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THE ARKANSAS SUPREME COURT AND THE AFTERMATH OF THE CIVIL WAR

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The Civil War settled two legal issues that had loomed over the people of Arkansas since before the state's admission to the Union in 1836. The war ended slavery in the state. On January 1, 1863, President Abraham Lincoln issued an executive proclamation freeing slaves in Arkansas and the other ten Confederate states.[1] Although federal authority in January of 1863 extended only to the northern half of the state, where there were relatively few slaves, any doubt regarding the legality of slavery was resolved in March of 1864 by the adoption of the Arkansas Constitution of 1864, which expressly abolished slavery throughout the state.[2]

The second great legal issue that was settled by the war was the state's relationship to the national government that it had joined in 1836. Throughout the first half of the nineteenth century state's rights advocates had asserted that the United States was formed by the states, not by individual citizens of the states. From this premise they had argued that each state, acting through it citizens, retained the right to sever its relationship with the Union. The people of Arkansas attempted to exercise this right in May of 1861 when a convention of specially elected delegates voted overwhelmingly in favor of secession.[3] The defeat of the Confederacy clearly established that a majority of a state's citizens lacked the power to withdraw that state from the United States.

Although the Civil War settled the questions of slavery and secession, it created new, albeit more prosaic, legal questions for Arkansans. Among the most troublesome were four questions that repeatedly reached the Supreme Court of Arkansas during the years immediately following the Civil War:

1. What was the legal effect of orders and decisions rendered by the courts of the state during the period that the state was a part of the Confederacy?

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1. *See* Exec. Proclamation No. 17 (1863), *reprinted in* 12 Stat. 1268 (1863).

2. *See* ARK. CONST. of 1864, art. V.

3. *See* JOURNAL OF BOTH SESSIONS, THE CONVENTION OF THE STATE OF ARKANSAS, WHICH WERE BEGUN AND HELD IN THE CAPITOL, IN THE CITY OF LITTLE ROCK 121-24 (1861) [hereinafter JOURNAL OF BOTH SESSIONS].

2. What were the rights of parties to a contract calling for payment in Confederate dollars, now a valueless currency?

3. Did the war toll the statute of limitations on enforcement of contracts and collection of debts?

4. Was a promise to pay for slaves legally enforceable after emancipation?

The court was forced to confront these politically charged issues during one of the most turbulent periods in Arkansas history. The political differences that led to the Civil War did not disappear with the defeat of the Confederacy. They survived and continued to drive political debate during the postwar years. Between 1865 and 1874, the state operated under three different constitutions, and there were three wholesale replacements of the justices who served on the supreme court. Because the postwar justices came from very different backgrounds, this political instability had an effect on the deliberations of the supreme court. Consequently, a discussion of the court's response to the legal issues produced by the war must be prefaced by brief portraits of the justices who served on the court during the decade following the war.

I. THE SUPREME COURT DURING THE POSTBELLUM PERIOD

By the fall of 1863 Union forces had conquered the northern half of Arkansas, including the state capital at Little Rock. In September of 1863 the Confederate state government retreated to the town of Washington in southwest Arkansas, where a government-in-exile managed to function for the final twenty months of the war. The Confederate state supreme court never addressed the legal questions produced by the defeat of the Confederacy because it passed out of existence with that defeat.

A. The Unionist Supreme Court of 1864-66

In early 1864 Arkansans loyal to the United States government met in Little Rock and drafted a new state constitution which voters in Union-occupied Arkansas approved on March 14, 1864.[4] At the same election in which they approved the new constitution, voters elected a complete slate of state officials including three justices of the supreme

4. *See* ARK. CONST. of 1864. *See also* JOURNAL OF THE CONVENTION OF DELEGATES OF THE PEOPLE OF ARKANSAS ASSEMBLED AT THE CAPITOL, JANUARY 4, 1864 (1870) [hereinafter JOURNAL OF THE 1864 CONSTITUTIONAL CONVENTION].

court.[5] When the Confederate state government collapsed in the spring of 1865, the Unionist government became the state's sole government. The three Unionist justices elected in 1864 under the Constitution of 1864 never considered the legal issues produced by the abolition of slavery or the repudiation of secession. Although the justices took office in June of 1864, they did not hear their first appeal until the December 1865 term, almost eighteen months after the court's formation and seven months after the war's end. Ironically, the very first opinion issued by the Unionist supreme court led to the demise of the Unionist state government that included the court.

The case, *Rison v. Farr*,[6] involved the qualifications of electors. The Constitution of 1864 provided that all white males who were at least 21 years of age and had been citizens of the state for six months were entitled to vote in an election.[7] On May 31, 1864, the newly elected Unionist General Assembly passed a statute imposing an additional requirement. Each prospective voter had to take an oath that he had not voluntarily borne arms against the United States or the state of Arkansas, or aided the Confederacy after April 18, 1864.[8] Since the Civil War continued for almost a year after April 18, 1864, the effect of the legislation was to disenfranchise many diehard supporters of the Confederacy. In *Rison v. Farr* the Unionist supreme court struck down the test oath as an unconstitutional legislative attempt to alter the voter qualifications prescribed by the constitution.

B. The Conservative Supreme Court of 1866-67

The court's invalidation of the test oath made it possible for former Confederates to recapture control of state government at the August 1866 general election. Neither side used traditional party labels during that election. To avoid identification with the prewar Democratic Party, ex-Confederates ran on a "Conservative" ticket. Supporters of the incumbent government preferred to use the ballot label "Unionist" since the national Republican Party was still unpopular with many Arkansas voters.[9] Conservatives swept the 1866 election. They won all contested state offices, including the three positions on the supreme court, and

5. *See* ARK. CONST. of 1864, sched., § 7.
6. 24 Ark. 161 (December Term 1865).
7. *See* ARK. CONST. of 1864, art. IV, § 2.
8. *See* Act 17 of the 15th Ark. General Assembly, 1864-65 Ark. Acts 48, § 6.
9. *See* THOMAS S. STAPLES, RECONSTRUCTION IN ARKANSAS, 1862-1874, at 101 (Peter Smith ed. 1964) (1923).

gained control of both houses of the General Assembly. The only Unionist officeholders to survive were those state officers, including Governor Isaac Murphy, whose terms were not up until 1868.[10]

The three justices elected to the supreme court in August of 1866 had impeccable Confederate credentials. The new chief justice was David W. Walker, who five years earlier had presided over the convention that voted to withdraw Arkansas from the Union. Walker was born in Kentucky in 1806 and came to Fayetteville about 1830.[11] Within a very few years he had achieved sufficient prominence to be selected a delegate to the convention that drafted the Constitution of 1836, and four years later he was elected to represent Washington County in the state senate.[12] He was the Whig candidate for Congress in 1844 but was easily defeated by Archibald Yell, the state's popular governor who resigned to run for the seat.[13] Walker served as associate justice of the supreme court from 1849 to 1855[14] but was back in private practice in Fayetteville at the time of his election to the 1861 convention. Like many Arkansas Whigs Walker was a reluctant secessionist, but he ably served the Confederate cause once Arkansas left the Union. In 1863 he was commissioned a colonel in the Confederate Army and appointed to the state Military Court,[15] where there were unconfirmed reports that he ordered the execution of Confederate deserters and mutinous conscripts.[16] Due to his substantial wealth, Walker was ineligible for the general amnesty proclaimed by President Andrew Johnson in May of 1865,[17] but with the endorsement of Unionist Governor Isaac Murphy as well as the United States Attorney for the Eastern District of Arkansas, Walker received an individual pardon from

10. *See id.* at 109. *See also* ARK. GAZETTE, Sept. 1, 1866, at 1 (weekly ed.).

11. *See* 2 PUBLICATIONS OF THE ARK. HIST. ASSOC. 264-65 (1908).

12. *See* ARK. SECRETARY OF STATE, HISTORICAL REPORT OF THE SECRETARY OF STATE 328 (1986).

13. *See id.* at 213.

14. *See id.* at 451.

15. *See* ARK. GAZETTE, July 4, 1863, at 1.

16. *See* MICHAEL B. DOUGAN, CONFEDERATE ARKANSAS—THE PEOPLE AND POLICIES OF A FRONTIER STATE IN WARTIME 125 (1976).

17. Johnson's general amnesty proclamation excepted all persons who had voluntarily participated in the rebellion and whose taxable property exceeded $20,000. *See* Exec. Proclamation No. 37, § 13 (1865), *reprinted in* 13 Stat. 758 (1863-65). According to the 1850 census, Walker owned real property valued at $27,322 and 20 slaves. *See* Robert B. Walz, *Arkansas Slaveholdings and Slaveholders in 1850*, 12 ARK. HIST. Q. 38 (1953).

the president.[18] Shortly thereafter he completed his rehabilitation by winning election to the state's top judicial post.

John J. Clendenin also won election to the supreme court in August of 1866. Clendenin was born in Harrisburg, Pennsylvania, in 1812. He came to Arkansas in 1836, the year it achieved statehood, and became private secretary to James S. Conway, the state's first governor. In 1840 the General Assembly elected Clendenin judge of the fifth circuit court (Hot Spring, Monroe, Pulaski, Saline, and White counties)[19] and re-elected him to another four year term in 1844, but he resigned in 1846, midway through his second term, to take a post as quartermaster with the United States Army. By 1848 he had quit his army post and was back in Little Rock practicing law with his brother-in-law, George C. Watkins. In 1849 he replaced Watkins as state's attorney for the fifth circuit, which under the Constitution of 1836 made him ex-officio the attorney general of the state.[20] In 1854 he returned to the bench as judge of the fifth circuit court, a post which he still held when Federal troops marched into Little Rock in September of 1863.[21] Clendenin apparently followed the Confederate state government to the temporary state capital in southwest Arkansas because in May of 1865 Confederate Governor Harris Flanagin sent Clendenin to Little Rock in an unsuccessful attempt to negotiate peace terms with the commander of Union forces in the state.[22] Clendenin was ineligible for President Johnson's general amnesty because of a pending federal lawsuit to confiscate his property, but like Walker, he received an individual pardon from President Johnson.[23]

The third justice elected to the supreme court in August of 1866 was Freeman W. Compton, who until the collapse of the Confederate state government in the spring of 1865 had served on the Confederate state supreme court. Compton was born in North Carolina in 1824 and practiced law for several years in Greeneville, Tennessee, before

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18. *See* Richard B. McCaslin, *Reconstructing a Frontier Oligarchy: Andrew Johnson's Amnesty Proclamation and Arkansas*, 49 ARK. HIST. Q. 323-24 (1990).

19. *See* Act of Dec. 14, 1838, 1838-39 Ark. Acts 4.

20. *See* ARK. CONST. of 1836, art. VI, § 13.

21. Except as otherwise indicated, the biographical information regarding Clendenin is taken from 1 JOHN HALLUM, BIOGRAPHICAL AND PICTORIAL HISTORY OF ARKANSAS 274-75 (1887). *See also Death of Judge Clendenin*, ARK. GAZETTE, July 6, 1874, at 1.

22. Clendenin's mission and the Federal response are described in a May 27, 1865 letter from Maj. Gen. J.J. Reynolds to the Adjutant General of the U.S. Army, *reprinted in* 48 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, No. I, pt. II at 626 (1896) [hereinafter OFFICIAL RECORDS].

23. *See* McCaslin, *supra* note 18, at 322 n.26.

moving to Arkansas in 1849. He purchased a plantation near Princeton in Dallas County and became a successful planter and lawyer.[24] In February of 1859 the General Assembly elected Compton justice of the supreme court, and he served in that position throughout the war years.[25]

The Conservative supreme court met only three terms—December of 1866, June of 1867, and December of 1867. It ceased to exist as a result of the Reconstruction Acts passed by Congress in 1867. These three acts placed Arkansas under military rule and conditioned the state's readmission to the Union on voter approval of a new constitution acceptable to Congress.[26] In November of 1867 Arkansas voters elected delegates to a constitutional convention which convened in Little Rock in early 1868 and drafted a new constitution.[27] The schedule to the proposed constitution provided for the offices created by the document to be filled at the same election.[28] By now three groups—recent immigrants from the north, native Unionists, and newly freed slaves—had coalesced to form the Arkansas Republican Party, and the party nominated a complete slate of candidates for the offices created by the proposed constitution. Congressional franchise restrictions barred or discouraged voting by many former Confederates. Those opponents of Congressional reconstruction who were eligible to vote did not nominate candidates for office and instead focused their efforts on defeating the proposed constitution.[29] At an election held on March 13, 1868, voters approved the proposed constitution by a narrow margin.[30]

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24. *See* HALLUM, *supra* note 21, at 318-20; 2 FAY HEMPSTEAD, HISTORICAL REVIEW OF ARKANSAS 455-56 (1911); *Judge Compton*, ARK. GAZETTE, May 30, 1893, at 3.

25. *See* ARK. SENATE JOURNAL at 498 (1859).

26. *See* Act of July 19, 1867, 15 Stat. 14 (1869); Act of March 23, 1867, 15 Stat. 2 (1869); Act of March 2, 1867, 14 Stat. 428 (1868).

27. *See* DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK, JANUARY 7, 1868, UNDER THE PROVISIONS OF THE ACT OF CONGRESS OF MARCH 2ND, 1867, AND THE ACTS OF MARCH 23RD AND JULY 19TH, SUPPLEMENTARY THERETO, TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 27 (Little Rock, 1868) [hereinafter DEBATES AND PROCEEDINGS OF 1868 CONSTITUTIONAL CONVENTION]. *See also* Cal Ledbetter, Jr., *The Constitution of 1868: Conqueror's Constitution or Constitutional Continuity*, 44 ARK. HIST. Q. 16 (1985).

28. *See* ARK. CONST. of 1868, Schedule, § 1.

29. *See Don't Vote for State Officers*, ARK. GAZETTE, Feb. 18, 1868, at 2.

30. The military governor of Arkansas declared the proposed constitution adopted by a vote of 27,913 to 26,597. *See* Letter from Major General Alvan C. Gillem, Commander of Fourth Military District, to General U.S. Grant, Commander of Armies of the United States (Apr. 23, 1868), *reprinted in* DEBATES AND PROCEEDINGS OF 1868 CONSTITUTIONAL CONVENTION, *supra* note 27, at 804-09.

C. The Republican Supreme Court of 1868-1874

The Constitution of 1868 increased the number of supreme court justices from three to five.[31] It also provided for the popular election of the four associate justice positions,[32] and since the Republican nominees were the only candidates on the ballot, they won election to these four positions. Under the new constitution the governor appointed the chief justice,[33] and newly elected Republican Governor Powell Clayton named a member of his party to head the new court. Consequently, on July 1, 1868, five Republican justices replaced three Conservative justices on the state's highest court. The backgrounds of the five new justices reflected the mix of newcomers and native Unionists who formed the Arkansas Republican Party.[34]

The chief justice was William W. Wilshire, who was born in Illinois in 1830. Following an unsuccessful stint in the California gold fields in the early 1850s, he returned to Illinois in 1855 and became involved in coal mining and the mercantile business. He began reading law under the tutelage of a local attorney in 1859, but the outbreak of the Civil War interrupted his legal education. In September of 1862 he recruited a company of infantry that eventually became a part of the 126th Illinois Infantry Regiment. His regiment was a part of the Federal army that captured Little Rock in the fall of 1863. He remained with Union occupation forces in Little Rock until July of 1864 when he resigned his commission due to his wife's ill health. After hostilities ended, he returned to Little Rock and resumed the study of law. He was admitted to practice in 1866, only two years before he assumed the position of chief justice.[35]

Justice Thomas M. Bowen was a native of Iowa who passed the bar at age eighteen and briefly served in the Iowa legislature before moving to Kansas in 1862. After helping recruit the 13th Kansas Infantry regiment, he was commissioned a colonel and named commander of that

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31. *See* ARK. CONST. of 1868, art. VII, § 3.

32. *See id.*

33. *See id.*

34. Despite overwhelming black support of the Republican Party, no African-Americans were nominated for statewide positions in the 1868 election.

35. The biographical information on Wilshire is taken from BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, SEN. DOC. NO. 100-34, at 2064 (1989); 2 FAY HEMPSTEAD, HISTORICAL REVIEW OF ARKANSAS 718 (1911); 13 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 483 (1906); 1 JOHN HALLUM, BIOGRAPHICAL AND PICTORIAL HISTORY OF ARKANSAS 453 (1887); and *Hon. W.W. Wilshire*, ARK. GAZETTE, Aug. 21, 1888, at 4.

regiment. His unit joined the Union army that invaded northwest Arkansas late in 1862 and participated in the battles at Cane Hill and Prairie Grove. Bowen spent most of the remaining years of the war on garrison duty in northwest Arkansas, although he did take an extended leave to attend the 1864 Republican convention that re-nominated President Abraham Lincoln. He also divorced his wife back in Kansas and married the daughter of a prominent Van Buren physician. After the war Bowen farmed in Crawford County, whose voters elected him a delegate to the 1868 constitutional convention. Upon his arrival in Little Rock the delegates selected him president of the convention.[36]

A second constitutional convention delegate who moved to the supreme court was John M. McClure. Like Bowen, McClure was a recent arrival in the state. He was born in Ohio in 1834. After studying law at his father's insistence, he was admitted to the bar in 1855 and for the next six years practiced law in Kalida, Ohio. He entered the Union Army in September of 1861 as a first lieutenant with the 57th Ohio Infantry regiment and served with that unit throughout the war. During most of the war, McClure's regiment was stationed east of the Mississippi River, although it did participate in the successful siege of Arkansas Post in 1863. McClure moved with his family to Arkansas in July of 1865. He rented a confiscated plantation at Swan Lake in Arkansas County and attempted unsuccessfully to raise cotton.[37] He also worked for a time as an agent of the Freedman's Bureau, the entity set up by Congress to assist newly freed slaves.[38] After passage of the Reconstruction Acts, McClure successfully sought election as a delegate from Arkansas County to the 1868 constitutional convention.[39]

The other two elected members of the court came from the native Unionist wing of the Republican Party. Justice Lafayette Gregg was born in Alabama in 1825, but his family moved to Washington County

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36. Most of the biographical information regarding Bowen is taken from Gary Craven Gray, *Thomas Meade Bowen: The Early Years*, 1835-1875 (1973) (unpublished M.A. thesis, University of Denver) (on file at University of Denver). Shorter biographical sketches of Bowen appear in 1 DICTIONARY OF AMERICAN BIOGRAPHY 506 (1928) (reprint 1964); 12 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 560 (1904).

37. *See* Orval T. Driggs, Jr., *The Issues of the Powell Clayton Regime, 1868-1871*, 8 ARK. HIST. Q. 1, 5 (1949).

38. *See* Cortez A.M. Ewing, *Arkansas Reconstruction Impeachments*, 13 ARK. HIST. Q. 137, 149 (1954).

39. Except as otherwise indicated, the biographical material on McClure is taken from C.R. STEVENSON, ARKANSAS TERRITORY-STATE AND ITS HIGHEST COURTS 71 (1946); 19 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 224 (1926); THE ENCYCLOPEDIA OF THE NEW WEST 190-91 (1881); *Judge McClure Called by Death*, ARK. GAZETTE, July 8, 1915, at 10.

in northwest Arkansas when he was ten. He represented Washington County in the lower house of the Arkansas legislature for one term in 1854 and served as prosecuting attorney of the Fourth Judicial District from 1856 until the start of the Civil War.[40] Throughout the secession crisis and subsequent hostilities, Gregg remained loyal to the Union.[41] He assisted in recruiting and later commanded the Fourth Arkansas Cavalry Volunteers.[42] In December of 1866 he presided over a convention of Unionists from counties in northwest Arkansas who gathered at Fort Smith to pass resolutions supporting the reconstruction policies of Congress and urging approval of the Fourteenth Amendment.[43] A month later, Governor Murphy appointed Gregg to be chancellor of the state's sole chancery court, but the Conservative-dominated General Assembly of 1866-67 refused to confirm his appointment.[44]

Justice William M. Harrison was born in Maryland in 1818. He came to Arkansas in 1840 and taught school for a year in Chicot County before returning to Maryland, where he continued to teach school while studying law. Harrison returned to Arkansas in the spring of 1844 and was licensed to practice law a year later. He opened an office at Columbia in Chicot County but moved to Monticello after Drew County was created in 1847.[45] From 1852 to 1856, he represented Ashley, Drew, and Chicot Counties in the Arkansas Senate.[46] He was elected to the Arkansas House of Representatives in 1860, and in the tumultuous session that immediately preceded the Civil War, he voted in favor of calling a convention to consider secession.[47] Harrison's whereabouts during the war are unclear. No records exist showing that he served in either army. In any event, his wartime activities were apparently sufficiently innocuous to render him acceptable to Unionist voters who elected him judge of the second circuit court in 1864.[48] Four years later, the Republican Party that met to nominate candidates for the 1868 election selected Harrison to run for the supreme court.

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40. *See* HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 12, at 337, 464.
41. *See* ARK. GAZETTE, Nov. 3, 1891, at 2.
42. *See* DAVID Y. THOMAS, ARKANSAS IN WAR AND RECONSTRUCTION 385 (1926).
43. *See Disunion Convention*, ARK. GAZETTE, Jan. 1, 1867, at 2 (weekly ed.).
44. *See* ARK. GAZETTE, January 22, 1867, at 2. The senate voted 21 to 1 not to confirm Gregg. *See id.*
45. *See Claimed by Death*, ARK. GAZETTE, Feb. 16, 1900, at 2.
46. *See* HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 12, at 334-35.
47. *See* ARK. HOUSE JOURNAL 410 (1860).
48. *See* HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 12, at 458. Harrison apparently did not take office until May 17, 1865. *See id.*

Over the next five years, political infighting within the Republican Party caused a shift in the initial balance between newcomers and native Unionists on the court. In early February of 1871 Justice Thomas Bowen announced his resignation, and Governor Clayton named John E. Bennett to replace him. Two weeks later Chief Justice Wilshire resigned, and Clayton elevated Associate Justice John McClure to the position of chief justice and appointed Elhanan J. Searle to McClure's associate justice seat.

Justice John M. Bennett was a native of New York and a graduate of Genesee College at Lima, New York. At the outbreak of the Civil War he enlisted in the 75th Illinois Volunteer Infantry Regiment and served with distinction east of the Mississippi. By the war's end he was a brevet brigadier general and commander of an infantry brigade in the Army of the Cumberland. In 1865 he joined the regular army as a captain. While serving as judge advocate of the military district that included Mississippi and Arkansas, he studied law and was admitted to practice in Arkansas in 1868, the first year of reconstruction.[49] Governor Clayton immediately appointed him judge of the first judicial circuit (Mississippi, Crittenden, Desha, Monroe, and Phillips counties),[50] and he still held that position when Clayton named him to Thomas Bowen's seat on the supreme court.[51]

Elhanan J. Searle, the other justice appointed during the February 1871 shakeup, was born in Illinois and graduated from Northwestern University in 1859. After studying law he entered practice in Springfield, Illinois. In 1861 he enlisted as a private in the 10th Illinois Volunteer Infantry Regiment and eventually rose to the rank of lieutenant colonel. He probably came to Arkansas in 1862, and during the winter of 1862-63 he was assigned to recruit volunteers from among Unionists in north Arkansas. One of the regiments he helped recruit was the First Arkansas Infantry Volunteers, and he served with the regiment during the Union campaign in south Arkansas in the spring of 1864. He later worked with future justice Lafayette Gregg to recruit the Fourth Arkansas Cavalry Volunteer Regiment. After leaving the army in August of 1865, Searle decided to remain in Arkansas.[52] He opened a

49. 14 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 335 (1910) (reprint 1967).

50. *See* Act 7 of 17th Ark. General Assembly, 1868 Ark. Acts 25.

51. *See* HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 12, at 456.

52. The biographical information on Searle is taken from Carolyn Pollan, *Fort Smith Under Union Military Rule September 1, 1863 - Fall, 1865*, 6 J. FT. SMITH HIST. SOC. 1, 6 n.10 (1982); Clio Harper, *Prominent Members of the Early Arkansas Bar—Biographies of 1797-1884*, at 328 (1940) (unpublished manuscript, on file with Arkansas History

law practice in Fort Smith, and following the Republican ascent to power in 1868 he served as prosecuting attorney and later judge of the ninth judicial circuit (Mississippi, Crittenden, Desha, Monroe, and Phillips counties).[53]

The last turnover on the Republican supreme court occurred in 1872. Incumbent justice William M. Harrison had broken with the regular wing of the Republican Party and ran in 1872 on a Reform Republican ticket nominated by dissident Republicans. The regular Republicans nominated Circuit Judge Marshall L. Stephenson, who defeated Harrison at the November 1872 general election.[54] Stephenson's background was remarkably similar to McClure, Bennett, and Searle. He was born in Kentucky, but he was raised in Granville, Illinois, where his parents moved when he was still a child. He studied law at Springfield and was admitted to the bar in 1860. When the Civil War started, he joined the 10th Illinois Cavalry Volunteer Regiment as a captain and participated in campaigns in southern Missouri and northern Arkansas. By 1863 he was a colonel and assigned to raise troops in north Arkansas. He helped recruit the 2nd Arkansas Infantry Volunteers and led six companies of that regiment in the 1864 south Arkansas campaign. He settled in Fort Smith after the war and, after briefly attending law school in Cincinnati, Ohio, was admitted to practice in Arkansas in 1866.[55] Before his election to the supreme court he served as judge of the fourth (Van Buren, Searcy, Marion, Newton, Carroll, and Madison counties)[56] and first judicial circuits (Mississippi, Crittenden, Desha, Monroe, and Phillips counties).[57]

The Republican supreme court ceased to exist in 1874 in the aftermath of the political crisis known to history as the Brooks-Baxter War. In May of 1874, Stephenson resigned, and the lower house of the General Assembly impeached Bennett, McClure, and Searle.[58] The senate trial of the three justices was mooted by the adoption of the

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Commission). *See also* THOMAS, *supra* note 42, at 385. In some sources, Searle's first name is spelled "Elhanon."

53. *See* HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 12, at 475-76.

54. *See id.* at 452. Harrison unsuccessfully contested the election in federal court. *See* Harrison v. Hadley, 11 F. Cas. 649 (C.C.E.D. Ark. 1873) (No. 6,137).

55. The biographical information on Stephenson is drawn from Harper, *supra* note 52, at 351; THOMAS, *supra* note 42, at 386; and *Judge M. L. Stephenson Dies*, ARK. GAZETTE, Sept. 19, 1911, at 12.

56. *See* HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 12, at 463.

57. *See id.* at 456.

58. *See General Assembly*, ARK. GAZETTE, May 26, 1874, at 1; ARK. GAZETTE, May 28, 1874, at 1.

state's current constitution in October of 1874, which ended the terms of all justices serving under the Constitution of 1868.[59]

The changes in the makeup of the supreme court during the period covered by this article are summarized in the following table:

JUSTICES OF THE ARKANSAS SUPREME COURT[60]

Position	1866	1867	1868	1869	1870	1871	1872	1873	1874
	Const. of 1864		Const. of 1868						
Chief J.	Walker		Wilshire			McClure			
Justice	Compton		Gregg						
Justice	Clendenin		Bowen			Bennett			
Justice			Harrison					Stephenson	
Justice			McClure			Searle			

The contrast between the three justices who served on the supreme court under the Constitution of 1864 during the period 1866-67 and the eight who served on the court under the Constitution of 1868 during the period 1868-74 was striking. The three former justices were elected on a Conservative ticket. The eight new justices were all Republicans. The three Conservative justices had been prominent members of the Confederate state government. All but one of the eight Republican justices had served in the Union Army. All three Conservative justices were longtime residents of the state. Six of the eight Republican justices had moved to the state during or after the Civil War. These differences in the backgrounds of the justices often led to divergent positions on the legal questions produced by the war.

59. ARK. CONST. sched., § 21.

60. The assignment of justices to particular positions is based on the tables in the HISTORICAL REPORT OF THE SECRETARY OF STATE. *See supra* note 12, at 452-54.

II. THE LEGAL EFFECT OF SECESSION

Probably the most significant war-related issue considered by the supreme court during the years after the war was the legal status of the Confederate state government. Should the actions of that government, particularly the orders and judgments of its courts, be recognized by postwar courts?

The secession convention that withdrew Arkansas from the Union in May of 1861 also adopted a new state constitution. When loyalist delegates met in Little Rock in 1864 to draft a pro-Union constitution, they made clear their views on the actions taken by their counterparts in 1861. The preamble to the Constitution of 1864 provided:

> We, the people of the State of Arkansas, having the right to establish for ourselves a Constitution in conformity with the Constitution of the United States of America, recognizing the legitimate consequences of the existing rebellion, do hereby declare the entire action of the late convention of the State of Arkansas, which assembled in the City of Little Rock on the 4th day of March, 1861, was, and is, null and void, and is not now, and never has been, binding or obligatory upon the people.
>
> That all the action of the State of Arkansas under the authority of said convention, of its ordinances, or of its Constitution, whether legislative, executive, judicial or military (except as hereinafter provided), was and is, declared null and void, provided that this ordinance shall not be so construed as to affect the rights of individuals . . . .[61]

This sweeping attempt to void retroactively all actions of the state government taken during and subsequent to the secession convention produced a number of supreme court cases during the postwar years.

A. Conservative Court

The Conservative supreme court addressed the scope of the 1864 constitutional preamble during its December 1866 term. The case was a mundane debt collection action.[62] In early 1861, prior to secession and the adoption of the Constitution of 1861, Hawkins sued Filkins in Pulaski County Circuit Court seeking to collect a $450 promissory note. Filkins offered no defense to the suit, and in September of 1861, after

61. *See* ARK. CONST. of 1864, preamble.
62. *See* Hawkins v. Filkins, 24 Ark. 286 (December Term 1866).

secession and the adoption of the Constitution of 1861, the circuit court entered judgment in favor of Hawkins. Possibly because one or both parties were absent from the county during the war, Hawkins made no effort to enforce the judgment during the war. On July 24, 1865, two months after hostilities ended in Arkansas, Hawkins attempted to levy upon the property of Filkins, who defended on the grounds that the judgment was void because the Pulaski County Circuit Court was not a legal court when it entered the judgment in September of 1861. The 1865 circuit court stayed enforcement of the judgment until the supreme court could rule on the question.

Filkins challenged the September 1861 judgment on several grounds including:

1. The state government of Arkansas ceased to exist with the adoption of the ordinance of secession and was not revived until adoption of the Constitution of 1864.
2. The actions of Arkansas courts following secession were void because the courts derived their power from the Confederate States of America, a foreign government that failed to achieve international recognition.
3. If the state government did continue to exist after secession from the United States, all acts of that government were invalidated by the preamble to Constitution of 1864.

Chief Justice David Walker authored the court's opinion. Only five years earlier in the same state capitol in which the court now sat, Walker had presided over the convention that adopted the ordinance of secession and the Constitution of 1861. Now he was called upon to address the legal consequences of the convention's actions. If this conflict caused the chief justice any discomfort, it is not reflected in his opinion.

Walker first addressed the legal effect of Arkansas' attempt to secede from the union. Whatever his personal views on the question, Walker acknowledged that the recent war had settled one question—a state had no power to dissolve the bonds that existed between it and the national government. But he also argued that under the system of federalism embodied in the United States Constitution, the existence of the federal government depended on the existence of state governments. Consequently, Walker reasoned that the war also settled that a state could not destroy its own state government by attempting to withdraw from the union. In short, Arkansas' attempt to secede from the Union was a void act that did not impair the legitimacy of its state government.

Walker also rejected Filkins' contention that the wartime actions of Arkansas courts were void because the courts derived their power from the Confederate States of America, which was a foreign government that failed to achieve international recognition by other nations as an independent government. Walker concluded that Arkansas' affiliation with the Confederacy in no way affected its rights or powers as a state. For purposes of internal sovereignty, Arkansas continued to exist as a state whether or not recognized by the United States or other nations, and its state government was both the de facto and the de jure government of the state until the adoption of a new state constitution in March of 1864. All acts of the state government during such period, including the acts of its courts, were valid and binding to the same extent as though secession had never taken place.

Walker then took up Filkins' argument that the Constitution of 1864 retroactively invalidated the Constitution of 1861 and all acts of the state government under that constitution. Walker had two responses to Filkins' argument. The first was based on a principle already announced by the court. Under the United States Constitution the federal government depended on the existence of state governments, and hence the Constitution required Arkansas to keep a state government in existence. The second reason that the 1864 constitutional convention could not retroactively nullify the 1861 Constitution and the actions of the Confederate state government also relied on the United States Constitution. According to Walker, such an attempt violated Article 1, section 10, of the United States Constitution, which prohibited a state from passing either ex post facto laws or laws impairing the validity of a contract.

Resorting to the rule of construction that courts must interpret a law so as to preserve its constitutionality, Walker concluded that the preamble to the 1864 Constitution voided the acts of the 1861 secession convention and the Confederate state government only to the extent such acts conflicted with the United States Constitution. The court buttressed its reliance on the federal constitution by citing language in the preamble to the 1864 Constitution which expressed the drafters' desire "to establish for ourselves a constitution in conformity with the constitution of the United States of America." Since establishing a circuit court in Pulaski County to resolve legal disputes did not conflict in any way with the United State Constitution, the 1861 judgment rendered by the Confederate circuit court was valid and entitled to enforcement by courts created under the Constitution of 1864.

The court followed *Hawkins v. Filkins* in another case decided at the December 1866 term. In *Beller v. Page*[63] a creditor attempted to execute on a judgment rendered by the Hempstead County Circuit Court in November of 1862. The debtor moved to quash the execution on the grounds that the circuit court did not legally exist in November of 1862. Since *Filkins* clearly controlled the case, the supreme court upheld the lower court's refusal to quash the execution.[64]

The Conservative court distinguished *Filkins* in a third case decided during its December 1866 term. *Ex parte Osborn*[65] involved a man convicted of second degree murder in Pulaski County Circuit Court. According to a statute enacted on January 21, 1861, prior to secession, the Pulaski County Circuit Court was scheduled to meet on the fourth Monday after the fourth Monday of August.[66] On November 18, 1861, the Confederate General Assembly changed the date on which the circuit court met to the fourth Monday after the fourth Monday in September.[67] The constitutional convention that met in early 1864 declared that all laws in force in the state on March 4, 1861, (the date the secession convention first met) were still in force.[68] The court that convicted Osborn met on the date specified by the January 21, 1861, legislation—i.e., the fourth Monday after the fourth Monday in August of 1865. Prior to the war the supreme court had invalidated decisions rendered by a circuit court that met at a time not provided by law.[69] The question presented by *Osborn* was which legislation controlled the meeting date for Pulaski County Circuit Court—the act of January 21, 1861, or the act of November 18, 1861. The court concluded that the 1864 constitutional convention could repeal all legislation enacted after March 4, 1861, and revive wholesale all legislation existing on that date. It distinguished its holding in *Hawkins v. Filkins.* There the circuit court met in September of 1861, prior to the November 1861 legislation

63. 24 Ark. 363 (December Term 1866).

64. The status of the Confederate courts was not addressed in *Millar v. Henderson*, 24 Ark. 344 (December Term 1866), because neither party appears to have questioned the authority of the Ouachita Probate Court to issue letters of administration in February of 1864.

65. 24 Ark. 479 (December Term 1866).

66. *See* Act 198 of 13th Ark. General Assembly; 1860 Ark. Acts 374, 377, § 5.

67. *See* Act 60 of 13th Ark. General Assembly, 1st Spec. Sess.; 1861 Ark. Acts 74.

68. The court's opinion in *Ex parte Osborne*, 24 Ark. 479, 481 (December Term 1866), quotes from an ordinance adopted by the 1864 Constitutional Convention. However, no such ordinance appears in the official records of the convention. *See* 1864-65 Ark. Acts at 29-30.

69. *See* Brumley v. State, 20 Ark. 77 (January Term 1859).

moving the meeting date. Hence, the *Filkins* judgment was rendered by a court that met at the time established by the pre-secession legislation.[70]

B. Republican Court

It took the Republican supreme court that assumed the bench in July of 1868 several years to sort out its view of the Confederate state government. One of the first appeals considered by the new court was *Kelley v. State*.[71] Kelley was a white man who was charged in October of 1866 in Pulaski County Circuit Court with the robbery of Armstead, who was black. At Kelley's trial, his attorney objected to testimony by Armstead, citing a prewar statute that barred persons of the African race from testifying against a white person.[72] Six months earlier Congress had passed a Civil Rights Act granting all persons of every race and color full rights of citizenship, including the right to give evidence in legal proceedings.[73] The trial judge permitted the testimony, and Kelley was convicted. For reasons that are not clear from the record, Kelley's appeal did not reach the supreme court until the June 1869 term, by which time the governor had pardoned Kelley. The appeal presented a narrow question. Kelley's attorney argued that the state of Arkansas retained the exclusive right to regulate proceedings in her courts and to determine the competency of witnesses, and that Congress lacked the power under the United States Constitution to provide otherwise.

In an opinion joined by Justices Bowen and Wilshire, Justice Gregg upheld the constitutionality of the Civil Rights Act of 1866. Gregg cited Article IV, section 4, of the United States Constitution, which requires the United States to guarantee to every state a republican form of government, as the source of Congressional power to enact the Civil Rights Act of 1866. According to Gregg, when Arkansas seceded, the republican government guaranteed by the United States Constitution ceased to exist, and the Constitution obligated the federal government

70. Osborn was tried after the adoption of the Constitution of 1864 in March of 1864. The *Osborn* court did not discuss the effect of a judgment rendered by a court that met before March of 1864 according to the November 1861 schedule, but it would have presumably upheld such a judgment. It would have made little sense for the court to uphold the legitimacy of courts of the Confederate state government, as it did in *Hawkins v. Filkins*, but then conclude that all actions taken by such courts were invalid because the courts met on the wrong date.

71. 25 Ark. 392 (June Term 1969).

72. *See* Gould's Digest, Ch. 181, § 25 (1858).

73. *See* Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144) (now codified as amended at 42 U.S.C. § 1981 (1994)).

to take such action as was necessary to restore a government republican in form, including passage of the Civil Rights Act of 1866.

The *Kelley* court did not specifically invalidate all actions by the Confederate state government, but that was the implication of its conclusion that a republican state government did not exist in Arkansas following its secession. The court's broad language even cast a cloud over actions taken by what the court referred to as the "provisional" state government that operated under the Constitution of 1864 between 1864 and 1868. Since Congress passed the Civil Rights Act at issue in *Kelley* during the tenure of the "provisional" government, *Kelley* implied that the federal government was still in the process of restoring a republican form of government to the state in 1866 and that the restoration process was not complete until the state adopted the Constitution of 1868.[74] This would have meant that Arkansas lacked a state government from secession in May of 1861 until adoption of the Constitution of 1868 in March of 1868. Justice McClure, probably the most radical member of the Republican court, dissented in *Kelley v. State*. He thought that Kelley's subsequent pardon made the case a poor vehicle for establishing "great and new principles of law."[75]

At its December 1870 term, the Republican court was presented with an opportunity to invalidate the actions of the state government that existed from March of 1864 to March of 1868. The General Assembly that met from November 5, 1866, to March 23, 1867, passed an act which granted a full pardon and amnesty to persons who had committed any crime except rape between May 6, 1861, and July 4, 1865.[76] In March of 1869 a Pulaski County grand jury indicted a man named Nichols for a murder committed on July 10, 1864. Nichols claimed immunity from prosecution under the 1867 amnesty act, and the circuit court dismissed the charges. The state appealed to the supreme court, arguing that the General Assembly's attempt to pardon persons who had committed crimes encroached on a power reserved exclusively to the governor under the Constitution of 1864.[77] The supreme court pointed out that the Constitution of 1864 conferred on the governor the power

74. The language used by the court to describe the government formed under the 1864 Constitution mirrors that used by the 1868 constitutional convention. When Conservatives proposed adopting the 1864 Constitution in lieu of a new constitution, Republicans countered that the government formed under the 1864 Constitution was "provisional" and "unrepublican." DEBATES AND PROCEEDINGS OF 1868 CONSTITUTIONAL CONVENTION, *supra* note 27, at 88-123.

75. *See Kelley*, 25 Ark. at 404.

76. *See* Act 71 of the 16th Ark. General Assembly; 1867 Ark. Acts 169 (1867).

77. *See* State v. Nichols, 26 Ark. 74 (December Term 1870).

to grant pardons "after conviction" and held that the legislature could grant pardons "before conviction" without exceeding its constitutional powers.

The importance of the *Nichols* opinion was that it necessarily confirmed the legitimacy of the government formed under the Constitution of 1864. The court did not even discuss the validity in general of actions of the state government formed under the Constitution of 1864. Notably absent from the opinion were the references to the "provisional" character of the 1864-1868 government that had appeared in *Kelley*, and the opinion seemed to resolve any doubts about the character of the 1864-68 government by stating that in a "republican form of government," as contrasted with a monarchial form of government, the power to pardon can be shared by all three branches of government.

The next "secession" case to reach the Republican court involved actions of a Confederate state court after the adoption of the Constitution of 1864. In *Page v. Cook*,[78] the probate clerk of Columbia county, who was acting as clerk under the Constitution of 1861 and a commission issued by Confederate Governor Harris Flanagin, issued letters of administration to the administratrix of an estate on March 31, 1864. The probate court ruled that any claims not presented to the administratrix within two years of her appointment were barred. Even the Conservative supreme court of 1866-1868 had been willing to concede that the only legitimate government existing in the state after March 14, 1864, was the Unionist government organized under the Constitution of 1864. The Republican court reached the same conclusion and ruled that a clerk elected under the Constitution of 1861 had no authority to issue letters of administration after the adoption of the Constitution of 1864. Hence, the statute of limitations on claims against the state did not start to run until the administratrix obtained new letters from a court formed under the new constitution. Justice Harrison, probably the most conservative member of the Republican court, dissented, but his opinion does not appear in the official reports.

Although *Kelley* presaged the demise of *Hawkins v. Filkins*, it was not until *Penn v. Tollison*,[79] decided during the June 1871 term, that the Republican court expressly overruled the Conservative court's decision validating acts of the Confederate state government. The facts of the case suggest that the court may have gone out of its way to address the legitimacy of the Confederate state government that existed from May

78. 26 Ark. 122 (December Term 1870).
79. 26 Ark. 545 (June Term 1871).

of 1861 until March of 1864. The case involved lands whose title had been the subject of litigation since 1856.[80] The precise question presented to the supreme court was whether a minor named Penn had been properly made a party to the lawsuit pursuant to a Crittenden County Circuit Court publication order entered in September of 1861. Although it is not clear that Penn's counsel questioned the legitimacy of the government created by the Constitution of 1861,[81] the court proceeded immediately to that issue.

The opinion, authored by Chief Justice McClure, rejected the suggestion that the court was bound by the Conservative court's decision in *Filkins*. *Filkins* had interpreted the preamble to the Constitutions of 1864, which declared all acts of the secession convention null and void but provided that this ordinance "shall not be so construed as to affect the rights of individuals." After *Filkins*, the people of Arkansas had adopted the Constitution of 1868, which likewise declared void the acts of the secession convention, but with a proviso that the declaration "shall not be so construed as to affect the rights of *private* individuals, arising under contracts between the parties."[82] As a delegate to the 1868 constitutional convention, McClure had served on the committee that drafted the constitution,[83] and according to McClure, this change in the preamble language was designed to overrule *Filkins*. The only rights preserved by the Constitution of 1868 were those of "private individuals," and all public acts of the state under the Constitution of 1861 were declared null and void.

The court next addressed whether the state government under the Constitution of 1836 continued to exist following the state's secession. In *Filkins* the Conservative court had concluded that "it was not intended by the [1861] Convention to destroy the State government,"[84] but the Republican court in *Penn v. Tollison* disagreed. In an ironic twist, the

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80. In 1856 Tollison filed suit to enforce a vendor's lien against certain lands and purchased the lands at the foreclosure sale. The vendee challenged the sale. In *Penn's Administrator v. Tolleson* [sic], 20 Ark. 652 (October Term 1859), the Arkansas Supreme Court set aside the sale and ordered the property resold. On remand the circuit court permitted Tollison to serve Penn by publication. *See Penn*, 26 Ark. at 550.

81. The summary of arguments that precedes the report of the case states that the order of publication was entered "pending the rebellion" at the September 1861 term of court and then asks rhetorically: "Will the court hold this to be good, or null and void to all intents and purposes?" *See Penn*, 26 Ark. at 547.

82. *See* ARK. CONST. of 1868, art. I, § 25 (emphasis added).

83. McClure was one of seven delegates who served on the Committee on the Constitution, its Arrangement and Phraseology. DEBATES AND PROCEEDINGS OF THE 1868 CONSTITUTIONAL CONVENTION, *supra* note 27, at 13.

84. *See Filkins*, 24 Ark. at 302.

court cited as support for its position a decision rendered by the Confederate state supreme court after the adoption of the Constitution of 1864. In *State v. Williams*[85] the Confederate state supreme court sitting in Washington removed Sam Williams, the Confederate state attorney general, from office after he took the oath of allegiance to the United States. When Arkansas seceded, the secession convention required all state officers to appear before it and take an oath of allegiance to the Confederate States.[86] If Sam Williams ceased to be the attorney general of the Confederate state government when he took the oath of allegiance to the United States, then it followed that the entire state government of Arkansas ceased to exist in May of 1861 when its officers took the oath of allegiance to the Confederate States. As the Republican court viewed it:

> When the army of the United States subdued the rebellion, in the State of Arkansas, in all the State of Arkansas there was no person who ever claimed to belong to the State government of 1836, or who claimed to be an officer of the same. When the federal arms had restored the peace, within the borders of the state, they found the Constitution of 1836 and that of 1861. That of 1861 was hostile to the federal government, and because it was formed in aid of rebellion, could not be recognized. They then involuntarily turned to the Constitution of 1836, and found it like the engine whose motive power is gone, a perfect, but dormant instrument. . . . Here was the Constitution of 1836, and the people who framed and adopted it, but there was no officer or person clothed with the legal power of filling vacancies in several departments, or who was authorized, either by the Constitution or laws of the State, to call an election, and yet we are told that the State government was not destroyed, in the State of Arkansas, by reason of the rebellious acts we have mentioned.[87]

The court then turned to the actions taken at the 1861 secession convention. If the state government organized under the Constitution of 1836 ceased to exist in May of 1861, did a new state government come into existence at that time? The court responded in the negative,

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85. *State v. Williams* does not appear in the official reports. The opinion appears at pages 234 to 420 of Records of the Opinions of the Arkansas Supreme Court Delivered at Washington, the Temporary Seat of Government on Aug. 8, 1864. After the war it was published in installments in the MEMPHIS APPEAL on Feb. 26, 1867, at 1; Feb. 26, 1867, at 1; Feb. 28, 1867, at 1; Mar. 1, 1867, at 1; March 2, 1867, at 1; March 5, 1867, at 1; March 6, 1867, at 1; March 7, 1867, at 1; March 8, 1867, at 1; March 14, 1867, at 1; March 15, 1867, at 1; March 16, 1867, at 1; and March 19, 1867, at 1.

86. *See* JOURNAL OF BOTH SESSIONS, *supra* note 3, at 290-93.

87. *See Penn*, 26 Ark. at 560-61.

citing several problems with the entire process by which the convention purported to create a new state government. The most serious defect was that people of Arkansas had never delegated to the convention the power to adopt a new constitution for the state. According to the act, authorizing a vote on calling a convention, the convention was to "take into consideration the condition of political affairs, and determine what course the State of Arkansas shall take in the present political crisis."[88] This limited charter did not authorize the convention to adopt a constitution that created a new state government to replace that existing under the Constitution of 1836.[89] In a bit of overkill, the *Tollison* court also deemed defective the procedure whereby the convention had adjourned on March 21, 1861, and was recalled by its president on May 6, 1861, "[f]or if this doctrine be conceded, the Convention would have the power to perpetuate itself for all time to come, if the President thereof should be of the opinion that such an emergency had arisen."[90] According to the Republican court, the convention's work was complete on March 21, 1861, and all acts of the convention subsequent to that date, including the adoption of the Constitution of 1861, were of no legal effect.

This left only the question whether the acts of the government created by the Constitution of 1861 were entitled to recognition as those of a de facto government. The court's resolution of this question was probably the weakest part of its opinion in *Tollison*. It conceded that the convention might have been able to form a de facto government under the United States Constitution, but it could not form a de facto government outside the United States Constitution. When it joined the Union in 1836, Arkansas did not reserve the right to assume the "inherent and rightful powers of an independent government."[91] Moreover, no state can exist except as a member of the United States. The organization that controlled Arkansas after secession was not a government at all but only evidence of what the state government would have been had the rebellion succeeded.

If the supreme court were to declare today that all actions taken by the state of Arkansas and its political subdivisions over a three year period were null and void, the result would be chaos. Fortunately, the

88. *See* Act 105 of the 13th General Assembly, § 8, 1860 Ark. Acts 216.

89. In 1862 the same question was presented to the Confederate state supreme court which deemed the question too political to be considered by the court. *See Ex parte* Danley & Johnson, 24 Ark. 2 (June Term 1862).

90. *See Penn*, 26 Ark. at 573.

91. *See id.* at 574.

impact of the Republican court's declaration that the government of Arkansas ceased to exist on May 6, 1861, was mitigated by the limited role played in the lives of citizens by state government in the 1860s. Moreover, both the Constitution of 1864 and the Constitution of 1868 carefully preserved from invalidation certain routine actions of the Confederate state government, including the administration of oaths by public officials, the acknowledgment of deeds and other documents, and the solemnization of marriage.[92] The primary effect of the decision in *Tollison* was to force the relitigation of numerous cases decided by Confederate state courts.

During the same June 1871 term that it handed down *Penn v. Tollison* the court decided a similar case, *Thompson v. Mankin*,[93] with similar results. Mankin sued Thompson in the Arkansas County Circuit Court, and in August of 1861 the court clerk issued a summons ordering Thompson to appear and answer the complaint at the November session of the circuit court. There was apparently no further action in the case until October of 1865, when Mankin obtained a default judgment against Thompson. The question before the supreme court was whether the summons issued in August 1861 gave the circuit court personal jurisdiction over Thompson. The supreme court held it did not and sent the case back to permit Thompson to plead to the complaint. Rather than simply apply *Tollison*, which clearly controlled, Justice Gregg authored a long rambling opinion much of which appears to be unnecessary to a decision on the narrow issue before the court. It is possible that rather than issue a concurring opinion in *Tollison*, Gregg used *Thompson v. Mankin* to air his views on the effect of secession. He based his conclusion that all executive, legislative, judicial, and military acts under the Constitution of 1861 were void primarily on the specific language of the Constitution of 1868. Possibly anticipating the argument that by nullifying all acts of the Confederate government the court was abridging property rights, Gregg made the point that a conquering power had no obligation to respect property rights in a conquered territory. He also argued that because nothing bound the United States government to recognize the acts taken by a state government during the period the state was not in the Union, the courts of the state, upon its readmission to the union, had no authority to hold such acts valid.

92. *See* ARK. CONST. of 1864, preamble; ARK. CONST. of 1868, art. I, § 25.
93. 26 Ark. 586 (June Term 1871).

Timms v. Grace,[94] also decided at the June 1871 term, was more typical of the cases that followed *Penn v. Tollison*. In July of 1868 Timms asked the supreme court to quash a judgment entered against him by the Desha County Circuit Court in October of 1861. The case had been pending in the supreme court for almost three years before the court declared the judgment void under *Tollison*. Similar results were reached in *Carroll v. Boyd*,[95] which involved the validity of a judgment rendered by a justice of the peace in September of 1861; *Cooksey v. McCrery*,[96] which involved payment received in November of 1863 by an administrator appointed earlier the same year; and *Cowser v. State ex rel Burt*,[97] which involved a probate order entered in August of 1861.

Penn v. Tollison was undoubtedly costly to those parties who were forced to relitigate issues decided by the Confederate state courts, but it may have actually saved the state and local governments a great deal of money. Many public officials had not been paid or paid only irregularly during the war years. By declaring valid the Confederate state government that existed following secession, *Hawkins v. Filkins* opened the door for these officials to file sizeable backpay claims. After the decision in *Filkins*, W.R. Cain, who served as judge of the third judicial circuit during the war,[98] filed a claim with the state auditor seeking $7,018 due him as salary from July 1861 to September 1865. When the state auditor refused to pay the claim, the administrator of Cain's estate applied for a writ of mandamus to compel the payment. In *Black v. Auditor*,[99] which was decided six months before *Tollison*, the Republican supreme court ruled that mandamus would lie to compel the payment of the salary although it dismissed Cain's petition for lack of proper verification. By invalidating the state government formed under the Constitution of 1861, *Tollison* foreclosed a flood of similar, properly verified, petitions from state and local Confederate officials claiming pay for wartime service.

A case decided at the December 1871 term, *Vinsant v. Knox*,[100] resolved the effect of *Hawkins v. Filkins* before it was overruled by *Penn v. Tollison*. Vinsant had been appointed administratrix of her husband's estate in April of 1862. The husband owed Knox $500, but Knox did

94. 26 Ark. 598 (June Term 1871).
95. 27 Ark. 183 (December Term 1871).
96. 27 Ark. 303 (December Term 1871).
97. 27 Ark. 444 (June Term 1872).
98. Cain served from 1860 until the end of the war. *See* HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 12, at 461.
99. 26 Ark. 237 (December Term 1870).
100. 27 Ark. 266 (December Term 1871).

not file a claim against the estate until March of 1871. The question was whether the two year period for filing claims against the estate had run when the claim was filed. Clearly, the statute did not begin to run when Vinsant was named administratrix in 1862, because the order of the Confederate probate court was void under *Tollison*. Vinsant argued, however, that the statute did continue to run during the period between December 1866, when *Filkins* was decided, and June 1871, when *Filkins* was overruled by *Tollison*. The supreme court disagreed, ruling that *Filkins* should be treated as never having been the law and that no person acquired any rights under the decision.

III. THE ENFORCEABILITY OF CONTRACTS PAYABLE IN CONFEDERATE MONEY

During the Civil War, there were two media of exchange in Arkansas—the United States dollar and the Confederate States dollar. The value of Confederate currency relative to United States currency fluctuated throughout the war depending on the battlefield success of Confederate armies. Because the United States government would continue to exist regardless of the war's outcome, Confederate dollars were never as valuable as United States dollars.

After the war ended, suits seeking to enforce contracts and promissory notes executed during the war years flooded the trial courts of Arkansas. Contracts or notes specifically calling for payment in "U.S. dollars" posed no interpretive problem for the courts, but such obligations were probably the exception. More common were wartime contracts or notes that called for payment in "Confederate dollars" or those that called for payment in "dollars" without specifying whether the parties meant United States dollars or Confederate dollars. Postwar lawsuits involving such contracts or notes raised two legal questions. First, if the contract or note was payable in "dollars," could the debtor introduce parol evidence to show that the parties intended for payment to be made in Confederate dollars? Second, if the contract or note was payable in Confederate dollars, how should a court measure the debtor's obligation? Requiring the creditor to accept payment in Confederate dollars was no remedy at all since after the war Confederate dollars were worthless. Requiring the debtor to pay the face amount of a debt in United States dollars was equally objectionable since United States dollars were invariably worth many times the consideration originally received by the debtor.

A. Conservative Court

The Conservative supreme court, which considered the issue during the December 1866 term, staked out a formalistic position on the Confederate money question. *Roane v. Green*[101] was an action brought by Green and Wilson to collect a promissory note dated October 24, 1862, in which Roane promised to pay the two plaintiffs "nine hundred dollars" for cattle. Roane sought to show that she had paid a portion of the purchase price in Confederate money and delivered her promissory note in the same medium for the balance of the purchase price. At the time Roane delivered her note, a Confederate dollar was worth only about ten cents compared to a United States dollar. The supreme court declined to interpret the note as requiring payment in Confederate dollars because to do so would violate the parol evidence rule. This rule, which most students learn in their first semester of law school, states that:

> when the contract is reduced to writing in plain, definite and unambiguous terms, and accepted by the parties contracting as the sole evidence of the contract between them, they become bound by it, and will not thereafter be permitted to introduce parol evidence to alter, or vary it in terms or meaning.[102]

Although a party can introduce parol evidence to explain an ambiguity in a writing, the court found no ambiguity in the word "dollars," which, it said, could never be interpreted to mean Confederate paper currency.

In *Hastings v. White*,[103] also decided during the December 1866 term, the court took the same inflexible position. The creditor brought suit in the Randolph County Circuit Court on a promissory note for $150. The debtor argued that the note was to be paid in Confederate dollars worth, at the time the note was executed, only twelve cents in United States dollars. The circuit court agreed with the debtor and awarded the creditor judgment on the note in the amount of $18.75 plus costs. On appeal the supreme court reversed. Citing its earlier decision in *Roane*, the court refused to look outside the four corners of the promissory note to determine whether the parties intended some medium of payment other than United States dollars.

These two decisions by the Conservative court imposed a hardship on the debtors while producing a windfall to the creditors. Because the

101. 24 Ark. 210 (December Term 1866).
102. *See Roane*, 24 Ark. at 212.
103. 24 Ark. 269 (December Term 1866).

notes in both cases were executed in areas under Confederate control, it seems likely that the parties intended the word "dollars" to mean Confederate dollars and set the amount of payment based on the value of a Confederate dollar at the time of the contract.

The General Assembly, which was meeting in early 1867 when the Conservative court decided *Roane* and *Hastings*, immediately overturned the decisions. On March 5, 1867, shortly after the supreme court handed down the latter decision,[104] the legislature passed the Confederate Money Act.[105] The act permitted a debtor to introduce evidence of the parties' intent when a wartime agreement failed to identify the type of currency in which payment was to be made. The act also provided that recovery under an agreement payable in Confederate money was to be based on the value of Confederate money in United States dollars at the time and place of making the agreement.

At its June 1867 term the Conservative court decided two more cases in which the debtor argued that a note denominated in "dollars" was actually payable in Confederate dollars.[106] The court invoked *Roane* in both cases without mentioning the Confederate Money Act. The probable explanation for this omission was that both cases were tried before March 5, 1867, the effective date of the act.

The Conservative court never considered a promise to pay "Confederate dollars," so it is impossible to state with certainty how the court would have treated a promise to pay an obligation denominated in a valueless currency. It seems likely, however, that the court would have applied the rule embodied in the Confederate Money Act, whether or not the act technically applied, and ordered the debtor to pay an amount in United States dollars equal in value to Confederate money at the time and place of the agreement.

B. Republican Court

The Republican supreme court that took office in July of 1868 considered three Confederate money cases at its December 1868 term. The first was *Moody v. Hawkins*[107] in which a creditor sought to collect

104. The court handed down its decision in *Hastings v. White* on January 16, 1867. *See* Ark. Sup. Ct. Judgment Book A-No. 2 at 62. *Roane v. Green* was decided on December 22, 1866. *See id.* at 41.

105. *See* Act 88 of the 16th Ark. General Assembly, 1867 Ark. Acts 195.

106. *See* Busby v. Atkins, 24 Ark. 540 (June Term 1867); Yell v. Snow, 24 Ark. 554 (June Term 1867).

107. 25 Ark. 191 (December Term 1868).

on three written promises to pay, each bearing interest at ten percent. The debtor argued that at the time he made the promises the universal medium of exchange was Confederate currency, then worth only about twenty percent of United States dollars. Citing *Roane v. Green*, the Republican court curtly rejected this argument as an attempt to set up a parol contract different from the terms agreed by the parties. The debtor also argued that the promises were usurious, apparently on the theory that they obligated him to repay an amount equal to five times the value of the consideration he received. The court conceded that a contract that on its face charged a legal rate of interest could illegally cover an intent to charge a usurious rate of interest, but it ruled that the mere depreciated value of Confederate money at the time the debt arose was insufficient to prove such an intention.

Later in the same term, in *Jordan v. Mitchell*,[108] the court again declined to infer a corrupt intent to charge a usurious rate of interest from the depreciated value of Confederate currency. In *Johnson v. Walker*,[109] decided a few days later, the court refused to consider the Confederate money question because neither party had raised the issue.

Curiously, the Republican court did not address the applicability of the Confederate Money Act in any of the three cases decided early in its December 1868 term even though both parties in *Moody v. Hawkins* raised the issue.[110] It may be that the Confederate Money Act was not technically applicable to a case tried before the effective date of the act. The court did consider the Confederate Money Act in a fourth case decided during the December 1868 term. In *Leach v. Smith*[111] a creditor brought suit on two promissory notes, each in the amount of $2,085 and each payable in "dollars." The debtor contended that the notes were to be paid in Confederate money, which at the time of the transaction had a value of only $836.66. Pursuant to the Confederate Money Act the debtor was prepared to pay the lesser amount in United States notes. The Republican court proceeded to rule the act unconstitutional on the ground that it impaired the validity of contracts contrary to both the United States and Arkansas constitutions. The parties had agreed to payment in Confederate money, a currency with fluctuating value. By requiring payment in a different medium of exchange—either gold, silver, or United States notes—the Confederate Money Act materially altered the terms agreed to by the parties. The court also struck down

108. 25 Ark. 258 (December Term 1868).
109. 25 Ark. 197 (December Term 1868).
110. *See Moody*, 25 Ark. at 192-93 (summary of arguments).
111. 25 Ark. 246 (December Term 1868).

that portion of the act permitting the parties to offer evidence of the parties' intent regarding the currency in which payment was to be made. Without ruling whether such a provision, standing alone, would be constitutional, the court concluded that the two provisions of the act were inseparable and that the unconstitutionality of one provision invalidated the other.[112]

The court's opinion in *Leach* may have been a knee jerk reaction to an act passed by a pro-Confederate General Assembly that validated debts contracted in Confederate money. It must have soon dawned on the Republican justices that their decision was a bonanza for those creditors who had provided goods or money during the war in exchange for a promise to pay in Confederate money. Following the *Leach* decision, these creditors could collect far more than the actual value of the goods or money they provided to debtors. In effect, the decision rewarded those persons whose loyalty to the Confederacy made them willing to accept a promise to pay in a currency of dubious value.

The Republican court remedied this oversight in dramatic fashion a year later at the December 1869 term when it decided *Latham v. Clark*.[113] The case was a suit to collect a promissory note dated March 1, 1863, which by its terms was payable in "Confederate money." The sole question presented to the court was the enforceability of a contract which expressly called for the payment of Confederate money. The opinion began by noting that the Confederate government issued money to finance an unlawful rebellion against the United States. From this incontestable premise the court proceeded to the questionable conclusion that any private citizen who accepted and used Confederate money became a participant in a conspiracy to commit treason against the United States. The court said:

> What would have been the result if the people of the rebellious State had not received and used "Confederate money" in their private transactions, and it had failed to become a circulating medium among them?

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112. After enactment of the Confederate Money Act, the debtors in *Roane v. Green* and *Hastings v. White*, the two cases decided by the Conservative court, sought to take advantage of the act. After it invalidated the Confederate Money Act in *Leach v. Smith*, the Republican court ruled against both debtors. *See Green v. Roane*, 26 Ark. 15 (December Term 1870) and *Hastings v. White*, 26 Ark. 308 (December Term 1870). The court also followed *Leach v. Smith* in *Woodruff v. Tilly*, 25 Ark. 309 (June Term 1869), where it refused to permit the introduction of parol evidence to show that the parties intended payment in Confederate dollars.

113. 25 Ark. 574 (December Term 1869).

> The answer is obvious, that the Confederate Government must have failed at once; its armies, in open hostility to the national Government, disbanded; its soldiers returned to peaceful pursuits; the lives of hundreds of thousands of the best men of the land, both North and South, would have been saved; the nation would have escaped the expenditure of untold millions of treasure, and the long train of evils, hardships, misery and woe, consequences of the rebellion, would have been avoided.
>
> If this be true, of which we have no doubt, then we think that the use by the people, in their private transactions, of "Confederate money," and the support, currency and circulation given it by such use, so connected all contracts between such individuals, based upon or for the payment of it, with the illegality of its issue, and the purpose for which it was used, as to taint such contracts with the illegality of the original issue of the pretended money, and render them void, as being opposed to public policy . . . .[114]

The court's reasoning ignored the reality of day-to-day economic life in Confederate Arkansas. Whatever their feelings about secession and the Confederacy, most persons in Confederate controlled Arkansas probably had little choice but to use Confederate money. In fact, in 1862 General Thomas J. Hindman, the commander of Confederate troops in Arkansas, and for a time the military dictator of the state, threatened to imprison any person who refused to accept Confederate money at par.[115] An additional problem with the court's decision was that it invalidated only contracts specifically calling for payment in Confederate money. Wartime contracts calling for payment in "dollars" were apparently not null and void because the parol evidence rule barred evidence that the parties meant "Confederate dollars."

Only Justice Harrison, the longtime resident who may have lived in Confederate controlled Arkansas during most of the war, resisted the court's rush to punish any person who had accepted a promise to pay Confederate money. In a calm, well reasoned dissent, he agreed that the issuance of Confederate money was an illegal act, but he argued that the illegality of Confederate money did not taint a contract in which the consideration was Confederate money because the illegality was collateral to rather than an inherent part of the contract. Harrison also pointed out that Confederate money was the only circulating medium of exchange in the state and that persons subject to the de facto control of

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114. *See Latham*, 25 Ark. at 585.

115. *See* Gen. Orders No. 4, Hdqrs. Trans-Mississippi Dist. (June 2, 1862), *reprinted in* Official Reports, series I, vol. 15, at 782 (GPO 1886).

the Confederate government were obliged to use Confederate money in their business transactions.

The majority in *Latham v. Clark* took a position directly antithecal to that adopted only months earlier by the United States Supreme Court in a Confederate money case out of Alabama. In *Thorington v. Smith*[116] the United States Supreme Court characterized the Confederate States as a government by paramount force analogous to a foreign power that occupied United States territory. Private citizens subject to such a government were obligated to obey it in civil matters and were not responsible as wrongdoers for such obedience. It necessarily followed that:

> Contracts stipulating for payments in [the currency of a government by paramount force] cannot be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further the invasion or insurrection.[117]

The majority opinion in *Latham* made no effort to distinguish its holding from that of the United States Supreme Court in *Thorington*, stating imperiously that, "[W]e regret that our convictions of duty impel us to a different conclusion."[118]

The decision in *Latham v. Clark* left open the status of executed contracts in which a creditor had accepted payment of a debt in Confederate money. Was the creditor now entitled to payment in legal currency? The court quickly foreclosed this possibility in *Glenn v. Case*,[119] which was a suit by a creditor against the estate of a deceased debtor on a $250 promissory note executed in October of 1860. The creditor alleged that in 1863 the debtor had threatened to report him to the provost marshal if he did not accept Confederate notes in payment of the note. Arguing that the forced payment did not extinguish the debt, the creditor filed a claim against the debtor's estate after the war.

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116. 75 U.S. (8 Wall.) 1 (1868).

117. *See Thorington*, 75 U.S. (8 Wall.) at 11-12.

118. *See Latham*, 25 Ark. at 593. The court reiterated its *Latham v. Clark* holding in *Ford v. Ragland*, 25 Ark. 612 (December Term 1869).

119. 25 Ark. 616 (December Term 1869). A related case, *Case v. Glenn*, 25 Ark. 620 (December Term 1869), was also appealed to the court.

The supreme court declined to set aside the payment, stating that when the parties were *in pari delicto*—i.e., equally wrong—the courts should leave them in the condition in which they have put themselves. The court's reasoning is dubious, since the doctrine of equal wrong hardly seems applicable to a case in which one party alleged that he was forced to engage in an illegal act, but the result was sound. Had the court permitted the creditor in *Glenn* to collect the debt a second time, it would have opened the door for all creditors who had accepted payment in Confederate dollars during the war to argue that they did so under duress and now preferred to be paid in United States dollars.

Latham v. Clark and *Glen v. Case*, both decided during the December 1869 term, clearly established that the Republican court would not enforce executory contracts calling for payment in Confederate money but would not disturb executed contracts in which payment had been made in Confederate money. These two decisions slowed the flood of the Confederate money cases, but the issue continued to surface in variations not specifically covered by the two cases.

Three Confederate money cases reached the high court during its December 1870 term. *Jordan v. Walker*[120] involved an attempt to collect a promissory note delivered in exchange for Confederate treasury notes. In an effort to avoid the holding of *Latham v. Clark*, the creditor argued that although the consideration for the note was Confederate treasury notes, the note itself was payable in United States currency. The supreme court deemed the distinction irrelevant and ruled that the contract was void ab initio because the consideration for the note was illegal.

In *George v. Terry*,[121] also decided at the December 1870 term, a cotton planter had promised during the war to deliver one hundred bales of cotton for $2,600, for which the purchaser paid $2,600 in Confederate notes. The planter delivered sixty-six of the promised bales, which the purchaser, probably a cotton broker with contacts outside the Confederacy, was able to resell for $8,717 in United States currency. The remaining thirty-four bales were burned without fault of either party, and to cover the value of the undelivered bales, the planter executed and delivered to the broker her note for $1,000. Since the note was payable in United States currency, *Latham v. Clark* did not apply. The court nevertheless ruled the promissory note unenforceable, reasoning that the original transaction was void for illegality, the planter had received

120. 26 Ark. 1 (December Term 1870).
121. 26 Ark. 160 (December Term 1870).

nothing for her cotton, and the note issued for the undelivered cotton was void for want of consideration.

The third case decided at the December 1870 term demonstrated that the court would set aside an executed contract involving payment with Confederate money when there was evidence of duress coupled with prejudice to an innocent third party.[122] In 1858 Thompson had sold lands to Freeman for $3,840, which Freeman promised to pay in three annual installments of $1,280 each. After Freeman made the first installment payment, Thompson died, and letters of administration were granted to Thompson's widow and a man named Bunyard. Freeman made no attempt to pay the debt until the summer of 1863, when he offered to pay the balance due in Confederate notes then worth about ten cents on the dollar. When both the widow and Bunyard refused payment, Freeman put pressure on both to accept Confederate money. The county sheriff was induced to bring his influence to bear on Thompson, described in the opinion as "a woman of weak mind."[123] Bunyard, who was hiding from armed patrols that were scouring the country seeking soldiers for the Confederate Army, was vulnerable to a different type of coercion. Freeman sought out Bunyard where he was hiding in the "brush" and persuaded him that he could avoid conscription by executing a deed to the lands in exchange for Confederate money. Both the widow and Bunyard eventually accepted the Confederate money and executed a deed to Freeman. After the war the heirs of Thompson sued Freeman, and Justice Harrison, then sitting on the circuit bench, ruled in favor of the heirs. He canceled the deed and gave Freeman a credit of ten cents on the dollar for the Confederate money paid. On appeal the supreme court affirmed the lower court's decree. The court conceded that it would be reluctant to rescue the widow and Bunyan if they had deeded away their own property from "ignorance and cowardice," but it refused to "wink" at a transaction that defrauded the heirs of the estate.[124] The court did not address the propriety of allowing a credit for the Confederate money paid by Freeman since that issue was not raised by the heirs. If the heirs had raised the issue on appeal, the reasoning of *Latham v. Clark* would presumably have dictated no credit for payment in an illegal currency.

At the June 1871 term, the court decided *Booker v. Robbins*.[125] There, the debtor had delivered a note payable in dollars to pay for a

122. *See* Freeman v. Reagan, 26 Ark. 373 (December Term 1870).
123. *See id.* at 376.
124. 26 Ark. at 380.
125. 26 Ark. 660 (June Term 1871).

horse. The payee of the note later assigned it to another in exchange for Confederate money. The court ruled that receiving illegal consideration in the form of Confederate money for the assignment did not affect the validity of the underlying promissory note. Since the debtor had originally received value for his promise to pay, the result was consistent with *George v. Terry*.

At the same term, the court answered a question left open by *Latham v. Clark*. A contract calling for payment in Confederate money was void for illegality, but was parol evidence admissible to show that the parties intended for payment to be made in Confederate money? *Leach v. Smith* had struck down the Confederate money act, which arguably restored the holding of *Roane v. Green* barring the introduction of parol evidence. *Waymack v. Heilman*[126] was an action to foreclose an 1864 mortgage on lands in Pulaski County. The debtor's defense was that the mortgage secured a debt of $500 payable in Confederate dollars, but the only evidence as to the medium of payment was testimony that the holder of the debt had attempted to assign it for $250 in United States currency after claiming that it was payable in Confederate money. Without mentioning *Roane* the court ruled that parol evidence could be used to show a failure or absence of consideration for a promise to pay money. Although it termed the evidence weak, it upheld the chancellor's factual determination that the parties executed the mortgage to secure the payment of Confederate money, and this meant that the mortgage was void under *Latham*.

The use of Confederate money was also an issue in *Cooksey v. McCrery*,[127] decided at the December term 1871. Cooksey had purchased property from Williamson and agreed to pay the state a $200 debt incurred by Williamson when he acquired the property from the state. Williamson died in February of 1863, and the administrators of his estate were forced to pay the debt due the state. After the war, McCrery was appointed successor administrator of Williamson's estate and brought suit against Cooksey for his failure to pay the debt. Cooksey argued that when the debt became due, it was in the hands of a government in rebellion against the United States. Alternatively, he argued that the estate had paid the debt in Confederate money and hence gained control of the debt contrary to public policy. The court ruled against the estate, citing, without explanation, *Latham v. Clark*,[128] *Penn*

126. 26 Ark. 449 (June Term 1871).
127. 27 Ark. 303 (December Term 1871).
128. 25 Ark. 574 (December Term 1869).

v. Tollison,[129] and *Booker v. Robbins*.[130] The court's apparent reasoning was that while the mere acquisition of the debt from the state in exchange for Confederate money did not affect Cooksey's liability, the acquisition of the debt from a government in rebellion was sufficient to tip the scales against enforcement of the liability.

Carllee v. Carlton,[131] which the court heard in June of 1872, was a suit for specific performance of an 1864 contract to convey land. At the time of sale the purchaser made a down payment in Confederate notes and "Missouri State money," and agreed to pay the balance of the purchase price in "current money of the State of Arkansas." The fact that the contract referred to money issued by the Confederate state government was sufficient to bring it within the rule that contracts in consideration of Confederate money were void, and the supreme court refused to enforce the contract.

Danley v. Crawl[132] came down at the December 1872 term. Danley held a mortgage on three lots in Little Rock. He retained the law firm of Pope & Newton to foreclose the mortgage. Both Pope and Newton left Little Rock after placing the case in the hands of another attorney, Pleasant Jordan, without the knowledge and consent of Danley. Jordan accepted payment in Confederate money of the debt secured by the mortgage. After the war ended, Danley brought a new action to foreclose mortgage, and the court held that the payment of Confederate money to Jordan was not binding on Danley. The case was not really about Confederate money, since the court indicated it would have reached the same result regardless of the kind of money used to pay Jordan because Danley had never authorized Jordan to act as his agent.

The final Confederate money case considered by the court was *Tucker v. Horner*.[133] The defendant had drawn a draft on a New Orleans bank in 1862 to purchase Confederate war bonds issued by the state of Arkansas. In a recent case out of the Eastern District of Arkansas, the United States Supreme Court had refused to enforce a promissory note

129. 26 Ark. 545 (June Term 1871).
130. 26 Ark. 660 (June Term 1871).
131. 27 Ark. 379 (June Term 1872).
132. 28 Ark. 95 (December Term 1872).
133. 28 Ark. 335 (December Term 1873).

delivered in payment for Arkansas war bonds,[134] and the Arkansas Supreme Court followed suit in *Tucker v. Horner*.

IV. THE EFFECT OF THE WAR ON THE STATUTE OF LIMITATIONS

Another war related issue that surfaced frequently during the postwar years was the effect of the war on the statute of limitations. Arkansas law required that a suit to collect a debt be brought within five years after the cause of action accrued.[135] During the war most lower courts in the state ceased to function, making it impossible for creditors to file suits within the statutory period. In December of 1862 the General Assembly responded to the breakdown in the judicial system with a statute providing that all suits then pending or thereafter filed in any court of the state were automatically continued until after the ratification of peace between the United States and the Confederate States.[136] In *Burt v. Williams*,[137] the Confederate state supreme court declared the statute unconstitutional on the grounds that as applied to criminal cases, it denied the defendant a speedy trial,[138] and as applied to civil cases, it impaired the validity of contracts.[139]

A. Conservative Court

After hostilities ended in the spring of 1865 and the lower courts reopened, creditors began filing suits to collect debts otherwise barred by the five year statute of limitations. The position of the Conservative court on the statute of limitations question was announced in *Bennett v. Worthington*,[140] which was an appeal from suit filed in 1866 in Chicot County Circuit Court to collect two promissory notes, one due in March

134. *See* Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439 (1872). The United States Supreme Court distinguished its earlier decision in *Thorington v. Smith*, discussed *supra* at note 116, upholding an otherwise legal contract payable in Confederate money, noting that persons in Confederate territory were obliged to accept Confederate money but were not obliged to buy Confederate bonds.

135. *See* DIGEST OF THE STATUTES OF ARKANSAS, ch. 106, § 15 (Josiah Gould ed., 1858).

136. *See* Act Approved December 1, 1862, by the 14th Ark. General Assembly, Acts Passed at the 14th Session of the General Assembly of Arkansas 72-73 (first published by Statute Law Book Co., 1896) (hereinafter "Acts of the 14th Ark. General Assembly").

137. 24 Ark. 91 (June Term 1863).

138. *See* ARK. CONST. of 1861, art. II, § 11.

139. *See id.*, art. II, § 18.

140. 24 Ark. 487 (December Term 1866).

of 1860 and the second due in January of 1861. The debtor pleaded that the creditor had not brought the action within five years after the cause of action accrued, and the creditor replied that he was unable to bring the action within the statutory period because the Chicot County Circuit Court was closed from October 1861 until October 1865. The supreme court sided with the debtor and refused to toll the running of the statute during the period that the courts were closed. It noted that the creditor did not fall within the categories exempted by prewar legislation from the running of the statute, and, citing English precedent, concluded "that where the will of the legislature is clearly expressed, the courts should adhere to the literal expression of the enactment, without regard to consequences, and that every construction derived from a consideration of its reason and spirit should be discarded."[141]

Dictum in the opinion did offer some relief to creditors. An act passed by the Confederate General Assembly in December of 1862 suspended the statute of limitations on the collection of all debts.[142] The *Bennett* court declared that the act was valid and that the statute of limitations on collection of debts was suspended from December 1, 1862, when the legislation was approved, until March 14, 1864, when the legislation was voided by the adoption of the Constitution of 1864. The effect was to add about fifteen months to the five year limitations period otherwise applicable to the collection of debts. Coming, as it did, almost two years after the end of the war, the extension probably afforded limited relief to most creditors.

At its June 1867 term the Conservative court refused again to toll the statute of limitations during the war. *Denton v. Brownlee, Homer & Co.*[143] was a debt collection action in the Carroll County Circuit Court on a promissory note payable on September 30, 1860. When the defendant pled the statute of limitations, the creditor offered an ingenious circumvention of *Bennett v. Worthington*. The prewar legislation that established the five year statute of limitations tolled the running of the limitations period "[i]f any person, by leaving the county, absconding or concealing himself, or by any other improper act of his own, prevent[ed] the commencement of any action."[144] The creditor in *Denton* argued that by engaging in rebellion and war against the government of the United States, the debtor had by an improper act

141. *See Bennett*, 24 Ark at 494.

142. *See* Act Approved November 21, 1862, by the 14th Ark. General Assembly, Acts of 14th Ark. General Assembly, *supra* note 136, at 72.

143. 24 Ark. 556 (June Term 1867).

144. DIGEST OF THE STATUTES OF ARK., *supra* note 135, ch. 106, § 32.

prevented the commencement of an action to collect the debt.[145] In rejecting the argument, the Conservative court cited another provision of the prewar statute of limitations which stated that the statute was tolled only if a disability existed at the time a cause of action arose. The debtor was not engaged in rebellion when the cause of action arose in September of 1860, and consequently any subsequent acts by the debtor did not stop the running of the limitations period.

During its final term in December of 1867, the Conservative court did permit a seller of land to enforce a seller's lien more than six years after the date of sale.[146] The case was distinguishable, however, from *Bennett v. Worthington* and *Denton v. Brownlee, Homer & Co.* since an action to enforce a seller's lien was equitable in character, and a court of equity did not insist on strict compliance with the statute of limitations.

The Conservative court handed down one other decision that, while it did not specifically deal with the statute of limitations, did affect actions to collect wartime debts. In May of 1864, the Unionist General Assembly had approved draconian legislation designed to punish creditors who supported the Confederacy:

> [A]ny person hereafter aiding or abetting the rebellion, or that has or shall hereafter violate his oath of allegiance, and all persons who are now in arms, and all rebels in prison by Federal authorities, and all persons who have abandoned their homes, and have fled, and have taken protection under the so-called Southern Confederacy, shall be forever banned from the collection of their debts in this State, of any description whatsoever, and all courts having jurisdiction in this State are hereby required to dismiss said suits whenever such proof is made at the plaintiff's cost.[147]

In *Vernon v. Henson*,[148] the Conservative supreme court ruled that the statute impaired the obligation of contracts in violation of the United States Constitution. According to the court, the legislature could alter the remedy for breach of a contract, but it could not do away completely with all remedies for such breach. By striking down the statute, the supreme court opened the legal system to those creditors who continued to back the Confederacy following the formation of the Unionist government.

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145. *See Denton*, 24 Ark. at 558-59.
146. *See* Atkins v. Rison, 25 Ark. 138 (December Term 1867).
147. Act 14 of the 15th Ark. General Assembly; 1864-65 Ark. Acts 45-46.
148. 24 Ark. 242 (December Term 1866).

B. Republican Court

The Republican justices who assumed the bench in July of 1868 ultimately took a different stance on the effect of the war on the statute of limitations. The first case involving the effect of the war on debt collections to reach the Republican court did not directly deal with the statute of limitations. *Pillow v. Brown*,[149] which was decided during the December 1870 term of court, involved a suit to recover $109,206 for the sale of eighty-five slaves in Tennessee on December 28, 1860. The seller, Pointer, retained a security interest in the slaves, and the purchaser, Pillow, also gave the seller a mortgage on plantations located in Phillips County, Arkansas. In September of 1865, well within the five year limitations period, the executors of Pointer's estate attempted to foreclose the mortgages on the Arkansas property. Pillow argued that interest should not accrue on the debt during the war because throughout the period of hostilities he was an officer in the Confederate Army who resided within Confederate lines while Pointer lived within Federal lines.[150] The chancellor decreed a foreclosure but abated the interest that had accrued during the war. The supreme court agreed that interest could not be recovered on debts between alien enemies during a period of war but noted that this rule did not apply where there was a known agent appointed to receive the money residing within the same jurisdiction as the debtor. The burden was on the debtor to show that the exception did not apply—i.e., the debtor had to offer evidence that he had attempted to pay the debt but was prevented by the war. Since Pillow had failed to offer any evidence on this point, the court affirmed the foreclosure decree but without the abatement of interest ordered by the chancery court.

The Republican court first considered the wartime tolling of the statute of limitations in *McCreary v. State*,[151] which was an action brought by the state to foreclose lands securing bonds issued by the state and sold by the defunct Real Estate Bank. The bonds fell due in October of 1861, but the state did not file suit until 1867. The owner of the lands argued inter alia that the state of Arkansas did not exist in 1867 when the suit was brought. His line of reasoning was apparently based on the

149. 26 Ark. 240 (December Term 1870).

150. Pillow also argued that the contract was unenforceable, but since the sale took place well before the Emancipation Proclamation the court summarily applied *Jacoway v. Denton*, discussed *infra* in the text at note 176.

151. 27 Ark. 425 (June Term 1872).

suggestion in *Kelley* discussed above[152] that no state government existed from secession in May of 1861 until the adoption of the Constitution of 1868 in March of 1868. The supreme court refused to address the argument, stating simply that the argument needed no comment. The landowner also argued that the suit was barred because the state waited from 1861 to 1867 to file the suit. The court gave this argument short shrift, noting that a six year delay was not unreasonable considering the state was in rebellion during most of that time.

The Republican court formally overruled *Bennett v. Worthington* in *Metropolitan National Bank of New York City v. Gordon*.[153] In March of 1872 the New York bank brought an action to collect a written promise to pay dated April 16, 1860, and due ten months after that date.[154] The debtor argued that the collection was barred by the statute of limitations. The bank countered by seeking to exclude the period from 1861 to 1865 when the courts of the state were closed. As an enemy alien the bank had an even stronger case than the creditor in *Bennett*. Under the Sequestration Act passed by the Confederate Congress, the bank's debt was confiscated by the Confederate government in 1861,[155] and the bank could not have brought an action to collect the debt even if the courts of Arkansas had been open. The opinion in *Metropolitan National Bank of New York City* did not, however, attempt to distinguish *Bennett*. Instead, it directly overruled the Conservative court decision, and relying on a series of recent United States Supreme Court decisions involving suits in federal court,[156] held that the war tolled the running of the limitations period. The Republican court even endorsed the dubious argument that a contrary rule might encourage citizens to rebel against the national government so as to close their courts until the statute of limitations had run.[157]

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152. *See* text *supra* at note 71.

153. 28 Ark. 115 (December Term 1872).

154. The opinion does not explain why the five year statute of limitations did not apply even assuming the exclusion of the period the courts were closed. It may be that the promise was incorporated into a writing under seal, which had a ten year statute of limitations. *See* DIGEST OF THE STATUTES OF ARKANSAS, *supra* note 135, ch. 106, § 15.

155. The Confederate sequestration act of August 30, 1861, is reprinted in OFFICIAL RECORDS, *supra* note 22, at ser. IV, vol. 1, at 586.

156. *See* The Protector, 79 U.S. (12 Wall.) 700 (1871); Levy v. Stewart, 78 U.S. (11 Wall.) 244 (1870); Stewart v. Kahn, 78 U.S. (11 Wall.) 493 (1870); Hanger v. Abbott, 73 U.S. (6 Wall.) 532 (1867).

157. The Republican court followed the *Metropolitan National Bank* case in *Eddins v. Graddy*, 28 Ark. 500 (December Term 1873). See also the dictum in *Jones v. Johnson*, 28 Ark. 211 (December Term 1873).

Hall v. Denckla,[158] decided in the following year, established the exact period that the statute of limitations was tolled. The court ruled that the war began on May 6, 1861, the day that the Arkansas convention adopted the ordinance of secession, and ended on April 2, 1866, the date that President Johnson declared hostilities in Arkansas ended.[159] The supreme court conceded that some Arkansas courts were open before April 2, 1866, but concluded that these courts operated under martial law and that no litigant should be compelled to file important documents with a court that could be closed at any time by a "corporal with a squad of soldiers."[160]

V. COLLECTIBILITY OF DEBTS RELATED TO SALE OF SLAVES

The transformation of one fourth of the state's population from the status of slave to that of citizen spawned numerous legal questions.[161] One such issue was the collectibility of debts for the sale of slaves. Prior to emancipation it was a common practice for the purchaser to defer payment of the purchase price of slaves. Instead of paying cash for a slave, the purchaser either delivered a promissory note to the seller or contracted to pay for the slave at a future date. Many of these notes and contracts had not been fully paid at the time of emancipation. When a seller sued on the promissory note or contract, the purchaser argued that emancipation excused payment.

A. Conservative Court

The Conservative court first considered a slave related debt in *Dorris v. Grace*,[162] which it handed down during the December 1866 term. On August 29, 1863, Dorris had purchased a slave from Grace by delivering to Grace a promissory note for $3,000 plus interest at ten percent. After the war, Grace brought suit on the note. According to prewar precedent the purchaser of a slave assumed the risk that the slave might die or escape. If the seller had good title to the slave at the time of sale and passed that title to the purchaser, then the seller was entitled

158. 28 Ark. 506 (December Term 1873).

159. *See* Exec. Proclamation No. 1 (April 2, 1866), *reprinted in* 14 Stat. 811 (1865-67).

160. *See Hall*, 28 Ark. at 512.

161. According to the 1860 census, blacks made up 26 % of the state's 435,000 inhabitants. *See* U.S. BUREAU OF CENSUS, THE STATISTICS OF THE POPULATION OF THE UNITED STATES, 1870, at 3-5, Table I (1872).

162. 24 Ark. 326 (December Term 1866).

to enforce a promise to pay for the slave. In one extreme case, the purchaser of a slave was killed by the slave, and the slave executed for the crime; the court nevertheless held the dead owner's estate liable for the purchase price of the slave.[163] Dorris' attorney was obviously aware of this line of cases because he did not argue that the emancipation of slaves subsequent to the sale constituted a failure of consideration that extingusihed his client's obligation to pay the promissory note. Instead, he contended that the note was void ab initio because the slave had been freed prior to the sale by the Emancipation Proclamation issued by President Lincoln on January 1, 1863.

The supreme court ruled that the promissory note was enforceable. The opinion, authored by Chief Justice Walker, termed the Emancipation Proclamation a war measure, issued in the president's capacity as commander-in-chief of United States armed forces. As such, it was effective only to the limits of federal military power and did not apply to slaves in territory controlled by the Confederacy. Since, on August 29, 1863, the "enemy," as Walker somewhat tactlessly put it, had not yet extended its lines to include Pine Bluff, where the sale took place, Grace received good title to the slave and was obligated to pay the promissory note. Even if the effect of the Emancipation Proclamation was not limited to areas under federal control, the opinion questioned whether the property interest of slave owners, which had long been recognized by the United States Constitution and the United States Supreme Court, could be divested by mere presidential proclamation. The court followed its *Dorris* holding in two other cases decided during the same term—*Rust v. Reives*[164] and *Ex parte Millwee*[165]—both involving sales of slaves in areas still under Confederate control.

The result in these three cases can be contrasted with that reached in *Steele v. Richardson*,[166] which was also decided during the December 1866 term of court. On April 14, 1865, Steele, who apparently was woefully ignorant of current affairs, conveyed to Richardson a 435-acre farm in Ouachita County valued at $10,000 in exchange for six slaves. When Steele belatedly discovered that the Constitution of 1864 had abolished slavery over a year before the exchange, he sued Richardson to recover the farm. Although Richardson knew at the time of the exchange that he lacked any property interest in the slaves, he contended that Steele should not recover the farm because ignorance of the law—

163. *See* Abraham v. Gray, 14 Ark. 301 (July Term 1853).
164. 24 Ark. 359 (December Term 1866).
165. 24 Ark. 364 (December Term 1866).
166. 24 Ark. 365 (December Term 1866).

i.e., the abolition of slavery—was no excuse. The conservative court ruled that Steele was entitled to have the deed to the farm cancelled because he had received no consideration whatsoever for his transfer of a $10,000 farm. The decision is easily reconciled with *Dorris* and the other cases in which the subjects of the sale were still slaves at the time of the sale. The decision is also consistent with antebellum decisions permitting the purchaser of a slave to recover the purchase price of a slave who had been legally emancipated prior to sale.[167]

The Conservative court heard three more slave cases during the December 1867 term. It was customary for a seller of a slave to warrant to the purchaser that the slave was a slave for life. In *Haskill v. Sevier*[168] a purchaser of slaves argued that the warranty of lifetime servitude was breached by the abolition of slavery. The court held that the warranties made by the seller applied to the condition of the slaves at the time of sale, not their future condition. The warranty that a slave was sound in mind and body did not promise that the slave would not later become insane or ill, and by the same token, a warranty of servitude for life was not a guarantee that the slave would never be freed.

The facts of *Willis v. Halliburton*[169] are somewhat muddled. Apparently, the seller conveyed title to several slaves to a buyer in exchange for a promise to pay $6,000. A third party who claimed title to the slaves then sued the buyer, but before the adverse claim could be decided by the courts, the slaves were freed. The buyer then refused to pay for the slaves alleging fraud and breach of the warranty of title by the seller. With very little discussion, the supreme court ruled against the buyer. The decision is explained in large part by the absence of any evidence in the record as to who actually owned the slaves at the time of sale.

In *Atkins v. Busby*,[170] the third case decided at the December 1867 term, the Conservative court drew a distinction between executed and executory contracts for the sale of slaves. Busby sold slaves to Atkins in 1859, but Busby retained both title and possession of the slaves until Atkins made the first of several installment payments. Since Atkins

167. In *Strayhorn v. Giles*, 22 Ark. 517 (January Term 1861), the seller's agent executed a bill of sale warranting that a particular slave was a slave for life despite the agent's knowledge of rumors that the slave was free. When the slave subsequently obtained a judgment of emancipation, the purchaser successfully brought an action against the agent for fraud.

168. 25 Ark. 152 (December Term 1867).

169. 25 Ark. 173 (December Term 1867).

170. 25 Ark. 176 (December Term 1867). This may be the same note at issue in *Busby v. Atkins* discussed *supra* in the text accompanying note 106.

failed to make the first installment payment, title to the slaves never passed to Atkins, and Busby continued to bear the risk of loss due to emancipation.

B. Republican Court

The Constitution of 1868 attempted to overturn the rule of *Dorris v. Grace* regarding the enforceability of contracts for the sale of slaves by declaring:

> All contracts for the sale or purchase of slaves are null and void, and no court of this State shall take cognizance of any suit founded on such contracts; nor shall any amount ever be collected or recovered on any judgment or decree which shall have been, or which may be, rendered on account of any such contract or obligation on any pretext, legal or otherwise.[171]

Despite this clear constitutional admonition, the Republican court that took office in July of 1868 ducked the enforceability question in the first three cases to reach it.

Johnson v. Walker,[172] which came before the court at its first term in December of 1868, was an attempt by the purchaser to set aside the March 1863 conveyance of a plantation complete with slaves and farm implements. The Republican court refused to rescind the contract because the purchaser had not offered to return a large amount of personal property conveyed by the seller. On the question of whether the seller had title to the slaves at the time of conveyance, the court noted cryptically that the purchaser had full knowledge of any defects in title that might result from emancipation.

A second case considered during the December 1868 term, *Coolidge v. Burnes*,[173] was a suit to collect on a bill of exchange[174] drawn on the defendants and accepted by them prior to the war. The defendants tried to escape liability on the grounds that the bill of exchange had originally been drawn by a third party to pay for slaves who were subsequently freed. The supreme court managed to avoid addressing the effect of emancipation on the validity of the bills of exchange. Since the defendants were not the purchasers of the slaves, they lost nothing when

171. *See* ARK. CONST. of 1868, art. XV, § 14.
172. 25 Ark. 196 (December Term 1868).
173. 25 Ark. 241 (December Term 1868).
174. The contemporary term for a bill of exchange is "draft." *See* U.C.C. § 3-104, cmt. 4 (1995).

the slaves were emancipated and were hardly in a position to complain about failure of consideration.

Six months later, in *Russell v. Shute*,[175] the court strained even harder to avoid the constitutional prohibition on enforcing slave contracts. In June of 1866, Shute obtained a judgment against Russell on a note given for the purchase of a slave. When Russell failed to pay the judgment, Shute secured a judgment on a bond posted by Cage as security for the judgment against Russell. The supreme court refused to enjoin the collection of Shute's judgment on the bond. The constitution barred the collection of judgments for the purchase of slaves, but, according to the court, the forfeiture of the bond extinguished the judgment for the purchase of the slave, and hence the judgment no longer existed when the Constitution of 1868 took effect. Shute was attempting to collect the judgment on the bond, which was entirely separate from the underlying judgment for the purchase of slaves. The court raised, but found it unnecessary to consider, the "grave question" whether the Arkansas constitution's prohibition on enforcing slave contracts conflicted with the United States Constitution.

It was impossible for the Republican court to avoid the constitutional prohibition on enforcement of contracts for the sale of slaves in the December 1869 case of *Jacoway v. Denton*,[176] which was a straightforward action to collect $4,500 for three slaves sold on October 4, 1861. According to three justices—Gregg, Wilshire, and Harrison—slavery was legal under the laws of Arkansas and the United States at the time the contract was entered. Consequently, any attempt by the state to deny the buyer the right to recover the purchase price impaired the validity of a lawful contract contrary to Article I, section 10, of the United States Constitution.[177] The majority also accepted the rule laid down by the Conservative court in *Dorris v. Grace* that the emancipation of slaves in Arkansas occurred as areas of the state came under Union control. The opinion rejected, however, the suggestion in *Dorris* that President Lincoln lacked the power to free slaves by executive proclamation, concluding instead that: "All property of rebels, captured by the army, as soon as secure, became vested in the Government; and, when brought within her military lines, she could, with the utmost propriety, liberate slaves."[178]

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175. 25 Ark. 469 (June Term 1869).

176. 25 Ark. 625 (December Term 1869), *appeal dismissed*, 154 U.S. 583 (1872).

177. Two years later the United States Supreme Court would reach the same conclusion. *See* White v. Hart, 80 U.S. (13 Wall.) 646 (1871).

178. *See Jacoway*, 25 Ark. at 629.

Bowen and McClure, the two members of the court who had served as delegates to the constitutional convention of 1868, dissented. The supreme court reporter states that Bowen dissented on the grounds that it was against public policy to enforce contracts for the sale of slaves. Unfortunately, his opinion does not appear in the official report of the case. McClure's lengthy dissent was printed in the report. It focused narrowly on the second clause of the 1868 constitution which states that no court of this state shall take cognizance of a suit to enforce a contract for the sale or purchase of slaves. The constitution that creates a court can also define its jurisdiction, and McClure interpreted the second clause as denying the supreme court, as well as all inferior Arkansas courts, the jurisdiction to enforce contracts for the sale or purchase of slaves. According to McClure, barring access to the Arkansas courts did not impair the validity of such contracts because they were still enforceable in the federal courts, which were not subject to the jurisdictional limitation imposed on the state courts.

At its December 1870 term, in *Kaufman & Co. v. Barb*,[179] the court considered an attempt to collect for the sale of a slave in Independence County on July 10, 1863. Since there was no allegation in the pleadings that Independence County was within Union lines on July 10, 1863, the court adhered to rule of *Dorris v. Grace* and reversed a judgment denying recovery of the purchase price. McClure dissented on the grounds that the pleadings did sufficiently allege the occupation of Independence County by United States forces at the time of the sale.

The Republican court heard three other cases during the December 1870 term,[180] and one case during the June 1871 term,[181] involving contracts for the sale of slaves that were clearly legal at the time they were made. The court concluded that all four cases were controlled by the holding in *Jacoway v. Denton* and summarily disposed of the cases.

McClure continued to dissent in several of these cases on the grounds that the Constitution of 1868 barred the court from considering cases involving the sale of slaves. His opinion in *Pillow v. Brown*,[182] was particularly vehement. The majority invoked *Jacoway v. Denton* without discussion. McClure conceded that closing the courts of Arkansas to Arkansas citizens seeking to enforce slave contracts might impair the

179. 26 Ark. 24 (December Term 1870).

180. *See* Buchanan v. Nixon, 26 Ark. 47 (December Term 1870); Pillow v. Brown, 26 Ark. 240 (December Term 1870); Sevier v. Haskell, 26 Ark. 133 (December Term 1870).

181. *See* Knott v. Knott, 26 Ark. 444 (June Term 1871).

182. The facts of the case are discussed *supra* at note 149.

validity of contracts, but he refused to extend the holding to a contract entered in another state between citizens of that state.

The Republican court heard its last slave sale case at the June 1873 term.[183] In *Anderson v. Mills*[184] the purchaser attempted to shift the risk of emancipation back to the seller by arguing that title to the slaves remained in the seller until the purchaser paid the purchase price, or alternatively, that title to the slaves reverted to the seller when the purchaser failed to pay the purchase price. The court rejected both arguments since the evidence clearly indicated that the seller had transferred both title and possession of the slaves to the purchaser and had made no attempt to foreclose his chattel mortgage on the slaves when the purchaser defaulted. McClure was still dissenting, as was Justice Bennett, who had joined the court after its decision in *Jacoway v. Denton*.

Both the Conservative court and the Republican court agreed that contracts for sale of slaves entered after January 1, 1863, the date of the Emancipation Proclamation, were enforceable unless the sale took place in an area controlled by Union forces.[185] Neither court was ever called upon to consider the effect of the Constitution of 1864 on contracts for the sale of slaves. Article V of that document specifically abolished slavery in Arkansas. Since both courts accepted the prospective validity of that constitution throughout the state, including areas still under Confederate control, both courts would have presumably refused to enforce any contract for the sale of slaves entered after March 14, 1864, the effective date of the new constitution, regardless of which side controlled the area in which the sale took place. It was not until 1886, however, over ten years after the end of reconstruction, that the supreme court confirmed that the adoption of the Constitution freed all slaves in the state.[186]

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183. The court did hear several appeals involving the enforceability of notes delivered for the purchase of plantations complete with slaves, but it managed to resolve all these cases without reaching the emancipation issue. *See* Campbell v. Rankin, 28 Ark. 401 (December Term 1873); Richardson v. Thomas, 28 Ark. 387 (December Term 1873); Sheppard v. Thomas, 26 Ark. 617 (June Term 1871).

184. 28 Ark. 175 (June Term 1873). The opinion was authored by former Confederate Chief Justice Elbert H. English, who was sitting as a special justice in place of Justice Stephenson.

185. The Republican court in *Jacoway v. Denton* reached the same result as the Conservative court in *Dorris v. Grace*—Arkansas slaves became free as they came under the control of the United States government.

186. *See* Graves v. Pinchback, 47 Ark. 470 (1886).

VI. CONCLUSIONS

On most questions produced by the Civil War the positions of the Conservative court of 1866-67 stood in sharp contrast to those of the Republican court of 1868-74.

1. The Conservative court decided that all acts of the Confederate state government were valid except to the extent they directly conflicted with the United States Constitution. The Republican court declared that no government existed in the state between the date of secession and the adoption of the Constitution of 1864.

2. The Conservative court never considered a contract or note specifically payable in Confederate money, but it did reject all attempts to show by parol evidence that the parties contemplated payment in Confederate money. The Republican court proclaimed promises to pay Confederate money unenforceable because the parties aided and abetted a rebellion against the United States government.

3. The Conservative court refused to toll the running of the statute of limitations during the war years. The Republican court suspended the statute from the date of secession to the end of hostilities in the state.

4. The two courts agreed only on the question of payment for slaves. So long as slavery was still legal at the time and place of sale, a postwar court would enforce the obligation to pay for a slave. The Republican court reached this last conclusion despite a clear constitutional dictate to the contrary.

All jurists are to some degree prisoners of their own political and economic experience, and the men who served on the Arkansas Supreme Court during the decade following the Civil War were no exception. Justices on both courts had experienced the trauma of the Civil War though from different sides. It is hardly surprising that victors and vanquished did not always agree on the appropriate response to the legal issues produced by the war.

The justices who sat on the Conservative supreme court came from the politico-economic class that led Arkansas to war, and their reaction to the defeat of the Confederacy was typical of that class. Secession had failed and slavery had ended, but the war changed little else. The goal of the former Confederates who swept into office in the August 1866 elections was to minimize the war's impact on the state and restore the status quo antebellum.

The Conservative dominated General Assembly that met in the winter of 1866-67 reflected this attitude. It passed a statute that denied

many basic civil rights to newly freed slaves.[187] It enacted draconian labor laws that made virtual peons of farm workers.[188] It set aside ten percent of all state revenues to provide disability benefits for Confederate, but not Union, veterans.[189] Finally, and most significantly, it rejected the Fourteenth Amendment to the United States Constitution.[190]

The Conservative supreme court likewise attempted to minimize the impact of the war, but unlike the General Assembly, which could take a proactive approach toward restoring the prewar situation, the court could act only through the cases that came before it. The best illustration of the supreme court's efforts to minimize the war was its treatment of the legal effect of secession. Despite attempts by the Unionist authors of the Constitution of 1864 to invalidate all actions of the Confederate state government, the Conservative court upheld all actions taken by the Confederate state government and its courts except those directly contrary to the United States Constitution.

In cases involving Confederate money or the statute of limitations, minimizing the war meant ignoring the conflict's extraordinary character and relying woodenly on stare decisis even when prewar precedent was poorly equipped to answer the problems created by the war. How else can one explain the Conservative court's refusal to permit evidence that the parties to a contract intended payment to be made in Confederate dollars or its insistence that the statute of limitations continued to run despite the complete breakdown of the judicial system?

In only one area did the Conservative court's adherence to prewar precedent provide a workable solution to the legal problems faced after the war. Antebellum law involving slaves dictated that the purchaser assumed the risk that a slave would escape or die following the transfer of title, and the court quite properly extended this precedent to cover emancipation by government edict.

While the Conservative court tended to minimize the effect of the Civil War, the Republican court seemed determined to drive home to former Confederates the enormity of their unsuccessful attempt to

187. Act 35 of the 16th Ark. General Assembly, 1866-67 Ark. Acts 98. Although the act granted persons of African descent the right to own property, make contracts, and give evidence, it specifically declined to modify any statute, law or "usuage" that prohibited intermarriage with whites, voting in elections, serving on juries, or joining the militia.

188. Act 122 of the 16th Ark. General Assembly, 1866-67 Ark. Acts 298.

189. Act 31 of the 16th Ark. General Assembly, 1866-67 Ark. Acts 90. The benefits were not available to persons "otherwise provided for by the United States."

190. ARK. HOUSE JOURNAL 289-91 (1866-67).

withdraw from the Union. This attitude was not immediately apparent following the July 1868 takeover of the court. During their first few years on the bench, the Republican justices were slow to disturb the decisions of the Conservative court. The decision in *Latham v. Clark* declaring void all contracts and notes payable in Confederate money was handed down during the December 1869 term. It was not until the spring of 1871, almost three years after the Republican court took the bench, that it issued *Penn v. Tollison*, which invalidated all actions of the Confederate state government. *Metropolitan National Bank of New York City v. Gordon*, which tolled the statute of limitations during the war years, came down during the December 1872 term.

The court's gradual denunciation of anything remotely related to the Confederacy coincided with the radicalization of the Arkansas Republican party. Not long after the Republican victory in the 1868 election, the coalition of newcomers and native Unionists who formed the backbone of the party started to unravel. Although most newcomers continued to support Governor Powell Clayton, who had come to Arkansas during the war as a Union officer, native Unionists rallied around Lieutenant Governor James M. Johnson, a longtime resident of Madison County in northwest Arkansas. In early 1871 Clayton announced his intention to resign the governor's seat to seek election to the United States Senate. This provoked a fight over his successor that largely pitted newcomers against native Unionists. The gubernatorial succession confrontation ended with the lieutenant governor's resignation and Clayton's election to the senate, but the rift created between the two factions of the party proved slow to heal. Native unionists began to stray from the Republican fold which came more and more to be dominated by Clayton and other newcomers.[191]

On the supreme court itself newcomers Bennett, Searle, and Stephenson replaced Bowen, Wilshire, and Harrison. Of the three justices who left the court, only Bowen had a reputation as a Republican hardliner. Harrison was a native Unionist who would be elected to the court as a Democrat after the end of reconstruction.[192] Wilshire was a newcomer, but he was not a "radical" as evidenced by his election to Congress as a Conservative following the 1874 Republican downfall.[193] By the end of 1872, the sole native Unionist left on the court was Gregg. Unlike Wilshire and Harrison, however, Gregg remained a loyal

191. *See* MICHAEL B. DOUGAN, ARKANSAS ODYSSEY 256-58 (1994).
192. *See* HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 12, at 451.
193. *Id.*

Republican. After leaving the court in 1874, he never again held public office, although he did run for governor as a Republican in 1886.[194] So long as the newcomer faction was aligned with long term residents of the state, the Republican supreme court was probably reluctant to invalidate contracts payable in Confederate money or the wartime actions of the Confederate state government and its courts. After all, many native Unionists, despite their loyalties, either personally used both Confederate money and the Confederate state court system, or at the very least appreciated the wartime predicament faced by Arkansans.

The best barometer of Unionist sentiment on the court was William H. Harrison, the longtime resident of Chicot County in the Arkansas delta. Harrison vigorously dissented in *Latham v. Clark*, the decision that invalidated all contracts for payment in Confederate money, and in *Penn v. Tollison*, the decision that voided all acts of the Confederate state government.

Lafayette Gregg, the other native Unionist on the court, occupied a position somewhere between Harrison and the more radical Republican members of the court. Gregg did vote with the majority in *Latham v. Clark*, but unlike Harrison, Gregg was from Washington County, which was occupied by Union forces in the first year of the war, and Gregg spent most of the war years in areas where Confederate dollars were not a medium of exchange and Confederate courts did not operate. Gregg also voted with the majority in *Penn v. Tollison*, but his authorship of the decision in *Thompson v. Mankin*, which reads like a concurring opinion in *Penn v. Tollison*, may indicate his lack of enthusiasm for some of the more extreme statements in *Penn v. Tollison*.

Political events at the national level may also have influenced the Republican justices. The position of the Conservative court mirrored that of Presidents Lincoln and Johnson, as well as most former Confederates—the defeat of the Confederate States had confirmed that a state could not withdraw from the Union. If Arkansas' attempt to leave the Union was a void act, then the wartime government of Arkansas continued to exist until replaced by a loyalist government recognized by the president. The Republican court, on the other hand, accepted the theory underlying Congressional reconstruction. The former Confederate states ceased to be members of the Union and did not again become states until they satisfied Congressional conditions for readmission.

194. *See id.*

Economic considerations may have also played a role in the Republican court's decisions. During the early 1870s the Republican leaders of Arkansas actively sought to attract investment in the state's economy. Unfortunately, Arkansas had a less than favorable reputation with northern investors thanks to the ill-fated Real Estate Bank and similar prewar attempts to raise capital.[195] The Republican court was not unaware of the need to burnish the state's good name in the eyes of northern creditors, and this may have played a role in several of the court's decisions. Except for a few unpatriotic souls who were not adverse to dealing with the enemy, northern banks and merchants did not extend credit to Arkansans during the war and were therefore unlikely to hold debts denominated in Confederate dollars. The Republican court could safely repudiate all wartime debts owed those creditors who had agreed to accept payment in Confederate dollars without discouraging the investment of new capital in the state. Continuing to run the statute of limitations during the war years, on the other hand, did pose problems for northern creditors. They would not have been able to collect the debts during the war years, and allowing Arkansans to invoke the statute of limitations would have cut off many prewar debts owed northern creditors. It was probably not coincidental that the case in which the Republican court choose to overrule the Conservative court and toll the statute of limitations during the war years involved a major New York bank. The decision came down during the same time period that Arkansas was attempting to sell various public improvement bonds to New York investors, and the justices may have taken into account the reaction of potential investors.

It is also significant that *Metropolitan National Bank of New York City v. Gordon* was decided after *Penn v. Tollison*. So long as the status of the Confederate state government and its courts remained uncertain, the Republican court struggled with whether to toll the limitations period during the war. Once, however, the court decided that no legal government, and hence no legal courts, existed in the state following secession, it became much easier to toll the limitations period.

In contrast to questions involving the legal effect of secession, the enforceability of promises to pay Confederate money, and the tolling of the statute of limitations, contracts for the purchase of slaves did not prove divisive during the postwar period. The Republican justices

195. A brief description of the default on the Real Estate Bank bonds and subsequent Republican efforts to rehabilitate the state's credit are described in Garland E. Bayliss, *Post-Reconstruction Repudiation: Evil Blot or Financial Necessity*, 23 ARK. HIST. Q. 243, 243-44 (1964).

followed the precedent laid down by their Conservative predecessors. This lack of disagreement, despite the different backgrounds of the justices, is explained by the absence of a clear political or economic agenda in the slave cases. The slave contract cases did not require a court to take a position on the morality of slavery or the wisdom of its abolition. The only issue was which of two former slave owners—the seller or the buyer—should bear the economic loss resulting from emancipation. The Conservative court followed prewar precedent which assigned to the buyer the risk that a slave would die or escape after title passed, and there was no political reason or economic incentive for the Republican court to change that result.