Texas v. White: A Study on the Merits of the Case

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ANNEXATION TO SECESSION

ON March 1, 1845, by a Joint Resolution of the Congress of the United States, Texas was formally annexed to the United States. The following reference was made in that document to the public debt and public lands:[1]

> Second. *Said state,* when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to the said republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; *and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said state may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States.*

Thereafter on June 23, 1845, the Congress of the Republic of Texas by Joint Resolution specifically adopted the second section of the Resolution of the Congress of the United States when it "resolved . . . that the Government of Texas doth consent, that the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas. . . ." The preamble to the Texas Constitution of 1845, passed as an ordinance in con-

*A. B., University of Illinois; LL.B., M.A., Southern Methodist University; member of the Texas State Bar.

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[1] J. Res. 8, 28th Cong., 2d Sess., 1845, 5 STAT. 797. Italics supplied.

vention on July 4, 1845, also included the second section of the Joint Resolution. Finally, on December 29, 1845, by a Joint Resolution of the Congress of the United States, Texas was admitted into the Union, and both parties thereby signified their assent to the terms of the second section.

Texas had accepted annexation; but the acceptance, directing retention of the debts of the late Republic, placed the new State in a very embarrassing financial position. The relinquishment of sovereignty denied the new State certain of its public properties and defense mechanisms; at the same time the new State was forced to settle the estate of its deceased parent. Although Texans expressed dissatisfaction over the failure of the Federal Government to assume the public debt of the Republic, it is to be noted that many thought Texas had been granted means to satisfy the debt. The Joint Resolution *had specifically* stated that Texas was "to retain all the vacant and unappropriated lands lying within its limits to be applied to the payment of the debts and liabilities of said Republic of Texas." This feature of the admission of the State of Texas into the Union was unique; no other state before or since has been received on comparable terms.

The question remains whether the lands retained would have made possible the payment of "the debts and liabilities of said Republic of Texas." The Commissioner of the General Land-Office reported, on August 5, 1845, that 181,991,403 acres of public domain remained subject to location and unsurveyed. An historian of the period commented:

> If to this be added "the amount issued by various boards of land commissioners and supposed to be fraudulent," 24,331,764 acres, the sum will be 206,323,167 acres; and some addition should be made from the "total amount issued by the authorities of Mexico, 22,080,000 acres, a portion of which was supposed to be valid." Suppose one-half of these invalid, and we have a grand total of 217,363,167 acres.[2]

[2] WILLIAM M. GOUGE, THE FISCAL HISTORY OF TEXAS (Lippincott, Grambo, and Co., Philadelphia, 1852) 135 *et seq.*

But on August 27, 1845, a committee of the Convention reported that only 102,730,240 acres of the surface of Texas were "unappropriated." The historian referred to explained:

> In so doing, they seem to have taken into the account all the "headrights" or settlers' claims, and soldiers' rights, not yet "located," and also the enormous grants made by the United State of Coahuila and Texas, which the independent government of Texas had steadily refused to acknowledge. The commissioner gives the extent of land "subject to location, and unsurveyed." The committee give the amount "unappropriated."[3]

These statements by a financial analyst, after careful study in the year 1852, indicate that the question should be answered in the affirmative.

The displeasure of the Texans was increased by territorial disputes which complicated the State's relations with the Federal Government. Prior to annexation the Republic of Texas had attempted to extend its jurisdiction over a portion of New Mexico which it had claimed since 1836. In 1841 President Lamar had dispatched the ill-fated Santa Fe Expedition to make good the Republic's claim to that region. Charles A. Warfield was authorized in 1842 by the Houston administration to conduct "operations to the northwest"; that and the Snively expedition, organized in 1843, marked further "steps in the aggressive policy of the Texan Republic from a military point of view."

The Texans of 1845, by virtue of an Act of December 19, 1836, of the Texan Congress, had claimed the western boundary to be the Rio Grande River to its source, and thence north to the line of 42 degrees latitude. This claim apparently was founded in part on the unratified Treaty of Velasco made with Santa Anna on May 14, 1836, and in part on a "winner take all" philosophy. But when the proposed treaty of annexation was pending in the United States Senate in 1844, President Tyler openly avowed the absence of any express definition of boundaries. Uncertainty continued to exist as to the exact boundaries, and the Joint Resolution of

[3] *Id.* at 133.

March 1, 1845, specifically left the question open by providing that the State of Texas was "to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments."

During the Mexican War United States troops under Colonel Stephen W. Kearny occupied New Mexico. Thereafter, the jurisdiction of the military government, Congressional territorial claims and Texas demands came into sharp conflict in the New Mexico territory. Prior to the cessation of hostilities the problem had been acute, but "the terms of the treaty of Guadalupe Hidalgo inaugurated a new stage in the Texas expansionist movement."[4] The period from 1848 to 1850 produced a new series of triangular quarrels involving New Mexico, the United States and Texas. A convention of the people of New Mexico in October, 1848, transmitted an anti-slavery petition to Congress protesting against any recognition of the Texas claim. The Government of the United States registered indecision and uncertainty in the orders relayed to army commanders stationed in the area. The State of Texas, through the media of the Spruce M. Baird Commission and the Robert S. Neighbors Mission, gave evidence that it had no intention of relinquishing its claim. The New Mexicans wanted a government separate from that of Texas; the Texans were determined to have the territory, and President Taylor was equally determined to resist any Texan efforts by force.

The discord connected with the Texas public debt and Texas public lands during this formative period makes it "one of the most spectacular features in the whole financial history of Texas.[5] The public debt and the public lands were interwoven in the pattern of dilemma that reached beyond a financial problem to a national question of extreme importance. At the time of the annexation of Texas by the United States the estimate of the debt of the

[4] WILLIAM C. BINKLEY, THE EXPANSIONIST MOVEMENT IN TEXAS (University of California Press, 1925) 153.

[5] EDMUND T. MILLER, A FINANCIAL HISTORY OF TEXAS (Bulletin of the University of Texas, 1916) 117.

Republic was approximately ten million dollars. The "vacant and unappropriated lands" lying within the State were to be used to pay its "debts and liabilities," so that "in no event [were] said debts and liabilities to become a charge upon the government of the United States." Inasmuch as the public domain would be looked to as the sole source of payment of these obligations, the larger the domain, the greater Texan ability to pay.

As long as the claims could be asserted with a reasonable degree of seriousness, the most pressing problem was that of actually using the public domain to discharge the debt. The first two Governors of Texas, Henderson and Wood, presented a plan to sell these unappropriated lands to the United States. As alternatives to this plan it was suggested that payment of the debt should be in land or the debt be refunded in state bonds. No solution had been reached in 1848 when the State Legislature scaled the public debt. The ire of the creditors reached a fever pitch in February, 1850, when the State Legislature made provision for payment of the scaled debt in land at the rate of 50 cents an acre.[6]

When the Thirty-first Congress convened in December, 1849, representatives of Texas creditors and members of the Texas delegation were present to attempt to forge a solution to the debt and boundary problems. Perhaps a consideration of one would provide the key to solve the other: could the settlement of the dispute between Texas and the United States over the State's northwestern boundary provide relief for the creditors?

Senators Benton of Missouri, Foote of Mississippi, Pearce of Maryland, and Henry Clay of Kentucky introduced separate measures looking to settlement of this dispute. Three of these measures failed, but finally a bill introduced by Senator Pearce, "which had the support of the entire Texas delegation and of moderate men North and South," was accepted by the Senate and passed by the House on September 6, 1850. The Texas Boundary Bill was one of a series of laws generally known as the Compromise

[6] *Id.* at 120.

of 1850, which became law when President Fillmore signed it on September 9, 1850. This particular bill was captioned :"An act proposing to the State of Texas the establishment of her Northern and Western Boundaries, the Relinquishment by the said state of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a territorial Government for New Mexico."[7]

The reader should compare the second section of the Joint Resolution of Annexation, March 1, 1845, and the following articles of the Act of September 9, 1950. The enacting clause includes the usual formalities, and the first two articles refer specifically to the land ceded; then the Act continues:[8]

> Art. 3. The State of Texas *relinquishes all claim* upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, custom-houses, custom-house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.
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> Art. 4. The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the state of Texas the sum of ten millions of dollars, in a stock bearing five per cent interest. and redeemable at the end of fourteen years, the interest payable half yearly at the treasury of the United States.
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> Art. 5. Immediately after the president of the United States shall have been furnished with an authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the state of Texas, as provided for in the fourth article of this agreement: Provided also, that no more than five millions of said stock shall be issued until the creditors of the state holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the treasury of the United States, releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the secretary of the treasury, and approved by the president of the United States. . . .

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[7] 9 STAT. 446.

[8] PASCHAL'S ANN. DIG. OF TEX. LAWS (2d ed. 1870) 193. Italics supplied.

At first the Texas press opposed the scheme, and generally opposition was displayed toward this "Washington bargain," but local elections during September and October, 1850, showed a trend towards accepting the proposal. On November 25, 1850, "an act accepting the propositions made by the United States to the State of Texas" was passed by the Legislature which "declared that the said state shall be bound by the terms thereof, according to their true report and meaning."[9] On this same day the Legislature requested the Governor to transmit its acknowledgment to the Federal Government and the Texas delegation in Washington.

The matter apparently was settled, but one important detail had been overlooked. Five million dollars was available to Texas, but the State Legislature had neglected to designate a receiver of the bonds for the State of Texas. Consequently, the delivery of the bonds was delayed until "An act to provide for the reception and deposit of a portion of the indemnity due the State of Texas by the United States" was passed by the Texas Legislature on December 16, 1851. By authority of this Act the Comptroller of Public Accounts of the State was directed to proceed to Washington, accept and receipt for the five million dollars in bonds, and deposit them in the state treasury.

A proviso to the Act of December 16, 1851, which subsequently caused much difficulty, merits mention at this time. It stipulated that "no bond issued as aforesaid, as a portion of the said five millions of stock, payable to bearer, shall be available in the hands of any holder *until the same shall have been indorsed in the City of Austin by the governor of the State of Texas.*"[10]

The bonds were now deposited in Austin, and the State proceeded to provide for their disposal by law. On January 31, 1852,

[9] Acts 1850, c. 2; 3 GAMMEL'S LAWS OF TEXAS (1898) 832, 833. This study is not concerned with the five million dollars that remained in the United States Treasury in 1852, and the Congressional solution of the controversy to the apparent satisfaction of the United States, Texas and the creditors of Texas in 1855.

[10] Acts 1851, c. 15; 3 GAMMEL'S LAWS OF TEXAS (1898) 889, 890. Italics supplied.

the Legislature passed "An act providing for the liquidation and payment of the debt of the late Republic of Texas." The first section of this act appropriated $2,000,000 of the bonds for the payment of certain described portions of the debt of the late Republic of Texas, and the second section prescribed the manner in which the bonds were to be transferred. During the following month, on February 13, 1852, the Legislature appropriated an additional $123,000 for the payment of a certain portion of the debt.

The Act of February 11, 1860, which provided for the disposal of the last of the bonds remaining in the treasury to the credit of the general account, completed the process of appropriating the $5,000,000 of indemnity stock. The use of these bonds is not pertinent to this investigation other than to determine why these bonds remained in Austin at the time of the Ordinance of Secession.

During this nine-year period the Legislature had appropriated some of the bonds into various state funds, among which were the special school fund and general school fund. The bonds channeled to the special school fund assume significance because they became the controversial subject-matter in *Texas v. White*.[11] On January 31, 1854, the Legislature approved an Act which stated:

> The sum of two millions of dollars of the five per cent bonds of the United States, now remaining in the treasury of the state, [shall] be set apart as a school fund, for the support and maintenance of public schools, which shall be called the special school fund, and the interest arising therefrom shall be apportioned and distributed for the support of schools as herein provided.

Two and one-half years later, on August 13, 1856, the Legislature lent part of these bonds to railroad enterprises contemplating development in Texas. When Texas seceded from the Union in 1861, about $800,000 of the $2,000,000 appropriated in 1854 remained in the special school fund.

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[11] 7 Wall. 700 (1868).

THE CONFEDERATE STATE OF TEXAS AND THE MILITARY BOARDS

After the Confederate State of Texas had disposed of the United States forces along the frontier, its attention turned to the grave problems of defense and finance. The Secession Convention of Texas in 1861 had little success in solving the problems of financing the revolution, and so the matter was placed in the hands of the Legislature and Governor Edward Clark, Sam Houston's successor. By an Act of April 8, 1861, the Legislature authorized the issuance of $1,000,000 of eight per cent state bonds; and Governor Clark sought to dispose of them. The Governor met with no success. His agent reported that due to the unsettled condition of the market, general lack of confidence in securities and want of patriotism, people would not buy the bonds. Consequently, when the Confederate Government called upon Texas to provide volunteers, the State of Texas was unable to outfit them.

Immediately after the outbreak of hostilities the Confederate War Department had set up a purchasing agency to procure arms, ammunition, and other ordnance supplies in Mexico. A Texas agent for this bureau soon reported that the business men of Mexico preferred the securities of the United States Government to those of the Confederate Government. The agent, G. H. Giddings, suggested to his superior, Secretary of War Judah P. Benjamin, that the Confederate Government seek some basis of replacing with Confederate bonds the United States bonds deposited in Austin. Secretary Benjamin, acting upon the suggestion, transmitted a letter to Governor Lubbock of Texas outlining a plan devised by the Confederate Government in Richmond. To his plea the Governor of Texas responded by requesting the convening Legislature to act promptly upon the matter. The State had not since secession attempted to use the remaining United States Texas Indemnity Bonds which had become part of the special school fund. The hesitancy of the state officials to offer them for sale was due in part to the rumor that the United States Government had repudiated them on account of the secession of the

State, in part to the opposition of friends of the schools, and in part to the fact the bonds had not been indorsed for sale by any governor of Texas.

The Texas delegation in the Confederate Congress had approved Secretary Benjamin's plea, and Governor Lubbock recommended to the Legislature that the proposition be accepted. The response of the Texas Legislature was embodied in "An act to provide funds for military purposes"[12] passed on January 11, 1862, stating:

> ... [T]he Governor, comptroller, and treasurer shall constitute a military board, and a majority of said board shall have the power to provide for the defense of the State by means of any bonds and coupons which may be in the treasury on any account, and may use such or their proceeds, and therefrom may sell, hypothecate, or barter such bonds and coupons, provided such disposal shall not exceed the amount of $1,000,000 of such bonds and coupons, and that they shall not be disposed of at any discount greater than 20 per cent. of their face amounts.
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> Section 2. Any bonds which may be disposed of under the provisions of this act shall be substituted by equal amounts of any bonds of the Confederate States of America that may be obtained by this State, and the bonds so substituted, respectively, in all respects shall be in place of the funds disposed of as aforesaid.

Thus, for "the defense of the State", the Military Board of Texas was created and began to act under this legislative authorization as the disposing agency of the bonds. Another act, passed on the same day, repealed the law which had required the indorsement of the governor for the sale of the indemnity bonds.

The Military Board of Texas merits consideration, particularly since it was born of problems concerning the bonds which became the subject of the litigation. The Board in 1862 consisted of Governor Lubbock, Comptroller C. R. Johns, and Treasurer C. H. Randolph. The first official act of this body was to seek a purchaser for the bonds. Subsequently, 100 bonds were turned over to the Confederate agent named by Benjamin to negotiate them. The receipt

[12] Charles W. Ramsdell, *The Texas State Military Board, 1862-1865*, 27 Southw. Hist. Q. (April, 1924).

for them, enclosed in a letter, dated January 13, 1862, to Secretary Benjamin, was signed by agent Giddings of the Confederate Ordinance Bureau. Giddings attached a note introducing his brother as the bearer of these instruments; in addition, he sought to assure Benjamin that even though accepting the bonds deviated from the original plan, nevertheless, under the circumstances it seemed advisable to approve this method. One month from the date of the creation of the Military Board, Secretary Benjamin replied from Richmond to the communications from Lubbock and Giddings. In very abrupt language Benjamin ordered Giddings to return the United States bonds to the State immediately, pointing out that the law only allowed him to *purchase* arms. In a letter to Governor Lubbock, Benjamin complained that the Governor had misunderstood him, that under the law he was not authorized to exchange bonds, and in very elementary language suggested a proper procedure.

The Confederate agent Giddings, unable to negotiate the bonds, deposited them with various firms in Brownsville, Matamoros and Houston. Giddings failed to recover them, and the Military Board succeeded only after more than a year of difficult negotiations. Seemingly undaunted by these early set-backs, the Board continued its project. On March 31, 1862, 75 bonds were placed in the hands of Jas. T. D. Wilson, an agent of the Military Board, who endeavored to sell them in Mexico. Failing in his assignment, Wilson returned 55 of them but placed the remaining 20 with Oliver and Brothers, a Monterrey firm. Although Oliver and Brothers failed to negotiate the bonds, they refused to return them because of an unpaid account against the Board for supplies. The Pease and Palm Report noted:[13]

> The old board, previous to the first of July, 1862, placed in the hands of Oliver & Brothers, of Monterrey, Mexico, for sale or exchange, twenty bonds, with one hundred and twenty coupons not matured, and one hundred and eighty matured coupons, amounting

[13] PASCHAL'S ANN. DIG. OF TEX. LAWS (2d ed. 1870) 907. This report was an investigation of the affairs of the State Treasury.

to $27,500. This house sent to New York and sold the one hundred eighty matured coupons, amounting to $4,500 for $3,691, besides the expenses of selling. They sent the old board five hundred blankets, forty-eight dozen pairs of shoes, and thirty-four dozen papers of wood tacks, which with charges and freight to San Antonio, and $287 62-100 in specie, were received in full payment.

The twenty bonds and coupons not matured, amounting to $23,000, appear to be still held by Oliver & Brothers, subject to the payment of a debt of $10,042 62-100, admitted by the new board to be due them.

It is possible there may be twenty and perhaps thirty-six more coupons of $25 each in the hands of this firm, but the books and papers of the old board leave this matter in doubt.

The next project of the "old Board" was directed toward the project of exchanging 300 of the bonds in England for supplies. The bonds were placed in the hands of John M. Swisher, a well-known political figure, with detailed instructions concerning the articles to be purchased. Swisher contacted an English banking house and sailed for England. Just how Swisher fared is best described in the Pease and Palm Report:[14]

The old board placed in the hands of John M. Swisher & Co., on the 11th of April, 1862, three hundred bonds, with one thousand eight hundred coupons not matured, and four hundred and eighty-seven matured, amounting to $357,175, with instructions to take them to Europe, and sell or exchange them for arms, munitions of war, and goods. They took them to Europe, where they sold $9,075 of the matured coupons for about one thousand seven hundred and forty pounds sterling. Subsequently they made a sale of one hundred and forty-nine bonds, with the coupons not matured attached thereto, for seventy-seven and a half cents on the dollar, partly for cash and partly on short time; the payments were all made and deposited with the bankers of Swisher & Co. They had invested about $10,000 of the money in goods, when the purchasers (George Peabody and Company of London) of the bonds becoming alarmed in regard to the legal right of Swisher & Co. to dispose of them instituted a suit in the English Chancery Court to rescind the contract, and procure a return of the money. To this suit, Swisher & Co., and William Droege of Manchester, England, through whom the sale had been effected,

[14] *Id.* at 906.

were made defendants, and the money not used, in the purchase of goods, which was all but about $10,000, was enjoined in the hands of the bankers, to await its decision. An arrangement was afterwards made between Swisher & Co., and Droege, by which the latter deposited in bank the $10,000 which had been used, and was to retain control of the one hundred and fifty-one bonds not sold, with the coupons attached thereto, to indemnify him against loss in the suit. A further agreement was made between Swisher & Co. and Droege, by which the goods that had been purchased, with other goods afterwards purchased, were consigned to the firm of Droege, Oetling & Co., of Matamoras, to be there delivered to Swisher & Co., whenever they should pay for them. So that the whole three hundred bonds, with the coupons due after the 1st of July, 1862, amounting to $337,500, are now awaiting the decision of this suit. Swisher & Co. claim no interest in them, and the Provisional Governor has taken measures to secure them for the State; but the State will probably have to pay the costs of the suit, and interest upon the money paid by the purchasers.

It is understood that Swisher & Co. afterwards sold the balance of the coupons that matured up to July, 1862, which, with those they had previously sold, amount to $19,675. No settlement was ever made by them with the military board for these coupons, nor for $2,000 in specie that the old board gave them. It is believed, however, that Swisher & Co. can be made to account with the State for the proceeds of these coupons.

By authority of the "old Board," in January, 1863, Governor Pendleton Murrah exchanged forty-four bonds, "at from 80 to 85 per cent of their face value," for Confederate Treasury notes.

Thus, by 1863 the Military Board had proved only that it was a novice in the field of financial adventure. It remained ineffective as an agency for war: a conclusion demonstrated by the absence of any efficient organization for carrying through relatively simple business transactions.

From November, 1863, until April, 1864, Governor Murrah, Comptroller C. R. Johns and Treasurer C. H. Randolph composed this "old Board." An act was passed in December, 1863, recommended by the "old Board," creating the "new Board," of which the Governor was to be *ex officio* president, and the two other mem-

bers were to be appointed by him. On April 12, 1864, Governor Murrah appointed N. B. Pearce and James S. Holman, who continued in office until the surrender of the Trans-Mississippi Department of the Confederate States. This Board sought to finance military expenditures by dealing in cotton, but difficulties involved in these projects caused the "new Board" to turn to the United States indemnity bonds remaining in the state treasury.

The next item in the Report of Pease and Palm concerned the contract that subsequently became the cause of action in *Texas v. White*. The Report reads:[15]

> A contract was made in January, 1865, between the new board and George W. White and John Chiles, by which the board were to give W. & C. one hundred and thirty-five of these bonds with coupons, amounting together to $156,275, and were also to give them an order on Swisher & Co. for seventy-six of the bonds, with coupons attached thereto, in the hands of William Droege. For the $156,275, W. & C. were to deliver to the board in Austin, twenty-five thousand pair of cotton cards at five dollars a pair, and the balance in medicines, at the same profit upon their cost, as there would be on the cards at five dollars a pair. For the other seventy-six bonds and coupons, W. & C. were to pay the board one-half in cotton cards, and one-half in medicines, at the same prices.

On March 12, 1865, the Board delivered the bonds to White and Chiles and at the same time gave an order on Swisher & Company for the seventy-six bonds and coupons in the hands of William Droege. Concerning the latter, on June 12, 1865, George W. White wrote from San Antonio to Board Member James S. Holman that Swisher & Company refused to deliver the seventy-six bonds. White expressed fear that the Union troops would get possession of the contract between White and Chiles and the Military Board, suggesting that Holman withdraw the contract, their security bond, and the recipt of White and Chiles from the Military Board Office. White also suggested that "Holman ought to withdraw from the Treasurer all of the United States bonds, $87,400 of which, or seventy-six bonds and coupons, have been sold to White and

[15] *Id.* at 907.

Chiles." The bonds that *were delivered* to White and Chiles by the Board had not been indorsed by any governor of Texas; as a matter of fact, on January 11, 1862, the Legislature had repealed the Act of 1851 which required the indorsement of the governor in order to render the bonds negotiable.

Pease and Palmer later reported that "there [was] nothing in the office of the board to show that White and Chiles ever delivered any of the cards or medicines under this contract, or that they even made any settlement for the bonds and coupons." On May 30, 1865, White and Chiles had written the Military Board that they had purchased part of the cards and medicines, and had shipped them from Matamoros to the Board at Austin. From the testimony in the case of *Texas v. White* it was disclosed that the articles never reached Austin, but that they were destroyed en route either by border bandits or, as Chiles claimed, by the disbanded soldiers of General Kirby Smith.

Disintegration and Reconstruction

The impact of General Lee's surrender, in April, 1865, placed the Trans-Mississippi Department in a state of shock. The mental and physical lethargy induced by a false sense of internal security gave way to confusion and chaos. Inefficient organization, unstable leadership and political graft provided fertile ground for anarchy. The pressures for desperate measures had been met with turmoil and bewilderment; the agitation of the masses had been met without courage or enterprise. The people were crestfallen and spiritless; the troops were bitter and unruly.

Shock gave way to the pain of reality; the reaction of the people and the troops evinced hopelessness and anxiety. Despite the fervent appeals of some civic and military leaders, the people remained listless, and soldiers deserted by the hundreds. During April and May, 1865, military leaders of the Trans-Mississippi Department stalled for time and more liberal surrender terms. The Union commanders, operating under strict orders, remained

adamant, and asserted that their only authority was to grant the surrender of the Trans-Mississippi Department upon the same terms that were granted to General Lee. After several unsuccessful efforts during the hectic weeks of May, 1865, to obtain better terms, on June 2, 1865, General Kirby Smith formally signed the Canby-Buckner Convention.[16] The situation was chaotic; citizens feared friend and foe; deserting soldiers swept the state looting, pillaging and committing acts of violence. Many fled the state to the comparative safety of Mexico. Any semblance of civil government disappeared; Confederate military control had vanished.

The Military Division of the Southwest, headquarters at New Orleans, was placed under the command of General Philip Sheridan. On June 19, 1865, General Gordon Granger assumed command of the Texas District and issued a proclamation demanding that all moneys belonging to the State be turned over to the military; the Federal authorities were determined to locate the "bonds."

Under the "Presidential Plan" of reconstruction in the South, A. J. Hamilton was appointed Provisional Governor of Texas on June 17, 1865, two days before General Granger assumed military command and five days after George W. White's frantic letter to Board Member Holman. Provisional Governor Hamilton arrived in Galveston on June 21, 1865, and was received in Austin a few days later. Acting under authority of the President, he sought to reduce the confusion and established a machinery of government. Under this government the people of Texas proceeded to make a new constitution.

During his term as Provisional Governor, A. J. Hamilton appointed Ex-Governor Pease and Swante Palm to investigate the Military Board and the status of the treasury. Some reference has been made as to the use of the bonds, but it should be pointed out that both General Granger and Governor Hamilton made personal recoveries. Following the military proclamation, Ex-Board Mem-

[16] Charles W. Ramsdell, *Texas from the Fall of the Confederacy to the Beginning of Reconstruction*, 9 Tex. State Hist. Assn. Q. 204-211 (1908).

ber Holman turned over to an agent of General Granger 106 of the indemnity bonds and 197 coupons ($110,925), and W. L. Robards turned over 762 coupons ($19,050) which he had received from former Board Member Randolph. This money reached the Provisional Government of Texas by way of the Secretary of the Treasury of the United States, who then made advances for its support upon the faith of these bonds. Also, Governor Hamilton, who was the guiding hand in the Report by Pease and Palm, made a recovery of six bonds and twenty coupons.

In addition to these recoveries, Governors Hamilton and Throckmorton sought, by civil suit and negotiation, to recover the bonds from White and Chiles. The first effort was made by Hamilton soon after he came into office. Provisional Governor Hamilton proceeded to re-establish the Texas court system, and the courts were directed to handle the trial of all civil and criminal cases in conformity with the laws of the State passed prior to 1861. An effort was made in the Texas courts to recover bonds from White and Chiles, but Texas courts lacked *in personam* jurisdiction—White having fled to Tennessee and Chiles having fled to New York.

In their briefs to the United States Supreme Court in the case of *Texas v. White*, White and Chiles claimed an attempt to comply with their original contract. The Pease and Palm Report noted a proffered compromise and stated: "White and Chiles have tendered to Governor Hamilton the amount of their indebtedness in state securities, and have demanded of Droege & Co. the eighty bonds stipulated for in their contract." Such a tender was a requirement of their original contract, if contractors White and Chiles should fail to live up to that contract. But this offer was refused by the Governor and the State Treasurer, who declared that the contract was not binding upon the State.

The Consitutional Convention of 1866 evinced decided interest in the bonds. Pease and Palm had been directed by the Governor to inquire about the disposition of the bonds and had recommended methods of recovery. The Convention in 1866, supple-

menting this, passed an ordinance empowering the Governor to take steps to recover the bonds or to compromise with the holders. J. W. Throckmorton had been elected Governor in an election held in accordance with the provisions of the Constitution of 1866. This official began to utilize the law granting him the discretionary power of compromising with holders of the bonds, "if such served the interests of the State." Negotiations were opened between White and Throckmorton concerning the bonds that were in White's possession. An agreement was reached whereby the State received $12,000 in currency and eight bonds which were then on deposit at the United States Treasury, and gained a release from White on his claim to the 76 bonds in England. In the bargain the State released White and Chiles from all obligations. This compromise allowed White to return an uncertain number of the bonds and released him from the obligations of his contract. It cannot be denied that this arrangement provided an aura of legality to the contract made by the Confederate Military Board.

It should be noted that White had quite a number of the bonds in his actual possession at the time of the compromise. From all appearances and from Chiles' explanation, White had swindled Chiles of the bonds in his possession. As soon as he learned of the compromise, in which White used a share of Chiles' bonds, Chiles vigorously protested, contending that he had not been consulted and that he was being deprived of his rights. Chiles complained to the Governor and unsuccessfully sought action in the courts against White.

This compromise did not affect the 51 bonds that were the elusive quest of the State in the case of *Texas v. White*, since these particular bonds had been transferred to third parties by the defendants. Certain authorities have contended that the injunction petition of the State of Texas was sufficiently inclusive to have affected all of the bonds if granted by the court. But the 51 bonds had been transferred to third parties; the transfer, the parties and their interests now require attention. These issues of the Texas Indemnity Stock were the subject-matter of *Texas v. White*.

THE BONDS

What were the physical attributes of these bonds? How were they worded? How could they be recognized? In fact, the bonds were called "Texan Indemnity Stock" and were issued by the Secretary of the Treasury in the sum of $1000 each, bearing issue date of January 1, 1851. The bonds read as follows:

> It is hereby certified that the United States of America are indebted unto the State of Texas or bearer the sum of one thousand dollars, redeemable after the thirty-first day of December, 1864, with interest at five per centum per annum, payable semi-annually on the first days of January and July in each year, at the Treasury of the United States, on presentation and surrender of the proper coupon hereto annexed. This debt is authorized by act of Congress approved September 9th, 1850. It is recorded in the office of the Register of the United States Treasury, and is transferable on delivery. Washington, January 1st, 1851.[17]

Interest coupons were attached, stating that there was "due from the United States to the bearer twenty-five dollars" for a designated six months' interest on a bond specified by number. The coupons were payable to the bearer, and were to be paid on their "surrender."

What were the legal attributes of this indemnity stock? The Report of the Hon. R. W. Tayler, Comptroller of the United States Treasury, dated August 15, 1865, the conclusions of which were approved by Attorney General James Speed, gave careful consideration to the legality of these bonds. Tayler stated:

> In the case of Lardner v. Murray, already referred to (2 Wallace, 118), the Supreme Court of the United States says: ..."That the possession of such paper carried the title with it to the holder. The possession and title are one and inseparable. *The party who takes it before due, for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid as against all the world.* Suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. *That result can be produced only*

[17] PASCHAL'S ANN. DIG. OF TEX. LAWS (2d ed. 1870) 902.

> *by bad faith on his part.* The burden of proof lies on the person who assails the right claimed by the party in possession. The rule may perhaps be said to resolve itself into the question of honesty or dishonesty." . . . "Where there is no fraud there can be no question."[18]

Then making specific reference to the United States bonds awarded to the State of Texas by the Congress of the United States on September 9, 1850, Tayler stated:

> The United States made a contract, which, by the well-known and established laws of the whole country, and indeed by the recognized rules of all civilized countries, as well by its own terms, had the character of negotiability by delivery. That contract declared "that the United States of America are indebted unto the State of Texas or bearer." Primarily it was a contract with the State of Texas, but secondarily and equally with any and everyone who might be the "bearer" of the bond. It was the acknowledgment of the indebtedness to the State of Texas, but equally of indebtedness to the "bearer" and so the United States became bound and obligated to pay the "bearer" the principal of the bond "after the 31st day of December, 1864. . . ." But the concluding part of the bond puts the question beyond doubt: — "It is recorded in the office of the Register of the United States Treasury and is transferable on delivery." Thus, it was explicitly declared and agreed not only that the United States owed the money "to the State of Texas or bearer," but also that the bond should be and was transferable on delivery, so as thereby to become a debt to the bearer, and to vest him with the ownership of the bond. This was the contract made by the United States and accepted by Texas — a contract well defined and recognized by law.[19]

Any treatment of the case of *Texas v. White* demands that attention be given to well-recognized rules of negotiable instruments law. Were the purchasers of these bonds from White and Chiles actually *bona fide* in their transactions? Were they on notice that White and Chiles did not hold title to the bonds? Did White and Chiles have title to the "Texan Indemnity Stock" held by them?

THE ELUSIVE FIFTY-ONE

The doctrine of *bona fide* purchase as it pertains to negotiable

[18] *Ibid.* Italics supplied. This report was a legal history of the Texas Indemnity Bonds.

[19] *Ibid.*

instruments was made applicable by the Supreme Court to the transfers of the bonds by George W. White and John Chiles, defendants. Without becoming involved, at least at this point, in the legal technicalities of "good faith" or "bad faith," the facts presented indicate the bases of the litigants' positions. As early as February, 1862, George W. Paschal, the State's Chief Counsel in the case of *Texas v. White*, had informed Secretary of the Treasury Salmon P. Chase that the indemnity bonds might be utilized for the benefit of the Confederacy, and that the Treasury Department should act accordingly. All evidence tends to substantiate the argument that the Treasury Department acted upon this information to a certain extent and refused payment of the bonds and the interest when the indorsement of the governor was missing. The policies of the United States Treasury Department on this matter were not consistent during the ensuing war years.

During the month of October, 1865, general warnings were issued to the public in the pages of the *New York Herald* and the *New York Tribune* over the signature of Governor A. J. Hamilton and through the efforts of George W. Paschal. The essential portions of the notice appeared on the financial pages of certain other contemporary newspapers. As a matter of fact, White and Chiles admitted that they had seen the article. Had John A. Hardenberg and others seen the notice or notices? John A. Hardenberg, defendant, who had purchased a number of bonds after the war, insisted that his purchases were in good faith without notice. So the manner in which Hardenberg obtained these bonds is of some import. The evidence showed that a fellow Tennessean, one Douglas, appeared in the transfer of 30 bonds to a New York commission merchant named Hennessey. As a speculator Hardenberg was contacted by Hennessey, who consummated the deal. In this transaction Hardenberg was not apprised of the exact source of the bonds, but he was aware of their nature and that the vendor had been loyal to the Confederacy. The speculator made no attempt to ascertain the identity of the Confederate owner, but was satisfied that he had 30 bonds which were of great value. Harden-

berg acquired four additional bonds from McKim, Brothers & Company and C. H. Kimball & Company, New York brokers, through the efforts of C. T. Lewis, a New York lawyer. The speculator professed acquisition in "good faith" in regard to all of the bonds.

Chiles had adopted a more direct approach in disposing of certain bonds in his possession. Bearing out the now known fact that Chiles was not a shrewd businessman, prior to the summer of 1865 he obtained a loan of $5,000 from Birch, Murry & Company upon the security of 12 bonds. The 12 bonds were taken to the United States Treasury by the Birch Company where, after some discussion, four were redeemed ($4,900), and eight remained unredeemed in the Treasury to the credit of the firm. In 1866 Chiles sought another loan from Birch, Murray & Company; as an inducement he offered a letter from Governor Hamilton and the report by Comptroller R. W. Tayler, both of which favored payment of the bonds by the United States Government. By his efforts and inducements Chiles obtained a loan of $4,125 on the strength of the eight bonds then on deposit in the Treasury, but they remained unredeemed.

The State of Texas sought to recover nine additional bonds that had been transferred by White and Chiles. Three bonds, "numbered 4226, 4227, and 4229, in the hands of the defendant, Samuel Wolf," four bonds "numbered 4230, 4231, 4235, and 4236, in the hands of the defendant, George W. Stewart," and two bonds "numbered 4879 and 4880, in the hands of the Branch of the Commercial Bank of Kentucky" were specifically mentioned in the bill of complaint. The bill of complaint filed by the State of Texas went on to name other defendants alleged to be holding the bonds for the aforementioned defendants. Fifty-one bonds, the number specifically sought by the State of Texas, had been carefully traced. The wording of the bill for injunction supports the contention that the State of Texas sought

not only the 51 bonds but others which could not be traced and were in the hands of unknown persons.

To recapitulate, the uncertainty of legality and inconsistency of policy of the United States Treasury Department on redeeming the bonds placed the Department in no little difficulty following the Civil War. But the question remains as to what the Department actually accomplished in the way of solving the problem. The pressure of the holders of the bonds forced Treasury Secretary McCulloch to call upon Comptroller R. W. Tayler for suggestions and recommendations as to the proper course to follow. Tayler recommended payment, the Secretary acquiesced, and the State of Texas vigorously protested. After an unavailing appeal to President Andrew Johnson and additional useless arguments before Comptroller Tayler, the agents of Texas were given notice to bring legal action within one week or the bonds would be redeemed in behalf of the holders. Immediately the necessary legal proceedings were instituted, but the case was dismissed. This decision resulted in payment of many of the outstanding bonds.

For example, the bonds held by Hardenberg were redeemed at this time, but only after Hardenberg and Secretary McCulloch had reached a private agreement. In spite of Tayler's recommendations, McCulloch hesitated to pay the bonds because the possibility remained that he could be sued by the State of Texas for restitution and damages. An agent of Hardenberg, Congressman S. S. Cox, a New York attorney, suggested that the bonds be redeemed, and in turn Hardenberg would deposit certain United States securities in a bank making Secretary McCulloch trustee. These securities would revert to McCulloch in the event the Court should decide against the validity of Hardenberg's title to the Texas bonds, and in case the United States Treasury should be held accountable for the amount paid in redemption. The legal position of Hardenberg and McCulloch was clarified in the case of *Texas v. Hardenberg*.[20]

[20] 10 Wall. 68 (1869).

THE MERITS OF THE CASE

The relief sought in equity by "The State of Texas, one of the United States of America" was an injunction against certain defendants to prevent them from setting up a claim to or obtaining payment of the Texas Indemnity Stock or bonds.[21] In addition, plaintiff desired a restoration of these bonds and with particularity demanded the return of about 51 of the bonds which plaintiff knew to be in possession of the defendants. On April 15, 1869, in a majority opinion written by Chief Justice Chase, the Supreme Court of the United States decided that George W. Paschal had authority to bring the action in the name of the State of Texas and that the Court had jurisdiction to hear the case. The issue involving the original jurisdiction of the Court produced the judicial language that became embodied in the scriptures of constitutional law. This judicial resolution of the "fundamental question of the status of the Southern States during the war" induced Chief Justice Chase to reflect that this opinion was "his most important work on the bench."[22] But having resolved this constitutional problem, the Court proceeded to consider the propriety of the relief prayed for by the plaintiff—the merits of the case.

This aspect of the majority opinion of Chief Justice Chase, in the light of earlier reports and subsequent decisions, necessitates analytical and thoughtful examination. Was the Chief Justice standing on firm ground *in re* certain judicial precepts? Was the Chief Justice swayed by the importance of the constitutional problem involved to the extent of minimizing other aspects of the case? If so, did this minimization result in damaging misconceptions and erroneous statements of law? These questions must be answered in order to grasp the full meaning of the case on its merits. The

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[21] 7 Wall. 700, 717 (1868). The defendants named in the bill of complaint were George W. White, John Chiles, John A. Hardenberg, Samuel Wolf, George W. Stewart, the Branch of the Commercial Bank of Kentucky, Weston F. Birch, Byron Murray, Jr., and ——— Shaw.

[22] ALBERT BUSHNELL HART, SALMON PORTLAND CHASE (Houghton, Mifflin & Co., New York, 1899) 378.

key to the approach lies in a careful evaluation of the statements of the Chief Justice, *i. e.*, the majority opinion.

The Act of 1851 and the Act of 1862 of the Texas Legislature, previously referred to, provided the foundation in the majority's judicial masonry. The opinion stated:[23]

> That the bonds were the property of the State of Texas on the 11th of January, 1862, when the Act Prohibiting Alienation Without the Indorsement of the Governor, was repealed, admits of no question, and is not denied. They came into her possession and ownership through public acts of the General Government and of the State, which gave notice to all the world of the transaction consummated by them. And we think it clear that, if a State, by a public act of her legislature, imposes restrictions upon the alienation of her property, every person who takes a transfer of such property must be held affected by notice of them. Alienation in disregard of such restrictions can convey no title to the alienee.
>
> In this case, however, it is said, that the restriction imposed by the Act of 1851 was repealed by the Act of 1862. And this is true, if the Act of 1862 can be regarded as valid. But was it valid?

The more important question would seem to be: was the Act of 1851 valid? According to the Court, the State of Texas, when it received the bonds from the Federal Government, had the right and exercised it (in the Act of 1851) of imposing certain restrictions upon their transfer and alienation which the holders must accept and abide by on receipt. Tayler, in his Report, had denied that the State had the power to impose such restrictions, and on the doubtful assumption that the State did possess such power the Legislature had subsequently repealed the Act of 1851 by implication prior to secession.

Certain paragraphs of Tayler's Report, dated August 15, 1865, and approved by Attorney General Speed, deserve mention at this point. Comptroller Tayler argued:

> It is not within the power of one party to a contract to change its terms or character, though he should indorse such change upon it; and with stronger reason must it be held that no such change can be made by the adoption of something which does not appear in the con-

[23] 7 Wall. at 732.

> tract. To make a change, a state has no more power than an individual. The exercise of such power is expressly prohibited in the Constitution of the United States, art. 1, Sec. 9.—"No State shall . . . pass any . . . law impairing the obligation of contracts." Judge Story, in his commentaries on the Constitution, declares that a law which, in any respect, assumes to change or alter the terms of a contract, is within this constitutional prohibition, and is therefore null and void; and this is the substance of numerous decisions of the Supreme Court of the United States. I conclude therefore, that the act of the legislature of Texas had no legal effect upon the character of the bonds, and in nowise impaired or restricted their negotiability.[24]

The Report then gave further consideration to the Act of 1851 and sought to prepare adequately for any possibility that legal reasoning could develop. Tayler pointed out that this Act of the Texas Legislature, which already had been shown to be null and void, might be construed to be *directory* upon the officers of the State. But this construction "would not defeat the title of any honest holder, who had purchased *without actual notice of its terms*, and without knowledge of the fact, if such were the fact, that the bonds had been put in circulation in violation of the rights of the state." Subsequent legislation had borne out the contention that the proviso in the Act of 1851 was merely "temporary in character and designed to restrain the state officers until the legislature should authorize a sale." Tayler could hardly have made the explanation more clear by stating that this legislation was to be a brake upon any unrestrained enthusiasm that the state emissary might have had in regard to the bonds on his return trip to Austin. Such a proviso was protection against loss, or theft by other state officials—the reader being reminded that these were bearer bonds.

Following an uneventful trip from Washington, the bonds awaited disposal by law. The Legislature of the State of Texas began the process of appropriating these bonds on January 31, 1852. On this date the first appropriation, $2,000,000 of the bonds, was made, for the purpose of paying certain parts of the debt of the late Republic of Texas. Under a section of this act "The Comp-

[24] PASCHAL'S ANN. DIG. OF TEX. LAWS (2d ed. 1870) 902.

troller of Public Accounts of the State of Texas" was authorized

> to transfer a sufficient amount of said stock, when the transfer shall be necessary, by simple indorsement, attested by his seal of office, to be countersigned by the Treasurer of the State, which transfer shall divest the State of Texas of all interest in such bonds or stock, and invest the same in the holder thereof.

Note that the Act of December 16, 1851, was in effect repealed by this new provision; even the Comptroller's indorsement was not necessary to effect a proper transfer of the bonds. The main purpose of this indorsement was to divest the State of property in the bonds—an effect established by simple sale and delivery. Subsequent legislation concerning the "Texan Indemnity Stock" failed to disclose a single reference to the governor's indorsement. Tayler stated:

> I have thus given a general view and abstract of all the state legislation on the subject of these bonds, commencing with the act of December 16th, 1851, and closing with that of February 11th, 1860, which makes provision for the disposal of the last of the bonds remaining in the treasury to the credit of the general account, and the acts passed subsequently to December 16th, 1851, thus examined, provided for the sale or disposal of the whole five million. Each of these acts contained within itself, or by reference to some other of them, full and adequate authority for the sale or disposal of bonds, neither referred to the Act of December 16th, 1851, nor did either contemplate an indorsement of the bonds by the Governor. And if a party contemplating purchase of bonds from the state officers were at all bound to inquire into other authority to make the sale, he was not bound to look farther than the act conferring it.
>
> And I take it to be a well-settled rule of law, that whatever confers authority to sell or dispose of personal property or securities, also confers authority to transfer the title without special words to that effect.[26]

The report of R. W. Tayler suggests that the question propounded by the Chief Justice concerning the validity of the Act of 1862 was, in a sense, unnecessary. If the assertions of Tayler have sound basis, the Act of 1862 by the Confederate legislature was

[25] *Id.* at 903.

[26] *Ibid.*

of no avail whatsoever. But the Chief Justice continued to probe this avenue of legal reasoning with the declaration that the Act of 1862 was invalid inasmuch as the Legislature was acting as a government in arms against the United States. The Court stated:

> And we cannot shut our eyes to the evidence which proves that the act of repeal was intended to aid rebellion by facilitating the transfer of the bonds. It was supposed, doubtless, that negotiation of them would be less difficult if they bore upon their face no direct evidence of having come from the possession of any insurgent State government. We can give no effect, therefore, to this repealing act.[27]

Chief Justice Chase cited no authority for the arguments advanced in his majority opinion on this point. The report of the Comptroller of the Treasury cited ample authority to substantiate his position.[28] The Supreme Court of the United States in a later case arising out of the Texas bonds gave credence to Tayler's opinion. In *Texas v. The National Bank of Washington* Mr. Justice Miller stated:

> It is true that in the first of these cases the eminent judge who delivered the opinion, in addition to deciding the bonds were overdue when delivered to White and Chiles, and for that reason subject to an inquiry as to the manner in which they had obtained possession of them, gave an additional reason why defendants could not hold them as bona fide purchasers, that they had not been indorsed by the governor as was required by the Statute of the State of Texas.... All of this, however, was unnecessary to the decision of that case, and the soundness of the proposition may be doubted.[29]

In 1884, Mr. Justice Matthews, in the case of *Morgan v. United States*,[30] laboriously tracing the history of *Texas v. White*, specifically overruled the latter on the issue as to whether an owner could limit the negotiability of bearer bonds by an act of legislation. The Court decided:

> It is apparent that the original decision of the Court in reference to the Texas indemnity bonds in Texas v. White, 7 Wall. 700, has been questioned and limited in important particulars in the subse-

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[27] 7 Wall. at 734.

[28] PASCHAL'S ANN. DIG. OF TEX. LAWS (2d ed. 1870) 902.

[29] 20 Wall. 72, 83 (1873).

[30] 113 U. S. 476 (1884).

quent cases involving the same questions. The position there taken that the Legislature of Texas, while the State was owner of the bonds, could limit their negotiability by an Act of legislation, of which all subsequent purchasers were charged with notice, although the bonds on their face were payable to bearer, must be regarded as overruled.[31]

That the Court in *Texas v. White* was in error on this particular point is a proposition not now to be doubted. If the State had not been in rebellion, and the bonds had been transmitted under legal contract before maturity, the title most assuredly would have been in the transferees notwithstanding the Act of 1851.

To the argument that the defendants were "innocent holders, without notice, and entitled to protection as such under the rules which apply to securities which pass by delivery" the doctrine of *Murray v. Lardner*[32] was suggested. Tayler, in his Report, quoted directly from that case.[33]

The Court said that the State of Texas had successfully sustained the burden of showing the lack of good faith of defendant holders of the bonds. As a matter of fact, the State of Texas could have sustained the burden, asserted Chief Justice Chase, by "no other proof than the legislative acts of Texas." The latter contention has been refuted, but what of the statement that the State of Texas had proved that the third party purchasers lacked "good faith?"

The opinion sways through a maze of technicalities, and seeks to weave its way out of difficulty in a very negative manner. The Court grasped for firm ground when it asked:[34] When did the bonds become matured obligations? When were they past due? On their face they were "redeemable after the thirty-first day of December, 1864." Were they payable on that date? Chief Justice Chase continued:

In strictness, it is true they were not payable on the day when they became redeemable; but the known usage of the United States —

[31] 113 U. S. 476, 496 (1884).
[32] 2 Wall. 118 (1864).
[33] *Supra* at note 18.
[34] 7 Wall. at 735.

> to pay all bonds as soon as the right of payment accrues, except where a distinction between redeemability and payability is made by law and shown on the face of the bonds — requires the application of the rule respecting overdue obligations, to bonds of the United States which have become redeemable, and in respect to which no such distinction has been made.[35]

This statement leaves no doubt how the Court reasoned. Negotiable government securities redeemable at the Government's pleasure after a certain date, no date of payment being fixed, are overdue and so nonnegotiable after the day on which they first become redeemable. Five years later in the case of *Vermelye v. Adams Express Co.*[36] Mr. Justice Miller, discussing the case of *Texas v. White*, stated: "It may admit of grave doubt whether such bonds, redeemable but not payable at a certain day, except at the option of the Government, do become overdue in the sense of being dishonored if not paid or redeemed on that day." There remained no doubt in the mind of Mr. Justice Matthews in the *Morgan* case. He declared:

> And the further position that negotiable government securities, redeemable at the pleasure of the Government after a specified day but in which no date is fixed for final payment, cease to be negotiable as overdue after the day named when they first become redeemable, must be regarded as limited to cases where the title of the purchaser is acquired with notice of the defect of title, or under circumstances which discredit the instrument, such as would affect the title to negotiate paper payable on demand, when purchased after an unreasonable length of time from the date of issue.[37]

What "notice" was available to the third party purchasers? The Act of 1851 was set up as a guide to determine whether or not the purchasers had notice of the tainted nature of the bonds distributed by White and Chiles. This foundation was undermined within a decade. The Court had reasoned that the defendants had notice when the Treasury Department refused payment on the unindorsed bonds. But as a result of the very Report which ques-

[35] *Id.* at 735.
[36] 21 Wall. 142 (1873).
[37] 113 U. S. at 496 (1884).

tioned the legality of the Act of 1851, many of the outstanding bonds had been paid by the Treasury. This inconsistent policy was noted, but the reason behind it was not incorporated into the opinion. Thus, the Treasury Department was well within the boundaries of the law of negotiable instruments, while the Court was skating on thin ice in order to implement a theory.

But, assuming that the Act of 1851 was not necessary as a guide to determine the good faith of third party purchasers, had the State of Texas sustained the burden of showing *dishonesty* on their part? The rule in *Murray v. Lardner* required just that, and the Court cited the *Lardner* case as their authority on the question of "good faith" or "bad faith." If the *overdue* character of the bonds was to be relied upon as evidence of "bad faith," then *Vermelye v. Adams Express Co.* and *Morgan v. United States* have undermined the opinion on that particular point. The briefs of the third party purchasers abound with allegations and documents denying positive dishonesty, while the briefs of the State of Texas cite the Act of 1851 and the Act of 1862, without affirmatively showing "bad faith" on the part of the purchasers.

True, the vendors (White and Chiles) did not have right or title in these bonds. Why? Because the bonds had been delivered to White and Chiles in consideration for an illegal contract. But did that mean the third party purchasers had no right or title in these bonds? An answer in the negative is demanded by the law of negotiable instruments. At the very least the Court should have given greater care and effort to this legal question. But, without further ado, the Court decided:

> It is impossible, upon this evidence, to hold the defendants protected by absence of notice of the want of title in White and Chiles. As these persons acquired no right to payment of these bonds as against the State, purchasers could acquire none through them.[38]

Mr. Justice Grier wrote a dissenting opinion in which Mr. Justices Swayne and Miller concurred as to the capacity of the State

[38] 7 Wall. at 736.

of Texas to maintain an original suit in the Supreme Court.[39] But on the merits of the case Mr. Justice Grier became the lone dissenter, with Justices Swayne and Miller agreeing with the majority. Mr. Justice Grier, without a careful evaluation of the issues, declared the purchasers (Hardenberg was singled out by name) to be *bona fide* and in effect holders in due course entitled to the bonds as against Texas.

THE DECREE

The Supreme Court of the United States decreed that the contract between the Military Board and White and Chiles was null and void, enjoined all participants from asserting a claim under it, and declared the State of Texas was entitled to receive into its possession all of the bonds and coupons mentioned in the contract.[40] Each of the defendants was enjoined from ever asserting any right, title, or claim to the 211 bonds specifically mentioned in the contract; and the State of Texas was held entitled to restitution of the bonds and coupons and proceeds that had come into the defendants' hands. The decree specifically enumerated the number of bonds and coupons for which each defendant was to be held accountable. Certain of the defendants had redeemed a number of bonds at the United States Treasury prior to this cause. The Court reserved to a later date an opinion on the effect of this redemption. Subsequently, other litigation arising from *Texas v. White* reached the Supreme Court.[41]

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[39] *Id.* at 737.

[40] *Id.* at 741.

[41] Texas v. Hardenberg, 10 Wall. 68 (1869); Texas v. Chiles, 10 Wall. 127 (1869); *In re* Paschal, 10 Wall. 483 (1869); Huntington v. Texas, 16 Wall. 402 (1872); Texas v. The National Bank of Washington, 20 Wall. 72 (1873); *In re* Chiles, 22 Wall. 157 (1874).

CONCLUSION

Texas v. White is a landmark case within the realm of American Constitutional Law. As a precedent its conclusions are not to be denied. The importance of the decision, measured in historical, political or legal spheres, is incalculable. The decision on the jurisdictional issue stands unchallenged by eminent historians, political scientists and authorities on constitutional law. Without doubt the majority opinion of Chief Justice Chase stands as "his most important work on the bench."

The very fact that Chief Justice Chase considered this opinion "his most important work on the bench" provides the background for this paper. The decision on the jurisdictional issue remains unchallenged in logic or in law, but this writer asserts that the importance of this issue had a disturbing influence on the merits of the case. The Chief Justice was swayed by the importance of the constitutional problem involved to the extent of minimizing other aspects of the case. This minimization resulted in damaging misconceptions and erroneous statements of law. These assertions have been documented in the preceding pages.

These assertions do not lessen the pre-eminence of the case in the field of constitutional law. They have raised and answered the question of whether or not the parties involved were granted the full benefits of equity in the Supreme Court. It is believed that the Supreme Court of the United States, as a court of chancery, misused its equity powers in the case of *Texas v. White.*

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