s policies over the fiscal model of Governor Roberts, enterprising citizens sometimes attempted to benefit from that presumption. They were often frustrated by the Court. While the Court declined to disenfranchise homesteaders by strict enforcement of formalities, the requirement of actual occupancy was strictly enforced.

For example, in Garrett v. Weaver, Justice Stayton, the real estate aficionado, refused to acknowledge the homestead claims of Weaver as against a valid patent

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87 70 Tex. 463; 7 S.W. 766 (Tex. 1888).
purchased by Garrett by virtue of a survey made under a valid land certificate issued by
the General Land Office. A patent is the legal document accomplishing conveyance of
land from the public domain to a private owner. Patents were issued upon submittal of a
survey and fulfillment of any other conditions, such as payment of a purchase price. "The
issuance of a patent is the final step in securing title from the government for a parcel of
land."  

The Court vindicated Garrett’s patent for the simple reason that neither Weaver,
nor the homesteader from whom he had purchased the land “ever lived upon the land.”

This type of case began to multiply. The reason was simple. The public lands of
the state existed, but no one knew exactly where they were. The legislature had provided
for the establishment of several counties out of the unsurveyed land in West Texas but no
one knew the precise character of the land within them. The General Land Office,
because of this uncertainty, and because of constantly conflicting claims, was never quite
certain exactly how much land remained unoccupied. The problem was further
complicated by the fundamental difference between the natures of the land claims
asserted. On the one hand, a settler could obtain essentially free land, if he could locate
unoccupied land in the western part of the state that had not been surveyed and patented
to another owner, and if he built a residence, moved his family onto the land, and
occupied it for three years while putting it to agricultural use. On the other hand, large
landowners and land speculators could apply to the Land Office, under laws passed from
time to time by the legislature (such as the one passed during the Roberts
Administration), to buy land in bulk by applying for a land certificate contingent upon the
completion of a satisfactory survey proving the acreage was public land. Thus, it often

88 Gary Mauro, The Land Commissioners of Texas: 150 Years of the General Land Office (Austin: The
General Land Office, 1986) 103.
89 Garrett v. Weaver at 463.
happened that settlers squatted upon land and eventually made application for the 160 acre gift, while a purchaser might simultaneously be in the process of purchasing that land as part of a larger block. Toward the end of the century, the upshot of this unfortunate situation was that the governor, the legislature, and the courts began to realize that, like fossil fuels, clean water, and ozone, the mythical unoccupied lands were not an inexhaustible resource. Ultimately, in 1898, the Supreme Court expressly declared that no more unoccupied public lands were to be had.\textsuperscript{90}

Certainly, by 1895, the Gaines court already knew that homesteaders and purchasers were not only fighting over resources that the legislature had already exhausted, but that the legislature had probably sold or appropriated more land than had existed to begin with. To compound the problem, even the General Land Office had no definite knowledge of how much land had been appropriated and for what purpose because it never implemented a system of accounting to keep track.\textsuperscript{91}

This made vigilant enforcement of the “actual occupation” requirement of homestead title particularly imperative. Finally, in \textit{Busk v. Lowrie},\textsuperscript{92} the court issued a strong statement designed to deter “fictitious” homesteaders. In that case, Lowrie was a tenant sharecropper of a man named Starkweather. Starkweather sold some land to Busk, including portions of the acreage that Lowrie was working. Soon thereafter, all the parties discovered that some of the land was actually unsurveyed public land which Starkweather had simply fenced off, but to which he had no patent, and for which he could trace no chain of title back to a patent or other sovereign land grant. At that point,

\textsuperscript{90} 	extit{Hogue v. Baker}, 92 Tex. 58; 45 S.W. 1004 (Tex. 1898).


\textsuperscript{92} 86 Tex. 128 (1893).
both the tenant Lowrie and the purchaser Busk began looking for ways to establish title to
the disputed portion of the land that was public. Busk eventually figured out that the only
way to get clear title was to apply to the General Land Office to purchase the land under
the “scrap law” passed by the legislature in 1887 to deal with just such cases. He had the
land surveyed and paid the required purchase price to the state.

Prior to Busk having made this application, Lowrie went on the land and
“smoothed off the ground and made rock pillars for a house in which he intended to live.”
However, he did not occupy the property until after Busk made his application under the
scrap law. Tellingly, Lowrie also brought with him a friend named Cornelius, and either
connived or agreed with him to have Cornelius to perform similar acts on the following
day on the remaining 74 acres that comprised the public “scrap” land. Since Lowrie
could only obtain 160 acres by donation, and since the entire “scrap” comprised 234
acres, this latter tactic was necessary for Lowrie to deprive Busk of the entire tract. It is
unknown whether he intended to buy the additional 74 acres from Cornelius, or whether
the two were friends and merely agreed to be neighbors. Whether innocent and well
intended or not, the apparent collusion involved could not have escaped the notice of the
Court.93

Of particular note from a political standpoint was the fact that Justice T. J. Brown
wrote the unanimous opinion rejecting Lowrie and Cornelius’ homestead claims. His
opinion makes clear that his Protestant ethics outweighed his well-known affection for
small farmers and populist policies. Brown began his opinion by carefully
acknowledging that the Court continued to believe that homesteaders should not be
deprived of free land, and the state should not be deprived of a growing class of yeoman

93 Busk v. Lowrie, 86 Tex. 128 (1893) at 129-130.
farmers, merely as a result of technicalities. For example, Brown repeated that the court had refused to disenfranchise such claimants merely because they had been late in filing paperwork, or in obtaining surveys, or in following other procedural requirements. This did not mean, however, that the court had abdicated its responsibility to enforce the law as written. For Brown, the gist of the matter was that “the only condition which the law imposes is that of settlement and improvement on vacant land … but the actual settler intended by the statute must reside on the land, or occupy preparatory to and with the bona fide intention of residing thereon.” The old tee-totaling populist went on to emphasize the use of the word “actually” by the statute as an adverb modifying the verb settlement. “The word actually is used in the sense of being a real, and not a constructive or virtual settlement.”

Because Lowrie and Cornelius had not returned to the land and actually settled there with their families until after Busk made his proper and legal application to the General Land Office to purchase the land, Busk already owned the land and it was no longer public at the time any homestead rights arose in Lowrie or Cornelius. Thus, the settlers lost. Clearly, for Brown, it was one thing to favor government policies that would empower the yeoman farmer idolized by Jefferson, but it was quite another to ask judges to wink at attempts to grab depleting state resources out from under legitimate purchasers who had observed all the formalities and properly paid the state treasury.

The legislature’s penchant for continually appropriating more and more unlocated, unsurveyed, and now non-existent land to particular public purposes further compounded the problem. Just prior to the period covered in this chapter, the legislature had appropriated lands in West Texas to form a Permanent University Fund. By that

94 Busk v. Lowrie at 131-132.
time, the legislature had also set aside half of the remaining public lands for a permanent public school fund, and this policy was further enshrined in the Constitution of 1876.\textsuperscript{95} Efforts by ranchers, real estate speculators, or railroads to claim rights to lands covered by either of these educational funds had to be strenuously rebuffed by the Court.

This was another judicial consequence of rapid societal change. Tripling of the population, railroad expansion, economic development, and securing the frontier against the Indian nations had combined to produce rapid occupation and purchase of the mythical “unoccupied public lands.” The legislature, bombarded with lobbyists’ schemes for obtaining cheap land in large quantities, was slower to appreciate the situation than the executive and judicial departments. Texas had a long and fundamental commitment to the liberal policy of free public education, and an equally well established tradition of funding it from the sale or lease of public lands.\textsuperscript{96} Characteristic of its method of responding to changing circumstances, the Court used and adapted conservative legal principles to defend from attack the traditional policy of land funded public education.

One species of real estate investor whose rights the Court was required to adjust against the government’s interest in education was the cattleman. By the early 1880s, the old system of open ranges had retreated in the face of the state’s population growth and increased settlement of remote areas. The same homesteaders whose claims were adjudicated by the court in the 1880s were fencing off unoccupied land upon which large ranchers had indiscriminately, and freely, grazed their cattle. While the state was always interested in leasing grazing lands, it could not prevent free use of huge expanses of public, and sometimes private, land. The fences that farmers and small ranchers were

\textsuperscript{95} Thomas Lloyd Miller, \textit{The Public Lands of Texas}, 1519-1970 at page 112; Act of March 18, 1873; and Article 7, Section 2, Texas Constitution of 1876.

\textsuperscript{96} See 1836 Texas Declaration of Independence and Texas Constitutions of 1845, 1861, 1866, and 1869.
putting up, however, certainly would. By 1883, the governor concluded that “population
and capital have flowed into the country far beyond any previous period. Enterprise in all
of the useful industries has been quickened and enlarged. Railroads have been pushed
into the heretofore unsettled territory of the state, until now we have almost no frontier as
it was formerly known.”

Upon taking office in 1883, Governor John Ireland had to face what had become
an epidemic of “fence-cutting.” As depicted in so many western movies, when cattlemen
or their cowboys came upon an aggravating fence, it was easy enough to simply cut it
with wire snips. Ireland went so far as to call a special session of the 18th Legislature to
address the problem. Laws were passed that both criminalized fence cutting and
simultaneously “provided adequate penalties for the unlawful enclosure of public and
private lands.” The two-sided nature of the legislature’s action in this regard is telling.
At the same time that fence cutting became a problem, it was coming to the attention of
the government that some large cattle ranchers were not only cutting other people’s
fences, but they were fencing huge grazing lands of their own by means of barbed wire.
As one might expect, some of the biggest cattlemen were among the biggest offenders.
The famous Charles Goodnight probably fenced in over 600,000 acres of land belonging
to the state.

This conflict manifested itself on the docket of the Texas Supreme Court in what
came to be known as “The Grass Lease Fight.” Charles Goodnight’s Panhandle Stock
Association was a powerful cattlemen’s group involved in lobbying and propaganda.
The main part of their program was to obtain legislation authorizing long term grazing

97 O. M. Roberts, supra, page 253.
98 O. M. Roberts, supra, page 261-262.
leases from the state at the lowest possible prices. Ultimately, they settled on a request to
lease public lands for as much as twenty years for four cents an acre, or less.\footnote{Kens, supra, pages 178-179, citing Aldon Socrates Lange, “Financial History of the Public Lands of Texas,” \textit{The Baylor Bulletin}, 35, No. 3, (July 1932): 110-114, at 192.}

The legislative response to intense lobbying by this organization was disappointing. In 1883, a new law restricted leases to no more than ten years, required competitive bidding for lease, and prohibited grazing leases of less than four cents an acre. The same statute created a State Land Board composed of the governor, the attorney general, the state treasurer, the comptroller, and the Commissioner of the General Land Office. This board was vested with the power to sell and lease school lands. The competitive bidding process did not work because the members of the stock association colluded and refused to compete with one another. Instead, each member only bid to lease the land he was already illegally expropriating, and no one bid more than the minimum four cents per acre. As a result, the Land Board was forced to promulgate regulations administratively setting the minimum lease rent at eight cents per acre. The legislature revisited the issue in 1887, passing a new law reducing the terms of leases to five years, but also reducing the rent back down to four cents per acre. However, a number of cases arising under the 1883 act and prior law were already pending before the Supreme Court when the 1887 act was passed. While the cattlemen had gotten some relief from the legislature, it remained to be seen how the judicial branch of government would treat their manipulation of public lands.\footnote{Kens, supra, pages 178-179, citing Miller, \textit{The Public Lands of Texas}, at 186.}

The 1887 case of \textit{Day Land and Cattle Company v. State},\footnote{68 Tex. 526; 4 S.W. 865 (Tex. 1887).} involved a sale to a cattle company, not a lease. It was one of the first “cattlemen’s” cases to come before the
Stayton/Gaines Court. An 1879 special act of the legislature appropriated one-half of all the public lands in Greer County for the free public schools of the state, and the other half “for the payment of the state debt.” This statute had the effect of giving the Public School Fund an undivided one-half interest in those as yet unsurveyed and unidentified lands. The other half was appropriated for payment of state debt and was to be sold for that purpose. The act further provided for a survey to be accomplished of Greer County lands in order to carry out its provisions. Five years later, Governor Ireland and the other members of the land board sold over 144,000 acres by patent to The Day Land and Cattle Company. The Attorney General, future governor Jim Hogg, brought suit against the cattle company to set aside these patents and to establish state ownership of the 144,000 acres of Greer County land. Hogg’s claim was that the 1879 act had appropriated the lands for specific public use, and thereby deprived the State Land Board of the power to sell them.

The Supreme Court agreed, holding that the 1879 statute had constitutionally accomplished appropriation by the legislature of all Greer County lands, thereby depriving the land board of the authority to sell them. The cattle company claimed that an 1881 act of the legislature empowering the governor to patent land to Confederate veterans created an exception to the previous legislature’s appropriation. Justice Stayton, writing for the court, disagreed. While the 1881 statute authorized the governor to patent and donate “any of the public domain” to Confederate veterans, Stayton ruled that the language of the act must have really meant only the “unappropriated public domain.”

In essence, Stayton sided with populist Attorney General Hogg and against the cattlemen on a very close issue of law. The case turned on the definition of “public domain” in the

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103 Day Land and Cattle v. State, supra, at 547.
1881 act. Stayton reasoned that the legislature must have intended to mean only the “unappropriated” public domain, but that conclusion was by no means preordained. In other words, the court could have just as easily ruled the other way. The judicial branch of government would be more vigilant about guarding the public domain from depletion than the other two branches of government had been.

A year later in *Smisson v. State*,\(^\text{104}\) Stayton was called upon to construe the leasing statutes, rather than a sale by the government to the ranchers. Again, the State of Texas was the plaintiff. The Land Board created under the 1883 leasing statute leased of public lands to Smisson at the administratively required minimum price of eight cents per acre, and a small portion of watered land at a higher rate of twenty cents per acre. Smisson, intending to challenge the Land Board regulation that had raised the lease prices, accepted the leases, entered into possession of lands, but would only pay four cents an acre on the grounds that he was bound only by the 1883 statute because the Land Board’s administrative fiat of rents higher than the statutory minimum was an unconstitutional exercise of legislative power. Stayton rejected Smisson’s contention on the obvious grounds that the legislature had only set a four cent *minimum* price but had also authorized the land board to accept competitive bids with a view toward obtaining higher rents. Furthermore, the legislature had not *required* the land board to lease *any* land. The land board was authorized to negotiate with owners by the provision in the act requiring competitive bidding, and since Smisson had agreed by contract to pay the higher lease rate, he was bound to do so. He was perfectly free to have refused such a lease and to attempt to find private grazing lands elsewhere.

\(^{104}\) 71 Tex. 222; 9 S.W. 112 (Tex. 1888)
The same year, Justice Gaines was called upon to revisit the dispute between the state and Day Land and Cattle Company. In *State v. Day Land and Cattle Company*, the Court evaluated another refusal by the ranch company to pay agreed rents. After having been deprived of the fee title to the 144,000 acres in Greer County, Day Land and Cattle apparently made application to the Land Board to lease that land for six cents an acre. That bid was accepted by the Land Board. The cattle company paid the first year’s rent, but had to be sued by the state to recover the rent for the second year. Instead of paying the rent, Day fenced the land, refused to pay, and argued that the Land Board, once again, lacked authority to enter into the leases.

This time, the court agreed with Day Land and Cattle. The 1883 act only authorized the Land Board to lease lands that had been surveyed and set aside for the benefit of the public schools, the university system, and certain asylums. Since the land in Greer County had still not been surveyed and set aside at the time Day Land and Cattle entered into its lease with the Land Board, the Land Board had acted without authority. The lease was void and the court denied the state any recovery, even in quantum meruit. The court agreed with Attorney General Hogg that Day Land and Cattle had unlawfully fenced the land, but the remedy for this was not an action for rent but one for criminal or civil penalties against the company. This case made clear the rubric under which the court would analyze similar future problems. “Until a recent date, it has been the policy of the state to permit the use of the public lands by the people at large as public commons.”

The court recognized that the legislature had the statutory authority to set aside portions of the public domain by appropriating them and by having them surveyed.

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105 71 Tex. 252; 9 S.W. 130 (Tex., 1888).
106 *State v. Day Land and Cattle*, supra at 259.
However, until appropriated to a specific use or fund, and until identified by the process of “survey and set aside” the public lands would remain commons of the same type recognized by English Common Law.

Nine days later, Justice Gaines dealt with another case involving fencing of substantial public lands, this time by ringleader Charles Goodnight. In *State v. Goodnight*, Hogg’s predecessor, John D. Templeton, had sued Charles Goodnight for a mandatory injunction to remove the fencing that Goodnight had placed upon over 600,000 acres of the public school lands of the state. The trial court had dismissed the suit for injunction on the grounds that other parties might have some interest in some portion of the 600,000 acres, and thus should have been joined as defendants in the suit. Gaines, however, focused on the fact that Goodnight had not denied that the fences were erected, owned, and controlled entirely by him. While Gaines agreed that a “proper practice” would be to require that other persons with legal interest in the land be joined as parties, he was characteristically pragmatic. It was still the case that even a part owner like Goodnight who “has been instrumental in creating the nuisance … should be compelled to abate it, although his co-tenant or partner may not be a party to the proceedings …” Gaines also gave short shrift to a more complex legal argument made by Goodnight’s lawyers, that the case should have been brought as a trespass to try title action or as a suit for criminal penalties. While Gaines acknowledged that these other actions might also lie, that did not change the fact that Goodnight’s fences could be removed by a permanent injunction designed to abate the “nuisance” that they were causing the state.

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107 70 Tex. 682; 11 S.W. 119 (Tex. 1888).
108 *State v. Goodnight*, supra, at 689.
One other “cattlemans dispute” deserves mention. Twice the Supreme Court was called upon to intervene in a lawsuit between the State of Texas and Wichita Land and Cattle Company. In *State v. Wichita Land and Cattle Company*, Justice Gaines was again unimpressed by a technical argument raised by a cattle company against the state, although this technicality was more serious. The Attorney General had brought suit to set aside the sale of four sections of school lands in Archer County. The State Land Board had sold the land in four separate sales to Wichita Land and Cattle, S. T. Jones, S. J. Moore, and F. Lewis. This was because the 1883 public lands law prohibited sales to any one purchaser of more than 640 acres of school land in any particular county. Jones, Moore, and Lewis were cowboys working for Wichita Land and Cattle. As soon as they each obtained their section of land from the State Land Board, they each conveyed it to Wichita Land and Cattle. In this way the company was able to purchase four times more land than the legislature had intended. However, in the interest of certainty of title to conveyed public lands, the law also provided that a conveyance of lands in excess of the amount allowed by law could only be set aside by a lawsuit filed within one year of the conveyance. It was this one year statute of limitations upon which the cattle company relied in having the trial judge dismiss the case against it. The Attorney General had not filed suit within one year of the conveyance. He had filed suit within one year after discovery of the fraudulent scheme.

Gaines had little problem applying to this set of facts the doctrine of fraudulent concealment. That doctrine provides that when a defendant fraudulently conceals his wrongful act, the statute of limitations does not begin to run on a claim against him until the injured party discovers the fraud. In this case, while Moore, Jones, and Lewis

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109 73 Tex. 450, 11 S.W. 488 (Tex. 1889).
purchased the lands and resold them to their employer almost immediately, Wichita Land and Cattle had held onto the deeds and not filed them until less than a year before the suit was brought. As the court noted, “why this was done it failed to explain.” Since “the defendant did not put its deed upon record until February, 1885 … this was the first circumstance that was reasonably calculated to excite a well founded suspicion that the law had been violated. The lands being enclosed in the defendant’s pasture at the time they were sold, it was not remarkable that it remained in such possession of the land as that enclosure would impart.” 110 The first appeal of this case reversed and remanded the original dismissal by the trial court on the grounds that limitation had been clearly shown. The second time the case came before the Supreme Court was the appeal by Wichita of the full trial where an Archer County jury found in favor of the state both with respect to the fraudulence of the purchases by the cowboys, and with respect to the State’s excusable delay in filing suit. Both appellate opinions underlined that, in upholding the ideal of cheap land and yeoman settlement, this court was more concerned with results than technicalities.

The Stayton/Gaines court understood that unappropriated and unidentified public lands should operate as common pasturage for the people at large, and that homesteaders should be given the benefit of the doubt. Nonetheless, such lands, once appropriated by the legislature, had to be zealously guarded from squatting and pilferage. It was well known to the court that in many ways the public lands had been squandered by unwise actions of the legislative and executive branches, and that powerful economic interests had essentially appropriated the land to themselves without paying for it. On display here is a Supreme Court acting almost as a trustee of the public’s resources, attempting to

110 Wichita Land and Cattle Company v. State of Texas, 80 Tex. 684; 16 S.W. 649 (Tex. 1891) at 689-690.
conserve them, not by creating any new law, but by tailoring existing principles to meet those policy goals.

IV. Railroads and the Public Domain

The powerful interests who wanted state lands were not limited to cattlemen. Railroads were the other big businesses constantly threatening the School Fund, the Permanent University Fund, and the other programs to be financed by the state’s vast public lands in West Texas. The Constitution of 1876 allowed the legislature to grant public lands to railroads, but only to the extent of sixteen sections per mile of track laid. While the legislature was originally quite free in using this constitutional provision to encourage the building of railroads, in 1882, the legislature repealed the existing railroad law, and thus there was no statutory enactment to put into effect the constitutional authority to grant land to railroads. This, however, did not stop railroads from claiming lands under the law as it existed prior to 1882.

As Governor Roberts had reported to the legislature, much land had been given to railroads prior to 1882, and much track had been laid in return, all to great effect. He proudly took credit for all this railroad expansion, even though he claimed to prefer selling to large ranchers instead. In 1882, he boasted that,

population and capital have flowed into the country far beyond any previous period. Enterprise in all of the useful industries has been quickened and enlarged. Railroads have been pushed into the heretofore unsettled territory of the state, until now we have almost no frontier as it was formerly known. Two branches of the Pacific Railroad have been completed and now pass through the state, one through the northern and the other through the southern portion of Texas, and a third one (the International) will soon have its connections by other roads through Mexico to the Pacific Ocean. … This result is due to the action of the legislature, the executive, and the judicial officers and employees of the government generally …

111 Message of Governor O. M. Roberts to the Texas Legislature, January 10, 1883, as quoted in Wooten, supra, pages 252-253.
On the other hand, when a less sanguine Governor John Ireland took over from Roberts in 1883, it was already clear that the public lands had been squandered. As he told the legislature, he was sure that posterity would judge the Roberts Administration harshly: “No more public lands; no more cheap homes; poverty and squalid want gathering fast and thick around the inhabitants. … I see them turn with deep mutterings from the wicked folly that crazed our people from 1865 to 1882.” From Ireland’s perspective, the repeal of the railroad land subsidy law in 1882 had been too little, too late. He had a point. Railroad land claims continued to clog the courts under the pre-1882 law for many years.

For example, as late as 1889, the Supreme Court was faced with having to deal with faulty draftsmanship by the founders of the Constitution of 1876 with respect to grants of public lands to railroads. Once again, the populist posturing of Attorney General Jim Hogg was prominent. *Galveston, Harrisburg, & San Antonio Railway Company v. State* was one of the few cases that created a serious division among members of the court. The case found the new Chief Justice Stayton at odds with Reuben Gaines and the remaining Associate Justice, John Lane Henry. Henry, the railroad lawyer, would write the opinion for the majority vindicating railroad interests in the case. He convinced Gaines to adopt his point of view even though Stayton, the Chief Justice, was in a uniquely authoritative position to pronounce upon the meaning of the laws crucial to decision of the case. As the details of the case will show, probably Gaines was motivated more by his usual amiable pragmatism than by legislative history or strict constructionism.

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112 Inaugural Message of Governor John Ireland, 1883 quoted in Wooten, supra, page 257.
113 77 Tex. 367; 12 S.W. 988 (Tex., 1889).
The provision in question was Section 2 of Article 14 of the Constitution of 1876 which appropriated public lands for the Permanent School Fund and set forth a method by which they could be granted to railroads by the legislature. However, this section of the Constitution could be read two ways. It defined the Permanent School Fund to include “one-half of the public domain of the state” and “all the alternate sections of land reserved by the state out of grants heretofore made or that may hereafter be made to railroads.” The question for decision was: Did this mean that one-half of all lands unsurveyed in 1876 were appropriated by the legislature for the Public School Fund, and that therefore railroads could only receive grants from the other one-half? If this construction were correct, the additional provision in the Constitution providing that railroads, after receiving grants, had to survey them and give one-half of the surveyed lands in “alternate grants” back to the state would mean railroads would only get one fourth of land appropriated to them, rather than one half. This was precisely the reading urged by Attorney General Hogg.

Railroads opposed this construction and argued that “public domain” in the Constitution should mean only the amount of public land that remained unappropriated at any particular point in time. That way, the state would always keep an undivided half interest in unappropriated and unsurveyed land, and once the land was granted to a railroad, it would realize and separate that one-half interest by the method of “alternate section” surveying. Otherwise, any grant a railroad received from the legislature would first have to be partitioned so that the Public School Fund’s one-half interest could be separated out, and then the railroad would still have to survey the remainder, giving another half of it in alternate grants to the state. The reason Stayton was in a particularly
authoritative position to know that this is what the Constitution intended was because he was a member of constitutional convention that produced it, and had in fact offered a floor amendment to this very provision, which was rejected by the convention. If anyone knew what the convention intended by the provision (and by rejecting his own amendment to it), Stayton did, whether the railroads liked it or not.

His dissenting opinion in support of the state’s literal reading of the law was not published until the Court decided on the motion for rehearing filed by Attorney General Hogg a year later.\footnote{77 Tex. 367; 13 S.W. 619 (Tex., 1890).} It was unusually long for its era (17 pages) and a classic exposition of the literalist and originalist theory of constitutional interpretation. At the time of the convention, Stayton’s dissent made clear, he was already concerned with the very question raised in this case. Should the “one-half of the public domain” be \textit{in addition} to the “alternate sections” railroads deeded back to the state upon surveying out their grants, or should the two provisions be seen as different ways of saying the same thing? The latter interpretation regarded the “alternate grant and survey” system as merely a means to effectuate the general policy of giving one-half of the state lands to the Public School Fund. The state would just not actualize the benefit of that one-half until the railroads were actually given a grant, surveyed it, and deeded back to the state its one-half.

Stayton knew that while this latter interpretation seemed logical, it was incorrect. This is because a certain delegate named Harris had first offered an amendment to strike out the words “one-half” and add the words “all” in their stead. This amendment was voted down because it would have appropriated the entire public lands to the support of the Permanent School Fund and made it impossible for the legislature to make grants to railroads or anyone else. Stayton then offered his own amendment at the convention
which proposed that the entire phrase “one-half of the public domain of the state” be deleted. This also would have resolved the conflict, but in the opposite direction. His amendment was necessary to make it clear that the Constitution was not literally appropriating an undivided one-half interest in the entire public domain to the Public School Fund, leaving only the other one-half to be surveyed and sold. The convention rejected Stayton’s amendment because that literal interpretation was precisely what it intended. Under these circumstances, while Stayton thought it unwise as a matter of public policy, he felt compelled to interpret the provision as he knew its drafters had, even though they had voted against him at the convention.

It is beyond serious doubt that Stayton, as an eye witness, was not only right about the intent of the convention with respect to the provision, but that his interpretation was required by a literal reading of it. This he takes great pains to make clear in the extended discussion in his opinion. Jim Hogg had independently come to the same conclusion in deciding to bring the suit which would effectively increase the state’s cut of any surveyed railroad lands by fifty percent(from one-half to three-quarters). Here was another great campaign issue for the ambitious populist.

The conservative railroad lawyer Henry simply could not accept such an impractical construction of the provision. In his majority opinion, he focused on Harris’ defeated amendment, rather than Stayton’s. If Harris’ amendment had passed, Henry reasoned, and if Hogg and Stayton’s interpretation were correct, then the Constitution would have appropriated all the public domain to the public schools and the provision regarding alternate section grants by railroads would have been superfluous. Ignoring the fact that this was the very reason the amendment was defeated, Henry went on to argue
that the amendment would not have been offered in the first place if the section had been understood by the convention in the literal way urged by the Attorney General. No, the proper way to reconcile the meaning of the two sections was to assume that the Constitution really intended that the Public School Fund have a perpetual right to one-half of the public domain, and that right would simply be actuated, as, if, and when the public domain was surveyed, partitioned, and sold.

Posterity has no way of knowing, but it is a reasonable assumption that while Gaines understood the logic of Stayton’s position, and while he undoubtedly knew that legislators and delegates like Harris often offered amendments that made no sense and could not be read to imply anything about the meaning of the original instrument, he simply could not risk the institutional credibility of the court by throwing a massive monkey wrench into state railroad policy that would unsettle all railroad grants and surveys made from 1876 until the date of judgment in this case fourteen years later. His decision to side with Henry can be seen as the judicial pragmatist working to keep the machine of government running without overtly undermining existing precedent. In other words, where there was more than one construction to be given a law, Gaines was likely to adopt the construction most calculated to maintain political peace, progress, and prosperity.

Six years later, the same railroad company would appear before the court, but this time in an offensive posture rather than a defensive one. While the Galveston, Harrisburg and San Antonio Railway Company was fending off Attorney General Hogg’s attempt to expropriate fifty percent of what it thought it owned, it was also engaged in

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court battles to obtain more state land it wanted. The Galveston-Harrisburg was corporate successor to the Buffalo Bayou, Brazos and Colorado Railway Company chartered in 1870. The Buffalo Bayou line had become insolvent by 1870, which resulted in it being bought out by the Galveston-Harrisburg. The legislature passed a special act in that year recognizing the Galveston-Harrisburg as the successor, for all purposes, of the Buffalo Bayou line. However, in 1870, when the Galveston-Harrisburg acceded to all of the Buffalo Bayou’s rights, the Reconstruction Constitution of 1869 prohibited legislative grants of land to railroad companies, or to any person whatsoever “except to actual settlers upon the same.” The Republicans in control of the state government at that time were apparently quite Jeffersonian compared to their northern industrialist brethren.

The original 1854 act chartering the Buffalo Bayou company only authorized it to lay track from Buffalo Bayou (the environs of Houston) to Austin, and the railroad had already been compensated in land by “alternate sections” for having laid that track. After 1870, the Galveston-Harrisburg, its successor, had constructed track from San Antonio towards El Paso, for which the state refused to pay with land. This track had been laid pursuant to the 1876 law providing for alternate sections to be gifted to railroads who constructed track. However, since that law was repealed in 1882, Governor Roberts had refused to issue the land certificates. In his opinion against the railroad, Justice Gaines, for a unanimous court, held that the railroad was not entitled to the land because it had no rights beyond those of its corporate predecessor. While the 1876 law allowed railroad companies to “earn” acreage for every mile of track laid, this did not expand the original 1854 grant of authority from the legislature the Buffalo Bayou line to construct its track
only from Buffalo Bayou to Austin. Thus, the Galveston-Harrisburg railway had constructed the new track in violation of the limitations of its predecessor’s original charter. Here the Court again protected the public domain from legal schemes to appropriate it to private purposes.

The most likely explanation for this judicial attitude is the obvious one that it was common knowledge throughout the government that there were more claims against the public domain and legislative appropriations of the public domain than public domain to satisfy them. As the years of the nineteenth century rolled by, this fact became more and more obvious, the pressure on mythical public lands became stronger, and the Court’s attempts to preserve it intensified.

The similar 1896 case of Thompson v. Baker\textsuperscript{116} demonstrated the court’s increasing reluctance to allow claims against public lands by railroads. The case involved the 1882 provision repealing the prior law that allowed “earning land by laying track.” After 1876, but prior to 1882, the Tyler Tap Railroad constructed 54 miles of track and claimed entitlement to 872 sections of land. However, the Commissioner of the General Land Office, after passage of the repeal, predictably refused to issue title certificates to the railroad. The railroad’s receiver, Thompson, sought a writ of mandamus from the Supreme Court commanding delivery of the certificates. While the U.S. Constitution prohibits states from impairing their contracts with private parties, Chief Justice Gaines nonetheless found a way to refuse the railroad’s claim. He disclaimed any desire to decide the merits of whether or not the state had breached a contract with the Tyler Tap allowing it to earn the lands. Instead he simply held that the Repeal Act of 1882 was intended to not only prohibit the acquisition of future lands by

\textsuperscript{116} 90 Tex. 163; 38 S.W. 21 (Tex. 1896).
railroads, but also to prohibit the Land Commissioner from issuing certificates for past or future construction. There was no judicial remedy provided by the 1876 prior law if the Land Commissioner failed to issue earned certificates, so the 1882 law prohibiting him from doing so had taken away no right vested in the railroad. Thus, it was not unconstitutional. Moreover, under the current statute the Supreme Court was without legislative authority to command the Commissioner to convey the land. The matter was one for legislative, not judicial, action. The old doctrine of judicial restraint was pressed into service defending the public domain.

In *Houston & Texas Central Railway Company v. State*, the Attorney General sued the railroad company to recover sixteen sections of land previously acquired. The Houston & Texas had obtained the land by building a railroad from Brenham to Austin. However, the building of that line was only authorized by an amendment to its charter passed by the legislature in 1870. Its original charter had authorized no such line. As noted above, laws governed by the Constitution of 1869 could not allow railroad companies to earn land by constructing track. Therefore, it was an easy matter for Justice T. J. Brown to hold that the trial court’s disgorgement of the land from the railroad company back to the state was correct. The only legislative grant of authority to build the railroad could not have constitutionally allowed it to earn land in compensation for doing so.

Brown was following precedent from an 1896 case involving the same railroad, *Quinlan v. Houston & Texas Central Railway Company*. This was another case where Jim Hogg’s Attorney General, Charles Culberson, had instituted suit to void land

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117 90 Tex. 607; 40 S.W. 402 (Tex. 1897).
118 89 Tex. 356; 34 S.W. 738 (Tex. 1896).
certificates issued to a railroad and recover the land for the state. It took approximately four years for the case to make its way all the way to the Supreme Court. By that time, Culberson had succeeded Hogg as governor. Chief Justice Gaines made essentially the same ruling as Brown made in the later Houston & Texas Central case. Again the Court was confronted with a company authorized to construct track by a law passed prior to the Civil War, but who did not actually construct the track until after the Constitution of 1869 prohibited public land grants to railroads. In this case, however, the crucial fact question was whether the railroad company had organized itself pursuant to legislative charter prior to the time the Constitution of 1869 was passed. If so, it could claim the track. If not, it had no pre-1869 rights upon which to base such a claim.

The court held that this was a question of fact and remanded the case to the trial court for determination of it. The trial court had decided the case in favor of Quinlan and against the railroad. The effect of the Supreme Court’s opinion was to generally side with Quinlan on the law, but to sidestep actual resolution of the matter by remanding the case to the trial court for a jury verdict on the undetermined issue of fact. However, Gaines made clear what he thought that resolution should be: “at the time (1869) … the railroad company had never been organized,” so the railroad should lose.  

V. Railroads and the Tort Law

The boom in railroad building affected much more than just the public domain. As Professor Baade demonstrated in the previous chapter, the rapid development of tort law in the latter part of the nineteenth century was due in large part to the proliferation of railroads. While earlier courts were extremely cautious in extending tort remedies to

119 Quinlan v. Houston and Texas Central Railway Company, supra, at 374.
victims of railroad activity, by 1883, with Justice Stayton’s appointment to the bench, the court adopted a somewhat more liberal attitude.

For example, in *Houston & Texas Central Railway Company v. Simpson*,\(^1\) Simpson, a teenager living in Denison, Texas had his right leg caught and crushed in a turn-table on the railroad’s property. Turn-tables were generally located at the end of a rail line and their function was to allow railroad employees to turn a locomotive around 180 degrees. On arriving at a turn-table, a locomotive was detached from its train, turned in its desired direction, and headed either for a new destination or to the roundhouse for repair. Turn-tables were balanced so precisely that as few as two people could turn the heaviest locomotives.\(^2\)

The trial of the case resulted in a verdict of $3,500.00 for Simpson’s injuries. The turn-table was unenclosed and near a pond that Simpson and his friends were accustomed to fish in. Under these circumstances, Justice Stayton held that it was “not a trespass in a child which would deprive it of the right to recover for an injury resulting from the attempted use of a dangerous machine to which children would be attracted for sport or pastime.” Rather, the Court, for the first time, adopted the doctrine of attractive nuisance. This doctrine holds that while adult trespassers are simply unable to recover damages under any circumstances, an “attractive nuisance” constitutes an exception in the case of children “for it is the duty of every person to use due care to prevent injury to such person, even from dangerous machinery upon the premises of the owner, if its character be such as to attract children to it for amusement.”\(^3\)

\(^1\) 60 Tex. 103 (Tex. 1883).
\(^3\) *Houston and Texas Central Railway Company v. Simpson*, supra, at 106.
Stayton went on the comment that while the evidence conflicted as to whether or not a railroad employee had warned the boys away from the turn-table,

it does appear that the employee knew that they were playing with the turn-table, and that he took no steps to fasten it so that they could not use it. The turn-table had no fastenings whatever, and, though almost constantly in use, there were times when it was not in use; and besides, it appears that boys were accustomed to use it at times when employees of the company were present.123

Especially where Simpson himself had played on the turn-table before, the Court determined that it was for the jury to decide whether the boy had “used such care as is required of one his age” (emphasis added),” and thus whether he should be barred from recovery by the doctrine of contributory negligence. This was an expansion of existing law. The question was properly submitted to the jury, and it found in favor of the boy. Finally, Stayton held that the damages of $3,500.00, a significant award in those days, were not so excessive as to require a reversal of the verdict.

This case represents, in a sense, the beginning of modern tort law in Texas; the kind of tort law that takes cognizance of modern technological and psychological reality. In the 1880s, the Texas Supreme Court first began exalting this type of realism over legal formalism in adjusting the rights of parties to an accidental injury. While Simpson was technically a trespasser on the railroad company’s land, and while landowners generally owe trespassers no duty of care, courts in other states had begun making exceptions for minors and in this case Justice Stayton, speaking for Chief Justice Willie and Associate Justice Charles S. West, also rejected formalism in light of what they considered to be the realities of the situation.

Railroads and railroad yards were becoming ubiquitous in urban Texas, and the development of public schools and economic prosperity had begun to create a new social

123 Ibid.
reality, the conception of children as only quasi-competent innocents who deserved special consideration and protection. Earlier in the nineteenth century, children were viewed legally and culturally as little more than small adults. They therefore worked, earned, owned and soldiered as their ability allowed or need required, and they did so without any particular legal exception or protection. In the Victorian era, however, the conception of the child as innocent and as an embryonic human, began to develop alongside notions of affective motherhood and female domesticity. By the Civil War, these cultural notions had wrought significant changes in American law. By the 1880s, matters had reached a point in Texas where the Supreme Court would excuse minors from conduct that would have left them without remedy if they had been adults.124

The later case *Texas & Pacific Railway Company v. Gay*125 evidenced a similar solicitude toward adult victims of railroad accidents. The case produced two appellate decisions, the first authored by Chief Justice Stayton (one of his last opinions), and the latter by Justice Denman soon after his appointment to take Justice Gaines’ associate justice position when Gaines replaced Stayton as chief. Both opinions dealt with the

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125 86 Tex. 571; 26 S.W. 599 (Tex. 1894); 88 Tex. 111; 30 S.W. 543 (Tex. 1895).
same defenses raised by the railroad: jurisdiction and limitations. John M. Gay, a
fireman for the TexPac Railroad was killed by a defective coupling apparatus which
allowed the engine and its tender car to separate, throwing him down between them
where he was killed. Suit for wrongful death was filed by his wife for herself and their
minor daughter. Shortly before the accident, the railroad had been placed in receivership
by a federal court in Louisiana. Therefore, the suit was originally brought against the
receiver, a Mr. Brown. More than a year later, a supplemental petition was filed adding
the railroad itself to the suit, although it was still in receivership under the supervision of
the Louisiana federal court.

The problem for the Gays was two-fold. First, the Texas Wrongful Death Statute,
always strictly construed, did not at that time authorize suits against receivers, but only
against “persons, partnerships, and corporations.” Since a tort remedy for wrongful death
was unknown in the common law and solely a creature of statute, there was no valid
claim against a receiver for wrongful death at the time the Gays files their suit. Soon
afterwards, the statute was amended to include receivers among possible defendants, but
this did not help the Gays. Second, the statute of limitations for wrongful death was one
year from the time of the death. As part of Texas’ modern policy of solicitude towards
minors, the statute did not begin to run against a minor’s claims until he or she turned
twenty-one. However, the widow’s claim could not be similarly rehabilitated, and the
railroad claimed that Mrs. Gay’s suit was untimely because the receiver could not be sued
at all, and as to the railroad itself, it had not been joined in the action until more than a
year after the accident.
The trial court initially dismissed the case on these and a number of other grounds. The matter reached the Supreme Court where Chief Justice Stayton, in another uncharacteristically long opinion, meticulously explained why there were fact issues that required determination by a jury. Therefore dismissal had been improper. The rationale for the decision boiled down to the fact that Gay’s attorneys had alleged that the railroad had placed itself into receivership through collusive litigation filed in the Louisiana federal court. In other words, no one had forced the railroad into receivership, but rather the railroad had sought to place itself in receivership under the authority of the federal court because it knew this would shield it from a number of pending claims. Under these circumstances, Stayton reasoned, the plaintiff should be allowed to avail herself of the doctrine of fraudulent concealment. By analogy to the public lands cases, the Court reiterated the rule that in Texas, a plaintiff would be excused from tardiness in filing suit if that tardiness had been produced by the defendant fraudulently concealing the existence of a claim. Fraudulent receivership was a form of fraudulent concealment because it had led the plaintiffs to believe they should sue the receiver (an ultimately futile gesture) rather than the railroad itself, and this misrepresentation by the railroad was fraudulent because it knew there was no real need for a receivership. Therefore, the case was allowed to proceed to trial where the plaintiffs could attempt to prove that the receivership was in fact fraudulent and collusive, thus relieving them of the necessity of having filed suit sooner.

Ironically, when the trial ensued in Travis County District Court, the railroad declined to even raise the issue. It requested no instruction or question to the jury as to whether or not limitations had expired. This was undoubtedly because the railroad did
not want the jury to be further inflamed against it by evidence of its effort to avoid liability for the death by tricky lawyering. It was bad enough that the jury did hear evidence from the railroad’s own employees that the reason the coupling pin had “worked up so as to let the bar connecting the engine and tender slip out” was because the coupling pin “did not have a slot and key in the lower end of it to prevent its working up.” The railroad’s own managerial employees admitted that after Gay’s death “we used slots and keys now on all engines.” In other words, the railroad knew of the danger, but only had an after-the-fact safety program.

The Gays won the suit and were awarded substantial damages. When the case returned to the Supreme Court on appeal of the verdict, Justice Denman affirmed the verdict with no trouble, given the state of the evidence and the defendant’s failure to pursue the issue of limitations below. In fact, according to Denman, “there is nothing in the record to show that such defense was urged or called to the attention of the court or jury on the trial.”126 The Court’s increasing concern over the callous corporate conduct that was producing more and more personal injuries is reflected in another passage of Denman’s opinion. In discussing the damning testimony of the railroad’s own employees on the subject of post-accident modifications to their safety procedures, the Court held that the railroad had waived any objection to the admissibility of that testimony. It should be noted that in today’s Texas courts, such testimony is usually not admissible by virtue of rules of evidence developed in the twentieth century. Yet here, in 1895, Denman made sure that lawyers and lower courts did not misunderstand his opinion as relying solely upon technical grounds. Even though this type of evidence would come to be excluded in Texas in the coming decades, and even though it was similarly treated by

other states in Denman’s own time, he went out of his way to say, “We do not wish to be understood as holding that such evidence was not admissible, as each member of this court is strongly inclined to the opinion that the case is excluding such testimony (in other jurisdictions) are not founded upon sound reasoning.”127

While the Stayton/Gaines court demonstrated its receptivity to liberalizing liability standards to account for the realities of modern life, it was equally vigilant in guarding against liberal damage awards. In 1883, twin cases of the same name, Gulf, Central, & Santa Fe Railway Co. v. Levy,128 wonderfully illustrated the way this court, early on, charted a moderating course between the Scylla of denying any redress to the injured on the one hand, and the Charybdis of runaway jury awards against businesses on the other. These cases are known as the “older Levy case”129 and the “younger Levy case.”130 They initiated two interconnected discourses within Texas law that remain confused and controversial: what to make of torts that arise between parties to a contract (now often known as “con-torts”); and how to understand mental anguish and other “intangible” damages.

Both opinions were written by Justice Stayton and both cases arose from the same set of facts. J.T. and Bettie Levy, a young couple who had fallen on hard economic times, were living in a rural area near Cleburne, Texas. J.T.’s father, Isaac Levy, resided in Cameron more than one hundred miles away. Bettie was pregnant, became violently ill, went into premature labor, and delivered an equally sick infant. Within twenty-four hours, both died. J.T. immediately traveled to Cleburne and wired his father to ask his

127 Ibid. at 117.
128 59 Tex. 542 (Tex. 1883); 59 Tex. 563 (Tex. 1883).
129 Gulf, Central, & Santa Fe Railway Co. v. Levy, 59 Tex. 563 (Tex. 1883).
130 Gulf, Central, & Santa Fe Railway Co. v. Levy, 59 Tex. 542 (Tex. 1883).
emotional and financial assistance. The railroad company, who also operated the telegraph line between Cleburne and Cameron, failed to promptly deliver the message even though apprised by the widower J.T. of the dire necessity of doing so. As a result, Bettie and the child remained unburied for another twenty-four hours, J.T. had to sell all he had and borrow from acquaintances in order to bury them, and he was the only mourner at their funerals. By the time the message was delivered to Cameron and J.T.’s father Isaac was able to travel to Cleburne, there was little he could do to assist his son.

Isaac’s suit against the railroad for his mental distress came to be known as Older Levy. J.T.’s suit for his “expense in keeping the corpse of his wife out of the grave awaiting the arrival of his father,” and for his mental anguish, came to be called Younger Levy. Both plaintiffs sought exemplary/punitive damages, and both won substantial jury verdicts for mental anguish in the form of exemplary damages. Apparently, anguish was submitted to the jury as relevant to the question of the appropriate level of punishment to assess as exemplary damages, in much the same way that modern criminal juries are allowed to hear “victim’s statements” in assessing criminal punishment. Both cases were appealed, and the appeals were decided on the same day by the Supreme Court.

The Younger Levy opinion, which Stayton strategically delivered first, contained a spoonful of sugar for the Levy family designed to make the remainder go down easier. He began by holding that Levy had clearly proved gross neglect and willful misconduct during the trial, and that therefore he was entitled to recover both his economic damage, e.g., the cost of the telegram, and his obvious anguish in the form of punitive damages. Nonetheless, Stayton reversed the case for another trial because he felt the amount awarded by the jury was inflated by evidence that should not have been admitted,
evidence of young Levy’s financial hardship. This evidence should not have been admitted according to Stayton because Levy’s:

financial condition…which caused the necessity for mortgaging or selling his property, was not the natural result of…failure to deliver promptly the message (but rather it was his own pre-existing poverty); in fact the mortgage seems to have been made before he could have had a reasonable expectation of even hearing from his father. The evidence was of a character calculated to arouse the sympathies of the jury in his favor, and their indignation against the appellant.\textsuperscript{131}

There was more bad news to come for the Levys. Although Stayton had explicitly held that the company’s liability to J.T. did not derive from the mere fact that he had a contract with it, he now announced that the elder Levy must lose because he had no such contractual relationship with the company. The impact of this salient fact was indirect. Since the Levys had only sought mental anguish in the form of punitive damages, Stayton correctly held that entitlement to some separate actual damages would have to first be shown. Since the older Levy had no other damage: no funeral expenses, no cost of sending the telegram, he had no other such antecedent damage. Therefore, the award of punitive/exemplary damage was reversed. Stayton did not address whether Mr. Levy could have recovered that same anguish as actual damages. Levy had not tried to do so. However, additional language in the opinion implied that the company owed no duty to Levy at all because as to it, he was just a member of the public at large.\textsuperscript{132} This was particularly confusing in light of Stayton’s assertion in \textit{Younger Levy} that:

\begin{quote}
Telegraph companies exercise a public employment, which imposes upon them duties to the public … There are … duties implied by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by a contract covering the same ground. The case of the common carrier provides us with a conspicuous illustration.\textsuperscript{133}
\end{quote}

\begin{flushright}
\textsuperscript{131} \textit{Younger Levy}, 59 Tex. 542 (Tex. 1883) at 551.
\textsuperscript{132} \textit{Older Levy}, 59 Tex. 563 (Tex. 1883).
\textsuperscript{133} \textit{Younger Levy}, 59 Tex. 542 (Tex. 1883) at 548-549.
\end{flushright}
Did the duty of a telegraph operator extend to the public at large, or only to its paying customers? Stayton appeared to believe that a general duty existed, but that it was only enforceable by paying customers. Since the cases were not overtly decided on that ground, only time would tell.

Although these cases represented the first announcement by the Supreme Court that mental anguish might *sometimes* be recovered in the absence of physical injury, the Levy cases actually scaled back Texas law, which was already rapidly evolving to allow recovery of mental anguish in such situations. Just two years earlier the Commission of Appeals had allowed a similar claim in *So Relle v. Western Union Tel Co.* on the simple theory that since it was eminently foreseeable to the telegraph company that intense mental distress would be caused by its neglect to use ordinary care in delivering emergency messages, any damage of that sort sustained by the addressee was recoverable as actual damages. The court rejected the claim of the telegraph company that anguish unaccompanied by physical injury was only a component of exemplary damages, not actual damage in its own right. This ruling allowed the plaintiff to prevail by proving only ordinary neglect, rather than the higher standard of willful conduct necessary to recover punitive or exemplary damages. Not wishing to be misunderstood, however, the Commission included in its opinion the increasingly familiar warning to the trial court not to go overboard in affording the plaintiff relief:

> It should be remarked that great caution ought to be observed in the trial of cases like this; as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company; for it is only the latter for which a recovery may be had; and the attention of juries might well be called to that fact.\(^\text{134}\)

\(^{134}\) *So Relle v. Western Union Tel Co.*, 55 Tex. 308 (Tex. Comm. App., 1881) at 313-314.
The doctrinal confusion remaining after the *Levy* cases was temporarily resolved two years later in *Stuart v. Western Union Telegraph Company*\(^{135}\) by affirming the liberal *So Relle* rule but limiting its application to suits by paying customers. Stuart had failed to receive a telegram informing him that his brother in Marshall, Texas had taken a turn for the worse and was on his deathbed. As a result, Stuart missed seeing his brother before his passing, and he also missed the funeral. An interesting wrinkle in this case was that, in order to get around the requirement that a personal duty exist towards him, Stuart alleged and proved that another brother in Marshall acted as his agent in sending him the telegram about their sick brother. Thus, even though he was the recipient of the telegram, plaintiff C. B. Stuart cast himself as its sender, through his brother/agent in Marshall. That solved one problem created by the *Older Levy* case. The other problem, created by the fact that the Levys had only sought mental anguish as part of exemplary/punitive damages, was whether or not C. B. Stuart’s mental anguish was recoverable as actual damages or only as a component of exemplary/punitive damages. The obvious importance of this question, left open by *Levy*, was its effect upon the standard of care Stuart would have to prove the company had violated. To recover exemplary damages, willful or grossly negligent conduct would be necessary. To recover mere actual damages, Stuart could recover on an allegation and proof of ordinary negligence (mere carelessness) in failing to deliver the message.

The initial opinion of the court, authored by Justice Sawnee Robertson, evidences some surprise that the telegraph company would claim “that injury to feelings in this kind of suit (was) held by this court in both the Levy cases to (only) be exemplary damages.”

Rather,

\(^{135}\) 66 Tex. 580, 18 S.W. 351 (Tex., 1885).
whether the damage arising from mental distress was actual or exemplary, was not discussed or decided, but it was held that such damage, which in that case, as in this, was mainly the basis of the suit, could be recovered. Otherwise, in a large class of cases, most grievous wrongs may be inflicted in matters as vitally affecting the welfare of individuals, as in other matters to which a pecuniary value, a market price, can be fixed …

Justice Robertson then catalogued the large number of cases contained in “our own reports” where “pain of mind, anxiety and all the forms of distress peculiar to a sentient being, have been held elements of actual damages in suits for injuries to the person through the negligence of others.” Robertson went on to reject another argument of the defendant to the effect that mental anguish was only actual damage when “a natural incident of bodily pain.” He responded vehemently that “in cases of bodily injury the mental suffering is not more directly and naturally the result of the wrongful act than in this case, not more obviously the consequence of the wrong done than in this case. What difference exists to make the claimed distinction?” Robertson concluded by indicating that while the elder Levy case had overruled So Relle with respect to whether a mere telegram recipient with no contract with the telegraph company could recover damages, So Relle’s other holding remained intact, that those who do possess a contract may recover mental anguish as actual damages.

The telegraph company was not satisfied. Its motion for a rehearing was sufficiently abrasive as to produce an opinion on rehearing by the court’s resident intellectual, Justice Stayton, who added his own indignation to Robertson’s, even though his opinions in Levy had caused most of the confusion in the first place. The motion for rehearing was solely upon a ground entirely understandable in light of Levy, that even in

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136 Stuart v. Western Union, supra. at 352 citing Younger Levy.
137 Ibid. at 353.
138 Ibid.
the case of a violation of a legal duty to an appropriate plaintiff, mental anguish was only recoverable as *exemplary* damages. The argument of the company was that exemplary damages, which are punitive in nature, are also justified on the ground that they act as a form of indirect compensation to the plaintiff for incalculable and intangible damage of a type that would include nuisance, harassment, inconvenience, unprovable or remote expense, and anguish.

Stayton had to admit that

“it may be, and is most likely true that the whole doctrine of punitory or exemplary damages has its foundation in a failure to recognize as elements upon which compensation may be given, many things which ought to be classed as injuries entitling the injured person to compensation … (and) at some period the tendency was to restrict the recovery of damages compensatory to such matters as were susceptible of having attaching to them an exact pecuniary value.”

In fact, he had clearly left that impression himself by his opinions in the *Levy* cases.

Frankly, Stayton had now apparently changed his mind. He now wrote that while anguish might have been one of the origins of the doctrine of exemplary damages, jurisprudential time had marched on, and that:

…the fact that it may be found difficult to ascertain the exact amount of compensation which ought to be made for an injury … is not considered as any sufficient reason why compensation should not be given … if one person be unlawfully wounded by another, the damages he may recover as compensation will not be restricted to such sums of money as may be equal to the value of time lost, money necessarily expended in treatment with a view to recovery, and other like matters; but the physical pain resulting from the wounding, enters into the estimate as a factor calling for compensation, more or less, as the pain may have been slight or sever, or of short or long duration. If such a wounded person’s condition, resulting from the unlawful act, be such as to cause mental suffering, this is also to be taken into estimate. Why? It is because the mental suffering is brought about by a maimed or disabled condition, for which of itself compensation must be made? Certainly not; physical pain is no more real than is mental anguish … If, in addition to the physical pain, the maimed condition of the same person, or the circumstances under which he is placed by the wounding, bear … mental suffering, this is also a matter for which compensation must be

\[139\] *Stuart v. Western Union Telegraph Company*, supra, (concurring opinion of Stayton, Jay) at 586-587.
given; but the right to compensation for the one injury has not its foundation in the existence of the other. Each of these elements for damages goes back to a common source of right to compensation – the act of the violator of a right secured by contract or the general law of the land; and whatsoever necessarily results to the injured person from the act … must give legal claim for compensation; and his right to this cannot be made dependent upon the motive with which the unlawful act is done, nor upon other circumstances which are ordinarily held to be sufficient to authorize the imposition of damages termed punitory or exemplary.\textsuperscript{140}

It would be difficult to find a more persuasive, or an earlier, exposition of the justification for juries awarding pain and suffering and mental anguish as money damages in civil cases. It is ironic that almost precisely one hundred years after this authoritative statement by one of the Court’s most eminent jurists, the more political branches of government, responding to public pressure, have begun to question it.

One more significant policy decision in the area of railroad torts bears mention here, the so-called “dissimilarity doctrine.” This doctrine reached maturity in the 1896 case of \textit{Mexican National Railway v. Jackson}.\textsuperscript{141} In that case, Jackson, a citizen of Texas, sued the railway, a Mexican corporation whose line extended into Texas, for personal injuries received while in the service of the defendant in Mexico. He recovered a sizeable damage judgment that was affirmed by the Court of Civil Appeals. The Supreme Court granted writ of error, and in an opinion by Justice T.J. Brown, held that since the accident happened in Mexico and the Mexican law of personal injury was “materially different from the law of this State in relation to the same subject,” Texas courts refused to provide a remedy and the judgment was reversed and rendered against Jackson.\textsuperscript{142}

\textbf{VI. More Torts: Breach of Warranty, False Arrest, Libel, Fraud, and Family Wrongs}

\textsuperscript{140} Ibid, pages 587-588.
\textsuperscript{141} 89 Tex. 107, 33 S.W. 857 (Tex. 1896)
\textsuperscript{142} For a more detailed treatment of this subject and how it continued to occupy Texas courts and the legislature well into the next century, see Hans Baade, “Conflict of Laws,” \textit{Southwestern Law Journal} 28, no. __ (1974) at 216.
Justice Robertson was right to say in *Stuart v. Western Union* that the records of the Court were full of prior cases where mental anguish had been awarded as damages, sometimes partaking of the nature of exemplary damages, sometimes clearly compensatory damages; sometimes accompanied by physical injury, sometimes not. What was new about the *Stuart* case was the recognition that a plaintiff could recover for an injury composed solely of mental anguish when a defendant had committed an act of only ordinary negligence or carelessness. Prior cases involving recovery for non-physical injury had been limited to the old common law forms of action traditionally associated with it: libel, slander, nuisance, alienation of affections, and other reputational or “outrage” torts. The Stayton/Gaines Court felt free to use common law reasoning to innovate in this way because “in this state we have no forms of action, and a plaintiff may state all the facts upon which he relies for a recovery, if they be so connected that out of the same transaction one injury results; the extent of the injury and the right to increased damages being affected by all the attendant facts.”

The fact that Texas had a “fact based” rather than a “formulaic” system of pleading allowed the Court some latitude in applying existing remedial doctrines to new fact situations like injuries to sensibilities caused by mishandling of new technology. Another example of how the court used this kind of legal elasticity to respond to new reality is the 1884 case of *Jones v. George*. In this case, Jones sued George on a theory of “breach of warranty.” Jones was a cotton farmer, and George was a druggist who sold him a patent medicine for killing worms. George told Jones that this medicine contained “Paris green”, a substance which Jones was satisfied had killed worms in the past.

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144 61 Tex. 345 (Tex., 1884).
Justice Stayton reasoned that under these circumstances, “no warranty arises, but there is an implied contract that the thing sold and delivered is of the kind which the parties contract with reference to.” While the case did not specifically recognize an implied warranty, Stayton did so by implication, holding that whether the action is denoted as one on an implied warranty or on a breach of contract “the relief would be the same.” This case gave rise to an entire jurisprudence within the state of implied warranty liability in impure food, drug, and commodity situations.

Guarding against inflated awards by juries inflamed by passion or sympathy was not the only way that the Court sought to control the economic consequences to business of its adaptation of traditional tort formulas to provide some relief to workers and consumers. In *Joske v. Irvine*, the court reversed a $250 false arrest verdict against Alexander Joske, the famous department store owner, and did so by adoption of a procedural rule designed to circumscribe jury discretion in compensating individuals aggrieved by corporate action. Irvine worked as a deliveryman for Joske. One evening upon returning from work, a dispute arose between him and Joske over some missing merchandise from his truck. Joske, unsatisfied by Irvine’s explanations, fired him and called in the police to investigate. Irvine, in turn, withheld from Joske three dollars of his receipts for the day, claiming that Joske owed him this much in back pay. When the police arrived, Irvine explained the situation and offered to take an officer to his apartment where he had sufficient funds with which to repay Joske. The officer told Irvine that he would arrest him if he did not do so. Irvine’s trial testimony was to the effect that he saw Joske intensely discussing matters with the police officer before they

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145 *Jones v. George*, supra at 350.
146 91 Tex. 574; 44 S.W. 1059 (Tex., 1898).
departed. On the way to the apartment, Irvine ducked into a bar, spoke to a friend, emerged with the three dollars, and offered to return with the officer to pay Joske. The officer then told Irvine that he still wanted to go to his apartment as promised, presumably because he suspected that the missing goods were there. Irvine, perhaps for the same reason, refused to take the officer there, at which point he was arrested.

The arrest was without a warrant, and the Supreme Court, through Justice Denman, acknowledged that under these circumstances, the officer’s actions were unlawful. However, in reversing the judgment, Denman focused on another part of the record he considered more problematic. While the jury had believed Irvine’s testimony and found that Joske directed Irvine’s arrest, Justice Denman was not so sure. Since Irvine had not actually overheard Joske give such an order, the jury must have inferred only from the surrounding facts and circumstances that such an order had been given. In aid of his ultimate disposition of the case, Denman relied upon authority from several other states in support of a new “mere scintilla” rule. He had to acknowledge the old maxim of Texas law that, “Whether there be any evidence is a question for the judge. Whether sufficient evidence, is for the jury.”

While acknowledging this to be the rule, Denman regarded it as “much quoted and often misunderstood.” He reasoned that the justification for the rule was that the court should take the case from the jury’s discretion when “there is no room for ordinary minds to differ as to the conclusion to be drawn from (the evidence).” Since statements like this in a number of cases had to assume that there was “some” evidence

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147 Joske v. Irvine at 581. Justice Denman acknowledges that this rule has been “generally admitted” and goes back to at least 1780.
148 Ibid. at 581.
149 Ibid at 582, citing Lee v. Int’l & Great Northern Rwy.Co., 89 Tex. 583; 36 S.W 63 (Tex. 1896).
for the court to evaluate, Denman reasoned that the court’s “no evidence” responsibility was not limited solely to cases where there was really “no” evidence on a material issue of fact. Rather, the important question was whether the evidence, viewed as a whole, was such that a rational person could conclude that such an ultimate fact had occurred; in this case whether Joske had directed the arrest. Thus, Denman reformulated the “no evidence rule” to expand the ability of judges to overrule jury verdicts for lack of evidence. Even if there were some evidence from which a jury might conclude that something had happened, if it were a “mere scintilla,” Denman reasoned, then that was the same as no evidence at all because no reasonable mind could reach a logical conclusion from it.

Another change that occurred in the late nineteenth century was the rapid expansion not only of industrial business and urban society, but of the organized press. As a result, the Court was called upon to revisit the tort law of libel, in a number of respects. In *A.H. Belo & Company v. Wren*, the court was faced with a question of first impression in Texas, the extent of any privilege that would protect a newspaper publisher from liability for publishing false and defamatory statements. Wren was one of a number of individuals under investigation by a special committee authorized by the Texas legislature to investigate land frauds, a subject that has already been demonstrated in this chapter to be of substantial public interest. Wren and some others were the subjects of this investigation and the *Galveston Daily News*, owned by Belo, published his name and the allegations made against him in the committee. The newspaper, represented by

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150 According to Todd M. Wescht, “Reading Your Every Keystroke: Protecting Employee Email Privacy,” *Journal of High Technology Law*, 1 (2002): 101, By 1890, technological advances in the printing press allowed 60,000 newspapers to be printed per hour with color and with bold fonts designed to attract the attention of even the most casual observer. This was the era of the rise of yellow journalism epitomized by William Randolph Hearst and caricatured by the 1941 film *Citizen Kane*. “The press was reporting the curious, dramatic, and unusual, providing readers a palliative of sin, sex, and violence.” Ibid. at 103.
151 63 Tex. 686 (Tex. 1884).
William Pitt Ballinger, argued that the report was privileged, i.e., that it could not be made the basis for liability, so long as it was nothing more than a fair and impartial account of accusations made within a legislative or judicial proceeding. In evaluating this claim, Chief Justice Willie could only turn to precedents afforded by treatise authors and the English common law. While establishing that Texas would recognize such a privilege, Willie denied its application in this case because the committee’s proceedings were secret, preliminary, investigatory, and ex parte. Under these circumstances, Willie wrote, “proceedings required by the policy of the law to be kept absolutely secret may (not) be published (with impunity) to the world in the columns of a newspaper. You cannot defeat the ends of justice, and the objects of the criminal law, for the purpose merely of satisfying the public craving for news and information.”152 The newspaper lost.

_Cotulla v. Kerr_153 was another case where the court struggled with annunciating the Texas law of libel and sided with a prominent plaintiff against an increasingly pervasive culture of muckraking and protest. Cotulla was a county commission in Frio County, sharing the same name with one of the older settlements in the entire area. The defendant circulated a petition accusing him of sitting in judgment over a matter in which he was financially interested. The defendants claimed that they had every right to circulate such a petition to request Cotulla’s removal from office, and that the mere circulation of such a petition did not constitute making defamatory statements about him. The jury was instructed by the trial court that whether the petition was defamatory, i.e., whether it should be understood as a statement of fact damaging to Cotulla’s reputation, was for them to decide. They decided that it was not, and that Cotulla should receive no

152 _Wren v. Belo_ at 724.
153 74 Tex. 89; 11 S.W. 1058 (Tex. 1889).
recovery. The Supreme Court disagreed. Taking a dim view of this sort of insurrection, the Court held that since the petition claimed that Cotulla had acted improperly in his official duties, the petition was defamatory and libelous as a matter of law. Thus, the judge should have instructed the jury that the petition was defamatory, not that the decision was theirs. The case was remanded to the trial court with the instruction that all Kerr could do to avoid losing the case was prove that the statements about Cotulla in the petition were true.

The Court continued to refusing to protect publishers from libel verdicts obtained by prominent citizens right through until the end of the century. In *A. H. Belo & Company v. Smith*, chief justice Gaines affirmed a $1,000 verdict for Smith, a prominent cattleman, against the *Dallas News* and the *Galveston News*, both owned by the Belo Corporation. They both published an article to the effect that Smith had been arrested in Kansas City on a warrant sworn out by a local bank to recover almost $15,000 allegedly advanced to him several years ago but never repaid. The newspapers argued that the article could not be construed as accusing Smith of any nefarious or criminal conduct, since merely owing money was no shame, nor was it a crime under Texas or Missouri law. While Gaines saw the logic of the argument, he nonetheless believed that “the whole writing is calculated to produce the impression that in the transaction there was some criminal conduct …” The trial court had left the meaning and implications of the articles to be determined by the jury, and the jury had found in favor of Smith. The Supreme Court approved. Again the newspapers lost.

One other area in which the court was sympathetic to plaintiffs was in the area of family law and the protection of women. Of course, this can only be judged by the

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154 91 Tex. 221; 42 S.W. 850 (Tex., 1897).
standards of the time. Family law in Texas had always been a blend of English common law and Spanish civil and community property law. The general rule was that spouses were immune from suits against each other. This rule was a vestige of the English common law belief in the “entire unity” of the married couple. In Nickerson v. Nickerson, Mrs. Nickerson was falsely imprisoned by her estranged husband and a co-conspirator in order to get possession of her two sons, upon whose services she relied for support. The Nickersons had been separated for several years, but this incident prompted Mrs. Nickerson to sue for and obtain a divorce. After obtaining the divorce, she filed suit against Nickerson and his co-conspirator, one Matson.

Bound by precedent, the Willie court was required to affirm the dismissal of the case as against Mr. Nickerson because even though the suit was not filed until after divorce, the wrongful conduct upon which it was based occurred during the marriage and could thus produce no liability from one spouse to the other. However, the Court affirmed the jury’s award of $200 against Matson, and in so doing made a minor exception to another established common law rule. Matson had argued that since the tort occurred during the marriage, Mr. Nickerson was a necessary co-plaintiff and had to authorize and join with his wife’s suit. The Court, while acknowledging that this was the general rule, carved out an exception under circumstances like these, where the wife was justifiably separated from her husband, although still married, at the time the cause of action arose. While it was not much in the way of service to battered women, it was an improvement on the then current state of affairs.

155 65 Tex. 281 (Tex., 1886).
Similarly, in *McMurray v. McMurray*, the court showed an increased understanding of the precarious position of many modern women. In that case, Mr. McMurray had filed for divorce after encouraging his wife to visit her mother out of state. He then fraudulently concealed from his wife and the court the true extent of their community property, and actually testified falsely to the court as to this and a number of other facts. Once she became aware of the fraud and the divorce, Mrs. McMurray moved the court to set aside its previous decree. Her husband argued in favor of the general finality of the judgments of all the courts of this state. While there was no authority directly on point, Justice Stayton ruled that a court has the power to set aside even final divorce decrees, if obtained by false testimony “introduced through the procurement or connivance of the party to be benefited by it.” The case was remanded to the trial court with instructions to conduct “a reexamination of the question of community property.”

The odd case of *Wright v. Tipton*, is an illustration of the simultaneous conservatism, paternalism, and increased solicitude towards women of the late nineteenth century Court. In 1887, in the throes of the debate over temperance, the legislature passed a law allowing women to prevent liquor sales to their husbands. In this case, Mrs. Tipton had sued Wright, a saloon keeper, upon his statutorily required “liquor dealer’s bond,” alleging that he had breached the bond by selling liquor to her husband after she had given written notice that he should not do so. Wright, following *Nickerson v. Nickerson*, argued that Mr. and Mrs. Tipton were not separated, and thus that the general rule required that Mr. Tipton join her in asking that his bond be forfeited. Mr. Tipton, the

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156 67 Tex. 665; 4 S.W. 357 (Tex. 1887).
157 92 Tex. 168; 46 S.W. 629 (Tex. 1898)
drinker, of course declined to do so. Justice T.J. Brown, the teetotaler, had no problem disposing of that argument. Referring to the Nickerson case, he curtly pointed out that it “was decided in the early part of 1886, and the law under which this suit is brought was enacted in 1887….” Brown then recited the well-worn adage that the legislature is always presumed to know the existing law. Therefore, the legislature must have known the new statute would be pointless unless it created an exception allowing wives to sue without their husbands’ permission. Thus, the new statute “was intended to do just what the language expresses, that is, to give the wife the right to sue in her own name …”  

It is an instructive case indeed that brings together the social and political currents of women’s rights, temperance, prohibition, and judicial paternalism in an opinion of less than two pages.

Perhaps even more interesting was a predecessor case decided by the Willie court in 1883, McCue v. Klein. There, Mrs. McCue brought suit for her damages resulting from her husband’s death under the recently passed wrongful death act. However, the circumstances were unusual, reminiscent of Wright v. Tipton. In McCue, Klein and certain others had conspired to make sport of the decedent, Mr. McCue, who was a habitual drunkard. They dared him to drink three pints of free whiskey, knowing he could not refuse, and offering him as an additional inducement the payment of one dollar. After McCue became thoroughly inebriated from the first two pints, they helped him down the third pint, promptly causing his death.

158 Wright v. Tipton, supra, at 171.
159 McCue v. Klein, 60 Tex. 168 (Tex. 1883).
The trial court dismissed the case, holding that the defendants’ cruel prank, although gone badly awry, could give rise to no valid claims. On appeal, Chief Justice Willie had little sympathy for the defendants’ plea of consent:

Here the deceased gave consent to an assault, to be effected by taking into his stomach poison in such quantity as would deprive him of life. It was administered to him perhaps in sport, but no one has a right to trifle with human life in such a manner; as well they might have wagered that they could fire a pistol at his person and not injure him. His consent to such a trial would not have excused a battery or murder that might have followed. 161

The dismissal below was reversed and the case was remanded for jury trial. The foundations of later “dram shop” laws were quite early in Texas, and moral condemnation of alcohol, at least in court, predated formal legislative action toward prohibition.

VII. Municipalities, Trusts, and Insurance

The last topic in this survey of the jurisprudence of the late nineteenth century Texas Supreme Court deals with questions of corporate power, public and private. Municipal corporations, chartered and authorized by specific legislation, were just beginning to come into their own as a result of the rapid economic expansion and urbanization occurring in this period. Simultaneously, the controversies over railroads, public lands, and farmer’s rights gave rise to populist demands for actions against predatory corporate practices of combination and monopoly. As society and technology continued to advance, a new form of corporation would come to dominate litigation to an event greater extent than the railroads, the insurance company.

At this time, Texas had a general municipal and corporate statute, but most significant municipalities were established by a special act of the legislature describing

161 Id. at 170
their boundaries and the methods by which they might grow. The city of Oak Cliff near Dallas was established under the general statute, and the Court was called upon to determine the limits of a city’s power under that statute to expand its borders, and thus its tax base. Oak Cliff held an election to increase its surface area by five hundred percent by annexing surrounding rural acreage. Since that area was sparsely populated, an election conducted over the entire region was easily carried by those actually living in the city. The county attorney of Dallas County, undoubtedly spurred to do so by the established and growing city of Dallas or by his rural constituents, sued to have the election set aside. Justice Gaines had no choice but to fashion a judicial remedy for this kind of municipal conduct. Because of the generality of the incorporation statute, the best he could do was to state the general rule that cities were empowered by the general incorporation statute to incorporate “themselves, and not also such portions of the adjacent territory as their inhabitants may be pleased to embrace within the limits of the corporation.” The only guidance he could give courts in making such a determination was that “a city does not extent beyond the area occupied by its houses and inhabitants … The fact that much of the territory lying beyond the actual city has been laid off into blocks and lots as prospective additions does not aid … (the) … case.”

For some time, litigation on this issue would have to proceed by case-by-case factual evaluations of urban geography.

In 1895, the Court evidenced a similar suspicion of growing municipal power in *Higgins v. Bordages.* In that case, the city of Beaumont attempted to foreclose on Higgins’ homestead to pay assessments for local improvements. This case would

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162 *Ewing v. State of Texas*, 81 Tex. 172; 16 S.W. 872 (Tex., 1891) at 177, 179.
163 88 Tex. 458; 31 S.W. 52 (Tex., 1895).
overrule the Court’s decision in *Lufkin v. City of Galveston*\(^\text{164}\) just twelve years before, which had included such assessments within the provision of the 1876 Constitution providing that homesteads, while normally exempt from any forced sale, could be executed upon for “taxes.”\(^\text{165}\) In deciding that assessments would no longer be considered “taxes,” Justice Brown reasoned that a tax, under the constitution, “must be uniform and equal.” Since numerous Texas decisions had exempted assessments from this requirement of equal treatment, Brown had no trouble determining that an assessment was not a tax “when it has none of the characteristics of a tax in any sense in which it is used in the constitution.”\(^\text{166}\) That the Court reversed itself in such a short time is an indication both of the influence of its newest members, Denman and Brown, and of the Court’s growing concern with the expansion of municipal authority in an ever more urban state.

While the extent of municipal corporation power might be of some interest to legislators and civic boosters, the public at large was much more interested in reining in the predatory practices of private corporations. In 1889, the legislature enacted Texas’ first anti-trust law as a result of public agitation and the efforts of Attorney General Jim Hogg. In fact, one contemporary commentator explained that “the formation of gigantic combinations for these purposes (of monopolization) in late years has created alarm and excited the liveliest interest in the public mind. The amount of discussion which it has invoked, considering the time during which it has progressed, is probably without

\(^{164}\) 58 Tex. 545 (Tex., 1883).
\(^{165}\) Texas Constitution, Article 16, Section 50 (1876).
\(^{166}\) *Higgins v. Bordages*, supra at 464.
parallel.”167 As the Supreme Court would later acknowledge, “in the year 1888 the discussion seems to have become general, and in 1889 many legislatures, including our own, made laws for the purpose of punishing and repressing such conspiracies.”168

This 1889 anti-trust law was challenged in Houck and Dieter v. Anheuser-Busch Brewing Association.169 In that case, Busch sued Houck and Dieter, distributors, on a sworn account for money owed for beer sold to them. The distributors responded by counterclaim and offset that they had been damaged in excess of the amount owed because Anheuser-Busch refused to abide by the terms of a written agreement between the parties appointing Houck and Dieter as exclusive Budweiser distributors in El Paso County. Busch’s rejoinder was that it had not abided by that contractual provision because of the passage of the anti-trust law, which made it illegal. This required Houck and Dieter to claim that the anti-trust law was, itself, unconstitutional. Chief Justice Gaines made short work of that argument. He simply agreed with the lower court of appeals, for the reasons given in its opinion, that the act was fine.

However, while Gaines had no intention of exhibiting the judicial activism required to strike the act down as unconstitutional, he was not averse to limiting its application so as to ameliorate its effects upon certain classes of business. In Queen Insurance Company v. State,170 Gaines, while still associate justice, required an uncharacteristically long opinion to explain why the 1889 anti-trust statute in no way limited or affected the activities of the growing insurance industry. The anti-trust law defined trusts as “combinations of capital … to create or carry out restrictions of trade.”

167 Queen Insurance Company v. State, 86 Tex. 250; 24 S.W. 397 (Tex., 1893) at 266, citing Beach on Private Corporations, Volume 2, Section 856.
168 Queen Insurance Company v. State, supra, at 266.
169 88 Tex. 184; 30 S.W. 869 (Tex. 1895).
170 86 Tex. 250; 24 S.W. 397 (Tex., 1893).
Gaines argued that the act was not intended to apply to combinations to fix insurance premiums or commissions of agents. Even though Gaines had to admit that “a combination between two or more insurance companies to increase their rates or to diminish the rates to be paid to their agents, is in a general sense a combination in restraint of trade,” he nonetheless argued that the statutory phrase “restrictions of trade” was “not intended to receive that construction in the statute under consideration.”

Gaines painstakingly documented his understanding of the public outcry that generated the anti-trust law, and he came to the conclusion that the law was motivated by a desire to control combinations “organized for the purpose of affecting the prices of articles of prime importance in commerce or the rates of transportation and intercommunication.”¹⁷¹ In other words, for Gaines, the term “trusts” was not to be understood in either a technical, economic, or legal sense, but only, by “very recent commercial usage,” to comprehend “combinations of corporations or capitalists for the purpose of controlling the price of articles of prime necessity, or the charges of transportation for the public.” This, indeed, was an odd form of judicial conservatism. Rather than interpreting the words of the statute by their literal meaning, Gaines was careful to restrict their application to only those cases known to the public and complained of at the time of the adoption of the law. The Court might stand aside as the legislature bowed to popular pressure, but it would construe the legislature’s enactments as narrowly as possible, requiring that every attempt to circumscribe private corporate power be specifically enumerated so as to leave no doubt of the intention of the legislature and the public.

¹⁷¹ Ibid. at 266.
The rise of insurance also required that the Court educate itself on the theory of risk allocation and begin to craft a jurisprudence designed to prevent this modern industry from degenerating into mere gambling conducted on a massive scale. For example, in *Price v. Supreme Lodge of the Knights of Honor*[^172] Chief Justice Willie struck down so-called “graveyard insurance” as bogus. Price sued the Supreme Lodge for amounts allegedly payable on a policy issued on the life of his fellow knight, Thomas C. Harper. The Supreme Lodge was a sort of mutual benefit association that agreed, in exchange for membership dues, to insure the lives of its members. Harper’s original beneficiaries were his wife and children, but he got behind in his dues and agreed with Price to make Price his beneficiary if Price would pay his arrearages. Price paid the dues, and he was recognized as the owner of the policy by the Lodge.

The problem for Price was the English common law doctrine of “insurable interest.” Early on, the English courts, followed by the United States Supreme Court, had determined that while a policyholder in arrears might pledge his insurance to a creditor as a means of repaying his debt, that creditor would not be allowed to essentially buy the policy. In other words, in order to become a beneficiary of a life insurance policy, the common law required that one have an “insurable interest” in the life of the insured, that is, stand in relation to the insured such that his death would cause financial hardship. Otherwise, anyone could gamble on the death of anyone else. Thus, business partners, widows, orphaned children, parents, and other close relatives, were automatically assumed to have insurable interests. With respect to strangers, their status as beneficiary of a life insurance policy was presumptively suspect. In *Price v. Supreme Lodge*, the Supreme Court adopted this doctrine of insurable interest to deprive Price of the benefits.

[^172]: 68 Tex. 361; 4 S.W. 633 (Tex., 1887).
of his bargain. To hold otherwise would be to allow strangers to place themselves in a position where the “early death” of the insured will “bring him pecuniary advantage. The temptation to bring about this death presents itself as strongly to him as to a party who originally affects insurance for his own benefit upon the life of another. Public policy removes the temptation to take human life, and it cannot matter how that temptation is brought about.”

Similarly, the court was faced with interpreting the “total loss doctrine” in connection with fire insurance policies. In Royal Insurance Company v. McIntyre, McIntyre sued his building’s insurer when it was damaged by a fire. He sought to recover a total loss because the policy provided for payment of the face amount of the policy in the event of “total loss by fire.” The insurance company sought to prove at the trial that although the house was damaged by a fire, the structure retained substantial value, and about ninety percent of the structural members were undamaged. The company also sought to show that it would cost less to fully repair the structure than the face amount of the policy. The trial court excluded this testimony on the grounds that it was irrelevant to the question of total loss, and the building owner won.

Justice Denman’s opinion reviewed the authorities from various jurisdictions that had created confusion and conflict for some time over the proper way to handle the issue of “total loss.” One line of cases, the one evidently followed by the trial court, regarded the only relevant inquiry as whether or not the functionality of the insured property had been completely destroyed. In other words, if the building were no longer capable of any use as a building, this would constitute a total loss. This line of cases arose out of cargo

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173 Price v. Supreme Lodge, supra, at 368.
174 90 Tex. 170; 37 S.W. 1068 (Tex. 1896).
losses that proceeded based upon the inquiry of whether or not the loss of cargo was one of “destruction in specie” or “destruction in value.” Under this line of reasoning, the residual value of a damaged good or structure was irrelevant to whether its functionality as a member of its “species” had been eviscerated. Denman rejected this line of reasoning and held that the trial court had erroneously excluded the evidence. Thus, at the end of the nineteenth century, the Supreme Court adopted the rule that whether or not insured property was a “total loss” would be based upon whether “the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury; … whether it is no adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question was before injury, would, in proceeding to restore the building to its original condition, utilize such remnant as such basis.”

**VIII. Looking Backward**

From 1882 to 1900, the Texas Supreme Court presided over by Asa Willie, Robert Stayton, and Reuben Gaines compromised between hidebound adherence to tradition and freewheeling judicial activism. Pragmatism, epitomized by the mercurial but charming Gaines, ruled. There is little to distinguish between the philosophies of each court, although changes in personnel occasionally made a difference in particular cases. Throughout this period, the Court consistently faced the same task, adapting existing law to rapidly changing social and economic reality without undermining the institutional credibility that was its very foundation. This was not always easy when faced with an often churlish, shortsighted, and unresponsive legislature on the one hand and serious grass-roots agitation for radical reform on the other. While jurisprudence within the

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175 Ibid. at 182.
period from 1882 to 1900 tended to be consistent, the court’s attitudes and techniques were a departure from the “redeemer” court of the 1870s, and the constitutional and organizational changes of the 1890s accelerated this process.

The more modern Texas court of the 1880s and 1890s, like some others had, could have struck down the state’s antitrust law or used antiquated common law rules to stifle attempts to help children, widows, workers, and other victims of growing industrialization. It chose not to. Yet, it also shielded itself from any serious conservative criticism by carefully circumscribing how far a jury, the ultimate democratic institution, could go. The Court, by mechanically following precedent, could have turned a deaf ear to the plight of battered women or abused spouses, yet it did not do so. It didn’t do much, but what it did do was moderately progressive by relative and contemporaneous standards.

On the other hand, while the Court occasionally innovated, it was no pathfinder. In the tradition of common law jurisprudence, which is to say the English tradition of judge-made case-law, the Court did its innovating only “intersticially.” As Benjamin Cardozo said in 1921, a judge’s room for policy maneuvering is narrow. “He legislates only between gaps. He fills the open spaces in the law,” yet “how far he can go without traveling beyond the walls of the interstices cannot be staked out for him on a chart.”

More than one hundred years earlier, Sir William Blackstone would claim that even in such instances, judges do not make new law, but...vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was a bad law, but that it was not law (at all); that is, that it is

not the established custom of the realm, as has been erroneously determined (by previous cases).  

The late nineteenth century Supreme Court took Blackstone and the tradition he embodied seriously. It lived up to Alexander Hamilton’s prediction that of the three branches of government, “the judiciary, from the nature of its functions, will always be the least dangerous…It may truly be said to have neither force nor will, but merely judgment.”  This also meant that the function of the Court was essentially conservative, not to change things, but to adapt legal rules only so far as necessary to conserve the existing rule of law, the predominant socio-political arrangements.

In the 1890s, after establishment of the year-round “Capitol Court,” Chief Justice Gaines and his wife Louisa resided in a steam heated, electrically lit suite at Austin’s Driskill Hotel. Whenever the couple strolled through the spacious lobby toward the modern elevator that carried them to their apartment, they might well have taken note of the many volumes kept on the Driskill’s well-stocked shelves for the use of its guests. In this twilight era after the invention of electric streetcars but before radio and movies, reading was still the primary means of polite distraction. That, at least, had not changed. Two books, immensely popular in their day, were *The Theory of the Leisure Class* and *Looking Backwards*.

Thorstein Veblen’s *The Theory of the Leisure Class* caused an instant stir when it was published in 1899. Veblen was an academic economist from the Midwest. The thesis of his book was simple. It was perhaps the most direct indictment of what has come to be called “the Gilded Age.” It was Veblen who invented our term “conspicuous

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\[\text{178} \quad \text{Alexander Hamilton, } \textit{The Federalist} \#78.\]
consumption.” He employed it to describe the process by which the wealthy spend their money on “superfluities” in order to demonstrate their exalted position in society. Indeed, it is precisely the superfluous, even the ridiculously impractical, character of their purchases that guarantees the perception of that status. The more profligate the luxurious spending, the more powerful the spender must be. Veblen’s theory would have been unthinkable before the huge accumulations of wealth that late nineteenth century industrialization, urbanization, and business oligopoly made possible.¹⁷⁹

*Looking Backwards*, published in 1888, was even better known than *Theory of the Leisure Class*. One of the bestsellers of its entire era, it sold ten thousand copies a week for several years. In it, author Edward Bellamy, an attorney turned journalist, through the literary device of a modern Rip Van Winkle, described the world as it might be in one hundred years. In Bellamy’s story, the main character Julian West falls asleep in 1887, only to awaken in the year 2000, where he finds a world without poverty, crime, or hardship of any kind.¹⁸⁰

In Bellamy’s imaginary year 2000, the very kind of economic restructuring advocated by 1890s real-world populists and radicals had produced this brave new world, and the book was so powerful among these constituencies that it led directly to the formation of “Nationalist clubs” all over the country. As Bellamy’s futuristic Doctor Leete describes it to the newly awakened West, 1890s Americans simply “concluded to assume the conduct of their own business, just as one hundred odd years before they had assumed the conduct of their own government, organizing now for industrial purposes on

precisely the same grounds that they had then organized for political purposes.” What they produced was a world with no violence, no greed, and no ambition beyond national service, which became “the sole and certain way to public repute, social distinction and official power.”

This transformation of society from a Darwinian struggle for self-advancement to one of egalitarian distribution of social benefits came about due to the general realization that more and more capital had been concentrated in the hands of fewer and fewer people. As Dr. Leete continues, “Before this concentration began,…the individual workman was relatively important and independent in his relations to the employer. Moreover, when a little capital or a new idea was enough to start a man in business for himself, workingmen were constantly becoming employers and there was no hard and fast line between the two classes. Labor unions were needless then.” Once society realized that the idyllic past no longer existed, ever increasing labor agitation inevitably caused the organization of a nationwide labor movement which then forced corporations to cede business functions to the people, i.e., the government. The result was a socialist utopia based upon the equality and brotherhood of man.

This alternative future was very much what radicals desired, what other populists hinted at, what progressives sought to bypass, and what conservatives most feared. It never materialized. Looking backward as he led his wife into the elevator of the Driskill Hotel, Chief Justice Reuben R. Gaines could be satisfied that the Texas Supreme Court

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182 Ibid. 53 (quote).
had modernized the traditional rule of law just enough to avert the coming of this particular brave new world, but not enough to disturb the powers that be.