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Dirck, Brian Richard, M.A.

Rice University, 1991
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"RIGHT AND READY":
THE LAW PRACTICE OF NATHANIEL HART DAVIS,
1850-1882

by

BRIAN DIRCK

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
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MASTER OF ARTS

APPROVED, THESIS COMMITTEE:

[Signatures]

DR. HAROLD M. HYMAN, DIRECTOR
WILLIAM P. HOBBY PROFESSOR
OF HISTORY

[Signatures]

DR. JOHN BOLES,
PROFESSOR OF HISTORY

[Signatures]

DR. IRA GRUBER
PROFESSOR OF HISTORY

HOUSTON, TEXAS
MAY, 1991
ABSTRACT

"Right and Ready": the Law Practice of
Nathaniel Hart Davis, 1850-1883"

Brian Dirck

Historians are unfamiliar with the frontier attorney. We know little of who he represented, what types of cases he litigated and his day-to-day labors. Nathaniel Hart Davis practiced law in Montgomery, Texas from 1850 to 1883; by examining his career we may shed light on these issues.

Davis specialized in civil law. Debt collection dominated his practice, but he also litigated land disputes, probate, slave law and divorce cases. He represented the propertied citizens of Montgomery, nearly always acting on behalf of the plaintiff. His energies were devoted primarily to out-of-court tasks: gathering information, tracking down debtors, buying and selling real estate for speculators, and disposing of probate property and debts.

Davis was not the stereotypical incompetent, ignorant, parasitical frontier attorney. A cautious, learned man, Davis fulfilled a vital role in his community. He tried to ensure relatively smooth business transactions in an unstable Texas economy.
ACKNOWLEDGEMENTS

I wish to thank the members of my examination committee for their time, patience and cooperation: Dr. Harold M. Hyman, Dr. Ira Gruber and Dr. John Boles. Professor Hyman, in particular, has been an untiring guide and mentor, not only in relation to this project, but also in my growth and development as a legal historian. I owe him an incalculable debt.

Rice University's Graduate Seminar in Legal and Constitutional History was the genesis of this project. Dr. Hyman and the members of the seminar suffered through the first drafts with commendable fortitude. Their comments and criticisms were greatly appreciated. I wish especially to thank Charles Zelden for his perceptive comments and suggestions.

Several individuals provided assistance in locating primary source materials. Nat Hart Davis, a descendant of the subject of this thesis, generously provided materials in his possession. The staff of the Barker Center for Texas History, Austin, Texas, were always willing to render their aid as I explored their collection of Davis's papers.

The staff and personnel of the District Clerk's Office in the Montgomery County District Court, Conroe, Texas were essential. In this respect, Selida Stansel deserves the highest praise. She patiently allowed me to explore the resources of the Conroe County Courthouse, and gave generously of her time and
support. This project would simply have been impossible without her aid.

Finally, I wish to thank my wife Donna, who has read and commented upon nearly every chapter of this thesis. She is probably more familiar with legal history and Nathaniel Davis than she bargained for; her insight and perseverance were invaluable.
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CHAPTER ONE

"Open the door to the lawyer's office..."

Nathaniel Davis's homestead in Montgomery, Texas still exists. The house is a typical frontier dwelling, single story with a low, wide porch. Several yards away stands Davis's law office, an odd little building with only one door, a small window and no adornment. The door is usually locked.

We need to open the door and discover what happened inside. We need to understand Nathaniel Davis and his law practice. An examination of Davis's career would help fill a large gap in our knowledge of American legal history.

Before 1950 the study of legal history existed in an intellectual dark age. Professional historians were daunted by the depth of technical knowledge necessary to analyze legal records. They avoided serious research into the history of American law. Legal history was consequently written by members of the bench and bar.¹

Lawyers' legal history reflected the preconceptions and limitations of the profession.² Lawyers wrote legal history for other lawyers, often with unfortunate results. Only the most prominent American attorneys and jurists were examined, in a laudatory style with little critical or scholarly investigation. American legal doctrine was portrayed as an unbroken process of ever-growing wisdom, leading to the modern system of justice, the best of all possible legal
worlds. The law in this literature was a hermetically sealed entity, unaffected by social, economic, or political developments.\(^3\)

Legal history's self-contained character was particularly disturbing. Law schools studied and dissected American jurisprudence apart from any larger social context, so it is not surprising that lawyers who tried to write legal history treated the law's historical development as a thing unto itself. This robbed legal history of a sense of relevance to larger social, cultural or economic themes of American history.\(^4\)

The self-centeredness of legal history changed in the late 1950's with the writings of James Willard Hurst, a legal scholar and historian at the University of Wisconsin. Hurst created a broad theoretical foundation for study of the law's past. He noted that legal history needed "some context of theory about the working relations of legal processes to the overall structure and processes of American history."\(^5\)

Hurst called for an end to the intellectual isolation of legal history. The law was fundamentally a reflection of the larger social environment in which it existed. Scholars should delve into the law's past to illuminate the relationship between the law and this environment. As Wythe Holt aptly summarized Hurst's point, "legal history...deals both with the effect of social change upon 'law' and with the ways in which men use 'law' to effect social change."\(^6\)

Hurst defined "social" in economic terms. He focused on
the nineteenth century as the formative era of American legal thought, arguing that Americans of that era wanted the law to create a fertile economic environment which allowed businessmen room to explore the free enterprise system. The law was a "rational tool" which competing private groups used to meet their own economic agendas.7

Hurst wanted to understand how this "rational tool" was used. This could not be achieved by studying only "high politics": the actions of the Supreme Court, legislators, congressmen, and other elites. Hurst wished to explore the day-to-day workings of the American legal system, and how it interacted with the needs of free enterprise.8

The Wisconsin professor almost singlehandedly fathered modern legal history. He freed study of the law's past from the stifling influence of "law office" historicism, by giving it a sense of social context. Hurst sketched in broad outlines a compelling theoretical base for future inquiries. Legal history was no longer divorced from the larger concerns of American social development. It was a relevant, vital field of American history.

Hurst's ideas influenced many legal scholars. Lawrence Friedman, Harry Scheiber and John Philip Reid, for example, built on Hurst's ideas and wrote several outstanding studies which further illuminated the relationship between the law, society, and economic development. Friedman produced the only one-volume history of the American legal system.9 Scheiber illuminated the government's use of eminent domain to
influence property allocation and economic development.\textsuperscript{10} John Philip Reid discussed the impact of legal thought on property and ownership relationships on the Overland trail.\textsuperscript{11}

Hurst's Wisconsin school also generated criticism. Some argued that Hurst's focus on economic relationships was too limited. Constitutional issues were given short shrift. Political matters were neglected. Others objected to the Wisconsin school's fascination with the nineteenth century, to the detriment of colonial developments and the twentieth century. Hurst's detractors generally argued that his ideas provided a good beginning, but were too confining.\textsuperscript{12}

Subsequent scholars rectified these oversights. Constitutional and legal history, long separated, have been combined in the work of scholars such as William Meicke, Herman Belz and Harold Hyman, who have addressed the interaction between the legal system, national and state constitutionalism and various social, political and economic phenomena.\textsuperscript{13} Political and legal relationships have been keenly examined by Stanley Katz and Don Fehrenbacher, among others.\textsuperscript{14} A considerable amount of scholarship has focused on the colonial era, particularly Katz and David Flaherty's work on the legal system's role in policing seventeenth century moral behavior.\textsuperscript{15} Scholars have also explored the recent past; especially noteworthy is Jerold Auerbach's study of the lawyer's role in twentieth century civil rights struggles.\textsuperscript{16}
These were only a few of the scholars who contributed to the explosion in legal history literature during the past thirty years. Legal history has come of age. It is no longer the exclusive bailiwick of lawyers, and it is not confined to strictly economic themes.

Professor Hurst's position as the "father of modern legal history" is universally recognized. His work is the foundation of legal historical scholarship. Yet it is fair to say that less attention has focused on Hurst in recent years. This is perhaps natural. Legal history has proven to be an incredibly rich and diverse field. The inquiries into constitutionalism, ideology, politics and other less economic facets of the law have drawn attention away from Hurst's pioneering ideas.

This is unfortunate, because many issues posed by Hurst remain unexplored. The Wisconsin professor was vitally concerned with the relationship between law, society and the economy in the nineteenth century. Both Hurst and subsequent scholars have focused their energies on various facets of this broad issue. However, a fundamental subject has suffered neglect: the nineteenth century lawyer.

Scholars have written much about the pre-1900 attorney, but this research has not come of age with the "new" legal history of the Wisconsin School. The literature of the nineteenth century lawyer, particularly those who practiced from 1830 to 1880, still resembles the old "law office" scholarship. Only those lawyers who achieved political
prominence have received attention. Scholars usually forget these men were practicing attorneys before they were legislators, governors, congressmen, and so forth. Biographies of these men are heavily slanted toward political aspects of the subject's career.\textsuperscript{19} Studies of Alexander Stephens, to cite but one example, rarely devote more than a few pages to his law practice, despite the fact that he was one of Georgia's leading trial attorneys for many years.\textsuperscript{19}

Those who eschewed politics and devoted all of their energies to the bar receive hardly any attention at all. Maxwell Bloomfield has written a collective biography outlining the legal careers of several barristers.\textsuperscript{20} Anton-Herman Chroust has written a useful account of the legal profession which illuminates the nineteenth century.\textsuperscript{21} Scattered monographs have shed some light on antebellum attorneys. Elizabeth Gasper Brown, Michael Harris and Jack Nortrup have contributed to our understanding of the lawyer's education, the contents of his library, and some features of his courtroom practice.\textsuperscript{22}

These historians have provided valuable insights, but a deep understanding of the mid-nineteenth century lawyer's practice continues to prove elusive. Several have commented on this fact.\textsuperscript{23} Lawrence Friedman expressed the point most eloquently when he wrote that "rare indeed are books which open the door to the lawyer's office, so to speak."\textsuperscript{24}

Legal history is badly in need of detailed research
concerning the nineteenth century lawyer's daily practice, the "nuts and bolts" of his work. What types of cases did he litigate? Who were his clients? How did he gather information? What out-of-court tasks did he perform? What was his relationship with other court officials?

Besides these "nuts and bolts" questions, others arise: how did an attorney's political beliefs affect his practice? What were his ideas concerning legal ethics? How did he approach arguing cases involving sensitive social issues, such as divorce or (in the South) slavery?

For southern attorneys, a unique issue arises. Very little has been written about the law below the Mason-Dixon line. Those authors who have turned their attention to this region have wrestled with a fundamental point: was there a "southern law" which was somehow different from law in other regions of the country? There is no doubt that the southern legal system addressed unique problems, such as slavery. Was the system itself unique? Or did southern lawyers, jurists and legislators adapt precepts found in American law as a whole, without creating a singular body of law? Any serious inquiry into this issue must include a detailed examination of southern attorneys, who were central components of the legal system.25

The lawyer played a decisive role in the process of interaction between the American legal system and the ordinary citizen. He was the chief liaison between the judge and the litigant. Professor Hurst's questions concerning the
interplay between law and society will never be fully answered until we explore the functions of the attorney.

The career of Nathaniel Hart Davis provides an excellent opportunity to do so. Davis practiced law from 1860 until 1883. He was in most respects an average attorney, of modest abilities, with no political ambitions. He was the sort of unremarkable nineteenth century lawyer who has escaped the attention of legal historians. His career reveals much about the day-to-day workings of the legal system in a large, busy southern state.

Davis's legal career spanned over forty years, encompassing activities on both the bench and the bar. He served twice as Montgomery's justice of the peace, and was appointed to a brief term as a state district judge. An examination of this aspect of his career would no doubt yield interesting results, but documentation is scarce, particularly for his tenure as a justice of the peace. A serious inquiry into his experiences as a judge must await discovery of more adequate source material.

Information concerning his work as an attorney is abundant and revealing. Davis kept detailed, if somewhat erratic records of his practice. These include personal and business correspondence, legal research notebooks, account books, copies of court petitions and drafts of arguments Davis delivered before the Texas Supreme Court. When coupled with the court records and docket entries located in the District Clerk's Office for Montgomery County, a remarkably complete
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CHAPTER ONE NOTES


2The term is Horton Horvitz's; see "The Conservative Tradition," 276.

3Ibid., 275-294.


6Holt, "Now and Then," 618.

7This is primarily from Hurst's seminal Law and the Conditions of Freedom in the Nineteenth Century United States (Madison: University of Wisconsin Press, 1956); Hurst writes in considerably more detail in his The Growth of American Law: the Lawmakers (Boston: Little, Brown and Co., 1950), but the theoretical structure remains the same; see esp. chp 1.


11 John Philip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino, California: The Huntington Library, 1980); particularly fascinating is his postulation of a "legal behaviorism" carried by nineteenth century Americans; see 335-364.

12 White, "Book Review", 1133-139; Holt, "Now and Then", 617-619; Flaherty, "Hurst as Legal Historian," 222-234, is an excellent defense of Hurst's work; he points out that Hurst's viewpoint is not so limiting as one might expect, that Hurst is not an economic determinist.


17 See generally Nelson and Reid, *Literature of American Legal History*.

18 Examples are numerous; rather than list them all, I refer to Friedman's remarks concerning this literature in his *A History of American Law*, 701.


CHAPTER TWO

"To Be Void if I Do Not Properly Pay": Law Practice, 1850-1861

Nathaniel Davis trained for the law under his older brother, Hugh Davis, an attorney in Marion, Alabama. Apprenticeship in a law office was a widely accepted educational method in antebellum America, where few law schools existed.¹ Nathaniel's training lasted only a little over one year. He was admitted to the bar in Marion in January, 1838.²

Whether an aspiring lawyer-to-be acquired competency at his trade depended largely on the character and abilities of his instructor.³ Hugh prepared his young charge well. Nathaniel's notebook from his period of training indicated an extensive reading list: not only standard texts (Coke, Blackstone and Chitty), but also treatises by Story and Kent, as well as cases reported from various state courts and the United States Supreme Court. He also studied the intricacies of Spanish land law, a handy skill in Texas.

Nathaniel acquired early the habit of methodical, careful preparation. "Never Speak on any Subject, till you have Studied profoundly," Davis later wrote, quoting Alexander Hamilton. This axiom extended not only to his speechmaking, but pre-trial preparation as well. Nathaniel exhaustively prepared his cases, an attitude acquired from Hugh which would remained with him his entire life.⁴
Within two years of his admission to the bar, Davis settled in Texas. He is said to have been persuaded in this decision by Sam Houston, whom he met on a steamboat in New Orleans. Davis was probably also influenced by the fact that Texas was the South’s newest frontier, where opportunities were plentiful for a trained lawyer.

Davis settled in the raw little community of Montgomery. Located in southeast Texas, Montgomery was barely nine years old when he arrived, a collection of log houses and not much else. The town did not even have a courthouse, though land had been set aside for its future construction. Davis recorded in his journal, "I arrived in Montgomery, Texas on April 4, 1840 at eleven and one half o’clock."

The young attorney from Alabama did not immediately begin practicing law upon his arrival. Civic matters occupied much of his time. He was Montgomery’s first mayor, an officer of the local militia, a notary public, a land commissioner, a Mason and a leader of the Methodist church. Davis also performed a lengthy stint as Montgomery’s justice of the peace. He quickly achieved a position of prominence in the little town.

There were probably a variety of reasons for this delay in beginning his law practice. Davis became deeply involved in helping his fellow townspeople create a home in the Texas wilderness. His house and office served as a sort of community center until the new courthouse was completed. The many positions he held indicated a desire to help
establish Montgomery as a stable community. His law training
thrust him naturally into a position of authority, calling
upon him to meet a variety of civic obligations. Not until
1850 did Davis cast these aside and become a full-time
barrister.12

Any fledgling antebellum American attorney faced problems
in beginning his trade. Competition was fierce, especially in
older communities whose experienced attorneys with
long-standing reputations snatched up the wealthiest clients
and lucrative cases.13

Many young lawyers despaired of earning a decent living in
the more settled eastern areas and moved west with the
frontier.14 But even in the wilderness lawyers proliferated.
A western attorney wrote in exasperation that "there is a
superabundance of Lawyers."15 The tiny Texas community of
Clarksville alone boasted fourteen attorneys in 1852.16

There were at least four other practicing attorneys in
Montgomery when Davis opened his practice.17 Davis possessed
advantages that many other neophyte lawyers did not. He was a
recognized local leader. As justice of the peace he was seen
as a knowledgable legal figure. He began his career with good
contacts among Montgomery's citizenry and considerable local
prestige.

Nevertheless, creating a new practice was difficult for
Davis. He decided to specialize entirely in civil law,
perhaps in the belief that his fellow attorneys already
possessed a monopoly on the criminal law trade in Montgomery.
Like so many others of his profession he began from the bottom up, handling simple, mundane cases for low fees as he built a clientele and a reputation.

His first clients were primarily local citizens. Advertising was out of the question, since Montgomery had no newspaper. He solicited business largely through personal contacts. Many clients were neighbors, such as Peter Willis, a plantation owner and merchant who would later become a very regular source of business. Others were acquaintances from Davis's days as justice of the peace, such as William Fowler, who was Davis's court clerk.

Building a regular following was slow and difficult. Thirty-eight cases are extant from Davis's 1850 practice. These cases were litigated for thirty-two different clients, indicating that many of these were one-case only customers. Only three men gave Davis any repeat business: William Fowler and Alexander McGown, who would be lifelong clients, and a local farmer named R.B. Martin.

What sort of tasks did these men bring to the Montgomery attorney? They were wealthy property holders, businessmen and farmers, who were involved in various schemes to acquire more property, especially land. They asked Davis to collect debts owed to them by their business associates. Thirty-eight of the thirty-seven cases involved some form of debt collection, with Davis almost always representing the plaintiff.

Much of this litigation involved real estate. In a typical
case heard before the state district court in July, 1850, Davis represented Alexander McGown in a suit involving a promissory note for land signed by William Simonton and endorsed by John M. Lewis and Charles Lewis. Davis named Simonton and the Lewises as co-defendants in the suit. The note was valued at $536.00; Davis and his client sued for $1000.00. The defendants denied owing McGown anything at all, but Davis produced a copy of the note, with their signatures, and won his case.²⁴

One suit involving money owed on land illustrates Davis's relative inexperience as an attorney. He represented R.B. Martin who in 1849 sold a 640 acre tract of land "lying on Lake Creek" to Lemuel G. Clepper. Clepper was a rich Montgomery plantation owner and avid land speculator. He bought the land on credit, gave Martin a promissory note valued at $270.20, and mortgaged the land to Martin as a lien "to be void if I do not properly pay." William Fowler co-signed the note, which was to expire in twelve months.²⁵

A year passed, and Clepper failed to pay Martin for the 640 acres. Nor did he pay any interest on the loan. Martin engaged Davis to sue Clepper and Fowler to compel payment of the debt.

In his petition to the court, Davis displayed the promissory note and mortgage. He asked that his client be paid. He also mentioned another debt owed to his client on a promissory note valued at $96.00. The jury agreed with Davis, and declared Clepper to be liable for both notes.²⁶
In September, 1850 Clepper and Fowler asked that this judgement be set aside. They stated that Davis's petition was flawed because it "was brought up on two distinct causes of action." Davis should not have brought suit for both the $270.20 note (involving a mortgage) and the $96.00 note (which involved no mortgage at all). The two issues were "thus incompatible and dissimilar", and the decision should be reversed, they argued. The district judge agreed, and the suit was dismissed. Davis's technical error cost his client over three hundred dollars.27

Land was not the only species of property involved in these debt cases. Davis's clients sued over money owed for a variety of goods and services. Alexander McGown hired Davis to sue a man named Jason Ballew. McGown claimed Ballew owed him many minor debts for boarding two black children, caring for his horse and saddle, a quart of brandy, several dinners and a cargo of animal fodder. Ballew replied that such claims were "confused, indefinite and in law wholly insufficient." How the suit was finally resolved is unknown.28

Usually Davis was able to prove that the debt in a given case was legitimate. He produced promissory notes signed by the defendant, rendering a decision in Davis's favor a foregone conclusion. The court then ordered the county sherriff to seize the defendant's property, if any could be found, and sell what was necessary to satisfy the debt. In one case, the court sold thirty-seven hogs to cover a debt owed by William Fowler to Davis's client J.A. Luter. In
another, the court took and sold a longhorn steer.\textsuperscript{29}

These seizures were somewhat uncommon. More often, neither the defendant or his property could be located. In ten of the thirty-seven debt cases litigated by Davis this occurred. The state district court ruled in his favor, but found no property to seize.\textsuperscript{30}

Several other cases were never resolved at all. Davis served the debtor with a subpoena and he promptly vanished. In a frontier state like Texas it was all too easy for a man who owed money to skip town with his belongings and disappear. Travelling conditions were too poor and officials too few to chase them down. Davis could only charge his client a minimal fee, usually a dollar for serving the subpoena.\textsuperscript{31}

Only one case in Davis's 1850 practice did not involve debt collection. This was a negligence matter in which the Montgomery attorney represented an Ohioan, George W. Mason. Mason was a book-dealer who hired a Houston stagecoach line to haul several hundred law and history books from Montgomery to Galveston. Somewhere along the route the stage managed to lose the books entirely, and Mason instructed Davis to sue the firm for $800.00, citing the stage's "carelessness and negligence." The district court jury sympathized with Mason, and Davis won his case. This matter must have provided a welcome interlude to the steady diet of debt cases.\textsuperscript{32}

The first year of full-time law practice for Davis was a hardscrabble existence. He litigated many short-term debt
cases for a variety of clients. Few of these cases lasted longer than one court term, and most involved clients who would call on Davis's service only once. His earnings could not have been great. Often he gained only a dollar or two serving a subpoena to a debtor who would never appear in court.33

Nevertheless, 1850 was a promising beginning. Davis established a good relationship with several future long-term clients, men like William Fowler and Alexander McGown. He also carved a place for himself as an attorney who worked well at the district court level handling civil law cases. All of these factors helped him create a fairly prosperous law practice by the outbreak of the Civil War.

Davis was earning a comfortable living by the middle of the 1850's. Records show that from 1856 to 1859 he often reaped one hundred dollars a month from his profession, a good salary by contemporary standards.34 Business was so good that Nathaniel asked his brother James to join him as a law partner in Montgomery. Twelve years younger, James received his training in Alabama, probably in Hugh's law office, and was admitted to that state's bar in 1849. He tried to establish a practice in rural Mississippi. But prospects looked brighter with his elder brother on the Texas frontier, so James moved west in January, 1856. He continued as Nathaniel's partner for over thirty years.35

There are forty-seven extant cases from this practice for the period 1860-1861. They reveal a stable, well-run
business. In many ways these were the best years of Davis's professional career, as a respected and prosperous middle-class Texas lawyer.

His clients did not differ significantly in class or background from ten years earlier. Davis continued to represent upper-class property holders, men like James Price, a well-to-do physician and slaveholder. These were primarily local citizens from Montgomery, although three of his customers resided in nearby Washington county, one was from Houston, and one lived in Galveston.36

By 1860 Davis had met with some success in building a regular clientele. Seven of his thirty-four litigants were repeat customers. Three of these men, Alexander McGown, William Fowler, and Peter Willis, were among Davis's first clients in 1850. Willis in particular proved to be a regular source of business. The Montgomery planter moved to Galveston after the death of his wife in 1856, where he established a dry goods store. He retained Davis as his attorney for business matters in Montgomery. Davis litigated eight cases for Willis in 1860-1861 alone.37

These eight regular customers supplied 20 percent of the Montgomery lawyer's business. Davis established a core group of regular clients that gave his practice more stability than in 1850. But overall his practice consisted primarily of one-case-only litigants.38

Debt collection continued to be his chief service. Twenty-four of the forty-seven cases from 1860-1861 involved
this sort of action. Litigating debt cases proved more complicated than in 1850. Montgomery was no longer a marginal establishment in the wilderness. By the eve of the Civil War, it was a permanent, thriving little town, with several mills and retail stores as well as extensive agriculture and ranching. The types of debts its citizens incurred, and the property on which they were owed, reflected a more developed, complex economy.

Many cases were still relatively simple, involving direct default on a promissory note. The amounts in question varied from the paltry sum of seventeen dollars to over six thousanded dollars owed for several valuable tracts of land. In a typical case decided in the fall of 1860, Davis's client, Abner Womack, sued J.R. Dupree for failing to honor a four hundred dollar note. Dupree could not be found (a frequent occurrence, as in 1850), and since Davis produced the note as evidence, the court ruled in favor of his client. Such cases differed little from the debt litigation performed by Davis ten years before.

But some were quite different. Five cases were centered around probate issues. The men who founded Montgomery in the late 1830's were growing old and often dying. The more well-to-do left large estates, and often large debts.

He represented the defendant more frequently in probate than in other matters. In November, 1860 Davis represented the executors of the estate of Alexander McGown. A man named Foster claimed a variety of property from McGown's heirs: a
horse, mule, several beds and other furniture, as well as
several outstanding debts. The case languished in court
through the Civil War and during the early 1870's. No
resolution was ever recorded.  

Probate cases were lengthy, complicated affairs,
involving many separate transactions which took place over a
long period of time. The deceased often kept poor records.
Harried executors were confronted with a variety of competing
claims by creditors on the finite resources of the estate. It
is revealing to note that, of the five probate cases
litigated in 1860-1861, only two were ever completed. The
other three lingered on the state district court docket for
years without final resolution.  

Another form of debt collection confronting Davis during
this period involved the most vexing form of "property" known
in the antebellum South: slaves. Davis litigated five cases
involving slaves in 1860-1861. Four concerned money owed to
Davis's client for hiring slaves out. The other case required
Davis, representing William Fowler's widow, to fend off the
claim of a local rancher, Willifort Cartwright, who sued the
estate for the value of a slave mortgage.  

How complicated these cases might be is evident in one
slave hire case, Thornhill v. Minnock, et. al. Both
litigants' wives, Susan Thornhill and Sophia Minnock, somehow
acquired joint ownership of several slaves in 1854; perhaps
through settlement of a probate matter, for example. Sophia
and her husband kept the slaves, but agreed to share the
money earned from their labors with the Thornhills. The Minnocks did not do so, however, and by 1860 Susan's husband hired Nathaniel Davis to sue for the money. This was a considerable sum, since the Minnocks apparently hired out all of the slaves in question on a full-time basis. Thornhill estimated the total profits to amount to about twenty-six hundred dollars, of which he and his wife claimed half. The Minnocks disputed this amount, which they thought was too high. The case was never resolved, though it remained on the district court docket until 1871.\textsuperscript{47} Such cases involved more than a straightforward debt on land. Value on a slave's labor was difficult to assess. And the peculiar nature of this form of "property" sometimes surfaced, a problem which will be elaborated upon in chapter four.\textsuperscript{48}

Davis was also compelled to represent himself on occasion. Twice in 1860 he sued a client for his fee. Neither defendant appeared in court, and Davis won both cases. Whether he was able to collect his money is not known.\textsuperscript{49}

Debt collection continued to be the backbone of Davis's practice. In many ways debt collection grew more complex. Probate, slave hire, slave mortgage and collection of his own fees presented more complicated, or at least different problems than was the rule ten years earlier.

Davis's 1860-1861 practice also included more non-debt related cases. Chief among these was land litigation. Real estate often appeared in Davis's debt litigation. But in 1860 there were six cases concerning disputes over land in which
no promissory note was involved. These were contests disputing clear title to a tract of land. In one such case, two Montgomery farmers claimed a 125-acre plot situated between their two homesteads. Davis's client, James Lynch, sued his neighbor George Matthews for possession of the tract. But the two litigants with their attorneys arranged an equitable out-of-court settlement which divided the land into two parcels. When the case was brought before the district court in April, 1861 Davis's only task was to record the survey marks of the settlement. 50

Davis also handled three divorce cases in 1860-1861. In one case he represented James Price, a regular client, who successfully sued his wife for desertion under Texas's 1841 divorce statute. 51 In another, Davis represented the wife, Matilda Burden, who sued her husband John, again for desertion. Matilda had lived apart from John for several years. When the county sherriff seized a flock of sheep belonging to the couple to pay her absent spouse's debts, she asked Davis to try and void the seizure. He advised her not to attempt such a suit, which she could not possibly win while still married to John.

She thereupon hired Davis as her attorney to sue John for divorce. He failed to appear in court, and the district judge granted Matilda's request, after which a jury convened to decide the fate of the ex-couple's property. Their 177-acre tract of land was divided, while Matilda was awarded everything else: household goods, several hogs, horses,
cattle and oxen, as well as a slave woman named Hannah. Hannah belonged to Matilda before her marriage, and by Texas law she was not considered part of the marriage's community property. Davis represented some local citizens for rather unusual purposes. On behalf of Robert Simonton the attorney petitioned the local district court to alter the construction of a local pathway called the Danville road. For unknown reasons Simonton wanted the road to run south rather than north of his land. Davis tried, but the court refused his client's request.

Non-debt cases like these were relatively uncommon in Davis's 1860-1861 work. But they do indicate a more balanced practice than in 1850, branching into areas other than debt collection. Stability was also evident in the length of time Davis devoted to each case. In 1850, almost none of his cases were litigated for longer than one term of the court. Just beginning his legal career, the young Montgomery barrister represented one-time-only clients with short-term needs. Ten years later the situation was very different. Only fifteen of the forty-seven extant cases were litigated for one term only. Most required at least two terms; several engaged Davis's energies for many years. Seven were appealed to the Texas supreme court; such appeals rarely occurred in his early career.

By the eve of the Civil War, Davis was no longer exclusively a debt collector, seeking his niche in Montgomery's legal market. He had found his place as a
competent civil law attorney. His practice remained somewhat specialized, dealing in debt collection and property matters for the propertied class of Montgomery society. But within this narrow area, Davis litigated a much wider variety of cases, touching on probate, slave law, land law and divorce, as well as debt collection. This lent his practice a broader base than ten years previously.

It undoubtedly contributed to greater respect for Davis, who became known as a competent lawyer in several areas of civil law. From a struggling young attorney seeking to earn a living by representing clients with simple, straightforward needs, Davis became an established civil law practitioner with a relatively balanced, thriving practice, a small but reliable regular clientele, and cases involving considerable complexity and expertise.
CHAPTER TWO NOTES

On legal education in America at this time, see Robert B. Stevens, *Law School: Legal Education in America from the 1850's to the 1880's* (New York, 1983), esp. chps 1-2.


See especially Box 3K403, Book 1338, Nathaniel Hart Davis Papers, Barker Center for Texas History, Austin, Texas (hereinafter cited BCTH); this is Davis's notebook dating back to February 23, 1839; for later examples of his study regimen, see Legal Notebook, "No. 1", (private collection of Nathaniel Hart Davis, Conroe, Texas); the quote is from this notebook, un-numbered prefatory page.


Ibid., 2-3.

This journal is apparently lost; it is quoted in Montgomery County Genealogical Society, *Montgomery County History*, (Winston-Salem, N.C.; Hunter Publications, 1981), 252.

His early civic career is conveniently summarized in Ibid., 252, and Bentley and Pilgrim, *Texas Legal Directory*, 52.


I have located evidence of only one case litigated before 1850 by Davis; see Miles O. Stephens to Nathaniel Hart Davis, January 19, 1844; 3K396, File 2, BCTH, pertaining to a debt case.

14Ibid., 406; also Bloomfield, "Texas Bar", 262.


16Bloomfield, "Texas Bar", 269.

17Martin, "Montgomery", 87.

18Montgomery's only antebellum newspaper, the Patriot, ceased publication in 1845; see Ibid., 40.

19Gaveston Daily News, November 27, 1873, contains obituary of Willis; on Fowler, see biographical sketch in Montgomery County Genealogical Society, Montgomery County, 223.

20This is based on cases found in Box 3K403, 1-8, Book 1032, BCTH, and District Court Minutes, 1848-1870, District Clerk's Office, Conroe County Courthouse, Conroe, Texas (hereinafter cited as DC0).

21Box 3K403, Book 1032, NHD Papers, BCTH, 1-8.

22This conclusion is based on examination of the backgrounds of Davis's clients in Montgomery County Genealogical Society, Montgomery County; Martin, "Montgomery County"; and U.S. Census Records, 1850, Montgomery County (Rosenberg Library, Galveston, Texas).

23Box 3K403, Book 1032, 1-8, BCTH, and District Court Minutes, DC0, Conroe; in three cases I was unable to identify who Davis represented; I found no cases in which Davis represented the defendant.

24McGown v. Simonton, Lewis and Lewis, Minutes, 1848-1870, DC0.

25Martin v. Clepper, et. al. 3K403, Book 1032, 7, BCTH; Minutes, 1848-1870, DC0.

263K403, Book 1032, 7, BCTH.

27Minutes, 1848-1870, DC0.

28Ibid.

29Luter v. Fowler, 3K403, Book 1032, 1, BCTH; Potter v. McCollum, 3K403, 2, BCTH.

303K403, Book 1032, 1-8, BCTH; Minutes, 1848-1870, DC0.
There are ten examples of this sort of occurrence in 3K403, Book 1032, BCTH; see for example A.H. White, guardian of P. Sheppard v. M.A. Sheppard and W.A. Sheppard Book 1032, 5, BCTH.

Mason v. Houston and Brooks Minutes, 1848-1870, DCO.

For one of many such cases, see Randolph v. Russell, 3K403, Book 1032, 6, BCTH.

Box 3K401, Book 1329, BCTH; this is a record of cash received by Davis during the latter 1850's and 1860's; a typical entry:

1859

<table>
<thead>
<tr>
<th>Month</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>January-February</td>
<td>$30.00</td>
</tr>
<tr>
<td>March</td>
<td>126.00</td>
</tr>
<tr>
<td>April-May</td>
<td>45.00</td>
</tr>
<tr>
<td>July</td>
<td>53.40</td>
</tr>
<tr>
<td>August</td>
<td>135.00</td>
</tr>
<tr>
<td>November</td>
<td>260.00</td>
</tr>
<tr>
<td>December</td>
<td>130.00</td>
</tr>
</tbody>
</table>

Biographical sketch of James in Bentley and Pilgrim, Texas Legal Directory, 52; unfortunately James left almost no evidence of what he did in the practice; scattered fragments indicate that he split the civil law practice with his brother; see 3K401, Book 1332 and 1325, BCTH.

Evidence concerning this phase of Davis's career is derived principally from three sources: Box 3K402, Book 1356, 29-55, BCTH; District Court Minutes, Civil Law, volumes E and F, DCO; and miscellaneous court records for the cases listed in these sources, DCO. The exact breakdown of types of cases:

- promissory note (debt) 24
- land 6
- slaves 5
- probate 5
- divorce 3
att. fees 2
miscellaneous 2

The Willis cases are all listed in 3K402, Book 1356, 31, 43, BCTH and Minute Book E, 281, F, 11, 73, 379, 381, and passim; in the tabulation for McGown, I have included, besides the cases bearing his name, Watkins v. Oliver in which McGown was the principal co-defendant; see Minute Book E, 236, 262, 267, 275, 280, DC0.

Davis's clients and the number of cases, based on sources cited above:

R. Simonton
Y. Baker
Davis (himself)(2)
W. Fowler (3).
A. McGown (2)
P. Willis (8)
James Lee
John Lindley
D. Williams (4)
John Winter
J. Numer (2)
James Lynch
_ Davis
_ White
James Price (2)
A lithia Clark
J. Thornhill
E. Ellmore
M. Taylor
George Pinchback
George Butler
Abner Womack
R.A. Brooks
J.R.P. Jett
Matilda Burden
A. Comstock
W. Caldwell
W. Gilliam
C.F. Jones
R. Bradley
W.H. Bailey
Joshua English

Based primarily on information in 3K402, Book 1356, BCTH.

Martin, "Montgomery County", chp. 3.

The seventeen dollar case was Paynhaus v. Jett, Minute Book F, 64-65, DC0; the six thousand dollar case was Fowler v. Fowler's ex., Minute Book F, 58, 159, 254, 635-636, DC0.

Dupree v. Womack, Minute Book F, 18, 99, DC0.

Willis v. Nobles adu., et. al., Minute Book F, 73, 78, 188, 253, 260, 490, DC0.

Foster, et. al. v. McGown's ex., Minute Book E, 112, 127, 169, 222, 266, 270, 304, 314-315, DC0; see also 3K402, Book 1345, BCTH.
See generally 3K402, Book 1356, BCTH.

Cartwright v. Fowler, 3K402, Book 1345, BCTH.


Arnold v. Willis and Fridge, Minute Book E, 29, 56, 112, 128, 159, 164, 222, 278, 310; F, 8, 49, DC0.

Davis v. Miller's ed., Minute Book E, 281; Davis v. Taylor, Minute Book E, 280, DC0.

Matthews v. Lynch, Minute Book F, 77-78, DC0.

Price v. Price, Minute Book F, 60, DC0.

Burden v. Burden, Minute Book F, DC0; for advice concerning sheep, see 3K402, Book 1356, 40, BCTH.

Box 3K402, Book 1356, 29, BCTH.

See generally 3K402, Book 1356, BCTH.
CHAPTER THREE

"The Labors of the Profession": Law Practice,
1861-1861

Nathaniel Davis was a successful southern lawyer in 1861. The Civil War would change this and significantly hamper his practice. The Confederate government passed laws which rendered debt collection, the mainstay of his practice, very difficult. The economic devastation wrought by the war was not conducive to a law practice built largely on property and business transactions. And Davis's political outlook, his adherence to nationalist, Unionist principles despite the consequences, contributed to his professional difficulties.

The Montgomery barrister held a variety of minor elective offices during his life, from mayor of Montgomery to major in the local state militia. He was interested in politics, but he was not ambitious for a high office. Nor was he politically astute. Davis consistently supported the losing party in the years before the Civil War, which in Texas usually meant any organization other than the Democratic party.

The Democracy was the only stable and politically viable party in the Lone Star state before 1865. While Whiggery was strong in many other southern states, the party never achieved a real foothold in Texas, primarily because of its opposition to Texas's admission into the Union. Annexation was almost universally supported by Texans, so their strong
Democratic loyalty is not surprising.²

There were exceptions, however. Opponents of the Democracy were the fringe element of Texas politics, occasionally capturing a local county office, a few state legislature's seats, even the governorship on one occasion. Historians have labelled them "the Opposition", for lack of a better term, since they never created a lasting party organization.³ During the first half of the nineteenth century this amorphous group of men operated under three different political banners: the Whig party, the American party and the Constitutional Union party.

There were a few Whigs in Texas. They made a poor showing in the county and state elections during the period: in 1848, for example, the Whig gubernatorial candidate carried only three counties. Never very stable, the Texas Whig party did not survive the demise of the national organization after 1853.⁴

Many ex-Whigs became Democrats after their old party fell apart. But a good number joined the growing Nativist movement. They formed the backbone of the American, or "Know-Nothing," party in Texas, founded in the summer of 1855.⁵ The national American party's virulent denunciation of foreigners and Catholics held little attraction for most Texans, except for individuals who resented the heavy German influence in some communities. The state party appealed to voters with deeply nationalistic, unionist sentiments: generally the old Whig constituency. The Americans elected
several state legislators and a United States congressman, but they usually fared badly against the Democracy. By 1857 the party had ceased to exist in Texas.6

Opposition men—former Whigs, Know-Nothings and some conservative Democrats—united without forming a party machine in 1858 to place independent candidate Sam Houston in the governor's chair.7 They did not create a de facto party until the summer of 1860. Alarmed at the growing sectional strife among the Democrats, and fearing above all else a Republican President, Opposition elements in Texas and around the country founded the Constitutional Union party.

The Constitutional Unionists did not adopt a platform. They merely called upon their countrymen to uphold "the Constitution and the enforcement of the laws." Their Presidential candidate, ex-Whig John Bell of Tennessee, carried only three border states. The Constitutional Union party vanished soon after Fort Sumter.8

During the decade preceding the Civil War, Texas's Opposition men never posed a serious threat to the Democracy's political hegemony in the state. Whigs, Know-Nothings and Constitutional Unionists were essentially the same men. They were middle-aged, middle-class Texans who lived in the more populous areas of the state, and were often associated with commerce or manufacturing.9

Lawyers were the largest occupational group among Opposition leaders.10 Opposition politics exerted a strong influence on the legal profession in Texas. While a few
Opposition lawyers were affluent urbanites, most were lower to middle-class attorneys who practiced in the less developed areas of Texas; men like Nathaniel Davis.\textsuperscript{11}

Davis was active in all three Opposition political parties before the Civil War. He served as a delegate to Whig and American party state conventions in Texas and Alabama.\textsuperscript{12} He was a member of the American party. He was founder and president of the Montgomery county Constitutional Union League, helping to draft a resolution which declared the Constitutional Union party platform to be "all that a Patriotic, National and Conservative people could desire."\textsuperscript{13}

"The Whig party of the present day," he wrote in 1839, "like that which first acquired the name, had its origins in the necessity of all people to resist the oppression of their rulers." Davis did not specify what he meant by "oppression." He was likely referring to Andrew Jackson, for he stated elsewhere that the "great primary object of the Whig party is the curtailment of Executive power." Whiggery, he believed, "adhered to the principles of the American Revolution and of the Republican party during the administration of Jefferson and Madison."\textsuperscript{14}

Davis also quoted the ideals of the American party, though with considerably less relish. "Americans only shall govern Americans," he wrote. But he immediately qualified this stricture: "vote for a Native American if he is competent and not excluded by any of the foregoing whiles...", drunkenness, gambling, vice, and so forth. He saw the American party
primarily as a means of preserving the Union and providing free, universal education.  

Davis's disdain for professional politics was always evident. "Do not vote for an incapable or unworthy candidate," he wrote, "because he has a regular nomination....Do not vote for a thief a fool or bad man, because his politics agree with yours." He liked to quote the popular contemporary maxim that "the office should seek [the] man, not [the] man the office." Davis expressed his "disgust for the wild hunt after office which characterizes the age," and believed a virtuous man would be above such "dirty politics."  

The Montgomery lawyer often expressed concern over the morals of his fellow countrymen. He felt "retraction and reform in every department of government" was necessary to weed out corruption. "Though all are equally free, not all are equally endowed with those virtues that render liberty safe, prosperous and happy," he declared. Davis worried about "such as are base, ignorant, vicious, slothful or cowardly" who were not as "equally useful to the societies in which they live" as their more "generous, wise, valiant and industrious" neighbors. He hoped the former would not corrupt the latter.  

Davis's nationalism was less pronounced than some of his Opposition colleagues, but it did exist. As a Constitutional Unionist he disparaged sectionalism both North and South as "detrimental to the best interests of the country."  

Do not
vote for a Disunionist," he reminded himself in 1860. "The maintenance of the Union of these United States as the paramount political good [is] the primary object of patriotic desire," he wrote.19

By the spring of 1861, this was not a popular position. Most Opposition leaders either allied themselves with the Confederacy or fled the state after Fort Sumter.20 Davis did neither. Like Sam Houston and other diehard Unionists, the Montgomery lawyer remained in Texas during the war.

His law practice was severely curtailed. From April, 1861 until December, 1862 only nineteen cases litigated by Davis are extant. These were almost all debt matters, with a few other cases involving slave hire, probate and land disputes.21 There are no surviving cases litigated by him after late 1862 until the end of the war, though his financial records indicate that he continued to practice law sporadically during that time.22

Davis's Unionism surely contributed to the scarcity of clients. Such beliefs were considered unpatriotic, even treasonous by most of his neighbors.23 He did not loudly proclaim his Unionism to all that would listen, like fellow Texas lawyer George Washington Paschal.24 Davis did not represent conscription evaders and jailed Unionists like Virginian John Gilmer.25 But neither did he make peace with the Confederacy, like his friend and Opposition attorney William Pitt Ballinger.26 Davis tried to sit the war out, with his Unionist principles intact, as comfortably as
possible.

With fewer clients and cases, his income dropped considerably. While before 1861 he could expect to earn at least one hundred dollars a month, during the war he often was paid a third that amount, or even less. On occasion, he earned much more, once gathering almost three hundred dollars from his practice in one month. But since many of his fees were paid in Confederate scrip, the value of those dollars was doubtful. By 1864, inflation in the Confederacy was running at over 4000 percent in some areas. Small wonder that he often took property, such as several bales of wool, in payment for his services.

Davis and his family shared the hardships produced by the war. Whether or not he was able to supplement his meager law salary with farming or sale of his land holdings is unknown. It is certain that he was impoverished. Davis was compelled to repair his own clothes, rather than buy new ones. He lacked shoes, harness for his horses, and sometimes even food.

Such privation ended with the war. Apparently his neighbors were willing to forgive his Unionist transgressions after Appomattox. Davis's practice entered a period of prosperity that equaled or surpassed his pre-war business. Between April, 1865 and January, 1868 Davis litigated at least ninety-eight cases. Over half these cases were debt litigation. Much of this business concerned pre-war debts. During the war the Confederate states, including Texas,
passed a variety of debtor relief laws to protect the frail southern economy and the men who were away in the army. \textsuperscript{33} These laws made debt collection difficult. It is doubtful in any case that creditors were eager to collect what was owed them in deflated Confederate currency.

After the war creditors clamored for payment, and attorneys like Davis reaped the profits from their business. In a typical case litigated in February, 1867, Davis sued George H. Vilz on behalf of his client Jonathan Haggerty for a $135 debt owed to Haggerty since 1862. \textsuperscript{34} In another, Davis represented his old client Peter Willis for a small debt owed to the Galveston dry goods merchant by a local Montgomery citizen. \textsuperscript{35} Davis's client nearly always won such cases. They were no different from debt cases litigated by him since the beginning of his professional career.

The war did affect his post-Appomattox practice. Davis litigated many cases in which the debt was tabulated not in dollars, but in pounds of cotton. In the failing Confederate economy, many southerners reverted to a sort of barter system, with cotton serving as the medium of exchange. \textsuperscript{35} A typical promissory note required the cotton "to be well packed, in good merchantable condition" and delivered to a factor in Galveston. \textsuperscript{37} In one such matter Davis represented a local farmer, E.E. Byrd, who sued the executors of A.J. Davis's estate for non-payment of four bales of cotton. The courts treated these cases as no different from payments in specie. \textsuperscript{38}
Several of Davis's clients sued for debts owed on slave-related matters. Three cases involved non-payment on slave-hire agreements. He represented the plaintiff in two of these cases. In the third, Davis himself was the defendant. Calvin Brooks sued the attorney for failing to pay him several bales of cotton in return for hiring out "Two negroes, Greene and Caroline." In another case, Davis represented James Woods, an overseer who sued his former employer for over one hundred dollars in back wages. No resolution was recorded for any of these matters.

Davis was involved in a variety of other non-debt cases. He represented clients in seventeen probate matters (mostly division of property among the deceased's relatives), five cases concerning disputed land titles, two involving division of property from defunct business partnerships and one divorce case.

Davis represented practically no regular clientele. Only four of his ninety-seven clients were repeat customers. Even Peter Willis, his most reliable source of business, asked the Montgomery attorney to litigate only one case. In those prosperous post-war days, the lack of a regular clientele did not matter. The war created so much business (especially debt litigation) for so many different people that Davis was able to earn a good living without a regular following.

The newly freed ex-slaves were a source of business. Davis was involved in four criminal cases, all petty theft matters. At least one client, probably more, were freedmen in these
In late 1867, he was also involved in a matter concerning the seizure of a cotton crop, a horse and a mule from several freedmen in Montgomery by the local sherriff. In one rather unusual case, an ex-slave came to Davis and asked him "to procure an apprenticeship" for himself and his three stepchildren. The records are vague concerning the details of the case, but it seems the attorney was asked to sue a local citizen over apprenticeships which were promised to the freedmen but never delivered. Davis wrote, "if the matter is settled before the court my fee [is] $10--if out [of court] $25." The different fees reflect the ex-slaves' desire to avoid publicly suing a white man in open court before an all-white jury. Apparently Davis managed to settle the matter without a lawsuit, for no court resolution was recorded.

Freedmen came to Davis because they knew he sympathized with them and their problems in the reconstruction South. Before the war, Davis was an Opposition man. During the war he was Unionist. After Appomattox he became an ardent Republican.

"The war for secession and slavery declared that naturalized citizens were true to the Union," he wrote, shedding the last vestiges of his earlier, lukewarm nativism. "The war abolished slavery," he continued, "and necessity, [and] general principles made the freedman a citizen." Never a slaveowner himself, he was not well disposed towards the institution which had brought about civil war and
disruption of the Union.

Davis's Republicanism was not unusual for a man of his antebellum political background. The Republican party proved a viable home for many former Opposition men. The motives of these Whigs-turned-Republicans varied. A few wanted wholesale changes in southern society, including property confiscation, complete racial equality and displacement of the white planter aristocracy. But most were more conservative, embracing the Republican party as a means of achieving a degree of justice for the freedmen, while not desiring a radical social upheaval.47

Davis became a Republican because it was the party of the Union, because he abhorred the Democracy as the party of secession, war and "dirty politics", and because he desired justice for the freedmen. The Montgomery attorney had always professed a deep reverence for the Union and the Constitution. He could not support the Democrats, who epitomized professional (hence corrupt) politics, and who had fueled the drive towards secession and war. His support of slavery had always been unenthusiastic, and after the war he wished to see the freedmen gain the benefits of American citizenship, including suffrage.

There were limits to the changes Davis wished to see in the South. Davis supported a qualified suffrage, limited to the more literate ex-slaves. He was not interested in giving blacks extra economic or political opportunities beyond those enjoyed by whites. "Talent, activity, industry and enterprise
tend at all times to produce inequality," he once wrote. Davis believed this to be the natural order of society. He would give the black man the same tools as the white man, such as the vote, but no more. Like many of his contemporaries, Davis favored equality of opportunity for freedmen. Beyond that he would not go.

The Montgomery attorney was not interested in any schemes to overthrow the southern planter class. As a civil law attorney, he devoted most of his professional career to defending their interests. Upper-class planters and businessmen were his clients, the mainstay of his practice. Davis usually represented the plaintiff in debt collection and land disputes, meaning he was engaged in maintaining the sanctity of property, and in defending established property-holders and their rights. Davis abhorred their Lost Cause, but he could not support confiscation or any other radical measures which would upset the southern class system.

As a civil law attorney, Davis was in a unique position. He had no direct interest either in slavery or the various forms of semi-voluntary servitude that befell blacks after the war, so he was better able than agrarian southerners to view the blacks' plight with a less jaundiced eye. His livelihood did not depend on the slave system. He often litigated property issues that involved slave property; but his connection with the peculiar institution and its problems were in the abstract form of deeds, mortgages and contracts.
Davis was less intimately connected with the slave system than most of his neighbors.

On the other hand, he possessed strong economic ties to planters and businessmen through his law practice. Davis identified with the southern propertied classes whom he represented. A law practice which was involved almost exclusively with property rights allowed Davis to be a radical on one point of the freedmen's cause (suffrage) and a conservative on another point (property confiscation).

Whether conservative or not, Davis was a "scalawag" to his fellow southerners, a turncoat Republican. Montgomery was overwhelmingly Democratic and pro-Confederate after the war, sometimes violently so. A Freedmen's Bureau schoolteacher who travelled to the town in Montgomery in early 1870 was found dead in a nearby creek under suspicious circumstances.\(^2\)

Davis watched with alarm the progress of Presidential Reconstruction and the ascendancy of ex-Confederates under the auspices of the Johnson administration. He corresponded frequently with C.C. Caldwell, a Republican party leader in Austin. Caldwell wrote Davis in November, 1867 that "truth, Justice, Law, order and good government are yet in store for us, but we must exert ourselves." Caldwell urged Davis to "buckle on his armour" and become more actively involved in organizing Montgomery Republicans. "Friend Yell [another Montgomery Republican] and yourself must do the work in that county," he wrote.\(^2\)

Davis was soon offered the opportunity. Texans elected
their state district judges under Presidential
Reconstruction in April, 1866. The men they chose were
ex-Confederates who excluded blacks from juries, blocked
prosecution of cases involving white violence against blacks,
and otherwise bolstered white supremacy in Texas. Complaints
from the state's Republican party members were so numerous
that by August, 1867, Congress authorized the military
authorities in Texas to remove these men and appoint loyal
Unionist Republicans in their place.\textsuperscript{53}

"I layed down my pen and called on the General [Phineas
Pease] and recommended you for District Judge," Caldwell
wrote Davis, "[h]e will have you appointed at once." Caldwell
urged his friend to accept the position, "as it is highly
important that our friends should be in position." He also
appealed to Davis's economic needs. "At your time of life and
a growing family I know you would be happier with a
comfortable salary than the labors of the profession."
Caldwell assured Davis, "I know you can take the oath, you
never saw the day but that you sympathized with the U.S."\textsuperscript{54}

Caldwell's plea had the desired effect. Davis accepted
the appointment as district court judge for the eleventh
district of Texas in the winter of 1868. His brother James
took over the practice, which he expected to remain as
lucrative and prosperous as when he left.

His brief tenure as a Republican-appointed judge was
rewarding, but uncomfortable. There were rumors that a
petition was being circulated to oust him from office, for
unsupported reasons. He wrote an anxious letter to governor Edmund J. Davis in March, 1870, asking if his removal was forthcoming. Governor Davis replied that "no petition has been received at this office."ss

Nevertheless, Davis was not re-appointed to the bench in the spring of 1870: the reason why is unknown. Davis returned home to Montgomery in August. He was pleased with his brief career as district judge, writing that "this interval in my professional life is perhaps compensated by the [sic] acquaintances—and some good friends—I formed whilst on the bench." Davis felt a trace of resentment, declaring that he did not fear "that any just man will attribute my failing to secure a judicial appointment...to anything of which a man and lawyer should be ashamed—In politics, I am a Union Republican, and in voting I am a free man...." Davis looked forward to resuming his practice. "I found that my general health improved," he wrote, and believed that he returned to the bar "with (as far as I know and believe) as good prospects as when I quit."ss

In this he was mistaken. The Montgomery attorney was fifty-five years old when he returned from the bench. While he continued to practice law as he entered old age, his business steadily declined. The period from 1870 to 1881 constituted the twilight of Davis's professional career.

The postwar boom in legal business had ended by the beginning of the 1870's. Most of the outstanding wartime debts owed by local citizens had been collected. Davis also
faced greater competition. At least three more attorneys arrived in Montgomery during and after the war to share in the growing town's legal market. He possessed almost no permanent clientele beyond one or two regular customers. Many of his old customers had died during or after the war, and Davis's scalawagism (which his neighbors found more difficult to overlook than his wartime Unionism) no doubt rendered problematic any attempts to build a new following. Only Peter Willis, one of his oldest clients, remained.

Willis's needs dominated Davis's practice after 1870. In 1870-1871, of the eight extant debt cases, seven involved the Galveston merchant. The following year all debt cases and one land matter were litigated for Willis; this constituted almost 50 percent of the extant total for 1872.

Willis was the aging Montgomery lawyer's only remaining regular client. A few other familiar names surfaced. Davis continued to work with the estates of deceased ex-clients, such as William Fowler. Some regular customers from before the war occasionally hired Davis. James Price, for example, engaged the attorney in 1870 to sue for a note owed on an old slave hire contract. But Peter Willis was Davis's only real source of repeat business.

Willis and Bro. was a far flung enterprise. One observer described the dry goods store as being "of colossal proportions", transacting business involving millions of dollars in several Texas counties outside Galveston. They sold goods from Galveston all over the state.
With an extensive out-of-town business, Willis and Bro. experienced considerable difficulty in collecting payment for their goods. Customers moved, or died, or simply refused to pay. The ease with which Texas debtors could elude their creditors before the war continued into the 1870's and 1880's. Much of the state was still sparsely settled and poorly connected wilderness, a haven for men who owed money but could not, or would not make good on their debts.83

The Willis firm spent a good deal of time and money in court trying to collect what was due them. They brought lawsuits in Galveston, Washington, Harris and Robertson counties, as well as Montgomery. Davis was their representative in Montgomery, but he was only one of several attorneys retained by the firm.84

The correspondence between Davis and Peter Willis was businesslike and amiable. "We are glad to hear of your good health..." Willis wrote Davis in a typical letter.85 He litigated over one hundred cases for the Galveston merchant during his career. Most of these cases occurred after the war, especially during the middle part of the 1870's.86 This work was almost entirely debt-related. Peter Willis chose his lawyer well, for by this time Davis had accumulated over twenty years experience in collecting debts.

Willis's debt cases were little different from any other such litigation. In a typical matter decided in late 1872, Davis and Willis sued M.C. Goldthwaite of Montgomery for the value of a promissory note held by Willis. Davis won this
case for his client, as he won most such cases. These were routine matters to the Montgomery attorney.27

Occasionally Willis's business was more complex. Difficulties usually occurred when Davis tried to collect on a debt owed by a deceased debtor. Complicated probate issues could become entangled with these cases.28

For example, Davis litigated a case for Willis that was appealed to the Texas supreme court. A Montgomery farmer, L.W. Matthews, died in 1864 owing Willis a considerable sum of money. To collect this debt Davis forced a court sale of a 581 acre tract of land owned by Matthews. The land was placed on the auction block in February, 1869, and Willis himself bought it for the low sum of $100, hoping to resell it later at a higher price. But Matthews's son contested the sale, arguing that his father had given him the tract before he died, and that he had since built his home there. There was no written contract to prove that Matthews had given the land to his son, but the state district court overturned the sale.

Davis appealed the matter to the Texas supreme court, arguing that "it is too late for him to insist on a homestead for himself on said land, even if the alleged gift conferred title. He should have made his claim when the former suit was pending...." The supreme court disagreed, however, and ruled that the land belonged to the son, because the "verbal gift" was clearly established, and because the son had made "improvements on the strength of the gift" on the land by
building his home there. 89

Such complex litigation was relatively rare. Only four cases litigated by Davis for Willis and Bro. were appealed to the state's highest tribunal between 1870 and 1880. 70 More typical were simple matters of debt collection that remained in the lower courts.

These cases could include a great many debts owed by several different defendants. In one such matter, Davis collected notes owed by sixty-eight different people to Peter Willis in the fall of 1871. The amounts ranged from thirteen to over three hundred dollars. 71

Peter Willis died in November, 1873. 72 Thereafter the business was managed by his brother Robert Willis. Davis litigated several cases for the Galveston dry goods store after Peter died, but the number steadily dwindled. Perhaps the Montgomery attorney enjoyed a less positive relationship with Robert than he had with his brother, whom Davis had known for thirty years. Whatever the reason, Davis's business with the Willis firm slackened after 1873. He litigated several cases during the middle 1870's for Willis that had been pending since the beginning of the decade. But he handled little new litigation. 73 With the decline in Willis's business came an overall decline in Davis's practice. By 1880 Davis was nearing retirement. His account book for that year listed twenty cases. But most were suits which had begun several years previously and were still on the district court docket. 74 Many were never resolved at all,
because Davis gave up his practice in early 1882. A
bankruptcy matter concerning a local business firm, for
example, was dropped by Davis in 1882 after having occupied
the court's attention for seven years.75

Of these extant 1880 cases, 30 percent were divorce
suits.76 In the last years of his practice, Davis turned to
divorce as his primary area of specialization to replace the
debt litigation that disappeared after Peter Willis's death.
In one such case, Davis represented Mary Paulina, who sued
her husband for divorce in September, 1880 for desertion.
Davis declared that Mary had been "a good and kind and
faithful wife," and that the defendant had "without cause
voluntarily abandoned her....[declaring] to different persons
that he intended never to return." The district court granted
Davis's client a divorce without hesitation.77

This was the only divorce case completed by Davis. All of
the other pending suits were dismissed in 1882 when he
retired. Of the twenty 1880 cases, which included several
land and probate matters along with divorce litigation,
fourteen were never resolved.78

Davis was sixty-eight when he quit his practice. A
photograph at this time showed an unbent, dignified elderly
man with balding head. His old-fashioned frock coat and
knee-length white beard revealed his age.79

Davis had acquired several tracts of land over the years.
He owned two town lots in Montgomery, a six hundred-acre
farm, a five hundred-acre tract, and other smaller parcels in
the area. He noted in one of his expense books. He apparently intended to hire out his land to be farmed by others, and live on the profits during his retirement. He did not return to the practice of law before his death in October, 1893.

It is interesting to note two major characteristics of Davis's thirty-year legal career. First, his practice often entailed work that might be considered outside the function of a nineteenth century American lawyer. The popular contemporary portrait of an attorney was a man who engaged in courtroom battles to defend the interests of his client. For Davis, this was only partially true. Debt litigation, which was a dominant part of his practice, involved work outside the courtroom: tracking down debtors, serving subpoenas, attending sherriff sales, and the like. The actual trial was less important than the labors preceding it. The details of these out-of-court functions will be made more clear in subsequent chapters. It is important to note here that such duties constituted the lion's share of Davis's legal career.

Second, the Montgomery lawyer's practice was prosperous and stable when it consisted of a balance between regular and one-time only clients, and between types of cases. Davis struggled to achieve stability as a young attorney in the 1850's when he litigated only one type of case, debt collection. And his practice dwindled when it came to depend almost entirely on one client, Peter Willis.
Davis found stability when he mixed areas of specialty with a variety of other types of cases. This type of balance was also beneficial concerning Davis's clientele, when represented a wide variety of clients and also a small core of repeat customers. This balanced practice occurred primarily during the latter part of the 1850's, when Davis reached his peak as a lawyer. To a lesser extent this was also true during the brief postwar boom period from 1865 until 1868, when Davis had no regular clientele to speak of. But he prospered, nonetheless, because he litigated a wide variety of cases, as well as those within his area of expertise, debt collection.

Chapters two and three illuminated broad aspects of Davis's career. The next three chapters will examine in detail several individual cases.
CHAPTER THREE NOTES

1 Box 3K396, Book 1340, BCTH; collection contains a fragment of the minutes from an early town meeting in 1845 over which Davis presided as mayor; for position in state militia see return for town elections, January, 1847, in the archives of the library of Sam Houston State University, Huntsville, Texas.


3 See Campbell, "Consensus", passim.

4 Ellison, "Whig", chps 3-4 and passim.


6 Wooster, "Know Nothings," 414 and passim.

7 There are several descriptions of this event, but Jane Lynn Scarborough, "George W. Paschal: Texas Unionist and Scalamag Jurisprudent", Ph.D. diss., Rice University, 1972, 50-55, is the best account I have seen.

8 Potter, Crisis, 416-417, is still the best general analysis of the Constitutional Unionists; John V. Hering, "The Slave State Constitutional Unionists and the Politics of Consensus", Journal of Southern History 43 (1977), 395-410, is useful, but flawed in its description of Constitutional Unionists as cross political opportunists; an examination of the party's leaders, at least in Texas, indicates quite the opposite; for the party in Texas, see James Alex Baggett, "The Constitutional Union Party in Texas," Southwestern Historical Quarterly 82 (January, 1972) 454-472.

9 Ellis, "Whig", vii-xi; Campbell, "Consensus", 219-225.


11 This is based on the data compiled in Wooster, "Know
Nothing", unnumbered foldout page; and Baggett, "Constitutional Union", 467-470; both used census data and tax records to determine that lawyers constituted the largest single occupational group in both parties.

12Box 3K401, Book 1328, BCTH; a "political notebook" in which Davis recorded his thoughts and favorite political maxims.

13Galveston Civilian and Gazette, September 25, 1860.

14Box 3K401, Book 1328, BCTH.

15Ibid, BCTH.

16Ibid, BCTH.

17Lawyer's notebook, "No. 2", (private collection of Nathaniel Hart Davis, Conroe, Texas); this booklet is filled largely with notes on various legal proceedings, but the first and last few pages contain miscellaneous comments and quotes.

18Box 3K401, Book 1328, BCTH; also Baggett, "Consensus", 232-237.

19Notebook, "No. 2" private collection, Nathaniel Hart Davis, Conroe, Texas.

20Baggett, "Consensus," 237 and passim.

21Box 3K402, Book 1356, BCTH; this account contains detailed information concerning cases litigated by Davis from 1860-1873, and scattered references to cases from 1873-1882; the entries from 1860-1873 contain the most complete information of any of Davis's account books: names of litigants, dates, and description of the action taken. This is the only available information on Davis' 1861-1868 practice. His wartime practice breaks down as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debt</td>
<td>8</td>
</tr>
<tr>
<td>Probate</td>
<td>4</td>
</tr>
<tr>
<td>Land</td>
<td>3</td>
</tr>
<tr>
<td>Slave hire</td>
<td>3</td>
</tr>
<tr>
<td>Misc.</td>
<td>1</td>
</tr>
</tbody>
</table>

22Box 3K401, Books 1329 and 1322, BCTH; these list cash received for Davis from the late 1850's through the war; I
have based my conclusions concerning Davis's income from his practice on the entries labelled "Davis and Bro."

For southern attitudes towards wartime Unionists, see generally Georgia L. Tatum, Disloyalty in the Confederacy (Chapel Hill: University of North Carolina Press, 1934); there are also a great many state studies; see for example James Smullin, "Disaffection in Confederate Texas: the Great Hanging at Gainesville," Civil War History, XXII (1976), 349-360.

Scarborough, "George Washington Paschal", 39-60

See the entries pertaining to John H. Gilmer, Confederate Imprints, Reel 91, entries f2750-2753


Box 3K401, Books 1329 and 1322, BCTH: a typical entry from 1862 reads:

<table>
<thead>
<tr>
<th>Month</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>$ 10.00</td>
</tr>
<tr>
<td>February</td>
<td>17.36</td>
</tr>
<tr>
<td>March</td>
<td>197.25</td>
</tr>
<tr>
<td>May</td>
<td>10.00</td>
</tr>
<tr>
<td>June</td>
<td>10.00</td>
</tr>
<tr>
<td>September</td>
<td>55.17</td>
</tr>
<tr>
<td>October</td>
<td>70.00</td>
</tr>
<tr>
<td>November</td>
<td>37.00</td>
</tr>
</tbody>
</table>

Some months are missing from these yearly entries; but enough information remains to draw reliable conclusions.


Box 3K402, Book 1356, 36, BCTH.

Box 3K402, Book labelled "Sundry Matters to N.H. Davis" (no number), BCTH; this lists Davis's monthly personal expenses.

This is based on an examination of the cases listed in 3K402, Book 1356, 191-304, BCTH.

Ibid., BCTH; 56 cases concerned some form of debt litigation.

Todd, Finance, 56-70 and passim.

Box 3K402, Book 1356, 101, BCTH.

Ibid., 83.

Ibid., 78.

Ibid., 81.

**Ibid.**, 191–304.

Ibid., 81.

Ibid., 191–215; only one case is specifically identified as involving a freedman, but I think this is the common denominator linking Davis’s unprecedented excursion into criminal law.

**William Van Horne to "Sheriff of Montgomery County, TX", November 8, 1867; Box 3K396, File 2, BCTH.**

Box 3K402, Book 1356, 100, BCTH.

Box 3K401, Book 1322, BCTH; under his pre-war entry outlining the beliefs of Know-Nothing-ism, Davis wrote in 1870, "My views are considerably changed."

A lively debate among historians has centered around white southern Republicans, or "scalawags"; David Donald and James G. Randall, *The Civil War and Reconstruction* (New York, 1961), 627–628, argued that white southern Republicans were really for the most part former Whigs and Unionists of the southern middle and upper-classes; Allen Trelease challenged this view with a statistical analysis of Republican voting patterns in his "Who Were the Scalawags?", *Journal of Southern History*, 39 (1963), 445-468; Trelease argued that the scalawags were really disaffected mountain farmers and yeomen who had long nursed grievances against the southern planter class, thus returning to the viewpoint first espoused by E. Merton Coulter and an earlier generation of historians who identified the scalawag as lower-class men with an axe to grind against the aristocracy. But Richard O. Curry was correct in pointing out in his "The Civil War and Reconstruction, 1861-1877; A Critical Overview of Recent Trends and Interpretations," *Civil War History* (1974), 233 that Donald has the more compelling thesis, and that Trelease's methodology was seriously flawed; Nathaniel Davis's career definitely
supports Donald's point of view.

[4] Box 3K402, Book 1356, BCTH; on Davis's beliefs concerning suffrage, see C.C. Caldwell to Nathaniel Hart Davis, November 11, 1867, 3K396, File 2, BCTH.

[5] Ibid., BCTH.

[6] Ibid., BCTH.


[8] C.C. Caldwell to Nathaniel Hart Davis, November 11, 1867, 3K396, File 2, BCTH.


[10] C.C. Caldwell to Nathaniel Hart Davis, November 11, 1867, 3K396, BCTH.


[12] 3K402, Book 1356, 34, BCTH.

[13] Martin, W.N., A History of Montgomery: A Research, M.A. thesis, Sam Houston State Teacher's College, 1950; Martin cites a list of practicing attorneys in Montgomery from a journal kept by Davis which has since apparently been lost.

[14] 3K402, Book 1356, 107-119, BCTH; this is the only substantial account book for Davis's practice during the 1870's. A precise listing of the types of cases from August, 1870 to the end of 1871, as listed in this book:

<table>
<thead>
<tr>
<th>Type</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debt (promissory note)</td>
<td>6</td>
</tr>
<tr>
<td>Land</td>
<td>6</td>
</tr>
<tr>
<td>Probate</td>
<td>5</td>
</tr>
<tr>
<td>Criminal</td>
<td>3</td>
</tr>
<tr>
<td>Slave hire</td>
<td>1</td>
</tr>
<tr>
<td>Partnership</td>
<td>1</td>
</tr>
</tbody>
</table>

*Galveston Tri-Weekly News*, November 30, 1873.

See entry in 3K402, Book 1340, (un-numbered page), BCTH; an entry for 1866, for example, lists several books and various odds and ends purchased from the firm.


"Office of P.J. Willis and Bro." to Nathaniel Hart Davis, July 21, 1868, 3K396, BCTH.

This is based on the author's examination of the Willis cases listed in the index for District Court Minute Books A through H, DCO.

3K402, Book 1356, 124.


*Willis v. Matthews* 46 TR 478 (1877).

*Willis v. Johnson* 38 TR 304 (1873), *Willis v. Ferguson* 46 TR 496 (1877), *Willis v. Matthews* 46 TR 478

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debt (promissory note)</td>
<td>5</td>
</tr>
<tr>
<td>Land</td>
<td>4</td>
</tr>
<tr>
<td>Guardianship</td>
<td>2</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>2</td>
</tr>
<tr>
<td>Probate</td>
<td>1</td>
</tr>
</tbody>
</table>
(1877) and Willis v. Gay 48 TR 463 (1878).

71 NHD Papers, 3K402, Book 1356, 113.

72 Galveston Daily News November 27, 1873.

73 See index for District Court Minutes F-H, DCO, which lists the cases litigated for R.S. Willis.

74 3K402, Book 1331, BCTH; this and subsequent references to Davis 1880 practice is taken from list of cases under the heading "Spring term, 1880", in this account book.

75 State of Texas v. Peel and Ronfro Minute Book H, 97, 425, 451, 491, 514, DCO.

76 3K402, Book 1331; unfortunately, a precise breakdown of all types of cases from this period is not possible; Davis did not record the types of cases in his account book, and since most were never resolved, there are no records other than entries on the District Court docket, which generally do not disclose the type of litigation. Divorce cases are identifiable, however, because the case title itself reveals an action by a husband and wife with the same last name.

77 Pauling v. Pauling, Minute Book H, 382, 421, 438-439, DCO.

78 3K402, Book 1331, BCTH; also see docket entries for these cases in Minute Book H, DCO.

79 The photograph is located in 3K396, BCTH.

80 3K396, un-numbered tax receipt book, BCTH.

81 3K402, Book 1340, un-numbered page ("Sundry matters to N.H. Davis," entry for 1878), BCTH.

CHAPTER FOUR

"More than many attorneys would have done...":

Greenway v. DeYoung, and Arnold v. Willie

As an attorney specializing in civil law, Nathaniel Davis was intimately concerned with property transactions. Civil law involved private rights and remedies, which usually meant property rights. Nearly every case he litigated touched on some form of property.

The physical characteristics of a given form of property defined the tasks Davis performed. A plot of land required different behavior from Davis than a flock of sheep; a herd of cattle was treated differently from a family of slaves. This is illuminated by comparing Davis’s management of two cases involving very different forms of property: land and slaves.

When Davis met Sam Houston on a steamship in New Orleans in the late 1830’s, Houston urged him to practice "land law" in Texas. Davis was a young man at the time, fresh from his brother’s law office in Alabama, on his way to settle in the Lone Star republic. Houston probably had land speculation chiefly in mind when he offered this advice. Many Texans purchased real estate hoping the resale value would increase as the territory attracted new settlers. Davis himself engaged in land speculation to augment his lawyer’s earnings.

Land transactions were a major factor in Davis’s
practice. Often land was involved indirectly, as one issue among many. But land could also be the focus of litigation, as in cases addressing mortgage rights, or the proper holder of title to a tract.

Unlike cattle, machinery, farm equipment or horses a tract of land could not be moved to facilitate courtroom procedures. Lawyers, judges and litigants were compelled to go to the land, not vice versa. This was usually impossible, especially in a large state like Texas. Men were therefore forced to rely on administrative, communication and travel accommodations which were fragile and uncertain. Immobility was the outstanding physical characteristic of real estate, as illustrated by Davis's involvement in a late antebellum probate case, Greenway v. DoYoung's Heirs.

Michael DoYoung died in early 1858. A resident of Montgomery County, he had engaged in the popular Texas practice of land speculation. He owned over fifteen hundred acres of real estate, in parcels scattered all over Texas. DoYoung was badly overextended when he died. The Montgomery speculator had borrowed heavily to finance his adventures. A court in Van Zandt County seized 1600 acres of DoYoung's land in the fall of 1858 to pay his creditors.

One of DoYoung's creditors was an out-of-state resident named Edward Greenway. He owned the mortgage on DoYoung's 640 acre Montgomery County property, and two promissory notes totalling almost two thousand dollars. Greenway himself was interested in Texas land. He was aware that
DoYoung had made good purchases, especially in Van Zandt County. He knew the 1600 acres there could be bought for a good price when auctioned.

Greenway engaged Davis as his attorney. He was to perform three tasks for his client. First, he would bring legal action against DeYoung's heirs, who refused to recognize Greenway's mortgage rights or repay the two promissory notes. Second, if DeYoung's family proved unable to honor the notes, Davis was to see to it that his client was repaid in some way. Third, he would act as Greenway's purchasing agent. This involved buying the Van Zandt County land when it sold at the sheriff's sale. It also involved Davis acting as a sort of investment broker by using the proceeds from the sale to buy choice tracts of Texas property, then reselling it later when it had appreciated in value.

The court case was a simple matter. The mortgage and promissory notes bearing DeYoung's signature were produced in the Montgomery County district court, and DeYoung's heirs were required to honor them. The 640 acres in Montgomery was ordered sold, and the proceeds given to Greenway. Davis's client also recovered the full value of the promissory notes.

DeYoung's heirs were unable to pay Greenway. Michael DoYoung had died a poor, indebted man, with few assets. The only property of any value owned by him were his scattered tracts of land. These passed to Greenway, his chief creditor. Greenway wanted these lands sold, and he
instructed his attorney to oversee the process. This would prove a complicated and time-consuming job.

Davis monitored the sale of real estate in several different counties, ensuring the lands were sold for a good price and the proceeds were given to his client. He was also to invest the money raised by these sales in other land, chiefly the Van Zandt County acreage, and then resell this land at a higher price.

Greenway was inexperienced in these matters, and attorney gave him much helpful advice. Davis told his client that "it may be that purchasers would want some time for a part of the purchase money," and he suggested that Greenway should obligate. "The notes could be made payable here and as such have to be bought [here]," Davis wrote. "Lands are seldom in Texas sold for all cash at private sale, and we would advise you sell on such terms." Greenway assented, and allowed Davis to offer the land on credit.

The attorney made the first of these purchases in the fall of 1858. He travelled to Van Zandt County and acquired the 1600 acres of land. He recorded the deeds in the county clerk's office, then mailed them to Greenway. "We are glad to know you are pleased with the purchase," Davis wrote his client several months later.

Davis wanted the 1600 acres immediately made available for sale. But he could not stay in Van Zandt County indefinitely. Months might pass before a prospective buyer could be found, and Van Zandt County was many miles from
Montgomery. He could not stay, and he could not take the parcel of land with him. Davis was forced to rely on local county officials for help.12

"The lands we purchased at Sherriff's sale in your county...we now put on the market as the agents of Mr. Greenway," the Montgomery attorney wrote to the Van Zandt County clerk in December, 1858. "will you please let it be known that these lands are now in market[?]" Davis indicated precisely how he wanted this done: "enclosed I send you a Notice of the sale of the lands--please stick it up at [the] Court house door of your county." He asked the clerk to "please see that these lands are not sold for taxes," assuring him that "we will pay for what Mr. Greenway bought."13

The Van Zandt County purchase proceeded smoothly. Elsewhere, matters were more difficult. DeYoung owned land in Erath county, which now belonged to Greenway. Apparently the Erath county court was not aware that DeYoung had died, or that his lands were to be seized. Davis tried to inform the county clerk. "We have written several letters to the officers...and as yet have received no answer," he told his client. The attorney did not like to rely on these men, but confessed he had little choice. "We have to depend on the accommodation of the Sherriff to answer our letters which accompany executions so as to let us know when the lands will be sold as they have to be advertised 20 days after levy before a sale can take place." Davis wanted to attend
the sale in person, rather than hire an agent, but he found this would pose problems. "It is over 200 miles from us and we shall have to go horseback through such a country at this season of the year," he wrote. "Our Winter has been so bad that we have concluded to wait until it breaks before we have the lands sold." 14

Davis's problems with local officers reached their height in Harris County. DeYoung owned 640 acres near a place called Willow Creek in that county. George Frazier, the county sherriff, seized the land and sold it according to Davis's instructions. In September, 1880, Frazier wrote the attorney with bad news, "I have just found out that the land I sold on Willow creek... Amelia DeYoung [Michael's wife] conveyed to L.G. Searns in 1854, which is upon record in this county." "I feel rather bad about the sale," he sheepishly admitted, "and think you ought to pay the money back." Frazier tried to shift some of the blame to Davis, pointing out that "I went by what you directed me to do in making the levy...[I] did not examine any further then to see that the deed was all right." The sherriff was chiefly concerned about the hapless purchaser of the land, "he is a clever fellow and I would not like to see him lose it for he asked me if I thought the title was good and I told him that it was...." How Davis resolved this matter is unknown.15

The Montgomery attorney experienced difficulties in dealing with local clerks and deputies. But he was also aided by them in many ways. The same Harris County sherriff
who caused him such embarrassment, for example, also gave him valuable information by correcting an erroneous survey. "The William J. Lovett tract upon clear creek [which Davis wanted to purchase for his client]...instead of the land being about 7 miles below the S. Houston and Henderson Railroad...is about the same distance above the road," he wrote. 16

Frazier also offered his opinion on the value of this real estate which Davis found useful. "I would not pay more than 50 cents per acre for this land," he wrote, "[there is] very little timber upon it....you had better come or send someone down..." 17 Other county officials could be similarly helpful. B. Killiburn of Falls County told Davis that one of the DeYoung parcels in his county "is a valuable tract if the title is clear it is worth some 6 or 10 cents per acre." He pointed out that "there is a little improvement on it by a squatter," believing this might heighten its resale value. "You may rely on my having it advertised as the law directs," Sherriff Killiburn wrote. 18

In carrying out the many transactions involved in the Greenway case, Davis was forced to rely, for better or worse, on such reassurances. The fact that real estate was immobile meant that many vital matters were out of Davis's immediate control. County clerks and sheriffs often provided him with useful information. But on the whole Davis was uncomfortable with his dependence on such men. A methodical, careful man. Davis preferred to control as many
aspects of a case as possible.

The Greenway transactions required a great deal of work, and Davis charged his client accordingly. "As to our charges for our services," he wrote to Greenway in July, 1860, "we propose to charge you the amount of $500 and are willing if it would suit you, to retain out of the cash now on hand only $250 or $300 and wait for the balance until some of the lands are sold." This was a handsome sum. The Greenway case had entailed much travel, expense and trouble. Davis felt that "this fee is low for the services rendered by us, and we feel we have done our full duty...and more than many attorneys would have done as to the outdoor labor and we hope our charge will meet with your approbation." Apparently it did, for there is no record of Davis suing Greenway for his fee, which he was sometimes compelled to do with other clients.19

Slave "property" also entailed difficulties, but of an entirely different nature. Whereas land was immobile, slaves could be moved. Indeed, slaves could sometimes move themselves, a fact which complicated Davis's work. This is illuminated by another late antebellum case, involving probate, slave hire and negligence issues: Arnold v. Willis, litigated in the state district court for Montgomery County from 1858 to 1860.

John Fridge died in 1851. A Montgomery farmer of some wealth, he appointed Peter Willis as the administrator of his estate. At the time, Willis was also a planter in
Fridge's estate left five slaves for Willis to take care of. One of these was a black carpenter named Hector. Willis had originally owned Hector but sold him to Fridge before he died. The slave was described by one observer as "about fifty years old, more or less, of dark complexion, very grey...." Hector became the center of several lengthy legal disputes after his master's death.

Fridge's son William claimed ownership of the five slaves. They were living on William's farm when his father died. Willis came to the farm soon after and took all of the slaves. William Fridge promptly sued Willis for possession of the slaves, who, he declared, "although often requested has refused and still does refuse to deliver them to the plaintiff and unjustly retains them from him." Fridge claimed that his father had sold the slaves to him for five thousand dollars. But William misplaced the bill of sale. The slaves remained with Peter Willis.

The Montgomery county probate court ordered Willis to hire out the "negroes of the estate of John Fridge, deceased." The proceeds from their labors were to pay off debts owed by Fridge at the time of his death. The probate officials wrote detailed instructions on how this was to be done. They asked Willis to hire out the slaves "at the courthouse door," and to require employers to give assurances, in writing, "for the safe return, unavoidable accidents only excepted," of the slaves. Willis was
obligated "to pay [the] Doctor's Bill..." and to make
certain the slaves had "comfortable clothing, food, etc."24

The court records paint a vivid picture of the hiring
process. The Montgomery courthouse, a two story wooden
affair, stood in the center of the little town.25 Willis
led Hector up the steps of this building on a cold winter
day in 1857, and placed him on display before the front
door. A crowd of men gathered around; most were locals, but
several lived in neighboring counties. It was a large
assemblage. One witness stated, "I know there was [sic] a
good many persons there at the time."26

Willis declared his intention to hire out Hector. He
produced the hiring contract and read its contents aloud to
the audience. The contract was a lengthy document. In
addition to the provisions mentioned by the court, Willis
required the prospective employer to "treat [Hector] well,
and to put him to no work more dangerous to his life or
health than working on a farm or common carpentry." The
hiring was "not to take him[,] suffer or allow him to go out
of the county." In addition, Willis required the employer to
post a twelve hundred dollar bond guaranteeing Hector's safe
return at the end of the twelve month hiring period.27

This last provision puzzled some of the listeners.
Posting bail on a slave hire contract was not unheard of;
but such a measure was deemed unusually precautionary. It
was assumed by most slave employers, under a ruling of the
state supreme court, that the very act of signing a hiring
contract implied the responsibility on the part of the hirer to return the slave safely.  

One of the bystanders, a local named A.M. Hanna, spoke up and asked Willis why he required a bond. Willis explained that there was some danger that the slave might either run away or be carried off to Guadalupe County, where another ownership dispute had occurred. A resident of that county, Elizabeth Johnson, claimed ownership of Hector. She brought a lawsuit to recover the slave carpenter, which was still pending at the time of Willis's hiring out process. Elizabeth and her son Telephus stated that they would find a way to repossess Hector, and Willis feared they would either try to entice the black carpenter to run away or steal him outright.

Willis wanted to take no chances. He believed the bond would serve as an extra security device that would compel Hector's employer to keep a close eye on him. Hector was evidently well disposed towards Mrs. Johnson. Someone in the crowd muttered that whoever hired him "would do to keep his eyes open."

After Willis read the contract, bidding began. It was a brief process. Only two men were interested in Hector's services. Hanna bid $260.00. But another man named William Arnold offered $275.00. No one matched this amount, and Hector was hired to Arnold.

Up to this point, the problems and procedures surrounding property rights in Hector were little different from those
found in other forms of "property." The slave hire contract was more complex and detailed than what might have been expected from a rental agreement concerning, for example, a team of horses. Otherwise, Hector had posed no special difficulties. But this would change when he began working for William Arnold.

Arnold gave his new hired hand a relatively free rein, allowing Hector to travel around the countryside frequently and alone on errands for his master. During these trips, Hector often met with Telephus Johnson, who lived close by. According to one witness, "I heard T.A. Johnson suggest the propriety of the boy's coming home," meaning Guadalupe County.33

In November, 1855, a short while before his contract would expire, Hector took Johnson's advice. One Sunday evening the carpenter appeared at the house of George Brook, a friend of Telephus Johnson, and acquired a horse. How he did so is unclear. A witness claimed that Brook "furnished him...a pony to ride." Brook denied such complicity declaring that Hector stole the animal. Whether stolen or given, the horse furnished Hector with transportation for the long trip to Guadalupe County and Elizabeth Johnson's farm.34

William Arnold took no steps to recover the runaway slave. When the contract expired in mid-1855, he could not return Hector to Willis. He refused to pay the twelve hundred dollar bond Willis had taken out for just this
Willis engaged Nathaniel Davis to sue Arnold for both the value of the slave and the bond. Davis helped Willis draw up the contract and bond agreement. He also helped Willis settle Fridge's estate in the county probate court. Davis now aided his client by suing Arnold in September, 1857. He argued that Arnold had negligently allowed Hector to run away without making any attempt to recapture him. The attorney declared that Hector's action was not an "unavoidable accident," the caveat phrase in the hire contract.38

Arnold countered with the charge that Willis had committed fraud in hiring Hector out. Arnold claimed that Willis had never told him about the ownership dispute in Guadalupe County. Nor had he been informed of Elizabeth Johnson's public declaration that she would take Hector home to Guadalupe County, whatever the outcome of her lawsuit. Arnold stated he had no way of knowing that there was a good chance Hector would leave.37

How far did the employer's responsibility extend to prevent a hired slave from running away? This was an unusual issue for the Texas district court. Liability matters concerning slave hire were familiar enough. Nine such cases were appealed to the Texas supreme court before the Civil War. But all of these involved some form of personal injury to the hired slave. The hirer was required to exhibit "discreet, humane and prudent behavior" in preventing a
hired slave from harming himself while laboring for his temporary master.\textsuperscript{39}

The \textit{Willis} case was different. Negligence involving injury or death to a slave usually meant failure to prevent carelessness on the part of the slave. A hirer who allowed a slave to engage in some dangerous task which was contrary to the hire contract could be held liable for the slave’s value if he were injured or killed. The employer was expected to prevent error and careless behavior, which southerners paternalistically believed was commonplace among slaves.\textsuperscript{39}

An 1852 supreme court decision stated that "[w]here the hirer refuses to redeliver the property at the expiration of the term of hiring, he becomes responsible for all loss, diligence or no diligence."\textsuperscript{40} But "refusal to redeliver" was different from a failure to prevent the slave from running away. In the former case, the hirer was the primary actor, and his will decided the slave’s fate. In the latter case, the slave exercised a will of his own, and southern law was never very adept at taking into account this inescapable factor of the peculiar institution.\textsuperscript{41}

Hector shed the ill-fitting mold of "property" by running away. He ceased being "chattel" and became a human being. The \textit{Willis} case was qualitatively different from other slave hire cases involving negligent injury or death. A runaway slave was a thinking, acting man; an injured slave was merely careless.

Arnold argued that a lack of information prevented him
from exercising the diligence necessary to foil Hector's escape. Davis did not dispute this. He tried instead to establish that Arnold knew of Elizabeth Johnson's claims.

The Montgomery attorney gathered depositions from several men who were present at the courthouse when Hector was hired out. The direction of his thinking is illustrated by the questionnaire he issued to Enoch Cooksey, a citizen of Fayette County, in March, 1850. After establishing Cooksey's presence, Davis asked him whether Willis "read any writing." He asked Cooksey to describe the contract in detail, especially the bond clause. He asked if Arnold was present, and whether he heard Hanna ask Willis about the reasons behind the bond.

Cooksey's replies were not very helpful. He described in some detail the event, but could not recollect whether Arnold was present to hear Hanna's questions. The questionnaires Davis issued to other spectators yielded similar disappointing results. He was unable to establish that Arnold definitely knew Mrs. Johnson's lawsuit.

Without such direct proof, Davis's task was difficult. At first, the district court was inclined to side with Peter Willis. A jury ruled in favor of Davis' client in May, 1858. Arnold asked for a new trial. His request was granted, and a second jury in April, 1860 found that Willis had committed fraud in failing to disclose Johnson's claims.

Davis then petitioned the court for a new trial. He declared that the jury "found contrary to the law and the
evidence," and that no fraud was proven in his client's actions. Davis also claimed that "the evidence does not establish that Hector either ran away or was stolen," hoping the jury might be led to believe that Arnold himself was secretly trying to keep Hector.44

The court turned down Davis's petition. The attorney gave notice that he intended to appeal the case to the Texas supreme court. This was in November, 1880, the month of Lincoln's election. The war swept Davis's case away before he could proceed with his appeal.45

The court's decision implied that rules for liability concerning runaways differed from those applying to injured hired slaves. More than "discreet, humane and prudent" behavior was required of both the owner and the hirer. Willis was expected to share the information which presumably would have led Arnold to take extra precautions and prevent Hector from running away; merely covering his own losses with a bond agreement was not enough. This ruling indicated that extra steps were necessary and should have been taken by Arnold had he known of the Johnson lawsuit.

Both the Greenaway and Willis cases illustrate how the physical characteristics of property affected, and often determined Davis's course of action. The simple fact of real estate's immobility, coupled with the difficulties of communication and travel in Texas, led him to depend on a variety of outside sources for information and service. Sherriffs and clerks, whatever their shortcomings, were the
only reasonably reliable aids available to him.

The mobility, and above all unpredictability of slave "property" caused difficulties for Davis, as well. As the attorney who helped Peter Willis draft the original slave hire contract for Hector, Davis tried to foresee all possible contingencies: clothing, medicine, food, treatment and so forth. But the inherent instability of defining a man as a thing rendered Davis's task problematic, at best.

Land and slaves were often linked in antebellum southerners' thinking. They were interdependent, vital forms of property which together were the chief symbols of wealth and power in the South. Yet each demonstrated peculiar physical characteristics that an antebellum southern attorney was compelled to assess.
CHAPTER FOUR NOTES


3. There are several references to Davis's speculation ventures in his papers; see especially his account book, "Tax Receipts, 1850-1864", 3K401, BCTH.

4. Edward M. Greenway v. Amelia DeYoung, et. al., District Court Minutes, Book E, 231, 246-247, DCO; there is no record of the exact date of DeYoung's death, nor how much land he owned, since the records of the case are missing.

5. Nathaniel Hart Davis to E.M. Greenway, January 1, 1859, 3K396, BCTH.

6. District Court Minutes, Book E, 246-247, DCO.

7. Ibid., 247.

8. This and the foregoing are based on eight letters related to the Greenway case found 3K396, BCTH; I have extrapolated the basic facts of the case from these letters.

9. Nathaniel Hart Davis to E.M. Greenway, January 1, 1859, 3K396, BCTH. Davis uses the pronoun "we" referring to him and his brother, but all of the Greenway correspondence is written by Davis.

10. Nathaniel Hart Davis to "Mr. Sharp, clerk of Vanguard County", December 21, 1859, 3K396, BCTH.

11. Nathaniel Hart Davis to E.M. Greenway, January 1, 1859, 3K396, BCTH.

12. Ibid.; as of September, 1860 Davis had located only one buyer who purchased a portion of the Vanguard County lands.

13. Nathaniel Hart Davis to "Mr. Sharp, clerk of Vanguard County", December 21, 1959, 3K396, BCTH.

14. Nathaniel Hart Davis to E.M. Greenway, January 1, 1859, 3K396, BCTH.

15. "George W. Frazier, Sherriff, Harris County" to Nathaniel
Hart Davis, August 17, 1860, 3K396, BCTH; also September 8, 1860; 3K396, BCTH.

18Ibid. August 17, 1860.

19Ibid

20"B. Killiburn, Sherriff of Martin, Texas" to Nathaniel Hart Davis, May 28, 1860, 3K396, BCTH.

21Nathaniel Hart Davis to E.M. Greenway, September 30, 1860, 3K396, BCTH.

22Reference to this case in Davis papers in 3K401, Book 1347, and Book 1345, BCTH both of which summarize the case and Davis's activities.

23That Peter Willis was the original owner is indicated in "Case No. 670, William Fridge v. Elizabeth Johnson", Fall, 1856 (facts of case pending in Guadalupe County as related to Willis case), case records, case number 1054, DCO.

24"Deposition of John Johnson," October 8, 1859, case records, 1054, DCO.

25"Document pertaining to case 786, Alexander Fridge v. Peter Willis, ad. of John Fridge, deceased", February 18, 1852, case records, 1054, DCO; Alexander Fridge was named the plaintiff in this case, but all of the information given in the matter was from William Fridge; Perhaps Alexander was a younger son of John Fridge, and William acted as his guardian.

26"Order in Vacation to hire negroes of estate of John Fridge, deceased," December 18, 1854, case records, 1054, DCO.


27"Continuation of Interruptions, etc," March 15, 1860 (answers to interrogatory posed to Enoch Cooksey), case records, 1054, DCO.

28Ibid.; also see copy of slave hire agreement, no date, case records, 1054, DCO.

29See Mims v. Mitchell 1 TR 443 (1842); this is the earliest known slave hire case to be appealed to the Texas Supreme Court.

30"Continuation of Interruptions, etc," March 15, 1860
(answers to interrogatory posed to Enoch Cooksey), case records, 1054, DCO.

"Document pertaining to case 786, Alexander Fridge v. Peter Willis, ad. of John Fridge, deceased." February 18, 1852, case records, 1054, DCO; it is interesting that Alexander Fridge and William were named defendants in this suit, since Peter Willis still held property rights as administrator to the slaves. The judge in this case ruled that the Fridges "had no rights at all", and that Peter Willis, as John Fridge's administrator, possessed all legal rights to the slaves. What he ruled concerning Elizabeth Johnson's claim is not given, but in light of the preceding statement, and subsequent events, it would appear she was turned down.

"Writ to Serve Notice and Interrogatories, etc.," March 10, 1860 (interrogatory of Enoch Cooksey), case records, 1054, DCO.

"Continuation of Interruptions, etc.," March 15, 1860 (answers to interrogatory posed to Enoch Cooksey), case records, 1054, DCO.

"Deposition of John Johnson," October 8, 1859, case records, 1054, DCO.

Ibid.; also "Interrogation of George Brook of DeWitt County," October 18, 1860, case records, 1054, DCO.

"Breach of Bond," no date, (petition to district court filed by N.H. Davis), case records, 1054, DCO.

3K401. Book 1347 and Book 1346, BCTH; for Davis's plea see District Court Minutes, E, 29, 56, 112, 128 and possum; also "Damurrer to Answer". Spring, 1857, case records, 1054, DCO.

"Answer to charges." Spring, 1857, case records, 1054, DCO.

Concerning American Slavery and the Negro (Washington, D.C: Carnegie Institution, 1937), mentions no such cases.


Young v. Lewis 9 TR 73 (1862).

"This difficulty is the fundamental point of Tusnot, Law of Slavery, esp. chp. 4.

Writ to Serve Notice and interrogatories, etc., " March 10, 1860 (interrogatory of Enoch Cooksey); Continuation of Interruptions, etc," March 15, 1860 (answer to interrogatory posed to Enoch Cooksey), case records, 1054, DCO.

District Court Minutes, E, 128, 159, 169, 278; F, 8, 49, DCO.

"Motion for new trial," Spring, 1860, case records, 1054, DCO.

District Court Minutes, F, 49, DCO.

"Land and slaves were intellectually linked in the minds of most Southerners; see Bevin Wright, Old South, New South (New York: Basic Books, 1986), 17-51.
CHAPTER FIVE
"To Assist His Client in an Act of Injustice..."

Pounds v. Baker

Nathaniel Davis often worried about what he saw as the deteriorating morals of his age. His revulsion at the "wild hunt after [political] office" that he felt characterized the political leaders of his time is a good example.¹ Davis's non-legal reading list included several works on ethical behavior, such as John Abercrombie's The Philosophy of Moral Feelings and Henry Ward Beecher's The Moral Uses of Luxury and Beauty.²

The Montgomery attorney was particularly sensitive to any perceived misbehavior by fellow attorneys or court officials. "He is grossly incompetent and hopelessly incapable of improvement," Davis railed against an unidentified court clerk, "He has been guilty of willfully overcharging fees fixed by law and receiving the money of them—knowing the same to be overcharged....He has been guilty of extortion on divers times and against divers persons," he continued. Davis also accused the clerk of being "ungentlemanly in his office in intercourse with the bar."³

A careful, principled man, Davis expected competence and forthrightness from those around him. He carried his own notions of honorable behavior in his legal dealings. Some idea of the parameters of these beliefs may be gained by examining a lengthy, unusual partnership case Davis
litigated in the late 1850's and early 1860's.

Yarborough Baker and Jonathan Pounds established a business partnership in the summer of 1855. Pounds owned two tracts of land in Montgomery: a 640 acre parcel, and a smaller adjacent plot on which was situated a small saw mill. The town was growing at a rapid pace, and Baker believed the little steam-powered mill could be developed into a large and profitable business. He approached Pounds with the idea, and the two men agreed to pool their resources.

The mill quickly grew into a large enterprise. Pounds and Baker expanded the original steam mill, added several other pieces of large machinery, a new mill house and all the wagons, oxen, horses, carts, and paraphernalia needed for such an affair. Yarborough Baker was largely responsible for the growth of the mill. Pounds was content to let his partner run their business, spending most of his time in Houston and Galveston.

Baker financed the mill's expansion largely on credit from a variety of local sources and individuals, apparently believing the new equipment would pay for itself as the volume of business increased. In this he was mistaken. Montgomery hosted two other mills, and could not support a third. By the spring of 1856 the mill was deeply in debt, with little prospect of generating enough new business to pay for the new equipment.

Relations between the two partners quickly soured. Baker felt Pounds did not carry an equal share of the burden of
running the mill, since he was often absent. For his part, Thomas Pounds was forced not only to raise new capital for the mill, but also to help Baker pay personal debts.

By the fall of 1856 the mill was doomed, its debts to various creditors totaling over two thousand dollars with no hope of relief. Pounds moved to disentangle himself from his failing relationship with Baker. "As there has been unpleasant difficulties now grown out of our Mill Partnership of such a nature that the partnership is not likely to prosper," he wrote Baker in September, "I propose to sell out to you....the whole matter is unpleasant to me and I propose to settle the matter on right and equitable terms..." His enclosed plan for dividing the mill's assets apparently did not satisfy Baker.

Several weeks later a more serious disagreement arose between the two men. For unknown reasons, Baker levied a charge of robbery against Pounds in the local Justice court. Pounds responded with a suit for malicious prosecution. Both accusations came to nothing, but the resulting animosities meant that a "right and equitable" out-of-court settlement concerning the defunct business was unlikely.

Nathaniel Davis represented Yarborough Baker's interests in the ensuing litigation. The various lawsuits and court proceedings stretched over fifteen years and three different courts. The procedures involved were very complex; but essentially Davis's task could be reduced to two major
issues. First, he protected Baker’s rights in the land which was part of the mill property. Second, he watched over the court’s division of the mill’s assets and debts, ensuring a fair settlement for his client.

When Pounds asked the state district court to dissolve his partnership with Baker in the fall of 1856, the court appointed Montgomery sheriff Samuel Morris receiver to oversee disposal of the business’ assets and property. This included the 640 acre tract of land, Baker’s house, and the small plot where the mill was located. Through a complicated series of events, Baker had acquired exclusive ownership rights to the 640 acres and his house.17

Without Baker’s (or his attorney’s) knowledge, all the property—the 640 acres, Baker’s house and the mill property—was represented to Morris as jointly owned by the two partners, to be disposed of to pay the mill’s many debts.18 In February, 1857, Morris auctioned all the property at a public sale. Lemuel Clepper, a wealthy Montgomery lawyer who happened to be Jonathan Pounds’s attorney, purchased the property at this sale.19

The 640 acres and Baker’s house should not have been sold at this auction, since it was not partnership property and hence not liable for the mill’s debts.20 Baker’s attorney, Nathaniel Davis moved quickly to assert his client’s rights. He asked the District Court judge to void the sale, since Baker held a mortgage to much of the property. The judge agreed and ruled the sale void. The court compelled Clepper
to surrender the deed to the 640 acres and the house. This left him with only the mill itself and the four acres on which it stood.21

So far the incident seemed minor, a mistake on the part of the receiver in determining which items were partnership property and which were privately owned. Several months later, however, the matter became more serious. A man named W.C. Hooker won a minor judgment against Baker in Montgomery’s justice court; Baker was ordered by the court to pay Hooker twelve dollars.22 For some unexplained reason, Baker delayed paying Hooker. Sheriff Morris immediately seized the 640 acres and Baker’s house to satisfy the twelve dollar debt. Within a week after the seizure, the land and house were again on the auction block, and the property was again sold to Lemuel Clepper, for the paltry sum of sixteen dollars.23

Davis was infuriated. He believed an elaborate conspiracy had been concocted to defraud his client of his home and land, involving Jonathan Pounds, Samuel Morris and above all Lemuel Clepper. Davis learned that Sheriff Morris had always known of Baker’s mortgage on the 640 acre tract and the house, so it was no accident that the property was mis-represented as part of the partnership’s assets and sold to Clepper at the first public sale in February. Apparently the Sheriff and Clepper hoped that the deed to the land and house could be quietly transferred to Clepper before Baker or Davis discovered what was happening. Davis had gotten wind of
the matter, and moved quickly to have the sale voided.

Baker's failure to pay the twelve dollar fine levied on him by the justice court provided Morris and Clepper with an opportunity to try again. Morris seized Baker's property; and this time he gave Clepper the deed before the property was placed on the auction block. The second auction of the land and house was a sham, the sixteen dollars a token payment. Clepper already owned the property.

Davis's fellow attorney was at the bottom of this complicated scheme. One of Montgomery's founding citizens, a wealthy landowner with many slaves, Clepper wanted the 640 acre tract of land that Baker owned. To acquire it, the attorney enlisted the aid of the local sheriff and the acquiescence of his client, Jonathan Pounds. Pounds was not interested in either the land or the mill; he merely wanted to cut his losses in Montgomery and get out.

Davis felt Lemuel Clepper had overstepped the bounds of ethical behavior for a respectable attorney. "Clepper certainly had a better knowledge than anyone save his client and law partner of the fraud in and about the Receiver's sale," Davis declared, "others might suspect they alone could know." Clepper had moved to profit from this knowledge, acquiring a valuable piece of real estate at a ridiculously low price. If Jonathan Pounds was to blame for these actions, then "the duty of an attorney does not bind him to assist his client in an act of injustice." But if, as Davis believed, Clepper exploited his knowledge as Pounds'
attorney for personal gain, then he was all the more blameworthy. An attorney "is bound to be faithful to [his client], and not to benefit himself to the disadvantage of his client."

Davis was also offended by what he termed Clepper's "secret partnership" with Pounds. "Can the conduct of Clepper...be tolerated upon by any other hypothesis than that of partnership between Clepper and Pounds?" Davis wondered. The resulting conflict of interest rendered Clepper incapable of attending to his duty as guardian of justice.

Nor was Davis happy with Clepper's behavior at the public sales. "He does not pretend that at either sale he gave a fair bid or fair or adequate price." The sale was "fraudulent, unjust and void", according to Davis. It was poorly advertised and executed, "and Clepper well knew the same." The low price paid by the attorney for the 640 acres and the house was by itself proof of fraud, Davis maintained.

Nathaniel Davis was offended by his counterpart's lack of ethics. But there was not much he could do to censure Clepper's actions. No American Bar Association existed in the 1850's to oversee professional standards of behavior. Some local bar associations did exist, but they possessed no means of creating or maintaining ethical standards. Davis could not have his fellow attorney disbarred; but he was able bring legal action on behalf of his client to void the second receiver's sale and wrest the property away from Clepper.
This would not be easy. Technically, Sheriff Morris's actions were within the law. Baker did owe twelve dollars to Hooker as part of a justice court's decree, he had failed to pay the required sum, and Morris was within his rights as sheriff in seizing the land and selling it at public auction.

Nevertheless, Davis did what he could. He began gathering information from individuals who were present at the sheriff's sales. He also sought men who had been employed by the mill; Baker hired many transient laborers and craftsmen to perform odd jobs.

Davis prepared detailed questionnaires for these men. In many cases they were difficult to find, since many were not local citizens. Davis wrote out his questions, enclosed them with an explanatory note, and mailed them to the district court clerk or sheriff of the county in which he believed a given laborer resided. This was a hit-or-miss way to question witnesses; but Davis could not very well travel to all these distant places, nor could he afford to hire agents.

His efforts were often futile. County officials were under no obligation to comply with his wishes. Sometimes his questionnaires were returned unanswered. One clerk wrote that he was unable to aid Davis; apparently the laborer had been located, but according to the clerk, no one could be found to write down the answers to his questions. In all fairness to the clerk, Davis's interrogatories were very lengthy and
detailed. Completing an entire questionnaire would certainly have been time consuming.31

What did Davis ask? Typical was the interrogatory intended for F.H. Webb, a laborer who worked briefly for the Baker mill, in Harris county. He asked many basic questions: name, occupation, relation to the mill, etc. Davis seemed chiefly interested in the sherriff's sales, which he believed Webb attended. "Did Pounds say anything about selling his share?" "Did he say anything about a mortgage?" "Did Pounds make a proposition that he would vacate the mill if you bought it?" Davis never knew the answers.32

Most questionnaires were returned empty; Davis had to rely primarily on other sources, chiefly local citizens, for information as he began proceedings in District Court in the summer of 1858 to have the sale overruled. The records are sparse concerning this case. Davis seems to have based his argument on the unjust and fraudulent nature of the sale, claiming that Sheriff Morris and Lemuel Clepper had combined to cheat his client. He argued that the low price paid for the land and house was sufficient proof of fraud to warrant voiding the sale.33

Davis lost his case in the District Court. His chief difficulty lay with District court judge Peter W. Gray, who instructed the jury that inadequacy of price did not alone prove fraud, and that Sherrif Morris's actions as an officer of the court must be presumed proper unless definitively proven otherwise. Davis appealed the matter to the state
supreme court, arguing that the judge had "erred and misled" the jury with these remarks. 34

The supreme court heard Davis' appeal in 1863. The Montgomery attorney dropped his allegations against Morris and Clepper. He concentrated instead on proving that the sale was improperly advertised, and that the price paid for the land was "grossly inadequate."

Davis fared no better here than he had before the District Court. He annoyed the Supreme Court justices with uncharacteristically sloppy procedural work. Justice George Moore scolded him for failing to present his exceptions "in the due order of pleading....they were intermingled in the replication with averments and allegations of facts, so that it would have been very difficult if not impossible for the court to have acted upon one without reference to the other."

In ruling on the case itself, Moore stated that Davis had failed to prove "any wrongful or fraudulent act" in connection with the sale. And inadequate price was not of itself conclusive. Moore quoted a previous supreme court ruling in which it was held that poor price "at a sale made under process of law is not sufficient without additional circumstances to invalidate the sale." These issues were properly submitted to the district court jury, and Moore could find no cause to overrule their findings. 35

Davis was no doubt fully aware that his prospects in this matter were very poor. His arguments in behalf of Yarborough Baker lack the clarity and meticulous attention to detail
of his other work. He exhibited throughout this litigation a high moral tone, for these issues deeply touched his sense of legal ethics. His indignation over Morris and Clepper’s behavior spilled over into the other major task Davis performed for Baker: overseeing the distribution of the partnership’s assets.

Baker borrowed money from a great many men in his attempts to keep the mill operating, including Davis and Clepper. He even borrowed from the migratory workers he employed. Ralph Hooker, for example, a coppersmith who worked briefly for the mill, made several small loans to Baker. Not only was he left unpaid; Baker could not even afford to pay Hooker his salary for the work he performed. Baker compounded his errors by failing to keep any accurate records of these transactions.

Both Pounds and Baker knew insolvency was imminent for their firm by early 1857. They tried to protect some of their assets from seizure by mortgaging the bulk of the mill property to Baker as his private possessions, though Pounds believed he still held an interest in the property. As such, the mill and its equipment could not be seized to pay the firm’s debts.

This was the situation Davis and the local district court faced in the summer of 1857. While Baker’s house and land were being placed on the auction block for a second time by sherriff Morris, to be purchased by Lemuel Clepper, the firm faced final liquidation by the court. The defunct mill owed a
plethora of major and minor debts. Many creditors were demanding payment, yet there was no record of their contributions. Further, these men stood a good chance of being completely defrauded because of the mortgage placed on the mill.

The court was obligated to protect their rights, and assure an just settlement of the mill's debts. Judge Gray appointed Sherriff Morris to oversee this task. The sherriff would complete an accurate list of the mill's creditors. To help him in this difficult job, the court created a board of auditors, consisting of four Montgomery citizens. Any property or funds remaining after the final settlement would be divided between Pounds and Baker at the sherriff's discretion.

Davis was primarily interested in assuring that none of Baker's personal assets were mistaken for partnership property. Errors were easily committed in such a confused situation, as illustrated in the case of Baker's house and land. Davis monitored the auditing process. He was given a copy of Morris's report before it was finally submitted to the court, to check for discrepancies between those officials' conclusions and the claims of his client. He would also try to guarantee a fair share for Baker of any remaining property.

An accurate list of the mill's creditors proved nearly impossible to obtain. Sherriff Morris and the board of auditors met with mixed success as they screened the many
creditors' claims. They labored at their task for three years; during that time Morris submitted four reports to Gray, all differing on the number of creditors and the amount owed by the mill. One report listed eighty-six different creditors, demanding amounts ranging from three to several hundred dollars. Morris wrote that the mill owed just under seven thousand dollars total, fourteen hundred dollars of which were "privileged claims," meaning creditors to be paid first when the mill property was sold. How the sherriff determined who was "privileged" is not known. Morris knew their were discrepancies. He stated that they were "probably due to miscalculations." He did not say whose errors were to blame.

Davis thought he knew. The attorney was displeased with Morris because of the affair involving Baker's house. He already believed the sherriff was dishonest. The confused creditor reports seemed to indicate incompetency, or perhaps dishonesty, on the part of the sherriff and the auditors.

Davis filed an indignant critique of one report in the fall of 1857. "There is manifest error in their calculations," he fumed. He listed a variety of mistakes in their listing of the firms debts. He also wrote a lengthy indictment of Pounds's actions concerning Baker's house, referring to Clepper as the "attorney confidant" and "secret partner" of his client. Davis could not resist pointing out that Pounds had "not borne his share of expenses or burden of running [the] company", had travelled extensively and
neglected his duties to the mill, and claimed that he had
"appropriated partner property for private uses", though he
did not list specific incidents. 40

Pounds quickly replied to these charges. In February 1857
he submitted a detailed report of his own. In it he refuted
all of Davis’s claims, arguing that the allegations were
"unjust and incorrect." Concerning his failure to support
the firm properly, especially his frequent absences from
Montgomery, Pounds declared that he had "only went to Houston
once, and that to replace broken machinery." 41

Davis filed another list of countercharges to Pounds’s
list of countercharges on May 7, 1857. 42 Judge Gray overruled
Davis’s May 7 allegations, but he said nothing about his
first report, or Pounds’s replies. 43 Davis then asked Gray to
remove Morris from the case entirely, citing his "improper
behavior" concerning Baker’s house. 44 The judge overruled
this request, as well.

By May 1857 the entire process of dissolving the mill
partnership had ground to a halt. Sherriff Morris and the
board of auditors found their tasks exceedingly difficult.
Both parties had engaged in a fruitless series of accusations
and counter-accusations, with no positive results. Davis
greatly mistrusted Morris, whom he believed to be corrupt and
inefficient. Davis was wont to place Morris’s behavior in the
worst possible light, due to his questionable behavior during
the sale of Baker’s house. Judge Gray seemed unable to move
the case forward, allowing Pounds, Baker, their attorneys,
and the sherriff to sink into a morass of mutual hostility.

Davis and Clepper tried to find a way around this paralysis by attempting an out-of-court settlement for their clients. The two attorneys met in late May 1857 to settle their differences. Both sides cleared up disputes concerning the amount of various minor debts.45

This no doubt helped the board of auditors and sherriff Morris. But the few debts this arbitration attempt did clear up were only a small part of the total owed to the mill's creditors. Many people still required payment, and no one was exactly sure how many creditors existed, or what they were owed. There was still the matter of the mortgage Baker held on much of the mill's assets: many creditors might never be paid. Pounds felt he held an interest in this mortgage, and he also claimed Baker owed him several hundred dollars. And nothing could be done concerning Davis's deep distrust of Morris's motives.

Judge Gray finally took action to move the case along in November 1857. He officially declared the mill insolvent. In a complicated ruling, he settled the debts owed by the partners to each other. Gray also voided Baker's mortgage, stating that it had been created with "the intention to defraud and hinder creditors." He accepted Morris's latest report as accurate, and ordered those creditors listed in it to be paid.46

Problems continued to surface. A week after Gray's ruling, two more creditors surfaced. Gray was compelled to
ask for yet another report from Morris, taking into account these newcomers. Judge Gray did not officially allow this new report until May 1859.

Davis's patience had worn thin by this time. Exasperated over the long delay, he filed a motion in April 1860 asking Sheriff Morris to write a "complete and accurate" list of the firm's creditors. His request was redundant; Morris and the auditors had been trying to perform that very task for over three years. The district court judge did not reply to Davis's request.

After this petition, the record of the case is fuzzy and incomplete. The issue of Baker's house was settled in 1863, as related above. But final settlement of the mill's debts continued to be delayed. The case lingered without final resolution, the auditors and sheriff still puzzling over the firm's accounts throughout the decade. In September, 1870, Davis notified the court that Yarborough Baker had died. A year later, the court finally cleared away the last remaining debt of his ill-fated steam mill.

The dissolution of Pounds and Baker's partnership required five separate court cases litigated over a fifteen year period. These cases touched the interests of nearly one hundred individuals: judges, lawyers, creditors, auditors, the local sheriff and the partners themselves, as well as several migrant workers, craftsmen and the officials of
neighboring counties who (sometimes) questioned them at Davis's request.

Yarborough Baker was deeply concerned with the final settlement, more than his partner, who had other business interests and simply wanted the matter disposed of with as little fuss and delay as possible. Baker was intimately involved with the day-to-day operation of the mill. He expanded its operations, he contracted most of the debts in the name of the firm, and he was chiefly responsible for its demise. Baker's home, land and livelihood were bound up in the failed business. How the partnership property was identified and divided was a matter of great importance to him.

Baker's reckless spending, bad judgment and nonexistent bookkeeping were responsible for much expense and delay. The courts were not very sympathetic towards him or his problems. Even when he was manifestly the victim of fraud, Judge Gray and the supreme court justices did not feel disposed to help him. Nor did Gray remove Morris from the case, despite his questionable actions during the sherriff's sales and difficulties with the creditor's reports.

As Baker's attorney, Nathaniel Davis tried to protect his client's rights before courts who were at least indifferent, if not hostile. There was a quixotic quality to Davis's behavior throughout this lengthy litigation. The case consumed a great deal of time, effort and expense, but it yielded him no discernable personal gain.
Davis was paid little or nothing for his services. Baker admitted at the outset that he could not afford to pay any legal costs, but Davis continued to represent him. He may have arranged a contingency fee agreement with Baker; but it must have been painfully obvious after 1857 that his client could hope for no material improvement from the outcome of the dissolution. There is no record of the Montgomery attorney's having received one penny throughout the fifteen years he represented Yarborough Baker.

Moreover, the failed mill-owner's cause could not have been popular in Montgomery. Many of the firm's creditors were local citizens, men who stood to lose money because of Baker's bad business practices. And the abortive mortgage scheme to defraud them must have been common knowledge in the town.

Despite all of this Nathaniel Davis devoted considerable energy to representing Baker's cause. This was often a daunting task. He must surely have known, for example, the final outcome of his appeal to the supreme court concerning Baker's house and land. The precedent established by the court that inadequate price did not illustrate fraud was a matter of record.

The Montgomery lawyer seems to have taken up Baker's case primarily on principle. The case touched his sense of right and justice. He was deeply offended by Clepper's actions and apparent lack of scruples. Sherriff Morris's behavior as an official of the court was also disturbing. Davis's outrage
was always just below the surface throughout the Baker case.
CHAPTER FIVE NOTES

1Box 3K401, Book 1328 ("Political Notebook"), BCTH.

2Ibid., TXC 129, BCTH.

3This passage found in Ibid., 3K403, Book 1032, 186, BCTH.

*Apparently the two men had been planning their business venture for several years; Pounds to Baker, September 11, 1853, "You must come down if you wish me to go ahead with our mill"; Baker v. Clepper, case number 1036, DC0.

*See auditors reports, 1036, DC0; the partners added a larger steam engine for their mill (valued at $10,000), planing machine, gist mill and peck mill; see also Pounds and Baker v. Steadham, Minute book E, 68, DC0.

*See especially "Exceptions to auditors report", Fall, 1857, 1036, DC0.

7Auditors and receiver's reports, 1856-1860, 1036, DC0; one such report (November 12, 1860) lists 96 different creditors.

9Martin, W.N., "A History of Montgomery: A Research", M.A., Sam Houston State Teacher's College, 1950, 35-39; it is interesting to note that Nathaniel Davis very rarely used the Baker Mill (as it was commonly known); he utilized the other mills frequently, but records indicate he used Baker's only once; see 3K401, Book 1340, BCTH.

9Auditor's reports, 1856-1860, 1036, DC0.

*"Exceptions to Auditor's Report", Fall, 1857, 1036, DC0; "The plaintiff [Pounds] has not borne his share of expenses and burden of running company"; in his reply to this document, Pounds countered by stating that all of his trips to Houston were conducted for business purposes, see "Reply to Exceptions", 1036, DC0.

11Pounds v. Baker (1858), Minute book E, 67-69, DC0.

17Auditor's reports, 1856-1860, 1036, DC0.

13Pounds to Baker, September 25, 1856, 1036, DC0.

14State v. Pounds (1856), 3K401, Book 1357, BCTH.

18Montgomery v. Pounds and Baker (1856), 3K401, Book 1357, BCTH.
16Ibid.; also Baker v. Clepper 26 Texas Reports 629 (1863): Usually a partnership was a simple affair, an agreement between two men to create and nurture a business, and to share the risks and rewards involved in that business. It was an old form of transaction, ideal for the traditional pre-industrial economy of early America, where almost all businesses were owned and managed by the same men. By the 1840’s, partnership arrangements were largely obsolete; see Alfred D. Chandler, The Visible Hand: The Managerial Revolution in American Business (Cambridge: Belknap Press, 1977), 36-38, 41-50; also Lawrence M. Friedman, A History of American Law, 2nd. ed., (New York: Simon and Schuster, 1985), 190, 200; for a good discussion of partnerships in an unusual, but useful context, see John P. Reid, Law for the Elephant: Property and Social Behavior on the Overland Trail (Salt Lake City, Utah: Publisher’s Press, 1980), 128-140. (Ch. 4).

The form continued to exist after 1840, especially in backwoods frontier towns like Montgomery, Texas, where businesses were still small. It was often difficult for court officials to sort out partnership affairs, such as what was partnership and what was personal property, or which creditors to pay first. The courts much preferred leaving settlement of these affairs to the partners themselves. When a bankrupt firm’s affairs were in such disarray that the creditors rights were threatened. A court could appoint a receiver or board of auditors to sort out the firm’s accounts and pay its debts; see Josiah Story, Commentaries on the Law of Partnership as a Branch of Commercial and Maritime Jurisprudence (Boston: Little and Brown, 1846); this was the most popular contemporary treatise on the issue, and of invaluable use to the historian, for there are no good historical works on this topic.

17Case v. Pounds and Dartz (1858), Minute book E, 226, 207, DCO; in November, 1855, Pounds sold property to Baker, subject to mortgage held by W.F. Case, which Baker later recovered in a lawsuit; see also Baker v. Clepper 26 TR 639 (1863).

18"Exceptions to Auditor's Report", Fall, 1857, 1036, DCO.


20See Story, Partnership, chp. VI., on personal property not being liable to seizure for partnership debts.

21Ibid.; also 3K401, Book 1097, 6-15, BCTH.

22Ibid.; I have not been able to find the precise details of this case.

23Ibid.
Information on Clepper's background is from Martin, "Montgomery", 60.

Interrogatories are filed in 1036 records, DCO.

See interrogatory for F.H. Webb, 1036, DCO.

Typical questionnaire was over ten pages in length.

Interrogatory for F.H. Webb, 1036, DCO.

Clepper v. Baker (1858), Minute book E, 107, 112, 151, 178, 188, 222, DCO.


Interrogatory of Ralph Hooker, 1036, DCO.

District Court Minutes, E, 68, DCO.

Ibid., E, 44, DCO.

"Receiver's report number 4", November 12, 1860, 1036, DCO.

"Exceptions to Auditor's Report", Fall, 1857, 1036, DCO.

Reply to exceptions, February 7, 1857, 1036, DCO.

The exact contents of this countercharge are unknown; see District Court Minutes, E, 50, DCO.

Untitled, May 6, 1857, 1036, DCO; Gray claimed it was filed too late.

Petition to remove Morris in District Court Minutes, E,
45; see also "Motion filed to Remove Receiver", May 22, 1857, 1036, DCO.

*8 List of debts found in 1036, DCO.

*9 District Court Minutes, E, 67-69, DCO.

*7 Ibid., E, 105, DCO.

*8 Ibid., E, 161-162, DCO.

*9 Ibid., E, 262, DCO.

50 Petition in 1036, DCO.

51 District Court Minutes, E, 312 and F, 188, DCO.

62 Ibid., F, 560, DCO.

63 Ibid., F, 658, DCO.

64 These include the main case, Pounds v. Baker, case 1036; State v. Pounds (robbery charge), Case v. Pounds and Darby, case 1160; Clepper v. Baker, case 1122; Baker v. Pounds, case 1014.

55 See District Court Minutes, E, 106, 151, 186, DCO.

66 This is based on examination of Davis's account books in 3K401 and 3K402, BCTH.

67 Davis purchased a great many books, including the state reports; see list of books, 3K401, Book 1334, BCTH.

68 Story, Partnership, v.
CHAPTER SIX

"No Light or Trivial Reason:" Cartwright v. Cartwright.

"Marriage is the most important institute of human society," wrote legal scholar Joel Prentiss Bishop in 1852, "how it may be entered into, or how dissolved, or what is the effect of a pretended dissolution, is matter of almost constant legal inquiry and litigation." Bishop pointed out that American lawyers, "embarrassed with doubts concerning this subject," possessed few satisfactory guidelines.¹ His Commentaries on the Law of Marriage and Divorce attempted to fill this need, and was published in several editions during the years preceding the Civil War.²

Divorce was not unheard of in the antebellum South.³ Southern judges would act to dissolve a marriage when convinced that "ill treatment...of such a nature as to render their being together insupportable" existed.⁴ But ill treatment needed to be extreme. Chief Justice John Hemphill of Texas spoke for most of his contemporaries in 1848, when he declared that marriage "is regarded by all Christian nations as the most solemn and important of human transactions.... and no light or trivial causes should be suffered to effect its recision."⁵ Joel Bishop agreed, writing that "the presumption both of law and fact should be carried to the very verge to uphold a marriage..."⁶

When a marriage had arrived at the "very verge" was the fundamental issue facing Texas and other American courts.
This was not a simple matter. Deciding what constituted legal grounds for divorce involved complex issues which were only imperfectly addressed by the courts. "The decisions of the courts were conflicting, or apparently so, more than almost any other topic," declared Bishop, who described the body of legal doctrine on divorce as "driftwood upon the stream of our jurisprudence."

Nathaniel Davis litigated divorce cases throughout his career. Divorce litigation was a minor aspect of his caseload before 1870; but in the later years of his practice he became something of an expert on such matters. Sorting through the "driftwood" of legal doctrine on marital breakup was an important, if frustrating task for the Montgomery attorney. Two especially difficult problems involved standards of evidence and definition of unclear terms.

In Texas an 1841 statute gave three justifications for a divorce: desertion, adultery, and cruelty, common to southern divorce legislation. Texas attorneys were compelled to produce evidence which established at least one of these three causes.

Desertion was the easiest to prove. The plaintiff's attorney needed only to establish the defendant's absence from his domicile for at least three years. Proof was usually available. The testimony of the deserted partner, neighbors and friends of the family established abandonment. Often a spouse who deserted his or her family, if found, would testify that he or she would never return.
Adultery was a more difficult matter. On the surface, it would seem as clear cut as desertion. Either a spouse committed adultery, or not. But proof of such wrongdoing was less easily obtained.

The most direct form of evidence, confession of adultery by a guilty partner, was inadmissible. This was an old rule. European church authorities had long wished to prevent false confessions by marital couples who wanted to end their marriage at any cost.12 Texas and other American courts followed this ancient principle, holding that married couples could not voluntarily dissolve their own marriages under the ruse of confessed adultery. Corroboration from a more trustworthy source was required.13

Actual eyewitness testimony of adultery was rare. Seldom was a plaintiff's attorney blessed with a witness who actually saw the defendant engaged in an illicit sexual act.14 A rural society may have left such behavior invisible. In Texas and the South slaves, the people—perhaps most likely to have directly observed adulterous relations were barred from testifying in court.

Lawyers who wanted to prove adultery as grounds for divorce were forced to rely primarily on circumstantial evidence. An attorney would produce a witness who saw the defendant in the house of a woman of questionable virtue, for example. Or an overseer might have seen a slave woman sneak in the window of her master's bedroom.15 The actual adulterous act was unseen, and it remained for the court to
decide whether or not the circumstances were convincing enough to warrant a divorce.

The Texas supreme court tried to establish standards for evaluating such evidence. In 1848 it ruled that the plaintiff must illustrate the "time, place and material circumstances" of adultery, along with testimony from a reliable person. There was no indication, however, of what a reliable witness was required to see: did he or she need to observe the actual act, or suspicious circumstances? If the latter, what actions could arouse enough suspicion to establish satisfactory grounds for divorce? No one knew.

If Davis searched outside the Texas case reports for guidance, he found little help. An 1837 Alabama court declared that adultery could be proven solely by circumstances, "but it must be shown by such facts as lead to it by fair evidence as a necessary conclusion." Nineteen years later the same court rid itself of even this caveat, declaring that circumstantial evidence alone was sufficient "without direct fact." But a Louisiana decision held that adultery must be "fully proved", and that "extremely suspicious conduct" was not enough.

Since no concrete standards of evidence existed for determining whether or not an act of adultery had occurred, judges and juries possessed few guidelines. Statutory language was vague, and common law precedents were few and contradictory. In Texas, the adultery issue arose only once before the Civil War; the state supreme court had little
opportunity to clarify its one vague ruling which called for "reliable testimony."

Other state courts were no more clear. An Ohio judge in 1833, for example, ruled that a husband's habit of frequenting a woman's house, and of "being familiar" with her, did not justify a divorce. A North Carolina court ruled that a single act of adultery, though proven by the fact that the husband had transmitted venereal disease to his wife, was not sufficient grounds; a spouse had to "live in adultery" to provide good cause for divorce. By comparison, a New York judge granted a divorce to the wife of a man who lived with a woman of "bad character," despite the fact that the man was seriously ill at the time, and without any direct proof of extra-marital relations.

In the South, accusations of adultery often mixed with racial matters. Some southern states separated interracial extra-marital relations from "normal" adultery, the implication being that the former was more serious. One southern judge expressed his revulsion with interracial adultery and granted a divorce on those grounds. The standards of evidence, however, were no different from cases involving only whites. A Tennessee court in 1837 granted a divorce merely because the husband took his slave Polly "to keep house with him...[and was] in [the] habit of sitting by the fire with [her] after the laborers in the shop had gone to bed." On the other hand, an Alabama court denied a divorce to a couple under similar circumstances, despite the
testimony of a housewife who testified that she had seen the husband and his mulatto slave frequently enter the master's bedroom alone together, and that she had discovered evidence of their having lain together in the bed soon after they left.26

In Texas as elsewhere, adultery was therefore a difficult charge to prove, by the reason of reliance on circumstantial evidence. Rules for evaluating such evidence were confused and largely subjective.

The third reason granted by the 1841 Texas statute for divorce, cruelty, was still more uncertain. Evidence was not the major issue in cruelty charges, for witnesses were far more likely to directly observe "cruel" behavior than adulterous behavior. The fundamental problem underlying the cruelty provision was the definition of the term itself.

"Cruelty" involved more than simple physical violence. Life-threatening beatings would almost certainly guarantee a dissolution of the marriage.27 But matters were rarely so simple. The Texas divorce statute allowed cruelty to be construed widely, as "excesses, cruel treatment or outrages...if such ill treatment is of such a nature, as to render their being together insupportable."28 Under this broad definition, "cruel treatment" could be viewed as anything from physical blows to unkind words.29

Rather than creating a harder definition of cruelty from the statutory language, judges relied on their own discretion, and that of juries, on a case-by-case basis. One
Texas judge stated, "no exact legal definition of legal
cruelty can be given....the juries have the parties before
them, and can appreciate and place the proper estimate on
their conduct and its effects upon each other; and such is
confided to their discretion." Another state supreme court
declared that "the habits and character of the parties, their
social condition and standing" should be considered in each
particular case.31

Definitions of cruelty would be arrived at not by brittle
procedural rules, but by examinations of the "character" of
the parties involved. "Cruelty" would vary from case to case,
depending on the circumstances surrounding each family
situation.

How character was measured, and therefore how cruelty was
defined, depended in large degree upon the social, racial and
gender-based assumptions of the judges and juries. One Texas
judge declared that cruelty meant different things to
different classes of people; to "persons of coarse habits",
he explained, "blows might pass for very little more than
rudeness of language or manner."32 One of his colleagues
contended that "angry words" which publicly denounced a
wife's virtue were a sufficient cause for divorce, since "the
wounds inflicted by calumny on the delicate texture of female
reputation may be closed, but are scarcely healed, by the
lapse of time."33

These character-based definitions of cruelty, while
flexible, also engendered a good deal of confusion. An 1843
case held, for example, that the term "outrages" in the statutory definition of cruelty referred only to outrages committed directly on the person. The following year, another case stated that "a series of studied vexations...deliberate insults...and provocations" could justifiably be termed cruelty, without physical violence. But the court was unclear concerning the exact definition of "deliberate insults".

Adultery issues and the consequent problems of evidence were also entangled within the definition of cruelty. The state supreme court strongly hinted that a groundless charge of adultery was sufficient reason for a divorce suit by the aggrieved spouse; Judge Hemphill could not "forebear the observation that there is more cruelty in this blighted charge, unsustained as it was by proof, than in all the sulkiness and short words proved against the appellant." On the other hand, an overly zealous search for proof of adulterous behavior might produce precisely the same result as too little evidence. An enterprising husband who "introduced men into his wife's bed then [brought] witnesses to detect them" was himself successfully sued for divorce by his outraged spouse for "extreme cruelty."

Charges of cruelty or adultery (or both) constituted the bulk of antebellum divorce cases. These matters involved difficult problems of evidence, definition and subjectivity. As a result, guidelines for litigating divorce suits were confused, contradictory or nonexistent.
This confusion is understandable. The courts left divorce proceedings sufficiently fluid to allow themselves flexibility. Unbendable rules might have impeded the court system from acting to relieve intolerable domestic situations. Divorce cases were relatively rare; but they did occur, and the courts did act when they saw fit. Narrow guidelines in a society which frowned on divorce in general might have prevented what little the courts did do.

Lawyers like Davis who prosecuted divorce suits nevertheless faced a difficult task. If a case was too weak, the court’s passion might not be sufficiently aroused to grant the plaintiff a divorce. But an attorney could not push his allegations against the defendant too far, lest he injure his client’s cause by leaving him or her open to a countersuit; "too far" being a subjective matter of how the court interpreted circumstantial evidence or defined hazy concepts. Once a divorce lawyer successfully negotiated this obstacle course, he could breathe easier. The chief remaining task, settlement of the marriage’s community property, was much simpler. These settlements were only occasionally mentioned in appeals to the Texas Supreme Court.

The only real property issue was a basic division of the goods jointly owned by the husband and wife. While the suit was in progress, the husband retained administrative rights. But the wife could ask for an auditor’s report to list each item involved, and the court was committed to intercede on her behalf if the husband tried to sell or transfer anything.
Once a divorce was granted the court administered the marital, or "community," property until it was divided. The judge could appoint a receiver to oversee the process, if necessary. The state's 1841 divorce statute prevented real estate or slaves from being considered part of the community property. Whoever originally owned land or slaves before the marriage retained title to them after a divorce was decreed.

This process did not arouse controversy. Property settlement in a divorce case was less complex and fraught with controversy than actually obtaining the divorce itself. While much discretion still lay with the court in the division of marital property, its decisions generated comparatively little friction.

How Davis approached the problems of divorce litigation is admirably illustrated in Cartwright v. Cartwright, a case involving accusations of desertion, cruelty and adultery. Difficult issues of race and slavery were intertwined in these matters. As he prepared to represent the plaintiff in the Cartwright case, Davis naturally expected his most difficult task to lay in providing grounds for dissolution of the marriage. The property settlement, if the divorce was granted, would be far less difficult; or so he thought.

James Bird married his wife Pink in Alabama in 1827. A serious "disagreement" soon arose between them, and James left his wife. Pink did not know where he was, or even if he remained alive. After several years, she presumed him dead,
but took no legal action to void the marriage. Unencumbered by children or other family, she joined an expedition travelling west to resettle in Texas. In 1834, she arrived at the newly created town of Montgomery.

During the journey, Pink met a fellow emigrant, Willifort Cartwright. Soon after their arrival in Montgomery, they married and settled down on a small farm with Willifort's two slaves, Jane and her daughter Mary, to raise cattle. For fourteen years, the Cartwrights led a quiet, modest existence.

Pink bore several children. With the birth of the last child, Charles, in 1848, the marriage began to show signs of serious strain. Willifort accused Pink of adultery, telling his mother and neighbors that "the last child was not his, [and] under such circumstances he could not live with the woman." He left Pink and lived with Jane in her house. He brought his youngest daughter with him, leaving the rest with Pink. Willifort contributed no money or aid to his family. This continued for four years.

In 1853, her health poor, the farm and house in disrepair, Pink sought a divorce from her estranged husband. She engaged the services of Nathaniel Davis, who she knew from previous legal work he had litigated involving her husband.

Davis submitted a petition for divorce to the state district court in 1853. In it he claimed authority from the 1841 divorce statute. He charged Willifort with cruelty towards his wife for having falsely accused her of
"infidelity to the marriage vow", and by failing to provide for her or their family; of desertion when he "abandoned the bed and board" of his wife; and Davis strongly hinted at Willifort's adulterous behavior by alleging that he had lived in "improper intimacy" with Jane.51

Willifort and his attorneys responded quickly. They produced an affidavit from Pink's first wife, James Bird. Bird was living in Texas, having arrived at about the same time his wife did. Bird claimed Pink as his legal spouse. He declared that they had not lived together for some time, but that they were "undivorced." Bird stated that they had both emigrated to Texas in the same expedition, and that Pink had known at the time of her marriage to Willifort of Bird's whereabouts. Willifort therefore asked the court to declare his marriage to Pink void, since she was demonstrably a bigamist.52

Davis's task was complicated. In showing grounds for divorce, he had to find a way to counter Bird's claim as Pink's first husband, while at the same time fixing blame on Willifort. This would not be easy. In divorce cases, southern judges invariably expected the plaintiff not only to castigate the defendant, but also to prove the plaintiff's own virtue, as well.53 Bird's accusation made the latter more difficult. If he succeeded, Davis was then expected to defend his client's interests in the division of the marriage's community property, and prevent Willifort from selling or disposing of anything which might rightfully belong to Pink.
Pink's attorney relied on the testimony of relatives, friends and neighbors in preparing his case. He drafted a general set of questions to be put to them. After asking each witness his or her relationship with the Cartwrights, Davis asked several pointed questions: Did Pink live with Willifort "as his wife"? "Is Willifort Cartwright a married, or single man? If married, who is his wife?" What was "his conduct towards her after the birth of first child?" Was his conduct after the birth of the last child any different?, and so forth. These general inquiries were followed by specific questions which varied, depending upon who was receiving the questionnaire. The answers formed the backbone of his case.54

Cartwright v. Cartwright was tried in the state district court in the Fall of 1855, before Judge Peter Gray. After a jury trial which lasted for two days, the court granted Pink a divorce from Willifort. Unfortunately, the surviving records of the trial give only the barest facts of the case. How Davis persuaded the district court to ignore Bird's testimony, and how he proved cruelty, desertion and "improper intimacy" to establish grounds for divorce is unknown.55 Willifort's attorneys immediately requested a retrial, which was refused; they subsequently appealed the case to the Texas supreme court.56 From the records of this appeal and the ensuing trial it is possible to construct a more detailed picture of the Cartwright case.

Willifort's attorneys argued two basic points in their appeal.57 First, they stated that their motion for retrial
should have been granted, since they had located new evidence to corroborate the claim of James Bird that Pink Cartwright knew of his existence and whereabouts before her marriage to Willifort. Second, they declared "that the finding of the jury upon many of the material issues submitted to them are irresponsible."

Davis was compelled to reargue all the major aspects of the case. The opposition’s first motion re-opened the matter of Pink’s first marriage. The second motion generally involved all three of the reasons established as grounds for Pink’s divorce.

The "new evidence" uncovered by Willifort's lawyers was the testimony of a man named Whitaker, one of the emigrants in Pink Cartwright's Texas expedition. Whitaker claimed that James Bird had accompanied the company westward, and that he had made himself known to Pink during the journey. He also stated that Matthew Cartwright (Willifort's brother), Al Springer, Patsy Springer and Martha Stokes, neighbors of the Cartwrights who testified during the district court trial, had witnessed the scene. Whitaker testified that Willifort was not present when Pink saw her first husband, and that he knew nothing of Bird's existence.

The whole tale was suspicious, and Davis exposed its defects. "The affidavit of Whitaker," he declared, "is not at all inconsistent with the hypothesis of [Pink] being ignorant of Bird's existence at that time or since. We maintain that there is enough in said affidavit to show that
Bird did not make himself known to Pink or any of the company—or say anything about his wife until after leaving the company. \(^{80}\)

Davis set about proving his claim by arguing two points. First, Whitaker's testimony lacked specifics. He never mentioned the exact circumstances of Pink and James Birds' confrontation. "Had Bird claimed Pink for his wife face to face," Davis declared, "that certainly would have attracted [Whitaker's] notice and caused him to remember the time, place, company etc." \(^{61}\) Second, if Whitaker's story were true, Davis asked, why had not Matthew Cartwright, the Springers or Martha Stokes alluded to it in their earlier testimony? "Such a claim could not have been forgot [sic] by the company at the camp," Davis argued. Indeed, their previous testimony positively contradicted Whitaker's assertions. Matthew Cartwright, for example, testified "that he saw Bird for the first time in 1855 in the army, below San Antonio," not, as Whitaker claimed, in 1834 during the expedition. \(^{62}\)

Davis pursued his argument by pointing out that Matthew Cartwright and the Springers were witnesses called by Willifort and friendly to his case. "If for a moment we could suppose that...Matthew Cartwright and Springer and others kept secret from [Willifort] Bird's right and claim," Davis said, "and that said witnesses had omitted it on the stand (involving Matthew Cartwright in a positive contradiction), yet might not we have expected an affidavit from them or some
of them, to strengthen or fill up Whitaker's story?" Indeed, why did not anyone else in the company, almost all of whom settled in Montgomery County, come forward to support Whitaker's story, "had it been so open and notorious as to fix on Pink a knowledge of...Bird's being alive?"\(^6^3\)

After casting as much doubt as possible on Williford's "new evidence", Davis turned to the grounds he wished to establish for Pink's divorce. Desertion was easily established. Davis called attention to the testimony of Williford's mother, Elizabeth Cartwright, that her son had "abandoned plaintiff's bed and board." "Williford told his mother he could not live with Pink," Davis said.\(^6^4\)

Cruelty was a more difficult issue. As pointed out above, the exact definition of the term was open to considerable interpretation, subject to a variety of different meanings. Davis was well aware of this. When he argued his case for Williford's cruel behavior, Pink's attorney chose the surest available route.

Davis briefly referred to the grounds mentioned in the original district court plea; namely, that Williford's false accusation of adultery was a cruel act.\(^6^5\) But he did not elaborate on this point. While earlier decisions by the Texas Supreme Court strongly hinted that such a false declaration might warrant a divorce, they had not said so unequivocably. There was room for doubt.\(^6^6\) Furthermore, proving that a person did not commit adultery was as uncertain as proving he or she did. No precedent existed for giving the accuser or
the accused the benefit of the doubt.

Physical violence that endangered the health of an aggrieved spouse was the surest argument for cruelty.67 Willifort had not beaten his wife, so a claim of direct violence was not possible. But there were other ways of establishing the charge that continuation of the marriage would endanger his client's health. Davis produced witnesses who testified that the Cartwright farmhouse "was a very bad one, it was open and part of the roof [was] off." Another stated that Pink and all her children "except the youngest daughter slept in the house and it had but one room." "That her house was unfit to live in," Davis argued, "is clearly proven."68

Davis further pointed out that Willifort was unwilling to supply his wife and family with bare necessities. Food and clothing were in short supply at the Cartwright house. "In bad health and in such a house," he declared, "and the winter season again approaching (to say nothing of her other trials, troubles and hardships), can anyone doubt that her longer remaining there was to prove injurious to her health?"69

Pink's lawyer produced testimony from friends and neighbors that she was in "a low state of health." Davis hammered at this point, for he wished to prove that Willifort's negligence was cruel behavior, as surely as if he had physically beaten her. "Is not 'danger to health' a legitimate sequence to or of several of the specifications?" he asked.70
"Yet her starvation was rendered more cruel, by the contrast with Jane's table where the 'little luxuries of life' were kept," Davis said. This led to the third reason for a divorce, Willifort's illicit relationship with Jane. Here Pink's attorney stood on the most uncertain ground of all. He wished to arouse the court's racial biases by proving an adulterous relationship between the white master and the black slave. But he had only circumstantial proof of such activity, and he did not want to push the accusations so far that Willifort might himself claim cruel behavior arising from a false accusation. Davis walked a narrow line between invoking the court's disgust at Willifort and invoking their ire at his accusations.

He did so by careful inference. "Forgetful of Race and Caste [Willifort] quit his wife and lived with his negro woman and suffered his white children to call her Mama," Davis said. "Yes, lived with a Negress...who washed and cooked for him—he kept his gun and clothes at Jane's house—ate there, shaved there, shirted there—may we not safely say he slept there?" Davis branded the whole affair repulsive. "We have no evidence that Dispeptia affects any part, except the Stomack [sic]," he said, "it may perhaps disincline any man to the plurality practice—yet we cannot believe it would wholly [sic] summon him and divine him off to bed with eunuchs."72

Davis never used the word "adultery", but his point was clear. He ventured still one step further, Hinting that the
master and slave had produced children. "By the color of her children," he stated, "[Jane] was quite partial to a white man, yet a little wanton in her tastes." The care he took in preparing this part of his argument is revealed by the first draft of his speech. He originally planned to say a white man "or men", but he scratched the latter phrase out. Davis knew what he wanted to infer. 73

His tactics in establishing grounds for Pink's divorce were eminently successful. Chief Justice John Hemphill pointedly ignored Bird's claims, apparently feeling that Davis had successfully undermined his credibility. The issue of Pink's supposed bigamy was set aside.

Hemphill lumped the cruelty and "improper intimacy" issues together, and declared both to be sufficient grounds for a divorce. Davis's success in arousing the court's disgust was evident. "Without scrutinizing, or discussing, in detail, the repulsive features in the facts of the case," Hemphill said, "the conduct of the husband was of such a character, there was so much cruelty in the deliberate, but groundless charge of infidelity against his wife, in his desertion of her bed and of the house...his perverse neglect to furnish his wife with the necessary supplies...and obstinately persisting to live in a negro house with his negro woman," that Pink was fully justified in seeking a dissolution of the marriage. 74

Davis executed the difficult task of establishing sufficient reason for divorce with skill. He effectively dismantled Bird's affidavit. In arguing the cruelty issue,
he found solid ground upon which to base his assertions (although Hemphill also ruled that the false accusation of adultery constituted good grounds). He exploited the court's racial attitudes without overworking his evidence.\textsuperscript{76}

The property settlement should have presented few problems. Immediately after Davis's petition to the state district court in the Fall of 1853, Judge Gray appointed a board of appraisers, not unlike a bankruptcy case's board of auditors, to catalog and estimate the value of all the property owned by the Cartwrights. They owned the farm in Montgomery, a league of land in Williamson county, several hundred head of cattle, and other odds and ends. Included on the list were Willifort's slaves, Jane and her child Mary, despite the fact that they were not considered community property. The auditors also listed Jane's four children and Mary's baby daughter, all born during the marriage.\textsuperscript{76} During the supreme court trial, Justice Hemphill called the amount of property, slaves excepted, "trifling."\textsuperscript{77}

The district court compelled Willifort to pay alimony for the support of his wife and family. The court allotted $200 per year for Pink. Her husband paid Pink indirectly, through the court. She was required to submit expense reports every year showing how the money was spent.\textsuperscript{78} In May, 1857, while the case was still pending in the Supreme Court, Davis petitioned Judge Gray to allow more money for Pink's expenses. For unknown reasons, he was turned down.\textsuperscript{79}

When Davis won his case in district court, Gray decreed
that all the community property should be equally divided at
the discretion of the auditors. Willifort retained possession
of Jane and Mary, since under the 1841 statute they were
considered exclusively his property. But the five slave
children born since the marriage were to be somehow equally
divided between Willifort and Pink, as a normal form of
community property. When Willifort's attorneys made it clear
that they would appeal to the Texas supreme court, the
district judge froze the division process until the appellate
court could review the case. Willifort was warned against
selling or otherwise disposing of anything in a way that
might harm Pink's rights. 80

Willifort's appeal to the supreme court only briefly
referred to the property division. His attorneys argued that
the district court erred in dividing the slave children
between Pink and Willifort. The precise grounds for this
argument are unknown. 81 Certainly Willifort's attorneys
devoted little effort to proving their point, treating the
slave division issue almost as an afterthought. They were far
more interested in preventing the divorce entirely. 82

Davis was not overly concerned with the matter, either. He
merely asserted that "the District Court did not err in
Decreeing a Partition of the increase of the slaves since
marriage." The increase of slaves was community property, he
argued. 83 Davis did not view slaves as any a peculiar species
of property. They did not significantly differ from real
estate, cattle or any other divisible items.
Justice Hemphill felt otherwise. He believed slave
division to be "the main question in the case." Both Davis
and his opponents, who focused their energy on the other
problems of the case, must have been surprised as the
supreme court's chief justice seized on what was to them a
minor matter and devoted to it the bulk of his long opinion.

Hemphill ruled that the slave children born after the
marriage should all be awarded to Willifort. He based this
decision on three grounds: the ancient precedent that the
condition of the slave mother determines the condition of her
children; a selective reading of Spanish precedent; and
humanity towards the slaves.

Hemphill only briefly referred to the first point. He
cited old Roman and Spanish law to prove that a slave mother
always bore slave children. "The children of a female slave
follow the condition of their mother," he declared, "they
consequently become slaves, and belong to the owner of the
mother." Since Willifort owned Jane, he received her
children. This was a well established principle, familiar to
southern jurists. Conceivably Hemphill might have stopped
with this one point.

The chief justice went further, however. In a lengthy
analysis of Spanish slave law, Hemphill argued that there was
a fundamental difference between the "fruits" of normal
chattel reproduction, which was community property, and the
"fruits" of slave property, which was not. He discussed the
"usufructuary" rights of a husband or wife, "usufruct"
meaning the right of one partner to enjoy the benefits, fruits and labor of a form of property without possessing absolute title to that property. Hemphill concluded that, "as a general rule, in both Roman and Spanish laws, the increase of slaves were not regarded as fruits belonging to the usufructuary possessor of the mother, as were the increase of animals." Pink's usufructuary right to the fruits of Jane's labor did not entitle her to of Jane's children. 87

The judge knew there was disagreement among scholars on this point. "I am aware that many of the commentators on Spanish law hold a different opinion," he said. But Hemphill felt "at liberty to maintain the opinion which is conceived to be most in harmony with the rules and the general spirit and policy of Spanish jurisprudence, and the one which is the best adapted to our own situation and views of sound policy." 88

Hemphill believed it was "absurd that man should be enumerated as a 'fruit', or an article of produce...slaves were not procured that they might beget children, but that they should perform service." 89 It seemed repulsive and inhumane to Hemphill that humans, even slave humans should be so closely compared to mere "lambs, kids, calves, etc." 90

Hemphill expanded this point concerning the slave's humanity, particularly regarding the slave's children. "Although slaves are property," he said, "yet in many respects they are persons, and are treated as such." It would be cruel to separate the children from their mother.
since "the children for years require the care and attention of the mother, and although there is no law preventing the separation of the mother from the child in infancy, yet such separation...is against the moral sense of the community." 91

The basic thrust of Hemphill's reasoning was that slaves were a peculiar form of property with unusual rights and needs. Like so many of his southern contemporaries, Hemphill tried to isolate slave property as a matter requiring special attention from southern courts. 92 This was apparently not a goal shared by Davis, his opponents or the district court judge. They viewed slave division as a minor point. The Chief Justice did not.

The Cartwright case returned to the district court in November, 1857. The supreme court's ruling was complied with by simply omitting the slaves and their children from the appraisers' report. Davis's client received half share of all other property, and she recovered the sum of $800 from Willifort, who despite the court's warning had tried to sell off Pink's share of the cattle, and other community property items. With the final settlement of these matters, the Cartwright case ended. 93

Cartwright v. Cartwright illustrates some of the more subtle qualities of Davis's practice. Divorce was a socially sensitive, legally uncertain subject, fraught with difficulties for attorney, client and judge alike. Davis was compelled to choose his words and actions carefully, perhaps more carefully than historians would tend to recognize,
motivated by prevailing notions of a rough-and-ready antebellum frontier bar, quick to employ florid rhetoric and heavy-handed tactics in a society that could appreciate little else. 34

The gap of understanding between the lawyers and the supreme court judge was striking. Justice Hemphill's preoccupation with slave property issues tends to confirm Paul Tushnet's thesis concerning southern judges and their desire to rigidly compartmentalize slave law. 35 But how far did such considerations penetrate past the appellate level to the lower courts? Davis had no inkling that the slave children would be treated differently from "normal" community property. Neither did Judge Gray of the state district court where Cartwright v. Cartwright originated. Chief Justice Hemphill followed his own notions of "sound policy" in this matter.

Davis obtained a divorce for his client, handling the most difficult issues of the case with skill. But Hemphill's decision concerning the slave children deprived his client of "property" valued at over two thousand dollars. 36 The final outcome for the Montgomery attorney was a mixed success. Given the confused state of divorce law, in Texas and elsewhere, perhaps he could realistically expect nothing more.
CHAPTER SIX NOTES

1 Joel Prentiss Bishop, Commentaries on the Law of Marriage and Divorce, 2 vols. (6th ed., Boston: Little, Brown and Co., 1881), v (all references are to vol. 1)

2 Ibid., viii; three editions appeared before the Civil War, in 1852, 1856 and 1859.

3 Not many historical works on divorce address the period in question; Nelson M. Blake, Road to Reno: A History of Divorce in the United States (1962) generally ignores the lawyer's role, as does the other major general history of divorce, Roderick Phillips's, Putting An Under: A History of Divorce in Western Society (Cambridge: Cambridge University Press, 1988).


5 Quote taken from 1841 Texas divorce statute in H.P.N. Gammel, The Laws of Texas, 10 vols. (Austin: Gammel Book Co., 1898), vol. 2, 13. (all references to vol. 2)

6 Sheffield v. Sheffield 3 Texas Reports 86 (1848).

7 Bishop, Marriage and Divorce, 13.

8 Ibid., vii.

9 Censer, "Smiling", 27.

10 Gammel, Laws of Texas, 19.

11 Sherman v. Sherman 18 TR 525; Pinkard v. Pinkard 14 TR 357.


13 Sheffield v. Sheffield 3 TR 79.

18. Johnston v. Johnston Wright 455 (Ohio, 1833); Jeter v. Jeter 36 Alabama 391 (1860).


20. Richardson v. Richardson 4 Post 467 (Alabama, 1837); see also Censer, "'Smiling'": 24-47 on development of cruelty doctrine.


22. Cooper v. Cooper 10 Louisiana 249 (1836).


27. Borden v. Borden 3 Devereux 548 (North Carolina, 1832).


32. Sheffield v. Sheffield 3 TR 82.


34. Wright v. Wright 3 TR 168.


36. Sheffield v. Sheffield 3 TR 82.

37. Ibid., 87; see Censer, "Tears," 30; in her discussion of the Sheffield case, Censer notes that "although Hamphill overturned the divorce that a lower court had granted Mr. Sheffield, his wife had not countersued; and thus the question of whether false accusations of adultery could entitle a litigant to a divorce was not directly addressed."
But she notes that the Texas court gave strong hints towards this conclusion, arguing that groundless accusations might constitute a "personal indignity".

37 Sharman v. Sharman 18 TR 525; of course, the end result was the same, a divorce between the couple; but guilt in a divorce case seems to have genuinely abhorred by most defendants in question. Evidence is lacking, but perhaps guilt affected the final property settlement; or perhaps the defendant wished to avoid social stigma.

38 Based on examination of cases in Century Edition of the American Digest, Sayles's Digest of Texas Cases and Catterall's Judicial Decisions Concerning Slavery and the Negro.

39 Based on cases in Sayles's Digest of Texas Cases.

40 Based on cases in Century Edition of the American Digest.

41 There is only one such case mentioned in the Century Edition of the American Digest.

42 Gammel, Laws of Texas, vol. 2, 19; also see Fitts v. Fitts 4 TR 449.


44 Ibid. 627-828.

45 "Interrogatory of James Bird", Court Records, case number 863, DCO.

46 "First Draft Briefs for Texas Supreme Court", 3K401 Book 1097, 7-10, BCTH.


48 "Supreme Court Briefs," BC, 12.

49 Cartwright v. Cartwright 18 TR 627 (1857); "Supreme Court Briefs", 12-15, BCTH.

50 See Cartwright v. Fowler, 3K401, Book 1345, and Cartwright v. Ford, et. al. Book 1357, BCTH; Davis often referred to Pink as "Pinkie", perhaps indicating a close personal acquaintance; see "Supreme Court Briefs," 11, BCTH.

51 Cartwright v. Cartwright 18 TR 627 (1957).

52 "Interrogatory of James Bird," case no. 862, DCO.

54 Interrogatories are located in court records, case no. 863, DCO; they were also entered into the District Court minutes, for reasons unknown.

55 Court records, 862, DCO.

56 "Supreme Court Briefs", 7, 11, BCTH.

57 I use the term "attorneys" throughout this chapter to indicate Willifort's attorneys, without utilizing proper names, because the records mention several individuals--Joseph Clepper, L.L. Bradbury, H.N. and M.M. Potter--and it is not entirely clear which attorneys were involved in which aspects of the case; see "Subpoena to Matthew Cartwright", 863, DCO, and Cartwright v. Cartwright 18 TR 627 (1857).

58 "Supreme Court Briefs", 7, 10, BCTH.

59 Ibid., 7-11, BCTH.

60 Ibid., 7-8, BCTH.

61 Ibid., 7, BCTH.

62 Ibid., 7-8, BCTH.

63 Ibid., 7, BCTH.

64 Ibid., 12, BCTH.

65 Ibid., 14, BCTH.


67 Ibid., 26-27.

68 "Supreme Court Briefs," 14, BCTH.

69 Ibid., 14, BCTH.

70 Ibid., 14, BCTH.

71 Ibid., 15, BCTH.

72 Ibid., 15, BCTH.

73 Ibid., 15, BCTH.

74 Cartwright v. Cartwright 18 TR 642-643 (1857).

75 Davis himself was rather liberal in his racial views. He
did not own slaves; after the war he was a staunch Republican, and an early advocate of suffrage for the freedmen; see 3K397 "Book No. 2," BCTH.

78"Appraiser's report", 863, DCO.

77Cartwright v. Cartwright 18 TR 627 (1857).

79Minutes, E, 44, 70, DCO.

80Ibid., E, 44, DCO.

80Minutes, D, 475, DCO.

81Interestingly, Williford raised several other property division issues in the district court—proper division of the real estate, the value assigned by the auditors to the slave children, etc.—but his attorneys apparently saw fit to drop these matters in the Supreme Court; see court records, "exception to commissioner's report", 863, DCO.

82There is no reference at all to the defendant's case in Hemphill's opinion about slave division, indicating that the defense's argument in this matter must have been negligible. Throughout his career on the Supreme Court bench, Hemphill always carefully summarized the arguments of both sides, but he did not do so here; Cartwright v. Cartwright 18 TR 627 (1857).

83"Supreme Court Briefs", 6, BCTH.

84Cartwright v. Cartwright 18 TR 627 (1857).

85Ibid., 626.


87Cartwright v. Cartwright 18 TR 627-632 (1857).

88Ibid., 636-637.

89Ibid., 638.

90Ibid., 637.

91Ibid., 636.


93Minutes, D, 475; also E, 70-72, DCO.
This view of the southern frontier bar is common; see Kermit Hall, "The Problems and Perils of Prosopography—Southern Style," Vanderbilt Law Review 32 (1979), 337.

See Tushnet, Law of Slavery, chp. 3.

The monetary value is based on "Appraiser's Report", 862, DC0.
CHAPTER SEVEN

"Right and Ready": Conclusion

Nathaniel Davis filled two notebooks with information, citations, and maxims of the law. Each book was divided into headings according to subject: probate, property, bailment, husband and wife, and so forth. On the title page, Davis wrote in large letters "Right and Ready." The phrase was an apt summary of his career.¹

"Right" described his pervading sense of moral behavior and legal ethics. Davis recorded his principles and ideas concerning moral behavior in the pages of his legal notebooks. He commented both on his political ideals and his beliefs concerning ethical behavior for attorneys.

Davis held a generally pessimistic view of the society around him. His chief concern was the naked pursuit of self-interest he felt was prevalent, especially among politicians. Political candidates should be upright, selfless men; but Davis saw little evidence that this was the case. "Base, ignorant, vicious, slothful [and] cowardly" was much more prevalent. He worried that such behavior threatened the moral fabric of his age.² He saw the dominant political party in the South, the Democracy, as the chief vehicle of political self-aggrandizement. Davis subsequently associated with various Opposition parties throughout his career: the Whigs, the Know-Nothing and the Constitutional Unionists.

Davis's conviction that selfless behavior was the root
of morality affected his legal work as well as his political beliefs. His primary motivation when he represented Yarborough Baker during the dissolution of his business partnership with Jonathan Pounds was a desire to combat unethical behavior on the part of Pounds's attorney, Lemuel Clepper. Davis devoted a substantial amount of his time and resources to this difficult, unpopular case, despite the fact that his client would probably never be able to pay him for his legal services.

The fraud practiced on Baker violated Davis's sense of morality. Clepper's collusion in the sham sale of Baker's house was unpardonable to Davis. Above all, he resented Clepper's use of his position as Pounds' attorney to profit from the breakup of the steam mill partnership.

Davis's principles sometimes proved costly. He remained a Unionist during the Civil War, despite the unpopularity of his beliefs. His Unionism cost him clients, and added to the hardships of the war. After Appomattox he became an outspoken Republican. "Scalawag-ism" was reviled by most of Davis's neighbors, sometimes to the point of violence. The Montgomery attorney's Republicanism may have contributed to the deterioration of his practice in the 1870's. Yet he remained affiliated with the party until his death.

Davis's code of ethical behavior was often hazy. He tended to express his beliefs in lofty generalities: "[d]o not vote for an incapable or unworthy candidate," "the lawyer is not bound to assist his client in an act of injustice," and many
other such expressions littered the pages of his notebooks. However ill-defined, Davis's sense of right and justice was not dormant.

"Ready" indicated his lifelong concern with careful work and thorough preparation in defending a client's interests. Davis was a methodical lawyer. This trait manifested itself most clearly in his out-of-court work. He always desired complete, detailed and reliable information to back his client's cause before he went to trial.

There were two especially noteworthy features of Davis's out-of-court work. First, the physical characteristics of different forms of property affected his work. This point was discussed in connection with real estate and slaves in chapter four. It is interesting to note that these effects were most evident in Davis's out-of-court functions. This was particularly true of land litigation. Real estate was immobile, and Davis adjusted to that fact. But other types of litigation were influenced by physical factors. Slaves, livestock, and other forms of "property" each possessed peculiar characteristics which affected Davis's practice.

Second, the environment was an important lineament of the Montgomery lawyer's practice. Texas was a raw, undeveloped area throughout much of Davis's career. The state possessed a poor infrastructure for enforcing law. This was acutely evident in Davis's debt litigation; debtors could easily disappear into the Texas wilderness, never to be found. There were few sheriffs or other state officials to track these
individuals.

Bad roads increased Davis's dependence on distant, and possibly untrustworthy, sherriffs and court clerks. They also limited the number and distance of his journeys on legal business, such as attending sherriff's sales.

The lack of a reliable communications network also hampered his work. His chief tool for gathering information was the written interrogatory. Davis frequently needed data from persons who lived outside Montgomery County. Questionnaires could not be sent by telegraph, since the law required a written record certified by a competent court official. Davis was compelled to mail a written copy of his questions, and hope that some faraway clerk would receive it, find the witness, question him and return his answers in time to be of use in court. This was not always the case, as the Pounds litigation illustrated.

The environment in which Davis operated was a limiting factor, introducing several practical difficulties in his work. Yet it should be noted that this same environment provided many opportunities for the Montgomery attorney. Much of Davis's debt business grew from the fact that debts were so difficult to collect in Texas. Had there been a sufficient number of sherriffs and court officials, many of his services, such as serving petitions, purchasing land, and so forth would not have been necessary. Had Texas possessed good roads and a more reliable mail system, distant clients such as George Mason might not have required Davis's services. Texas
offered opportunities along with drawbacks, a fact which led Davis and many other lawyers to settle there and in other western communities.

Davis’s clients often asked him to perform a variety of tasks which had little or nothing to do with a courtroom trial. Besides debt collection, he also acted as a purchasing agent, buying property for clients like Edward Greenway. He also helped Greenway speculate in real estate by reselling the parcels of land he purchased at a profit. Sometimes local citizens turned to him for no other apparent reason than that, as a lawyer, Davis knew how to get things done with local government. Such was the case when Robert Simonton asked Davis to petition the district court for a route change in a nearby farm road.

Many cases required considerably more trial work than debt collection, land purchases, or other sundry matters. But the amount of outside effort Davis expended was still considerable. Out-of-court labor dominated his work; but trial arguments were also important. When he spoke before a judge or jury, he endeavored to be “ready.”

Davis was an effective public speaker. One observer described a speech he gave in 1845 as being “both eloquent and felicitous.”* But his trial work did not depend on rhetorical bombast.

Many cases required considerable subtlety and tact. The Cartwright case was an excellent example. Davis was fully capable of recognizing the need for care and restraint in
this matter. An outright accusation of miscegenation on the part of Willifort Cartwright might well have harmed Pink's interests. He adjusted his argument accordingly. He was capable of caution and subtlety in his trial arguments.

"Right and Ready" was an apt description of Davis's approach to the law. He possessed an active, if somewhat vague sense of legal ethics. This Texas attorney was also vitally concerned with careful, methodical preparation in his practice, both in and out of the courtroom.

"Right and Ready" provides some insight into Davis overall philosophy towards his career. What of the "nuts and bolts" of his practice?

Davis litigated some criminal matters, many for freedmen, in his career, but he was primarily a civil law attorney. Civil law concerned the private rights of an individual citizen, and the remedies citizens possessed to redress grievances against each other. These remedies occupied nearly all of Davis's attention during his thirty year career at the Texas bar.

The civil cases he litigated could be divided into four broad categories. First, and by far the most numerous were debt cases. When one person owed another person money and failed to pay, Davis was called upon to enforce payment of the debt. He nearly always represented the creditor. Davis litigated cases with debts owed on a wide variety of goods and services, from cattle to overnight lodging.

The typical debt transaction involved real estate. Texans
were enthusiastic land speculators, and as Davis pointed out
to Edward Greenway, land was usually purchased on credit.
Often enough this proved to be bad credit. It was all too
easy for Texans to contract debts and then disappear.
Nevertheless, creditors tried to force payment through the
courts; they engaged attorneys like Davis to represent their
interests. Such activities were the mainstay of Davis's
practice until the very end of his career.

Second, Davis was involved in disputed ownership rights.
Two or more persons each claimed title to a piece of
property, and turned to the courts to settle their disputes.
Many probate cases were of this nature, with family members
contending over the division of a deceased relative's estate.
The late antebellum case between James Lynch and George
Matthews, with each possessing conflicting claims to a 125
acre plot of land was a good example. As with debt
litigation, the chief form of property in question was land.
These cases were less numerous than debt litigation, but
Davis usually handled a few title disputes in any given year.

Third, Davis worked with cases concerning property division.
This litigation involved two persons who sought legal aid in
dissolving a concurrent property ownership arrangement. Davis
litigated two distinct types of property division cases:
dissolution of business partnerships and divorce. Partnership
dissolution was rare in Davis's practice, but those few cases
in which he was involved were lengthy and complicated
processes. Davis also normally prosecuted several divorce
cases every year. At the very end of his practice, divorce was a substantial part of his work.

Fourth, a small number of Davis's civil law cases concerned charges of negligence. A person sued another person for damage inflicted on his or her property. The early case concerning the loss of a shipment of books from Montgomery to Houston was one such matter. *Arnold v. Willis*, discussed in chapter four was another. These were rare issues for Davis.

All four categories involved some form of property dispute. In most instances Davis represented the plaintiff, the person seeking redress for his or her violated rights of ownership. His clientele consisted of middle to upper-class white property holders. Even the more modest among them were comparatively well off, often owning several hundred acres of land, livestock and a few slaves. Nor did this change in the postwar period, when Davis continued to work for well-to-do southerners like Peter Willis. The Montgomery attorney identified with those wealthy white men whose rights he protected.

His decision to concentrate on civil law matters indicated a surprising degree of specialization for a nineteenth century lawyer. Except for the very early years of his career, Davis litigated several types of civil cases: debt, land, probate, divorce, negligence, and so forth. Within the field of civil law, he worked in many different areas.

His clientele also varied widely. Davis usually represented a core of five or six regular clients. Some of
them accounted for a great deal of business; Peter Willis, for example. But most of his clients were one-time-only customers.

Davis's practice encompassed a variety of case types and customers. But variety did not necessarily mean instability. As chapters two and three illustrated, his business functioned well when he possessed a mixture of types of cases, and a balance between regular and once-only clients. During these years his practice was prosperous and his income stable. Davis's practice was less stable when it depended on one type of case (in the early 1850's) or one client (in the 1870's).

In a fluid society with a relatively undeveloped economy, Davis could not afford to pin his fortunes on one type of case or one client. Yet a degree of specialization was desirable, establishing his expertise in a highly competitive legal market and guaranteeing a steady flow of business from at least a few regular customers. This nineteenth century attorney achieved stability when he could balance specialty and variety.

When we open the door to Nathaniel Davis's law office we find several interesting features of his role as an intermediary between the legal system and the clients he represented. We have a clear picture of what types of cases he was called upon to litigate, the problems involved in each type of litigation, and the work he performed in preparing for these cases.
Two points are especially noteworthy. First, we know who Davis represented. Davis served a relatively narrow segment of Texas society. The Montgomery attorney acted chiefly as an liaison between the law and well-to-do white southerners. He was expected to insure that the law met their needs: a functioning credit system, repayment of debts, the efficient buying and selling of land and satisfactory division of property in probate, divorce and business matters.

Davis was expected to help maintain a stable, workable economy for property-owning Texans. His clients were men and women who actively engaged in the buying and selling of property and who desired a degree of security in doing so. Davis tried to provide this security in his practice.

Second, the informal nature of this work is significant. Davis's practice involved a great deal of work outside the courtroom, as illustrated above and in preceding chapters. He acted as an investment broker, purchase agent and debt collector, jobs which fall outside the traditional picture of a trial advocate.

Citizens asked Davis to help keep the economy functioning smoothly, to allow for the unrestricted exercise of "creative energy." The free enterprise system in Texas, built largely on credit, generated complicated problems. Creditors needed payment, speculators needed agents to oversee their purchases and investments, slaveowners required help in drafting hire contracts, and so forth. Texas lacked specialized, professional establishments to meet these needs.
Lawyers like Nathaniel Davis filled in these gaps. More than a courtroom advocate, Davis was an agent of the economic process. He acted in a variety of ways which had little or nothing to do with courtroom advocacy, helping the free enterprise machinery in Texas to function relatively smoothly.

Davis's performance of these tasks do not suggest a singularly "Southern" approach. The treatises, textbooks and cases reports he cited were written in states north and south of the Mason-Dixon line. In his politics and his practice, Davis was no provincial.

He was called upon to litigate cases of a uniquely southern character, meaning slavery, but he usually employed property law precepts which could be found anywhere in America. Davis was often caught off-guard when slave property exhibited peculiar characteristics and needs; he expected slaves to behave as any other form of "property." He formulated no unique plans for litigating slave property cases. Perhaps he should have, for the outcomes in both Arnold v. Willis and Cartwright v. Cartwright surprised him and were detrimental to his client's cause.

There is no evidence in any aspect of Davis's work or career which would support the existence of a unique "southern" law.

When we open the door to Nathaniel Davis's law practice we find a practice which, both in and out of the courtroom, fulfilled vital economic functions. If legal historians
continue to ignore the day-to-day activities of the average nineteenth century American attorney we will miss vital information concerning the impact of law on society. Lawyers affected social and economic behavior in ways which may only be dimly understood by focusing exclusively on appellate judges, legislators and constitutional theorists. Hopefully, future studies of other nineteenth century attorneys will further illuminate this dark area of American legal history.
CHAPTER SEVEN NOTES

13K402, Book 1341, BCTH; Notebook "No. 1", (private collection of Nat. H. Davis, Conroe, Texas).

2Ibid.

3Quotes from 3K402, Book 1341, BCTH.

*Houston Telegraph and Texas Register May 21, 1845.

4The prevailing belief among scholars has been that the attorney of this time was a jack-of-all-trades; see Maxwell Bloomfield, "The Texas Bar in the Nineteenth Century," Vanderbilt Law Review 32 (1979), 261-279.