Test Oaths, Belligerent Rights, and Confederate Money: Civil War Lawsuits Before the West Virginia Supreme Court of Appeals Kenneth R. Bailey

ABSTRACT

Charles J. Faulkner, in 1866, successfully challenged a requirement that West Virginia lawyers take a loyalty oath, which had been enacted by the legislature in 1863. His success set off a firestorm of Radical Republican laws to close loopholes in measures designed to punish former Rebels and to keep them from gaining control of state government. Faulkner's appeal, Ex Parte Faulkner, was one of the first to challenge West Virginia's proscriptive laws before the West Virginia Supreme Court of Appeals. As former Rebels sought relief from lower-court decisions, it was followed by many others. The various proscriptive acts impacted the most basic constitutional rights of citizens—property (including the ability to make a living), voting, equal protection of the law, and the right of appeal.

ARTICLE

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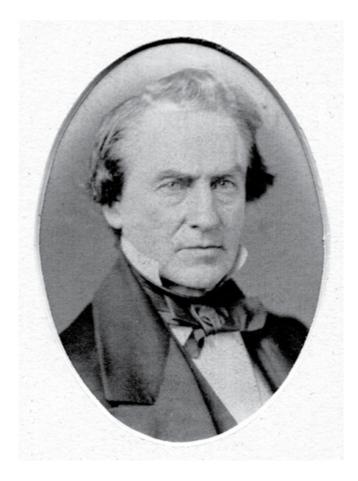
Restrictive legislation was not unique to West Virginia and was common in the other "border states."¹ Though West Virginia was not one of the occupied states in the former Confederacy, historians have generally included West Virginia's experience in adjusting to the political struggles of a new state as part of Reconstruction. Historian Eric Foner contends that Reconstruction in West Virginia began in 1861 when the Restored Government of Virginia was created² by members of what John A. Williams has termed the "political and social elite" of western Virginia.³ That is, the new government immediately instituted measures that were designed to restrict the rights of, and even impose financial and criminal punishments on, those who had joined the Southern cause. In his essay on Reconstruction in West Virginia's new leaders, because of previous experience in the Restored Government of Virginia, were "already well practiced at internal security,"⁴ and quickly enacted a new loyalty oath designed to protect the new state. Regardless of terminology, the war experience and the adjustment to it defined West Virginia's early history.

Lawsuits to recover damages from Confederate soldiers and sympathizers were filed in West Virginia courts long before the Civil War ended in April 1865. After the war, disputes over the legality of actions by county officials in Confederate-controlled territory, belligerents' rights, the value of Confederate money, and other issues entered the courts and continued to be contested for another decade. Damage suits against Confederate troops, partisan rangers, guerrillas, or Southern sympathizers were filed and prosecuted by Union civilians who had suffered from unlawful imprisonment, confiscation, or destruction of property. Southerners, who had suffered equally at the hands of Union sympathizers, were unable to seek redress due to the restrictive measures passed by West Virginia's Republican-dominated legislature to punish former Rebels and to tilt the scales of justice to Union supporters.

Some of the many lawsuits made their way to the West Virginia Supreme Court of Appeals, and it is to that court that we look for details on the circumstances leading to the suits. Appellants who sought relief from what they considered arbitrary circuit court decisions were initially disappointed by the decisions at the Supreme Court. According to historian Milton Gerofsky, one of the first historians to investigate West Virginia's post-Civil War legal climate, in the years immediately after the war the court simply ratified lower court actions based on legislation influenced by Radical Republicans in the West Virginia legislature.⁵ However, the eventual easing of restrictions, the "let up," had an aborted beginning as early as the election of 1865.6 The Radicals believed they had covered all bases with a set of legal tools, which included the lovalty oath and voter's test oath. They even allowed lawsuits arising in some counties to be moved to other counties where Union sentiment prevailed.7 Furthermore, in February 1865, the legislature had changed the statute of limitations to ensure that actions taken by Confederates or their sympathizers during the war could be the

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object of civil suits when the fighting ended. Fearing that some courts would dismiss damage lawsuits on the grounds that the action complained of was beyond the legal time to file a claim, the legislature exempted the period from March 1861 to February 1865 from consideration in calculating the time limits.



Charles James Faulkner of Martinsburg, W. Va.; courtesy of the West Virginia and Regional History Collection, WVU Libraries

The suitor's test oath, also enacted in February 1865, further hampered former Confederates. This oath required anyone filing a lawsuit to swear that he had never taken up arms against West Virginia or supported the Southern cause. The suitor's test oath effectively eliminated former Confederates access to the courts, except as defendants. Gerofsky claims that between 1863 and 1870 no former Confederate found relief from an unjust decision.8 Despite the best laid plans of the Radical Republicans to punish former Rebels and to keep them from voting, many former Confederates did, in fact, vote and chose other former Confederates for office. According to historian Randall S. Gooden, elections in the fall of 1865 were "pivotal": "The symbolic victories in the election of 1865 heartened former Confederates, but they alarmed state leaders." The test oath was ignored, or local officials, in defiance of the law, accepted oaths from persons they knew to be former Rebels, leading to the election of a number of them to state and county offices.9 On the heels of these setbacks to Republican plans, Charles J. Faulkner successfully challenged the loyalty oath as applied to lawyers.

I

The various loyalty, or test, oaths were not part of the West Virginia Constitution of 1863 but were initiated by legislators beginning with a statute in June 1863 that required all state and local *officials* to swear an oath of loyalty to the government of the United States and of West Virginia.¹⁰ Oaths based on the first law simply required that applicants swear to uphold the constitutions of the United States and West Virginia.¹¹ This oath was not objectionable to many Rebels who had already left the service due to wounds or for other reasons and were no longer part of the active resistance. However, the fact that such persons could reenter the political life of the state alarmed Radical Republicans so they amended the oath in November 1863 to include a statement that the individual had never taken up arms against the United States or supported an authority or "pretended government" hostile to the United States.

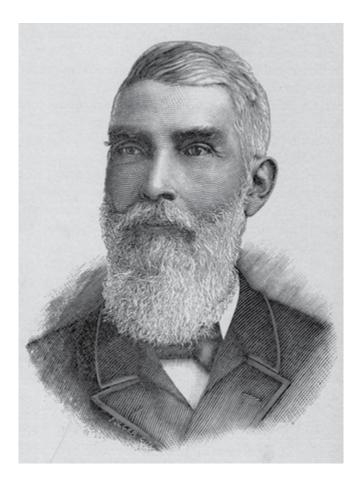
Charles J. Faulkner, a lawyer from Berkeley County, argued

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that he was not required to take the oath, because as a lawyer, he was not an "official" or "officer" as defined by the law. Faulkner avoided arguing that the test oath was unconstitutional, instead claiming that lawyers were not "civil officers or military officers" as defined in the act (see wording of oath).¹² William Ware Peck, a lawyer imported from New York who was paid 500 dollars to serve as an assistant to Attorney General Edwin Maxwell, presented the state's position. The *Wheeling Register* questioned Peck's employment, wondering if there was no West Virginia attorney who would "stultify himself by attempting to argue against so plain a proposition as that involved in Mr. Faulkner's case?"¹³

James H. Brown wrote the opinion of the court, agreeing in principle with Faulkner and noting that the West Virginia constitution carried forward many of the laws enacted by the state of Virginia and did not invalidate licenses issued to lawyers under those laws. With similar logic, Judge Ralph L. Berkshire, then president of the court, concurred. However, Nathaniel Harrison, judge of the circuit encompassing Pocahontas, Greenbrier, Monroe, Mercer, and McDowell Counties, who was named to fill in for ailing Judge William Harrison, filed a strong dissent. He argued that Faulkner had not taken the oath prescribed by the Reorganized Government of Virginia and thus was not licensed by the legitimate state of Virginia.



James H. Brown; courtesy of the West Virginia and Regional History Collection, WVU Libraries

Although all three were Republicans, Brown and Berkshire held more moderate views than Nathaniel Harrison. Brown, a former Democrat and a prominent Kanawha County landowner and lawyer, had been a member of the legislature of the Reorganized Government of Virginia and of the Constitutional Convention of 1863 before election to the court. He was noted for his interest in reforming land titles with a view of promoting economic development.¹⁴ Berkshire had been a Whig, a delegate to the convention that reorganized the government of Virginia, a prosecuting attorney and judge in Monongalia County prior to being elected to the West Virginia Supreme Court of Appeals.¹⁵ Harrison was a Monroe County lawyer, a former prosecuting attorney, and a former Confederate who had deserted that cause when he failed to receive an army staff position. He spent the first couple of years of the war in Richmond, and apparently returned to Monroe County when he realized the South would lose.¹⁶ Governor Arthur I. Boreman appointed him as judge of the ninth circuit (changed to the seventh circuit in 1869). Harrison was chosen to sit on the court to hear this case, because Judge William A. Harrison (president of the court) was ill. It is not known if the two Harrisons were related, but the Wheeling Register claimed that the only similarity between the two were their last names. Nathaniel Harrison came under attack from all guarters for his extreme acts toward former Confederates in his circuit and his notorious personal life. Complaints to the legislature led to his eventual resignation from the bench under threat of impeachment.¹⁷

Brown and Berkshire would probably have ruled the way they did no matter who filed the suit, but the case was interesting because of Faulkner himself. Before the war he was a well-known and respected lawyer, a four-term congressman from Berkeley County, and was appointed ambassador to France by President James Buchanan.¹⁸ On his return from France, he was confined as a suspected Confederate sympathizer, was exchanged, and then served in the Confederate Army (as did his two sons). Ironically, granting Faulkner the right to practice ensured him a steady business from former Confederates who needed someone to represent them in court.

Besides being a rare victory for former Confederates, the Faulkner case is important because of the backlash from the Radical Republicans. Despite a feeling among some moderate Republicans, conservatives, and Democrats that former Confederates needed to be absorbed into the political and economic life of the state, Faulkner's victory was a warning to Radicals that their control of the state was in jeopardy. A similar suit, *Ex parte William A. Quarrier*, was decided at the same term of court. Quarrier, a well-known lawyer from Kanawha County, had received a pardon from President Andrew Johnson and sought to practice. He was denied on the grounds that he was a "traitor," having served in the Confederate Army. Brown again delivered the opinion of the court, which maintained that Quarrier had never been charged or convicted of treason, and allowed him to regain his license to practice. Brown also wrote, "No act of the legislature has been found disbarring the applicant, or making it the duty of the court to do so."¹⁹

Within days of the Faulkner and Quarrier decisions (January 1866), the West Virginia legislature enacted a law establishing new voter registration boards in each county and oaths specifically designed to prevent Rebels from serving as lawyers or teachers. There was an immediate challenge to the constitutionality of the new lawyer's oath. Andrew Hunter, Samuel Price, W. S. Summers, Samuel Miller, and Caleb Boggess claimed that the Lawyer's Test Oath was *ex post facto*, and that each of the first four appellants had secured pardons from the federal government that nullified any action by West Virginia to bar them from practice. Their argument was rejected by James H. Brown, writing for the majority of the court. Brown wrote that the pardons exempted the applicants from restrictions imposed on federal offices, but that admission to the practice of law was a state issue and West Virginia could impose limitations on who was admitted.²⁰ Indeed, the legislature had created new restrictions on lawyers, based on Brown's wording in Ex parte Quarrier. Another applicant, Caleb Boggess, had not borne arms against the governments of the United States or West Virginia nor been a Southern sympathizer. He had been a member of the Secession Convention, voted against secession, and supported the Union throughout the war. He refused to take the oath, along with Daniel Lamb, because he had been admitted to practice in West Virginia before the passage of the act, and he claimed it unconstitutional as applied to him. Lamb apparently concurred in this view. Lamb, a man of unquestioned lovalty, had been a member of the First and Second Wheeling Conventions and the

Constitutional Convention of 1863. He was a member of the House of Delegates in 1863, 1864, 1865, and 1867, but not in 1866, when the lawyer's test oath was enacted. Lamb's and Boggess's arguments, like those of the former Confederates in this case, were rebuffed.²¹ Though there is no evidence, it is assumed that both Boggess and Lamb soon took the oath. In 1867, serving as a member of the legislature once more, Lamb was chosen to write the first Code of West Virginia. Though he did not complete the task, that work is still known as the "Lamb Code."

Unable to practice, many lawyers—including Faulkner's son E. Boyd Faulkner—moved to other states (Kentucky being a popular destination) where no such restriction existed. As with the other proscriptive statutes, this one was unpopular and, before the law was repealed in February 1870, exceptions to the law were granted. In a celebrated case in Wayne County, two men who had enlisted in the Confederate army while under the age of sixteen were admitted to the bar without taking the oath, as the judge considered them "infants" and thus not responsible for their youthful indiscretion.²² In 1869, the legislature itself passed "special acts" granting eleven individuals the right to practice law without taking the test oath and exempted two teachers from the oath applying to teachers.

II

Though the test oaths gained the most notoriety, other cases dealing with belligerent rights and the statute of limitations came before the West Virginia Supreme Court of Appeals. The higher court considered whether secession was legal and if the conflict that had just ended was a war, civil war, rebellion, or something else. The answer to both questions would determine if actions taken during the war by former Confederates were protected under commonly understood international rules on warfare or if they were criminal acts punishable and liable under criminal or civil statutes. In January 1866, Judge James H. Brown wrote that no state had a right to secede. The case before the court was *Hood vs. Maxwell*, an appeal from a suit in Marion County in which a merchant claimed Confederates confiscated his wheat. In their defense, the Confederates claimed to have acted under orders from their superiors. The incident occurred on May 28, 1861, after Governor John Letcher had called out the militia. The soldiers claimed they were bound to respond to the call to service and to obey orders. In his opinion, Judge Brown wrote that there was no constitutional authority for secession, and that the Reorganized Government of Virginia, considered the legal government of Virginia, had repealed and repudiated all decisions of the Richmond Convention, including its approval of the secession ordinance.²³ Consequently, all actions either by Confederate officials or by those acting in response to orders from them were illegal. This view was later overturned in the 1872 West Virginia Constitution, in which Civil War participants were exempted from civil or criminal suits if their acts were "in accordance with the usage of civilized warfare."²⁴

If secession was not legal, how was the conflict to be defined? In 1867, the West Virginia Supreme Court of Appeals considered several cases consolidated into one, Hedges vs. Price, arising from judgments against former Confederates in Berkelev County. Judge Brown's detailed, considered and well-written opinion declared the recent conflict a "civil war," denied that the "so-called Confederate States" were ever recognized by the United States, and consequently decreed that those who engaged in the fight against the United States did so as private persons and were liable for damages for their actions. Charles J. Faulkner had argued for the plaintiffs in error: because other nations had recognized the Confederate States as a belligerent power and because the United States had blockaded southern ports, the Confederate States was clearly a sovereign power. Brown countered that no action by the United States to defend itself, a blockade to deny supplies to rebels for example, was an ipso facto recognition of belligerent rights. He pointed to President Abraham Lincoln's proclamation of August 15, 1861 that declared the southern states' action to be an "insurrection." Likewise, other nations could recognize the Confederacy, but that recognition did not accord it sovereign power, and US officials had made it abundantly clear that it would not acquiesce in foreign

intervention in the conflict. He also noted the earlier court decision in *Hood vs. Maxwell* that there was no constitutional provision that allowed a state to secede.²⁵ Faulkner had also claimed that the exchange of prisoners between the Federal and Confederate governments gave the latter sovereign power. Brown countered:

Where a sovereign has a resort to war to suppress insurrection against his authority among a portion of his subjects, what motive can possibly be assigned to induce him to limit his sovereign rights, to deal with his insurgents, otherwise than as his laws require? Humanity and necessity. In obedience to these, he treats and exchanges as prisoners of war his captured subjects, not because he recognizes any right in the insurgents to demand it of him, but because they having by the fortunes of war got some of his loyal subjects in their power, may execute them in like manner by way of retaliation. Humanity and necessity therefore, induce him to stay his hand, and forbear to do what in the particular instance he otherwise might lawfully do. But since humanity and necessity induced this concession, it cannot be extended any further than they require, unless the sovereign so expressly declares. And such was precisely the case and course with the United States in the late rebellion. Insurgents who were captured and fully and fairly tried and convicted of piracy and sentenced by the courts for the crime, were not executed, but exchanged as prisoners of war by the government which repudiated the right of the rebels to require it. Yet it was done to save the lives of our own officers and soldiers and citizens who had been seized by the insurgents, and threatened with execution if the pirates were not released.26

The law limiting a defense on the statute of limitations was also challenged. The law applied only to specific counties. "In computing the time within which any civil suit or proceeding in trespass or

case shall be debarred by any statute of limitation in the counties of Pendleton, Hardy, Grant, Monroe, Wayne, Putnam, Calhoun, Gilmer, Kanawha, Doddridge, Harrison, Upshur, Marion, Taylor, Lewis, Hampshire, Mineral, Greenbrier, Boone, Logan, Wyoming, McDowell, Mercer, Raleigh, Pocahontas, Webster, Clav, Nicholas, Favette, Cabell, Morgan, Jefferson, Berkeley, and Roane."27 (It is no surprise all the counties named were either totally controlled by Confederates during the war or had significant regular Confederate troop actions or partisan ranger units in operation.) The original period (March 1861 to February 1865) was extended to February 27, 1866 by the next session of the legislature. In a 1868 suit, Lively, *Ex'r v. Ballard*, a circuit judge's refusal to consider the statute of limitations as a defense was upheld, and the law itself was declared constitutional in 1870 in Caperton v. Martin. Also in Lively, the court declared that jurors in circuit court could be required to take the loyalty oath required by the legislature on November 4, 1863.28

The inability to claim "belligerent rights" as a defense cost some former Confederates dearly. The West Virginia Supreme Court of Appeals considered appeals of suits for damages for false arrest, confiscation of property, and other actions where belligerent rights were claimed as a defense.²⁹ In each case, based on lower court decisions, damages were upheld or, if a defense of belligerent rights had been permitted, the case was returned to the lower court based on an error by the judge and a new trial was ordered.

The cases, remarkably similar in the offenses alleged to have taken place, provide insight into the lot of civilians during the war. Henry Pitzer of Berkeley County sued John Cunningham, who he claimed took two hundred bushels of his wheat for Confederate troops. In Monroe County, Lewis Ballard accused Joseph Lively of robbing him of "goods, merchandize, jewelry &c," in the amount of ten thousand dollars on July 21, 1861 apparently because he was thought to be a Union supporter in a Confederate county. (Lively's unsuccessful defense was that he had acted under orders of Confederate authorities.) Other former Confederates were sued for either causing, or participating in, the arrest and imprisonment of real or alleged Union sympathizers.³⁰ Allen T. Caperton, who served in the Confederate states' senate, was also provost marshal for the Confederate government in Monroe County. He was sued twice, lost both suits, and appealed to the West Virginia Supreme Court of Appeals for relief but was denied both times. In the first, his defense of belligerent rights was refused. In the second, his claim that the jury pool was suspect was likewise turned aside.³¹

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Lawsuits for false arrest were so numerous they attracted national attention. In 1866, a correspondent from the Springfield, Massachusetts newspaper, the Republican, visited Ceredo, West Virginia. In a mostly unflattering piece about West Virginia, the correspondent described some of the litigation between Unionists and Confederates in the southern West Virginia counties. "The suits for damages for imprisonment during the war, in nearly all the border counties, are making a great deal of disturbance and ill-will. In Boone county circuit court, three weeks ago, there were thirty-one of these cases on the docket. Several, brought by Union soldiers, were dismissed and the plaintiffs, in nearly all the cases, began to think it was a poor investment." The correspondent described the lawsuits as being against men of property who were known to be Southern sympathizers, though they may have had little or nothing to do with the alleged ill treatment. He concluded, "The injury caused by these foolish suits extends to all of us, and is the more hateful because it is an unnecessary evil resulted from the war."32

Some former Confederates were unable to pay the damages awarded by the courts and ended up in bankruptcy. The situation was particularly bad in the circuit covering Greenbrier, Mercer, and Monroe Counties, where the circuit court judge was alleged to have conspired with a "carpet bagger" lawyer in suits against former Confederates. According to James H. Miller in his 1908 history of Summers County, Judge Nathaniel Harrison, who had filed a strong dissent in the Faulkner case, recruited Major Cyrus Newlin, "an educated and finished lawyer," to Union, Monroe County from Philadelphia. Newlin presented cases against former soldiers and Southern sympathizers. "Harrison, as judge, tried the cases, determining arbitrarily in favor of Newlin and his clients and against those in opposition." It was estimated that Harrison made twenty thousand dollars per year at one time as his part of the proceeds of such trials. Harrison's behavior led to many protests to the legislature and governor. His actions became so outrageous that even the Republicans called for his removal, and he was forced to resign in face of impeachment proceedings in 1870.³³

Documents related to a lawsuit from Cabell County show how the case originated, was litigated, and finally resolved. Perhaps more importantly, the case illustrates how the "let up" in restrictions on Confederates affected the outcome of similar lawsuits. In 1864, Julius Freutel, J. B. Alford, Thomas Kyle, C. Dusenberry, and Robert Ross brought separate suits against Thomas J. Jenkins, William A. Jenkins, George W. Holderby, Peter C. Buffington, Robert Holderby, and over twenty other Confederates or Confederate sympathizers, and levied attachments on the lands of P. C. Buffington and the Jenkins.³⁴ The suit alleged assault and battery and false imprisonment. Though the legal documents do not relate the specifics, it is likely that the plaintiffs were captured by Confederate troops and sympathizers when they raided Guyandotte early in the war. These prisoners, and others captured later, were lodged in Libby Prison in Richmond. While the suit was filed against soldiers and Confederate sympathizers, realistically the promise of recovery was against two large landholders, Jenkins and Buffington. Details of the legal wrangling come from a later bankruptcy proceeding involving James H. Ferguson, one of the attorneys in the case.

The lawsuit was filed June 22, 1864 but not decided until November 22, 1864. One of the plaintiffs, Julius Freutel, signed an agreement on November 14, 1864 to give Ferguson a 20 percent fee should the suit be successful.³⁵ The court awarded Freutel and others the damages requested and the sheriff proceeded to sell Thomas Jenkins's land on January 13, 1865. However, in a curious turn of events, the sheriff didn't record a deed of the sale until 1870. By this time the "let up" of proscriptions on former Confederates was well underway. In 1870 and 1871, the legislature liberalized the ability of former Confederates to have their cases reheard, and, in 1872, eliminated the period from 1865 to 1872 from consideration in the statute of limitations governing the time to file an appeal.³⁶ In 1870, the defendants appealed the circuit court action to the West Virginia Supreme Court of Appeals, alleging that they had not had the chance to be heard in court. In *Kyle vs. Jenkins*, the Court of Appeals remanded the case to Cabell County and ordered that it be retried.³⁷ The defendants prevailed in a rehearing. Ferguson's bankruptcy was hastened by the retrial, as he had borrowed money on his supposed fee from the case that Freutel could no longer pay.³⁸

IV

Shortly after the war, other types of cases made their way to the Supreme Court. Several questioned whether actions of local officials who had not taken the oath of loyalty, required by the Restored Government of Virginia or the new state of West Virginia, were legal. Two of the cases were reported in July 1867. In 1865, James H. Jennings sued Daniel Burkhart, William D. Burkhart, John W. Stewart, Adam Small, Thomas P. Hollis, and Daniel Lafever in Berkeley County circuit court alleging that, in 1861, the defendants "contriving and wrongfully and injuriously intending to harass, oppress and injure the plaintiff without good cause, did sue out one writ of attachment against the property, goods and chattels of the plaintiff, before one George Doll, acting as a justice within the county of Berkeley, but without legal authority."39 Jennings owed the Bank of Berkeley one thousand dollars, which he did not deny, but it was alleged that he was contemplating leaving Virginia, taking his slaves with him. The bank sought to protect its investment by foreclosing on the loan and seizing his property. One of the defendants, Berkeley County sheriff Daniel Lefever, claimed that he acted on the basis of a judgment and order from the Berkeley County circuit court which directed him to seize the property and sell it to satisfy the debt. Jennings claimed that he never intended to leave the state, had four farms and sufficient collateral to cover his debt, and

Jennings, a minister as well as a wealthy landowner, was born in New York and educated at Hampden-Sydney College. By marrying Elizabeth Robinson of Berkeley County, he became a prominent farmer. Despite owning slaves, he was described as "a conscientious Union man" who left his family in Virginia during the war to take refuge in Maryland.⁴¹ In August 1865, a Berkeley County jury awarded Jennings 1,450 dollars with interest from September 20, 1861. At least part of the decision was based on the fact that Berkeley County officials were not legitimate after the Declaration of the Wheeling Convention of June 13, 1861, which called for the creation of a new government of Virginia and declared that acts of the Confederate officials were "without authority and void; and the offices of all who adhere to the said Convention (Secession) and Executive (Confederate State of Virginia), whether legislative, executive or judicial, are vacated." ⁴²The 1867 appeal from Burkhart and the other defendants argued that the convention in Wheeling had no authority to vacate the offices of properly elected officials in Virginia. In addition, the defendants pointed to a law enacted by the Virginia legislature on February 28, 1866 that declared that lawful acts by duly elected or appointed officials in Virginia from the adoption of the Ordinance of Secession, April 17, 1861 until the Virginia government was "overthrown and suppressed by the military forces of the United States in April 1865" to be valid.43

The West Virginia Supreme Court of Appeals denied the appeal, rejecting a number of grounds, the most significant of which was whether Confederate officials had a legal claim to their posts. In his opinion for the majority, James H. Brown wrote that the defendants claimed to be officers of a *de facto* government that was at war with the United States and the government of Virginia and that the *de facto* government "then held possession and control of the county of Berkeley." Brown countered that the June 13, 1861 Declaration of the Convention at Wheeling repudiated the "convention at Richmond (Secession Convention) (which) had usurped and exercised the powers of government to the manifest injury of the people, and to

the peril of their liberties; that it required them to wage war against the Union and sister States; to transfer their allegiance to an illegal confederacy of rebels and submit to its edicts, and in conjunction with the execution, had instituted a reign of terror, suppressed the free expression of popular will, and made elections a mockery and a fraud." The Wheeling Convention then restored "the constitution and loyal government of the State, and thereupon appointed a governor, lieutenant-governor" and other officers. Brown went on to opine that there could not be two "lawful" governments in a state. If one is lawful the other must be unlawful.⁴⁴ The fact that the "so-called" Confederate government held possession of Berkeley County at the time that Jennings's property was attached, did not legitimize unlawful acts of unlawful officials.⁴⁵

However, a careful reading of this and other decisions indicates that declaring acts of elected officials unlawful must have been distasteful to the justices. In another suit arising in Greenbrier County, Edwin Maxwell, who took a seat on the Supreme Court in 1867, struggled with the issue. The reason the suit was filed is not clear, but the point before the Supreme Court was whether the Greenbrier County circuit clerk, who had not taken the oath to support the Restored Government of Virginia, could issue a valid subpoena in May 1863. Judge Maxwell wrote that if the clerk "were either a *de jure* or a *de facto* clerk, the proceedings in the cause were regular, and the case properly on the docket, it should not have been dismissed as it was, for it is an established principle of the common law, well settled by a long and consistent series of decisions that the acts of an officer *de facto*, though he may be ineligible, or his title bad, are valid as far as they concern the public, or the rights of third persons, who have an interest in the things done."46 Maxwell clearly saw the need to support normal governmental functions, even in areas under the control of the "so-called" Confederate States of America. However, he worried that holding the circuit clerk's actions to be valid would "be to acknowledge the existence and validity of the insurgent government, so far as this court could do it, for this clerk was just as much a part of it as was any other officer in it. It would be to repudiate the result of the war as well as the purposes

for which it was waged by the government of the United States, for, the purpose for which it was waged, was to suppress the insurrection and prevent the insurgent government from being established and such was its result."⁴⁷ Maxwell's decision, based as much on politics and emotion as on the law, declared the clerk's actions to be null and void.

In the years immediately following the war, United States Supreme Court decisions and the general attitude of the federal government supported decisions declaring acts of Confederate officials null and void.48 However, did it make sense to invalidate all governmental acts solely on the basis of having been performed by officials who were loyal to the "so-called" Confederate States of America? Clearly, deeds were written and recorded; marriages, births, and deaths were recorded; and suits were filed in counties under the control of the Confederate government. In fact, residents recognized county functions as legitimate, and suits arose only where one or the other of the parties wished to protest results of legal actions, using legitimacy of county officials as a reason for their appeals. As time went by, the official stance on actions by Confederate officials changed. In 1869, the United States Supreme Court ruled in Texas vs. White that actions of local Confederate officials were valid.

Acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to persons and estate, and other similar acts which would be valid, if emenating [*sic*] from a lawful government must be regarded, in general, as valid, when proceeding from an actual, though unlawful, government.⁴⁹

The effect of this approach was to treat the Confederate state governments as *de facto* governments.⁵⁰

By 1868 and 1869, passions over the war had cooled. Letters to Governor Boreman reflect a growing dissatisfaction with restrictions. On voting, for example, there were allegations and complaints that the boards of registration were disgualifying even loyal Union men. "Let ups" or moderates such as Governor William E. Stephenson were willing to accept former Confederates back into political life. Resentment over the ratification of the Fifteenth Amendment, which guaranteed the vote to blacks, led to new calls to end proscriptions on former Rebels and resulted in the Flick Amendment, which ended voting restrictions. Immediately, a number of former Confederates were elected to the state legislature and to other government positions. A new constitution was written and statutes easing legal restrictions on former Confederates were enacted. In 1872, the West Virginia legislature passed a law to validate actions of county officials if they had been qualified for office under the laws of the state of Virginia.51

V

Though the test oaths and other proscriptions were being eased, there were other war-related issues with which to contend. Lawsuits had been filed over the value of Confederate money and whether it was legal tender even during the existence of the Confederate states. A number of appeals concerning Confederate money from circuit courts made their way to the Supreme Court after 1870. The cases were similar in that contracts or sales or other transactions entered into by persons in those counties under the control of the Confederates, and the consideration of which were to be paid in Confederate money, were challenged as being void. Immediately after the war it was assumed that Confederate money, backed only by the faith and credit of the Confederate States of America or their individual states, was worthless. It was a huge problem for those persons who had accepted or were owed Confederate money or who had incurred debt that was contracted in such currency but then expected to be paid or to pay in United States dollars. It was likewise a problem for judges of the Supreme Court who may have wanted to

attack the Confederacy in every way, including declaring its currency worthless, but who, from training, environment, and experience sought to protect private property and the sanctity of contracts. In fact, they had decisions from the United States Supreme Court on which to rely.

In *Kepple v. Petersburg Railroad* and *Thorrington v. Smith & Hartley*, the United States Supreme Court had held that residents in states controlled by the Confederate States of America had little choice except to utilize the existing currency in their transactions and that the use of Confederate money did not invalidate otherwise valid transactions.⁵² The West Virginia Supreme Court of Appeals found other issues in these cases on which to base its decisions and avoided ruling on Confederate money *per se*. In one instance, Judge Charles Page Thomas Moore, a Democrat who opposed secession and sat out the war and who had been elected to the court in 1870 after failing in an earlier bid in 1868, specifically noted that he would not express an opinion on whether or not Confederate money could have been used in payment of debt.⁵³

The first legislature elected under the Constitution of 1872 provided a solution for the Supreme Court of Appeals and all citizens struggling with issues relating to Confederate money. On April 7, 1873, "An Act providing for the adjustment of certain liabilities arising under contracts made between the first day of May, 1861 and the first day of May 1865" was passed. The bill provided that the value of Confederate money considered in valid contracts made between 1861 and 1865 would be based on the true value of the money at the time the contract was made.⁵⁴ What constituted "true value" was not defined, but in *Jarrett's admrs. v. S. C. Ludington, & co.*, Confederate money was compared to its value in gold.⁵⁵

CONCLUSION

Even before the Civil War ended in April 1865, former Confederate soldiers were returning to West Virginia. They came "not in battalions, nor even by squads; but singly and quietly they were seeking to rebuild their desolate homes and take the places in the ranks of peaceful avocation."⁵⁶ The former Rebels may have had peaceful intentions, but many Unionists and Radical Republicans considered them a danger to the existing governmental structure and harbored grievances over Confederate actions toward civilians during the war. Those in charge, wanting former Confederates to suffer, used their control of the executive, legislative, and judicial branches of government to enact laws designed to create suffering. In fairness, many civilians were mistreated by Confederate regular or irregular troops, but the same could be said of Southern sympathizers who were deprived of property and liberty by Union soldiers or the home guard. Since the South lost, complaints about Union forces were ignored, and the West Virginia legislature acted to prevent former Rebels from suing to redress their grievances.

The desire for revenge was not universal. On the national level, President Andrew Johnson issued an amnesty proclamation in May 1865 designed to speed reunification and healing the wounds of war. In West Virginia, the Democratic Party reorganized and called for easing the restrictions, especially on voting, and found some support among conservative Unionists. The strength of the support was evidenced by the strong showing of the Democratic candidate for governor, Benjamin H. Smith, who lost to the wartime governor, Arthur I. Boreman, by a relatively slim majority of 23,806 to 17,144 in the fall of 1866, at a time when most former Confederates could not vote.57 Boreman's victory, and the continued Republican control of the legislature, ensured that it would be years, not months, before the tide turned and the proscriptive laws were repealed. However, things changed, and the end was near when moderate Republican William E. Stephenson took the office of governor in 1869. Soon after, the Flick Amendment restored voting rights to former Confederates, the tests oaths were repealed, and, in 1871, a Democrat occupied the governor's office.

In the short time between the end of the Civil War and the Democratic Party resurgence, the West Virginia Supreme Court of Appeals heard numerous cases arising from wartime activity. Milton Gerofsky rightly claims that the court upheld laws enacted by the Radical Republican controlled legislature. However, a closer inspection of the cases decided shows that there were exceptions. Tradition, history, and existing law gave the Supreme Court room to disagree with the state's position in *Ex Parte Faulkner* and in upholding William A. Quarrier's argument that he was not guilty of treason. When the statutes were made more explicit by the West Virginia legislature, the court was reluctant to overturn actions of a legislature that had been, at least on the surface, properly elected by the people. All that changed when the Democrats gained control of the legislature and set about to repeal the proscriptive laws and to write a new constitution.

The ratification of the Constitution of 1872 effectively ended the Civil War era in West Virginia. Whether this ended Reconstruction in West Virginia or whether the state truly experienced Reconstruction is for other historians to argue. Factually, all proscriptive acts were repealed and other vestiges of Radical Republican rule were eliminated. Nowhere was the change more pronounced than on the West Virginia Supreme Court of Appeals. In 1873, after ratification of the new constitution, three Democrats— James Paul and Confederate veterans John S. Hoffman and Alpheus F. Haymond—joined Democrat Charles P. T. Moore on the state's highest court. After Moore's election in 1871, no Republicans were seated again until 1897.

NOTES

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1. Though the actual experience was different in each, there were common characteristics such as the imposition of proscriptions on former Confederates to keep them from voting or from exercising the normal rights of citizens. Administration of the proscriptions varied from extreme (Missouri) to moderate (Kentucky), but were similar in that the party in power, whether Republican or Democrat, sought to keep control of state government by dictating who could vote. In every state more moderate Unionists and former Confederates worked to eliminate the proscriptions and in each they were eventually successful. The restrictions were eased in Kentucky within a year after the war ended, while they extended until 1872 in Missouri. For a treatment of the Reconstruction Era in these states see Eric Foner, *Reconstruction, America's Unfinished Revolution 1863–1877*

(New York: Harper and Row, 1988); Richard O. Curry, ed., *Radicalism, Racism, and Party Realignment: The Border States during Reconstruction* (Baltimore: Johns Hopkins Press, 1970); W. H. Perrin, et al.; *Kentucky: A History of the State* (Louisville: F. A. Battey and Company, 1887); J. Thomas Scharf, *History of Maryland*, Vol. III (Hatboro: Tradition Press, 1967); Lucien Carr, *Missouri, A Bone of Contention* (Boston: Houghton-Mifflin, 1888); William L. Wilson and Odell S. Long, "Reconstruction in West Virginia," in Hilary A. Herbert, ed., *Why the Solid South?* (Baltimore: R. H. Woodward and Company, 1890).

- 2. Foner, Reconstruction, America's Unfinished Revolution, 1863–1877, 38.
- 3. John A. Williams, *West Virginia, A History*, 2nd Ed. (Morgantown: West Virginia University Press, 2001), 41–43.
- 4. Randall S. Gooden, "Neither War nor Peace," in Andrew L. Slap, ed., *Reconstructing Appalachia, The Civil War's Aftermath* (Lexington: The University Press of Kentucky, 2010), 212.
- Milton Gerofsky, "Reconstruction in West Virginia," West Virginia History, 8 (Oct. 1945), 5. Former Confederate Col. Robert White, president of the West Virginia Bar Association, presented an interesting discussion on litigation of Civil War issues in an address to the West Virginia Bar Association in 1914. Proceedings of the West Virginia Bar Association, 1914 (Wheeling: Wheeling News Lithograph, 1915), 16–28.
- Henry S. Green, "Historical Sketch of West Virginia," West Virginia, Legislative Handbook and Manual and Official Register (Charleston: Tribune Printing Co., 1917), 329. The term "let up" was in common use early in the years after the war and was applied equally to moderate Republicans and Democrats. See, for example, *The Cabell County Press*, Nov. 8, 1869.
- 7. West Virginia, *Acts of the Legislature of West Virginia* (Wheeling, John F. McDermott, 1863), 63.
- 8. Gerofsky, 5–39; and see general histories by Charles H. Ambler and Festus P. Summers, *West Virginia, the Mountain State* (Englewood Cliffs: Prentice Hall, 1958), 264–277; and Otis K. Rice, *West Virginia, A History* (Lexington: University Press of Kentucky, 1985), 154–163.
- 9. Among those were future governor Henry M. Mathews, a former Confederate major and lawyer from Greenbrier County who, though popularly elected, was refused a seat in the West Virginia senate and Samuel Price, whose election as circuit judge was rebuffed by Governor Arthur I. Boreman. Boreman refused to issue a commission to Price who had served as lieutenant governor of the Confederate state of Virginia during the war. Another was Patrick K. McComas, an attorney in Logan County who was elected prosecuting attorney of Logan County on October 26, 1865. He agreed to take all oaths except that passed by the legislature on November 16, 1863 and was thus denied his office by the judge of the circuit court. See James H. Ferguson Papers, MS 78-8, Box 4, Folder 14, West Virginia State Archives (hereafter cited as Ferguson Papers), for copy of McComas's pleading. For general details on the election and its impact see Ambler, *West*

Virginia the Mountain State, 267; Rice, *West Virginia, A History*, 156; and Gooden, "Neither War Nor Peace," 217.

- 10. William L. Wilson, a former Confederate and member of Congress, and Republican Odell S. Long who was clerk of the West Virginia Supreme Court of Appeals, wrote in 1890 that "The Constitution of 1863 was, in the main, a fair, prudent and equitable instrument. True, it was afterwards warped by construction so as to tolerate the most proscriptive and unjust enactments, but that was the fault of the Legislature and the courts; the Constitution was right, but the courts were wrong." Wilson and Long, "Reconstruction in West Virginia," 260.
- 11. For sample oaths, see Secretary of State Papers, AR 1769, Box 9, Folder 1, West Virginia State Archives.
- 12. The act of June 1863 was applicable for each elected or appointed officer, at every level of government. The amendment in November took away any doubt as to what oath was required. "Every person elected or appointed to any office of trust, civil or military shall, before proceeding to exercise the authority or discharge the duties of the same, take the following oath: 'I. A. B., do solemnly swear that I will support the constitution of the United States and the constitution of this State; that I have never voluntarily borne arms against the United States: that I have voluntarily given no aid or comfort to persons engaged in armed hostility thereto, by countenancing, counseling or encouraging them in the same; that I have not sought, accepted nor attempted to exercise the functions of any office, whatever, under any authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government authority, power or constitution with the United States, hostile or inimical thereto; and that I take this obligation freely, without any mental reservation or purpose of evasion." This oath was held to be constitutional in Ex Parte William Stratton, 1 WV 304 (1867).
- 13. Wheeling Register, Feb. 5, 1866.
- 14. Brooks F. McCabe Jr., "Benjamin Harrison Smith, Land Titles and the West Virginia Constitution," West *Virginia History*, 6, (Spring 2012); George W. Atkinson, *Bench and Bar of West Virginia* (Charleston: Virginian Law Book Company, 1919), 9–10.
- 15. Atkinson, Bench and Bar, 56.
- 16. Wilson and Long, "Reconstruction in West Virginia," 280.
- Ex Parte Charles J. Faulkner, 1 W.Va. (1866), 269–303; Otis K. Rice, A History of Greenbrier County (Parsons: McClain Printing Company, 1986), 306; Wheeling Register, Feb. 5, 1866; James H. Miller, History of Summers County (Hinton: 1908), 228–233; Richard E. Fast and Hu Maxwell, The History and Government of West Virginia (Morgantown: Acme Publishing Company, 1901), 164; Wheeling Register, Feb. 5, 1866. The charges of impeachment against Harrison are published in West Virginia, Acts of the Legislature, 1870 (Wheeling: John Frew, 1870)136–142.
- 18. Atkinson, Bench and Bar, 4.

- 19. Although this case had been decided in 1866, it was not reported until 1867. *Ex Parte William A. Quarrier*, 2 WV 569 (1867).
- 20. Ex Parte Hunter, et al., 2 WV 166 (1867). Hunter, Price, Summers, Miller, and Boggess were all prominent lawyers before the Civil War. Price, for example, had served in several Virginia legislatures, in the Constitutional Convention of 1850–51, and as the lieutenant governor of Virginia during the Civil War. He was later the president of the 1872 Constitutional Convention and was appointed United States Senator in 1876 to replace Allen T. Caperton, who died in office. Price served for slightly over a month.
- 21. Atkinson, *Bench and Bar*, 55, 120; West Virginia, *Legislative Handbook and Manual*, (Charleston: The Tribune Printing Company, 1917), 344–349.
- 22. William J. Mansfield, "Bench and Bar of Wayne County," unpublished manuscript in Lambert Collection, Special Collections, Marshall University. The young men were Lucien "Cooney" Ricketts and Joseph Plymale. Ricketts's first law partner was C. P. T. Moore, who was elected to the West Virginia Supreme Court of Appeals in 1870. See Jack L. Dickinson, *Cooney Ricketts, Child of the Regiment* (Charleston: Pictorial Histories, 2001), 88.
- 23. 7 W.Va. 247-248 (1866).
- 24. West Virginia Constitution of 1872.
- 25. Hedges v. Price et al., 221-241 (1867).
- 26. Ibid., 234.
- 27. Quoted in Caperton v. Martin, 4 WV 138 (1870).
- 28. Ibid.; Lively, Ex'r v. Ballard, 2 WV 496 (1868).
- 29. Examples are Williams v. Freeland, 2 WV 306 (1867); Lively v. Ballard, 2 WV 496 (1868); Echols vs. Stauntons, 3 WV 574 (1869); Caperton v. Martin, 4 WV 138 (1870); Carskadon vs. Johnson, et al., 4 WV 356 (1870).
- Examples are Carskadon v. Johnson et al., 4 W.Va. 356 (1870); Caperton v. Martin, 4 WV 138 (1870); Ruffner v. Williams, 3 WV 243 (1869); Bloss v. Plymale et al., 3 WV 393 (1869); French v. White, 4 WV 170 (1870); Caperton v. Nickel, 4 WV 173 (1870).
- 31. Caperton v. Nickel, 4 WV 173 (1870). and Caperton v. Martin, 4 WV 138 (1870).
- 32. *Wheeling Intelligencer*, Jan. 5, 1867. Reprint of an article that appeared in *The Republican*, (Springfield, Massachusetts) Dec. 15, 1866. The correspondent published a version of how such lawsuits came to be filed. "I will give the ground and cause of one, and it will answer for all. Mr. B. owns a large farm, with a good deal of stock, &c., to look after, and wanted to stay at home during the war. He is not sure whether he is a Union man or not, but when the rebel scouts came along, he solemnly assures them that he is loyal (which they understand to be to the southern confederacy,) and that he wishes to remain quietly at home and attend to his own business. In a few days he gets uneasy and want to know how the fight is progressing, and goes to the nearest military post of the Union troops and there claims to be 'loyal,' and gets a pass to go and come, and to satisfy the commander

that he is all right, begs a musket and ammunition, and tells him how quick he shall shoot if a rebel comes near him. He goes and comes frequently, and the rebels soon hear of it, and visit him. To quiet them, he makes new protestations of loyalty, feeds them and their horses and furnishes them with rations to take along. Then he returns to the Union commander and complains that the rebels are about to ruin him and he is "mightily afeared" they will kill him or take him off to Richmond. So the commander sends a squad of soldiers to hunt for the rebels who so much threaten neighbor B. In his enthusiasm, and while protected by the blue jackets, he forgets the promises he had made to the rebels, becomes intensely loval, blusters incoherently about the slaughters he will do when he meets the foe. But the enemy is not found, and the blue jackets retire, and in a few days, the rebels in their camp fifty miles away have heard of the double treachery of Mr. B., and come on and take him prisoner and send him to Richmond. Now that the war is all over and he has brought suit, not against the men who took him prisoner, or commanders of the men who took him, but against men of property in the county, some of whom were known to sympathize with the rebels, and some who were not rebels, but all men of property, who can pay the damage if he gets a judgment. If he succeeds a dozen other suits will be at once commenced, all just the same in cause and character as his. In Boone county, the other day, without my informant's knowing the purpose of my queries, I found the cases there were all the same. Lawyers celebrated all over the State and lawyers from Ohio are employed in these suits and the hatred between the parties will increase until they are dismissed or discontinued."

- 33. James H. Miller, *History of Summers County* (Hinton: Miller, 1908),
 228–231. See also Otis K. Rice, *A History of Greenbrier County* (Parsons: McClain, 1986), 300–332. For the resolution of impeachment, see West Virginia, *Acts of the Legislature* (Wheeling: John Frew, 1870) 136–161.
- 34. George S. Wallace, *Cabell County Annals and Families* (Genealogical Publishing Company: Baltimore, 1997), 42.
- 35. Ferguson Papers, MS 78-8, Box 5, Folder "Legal Documents."
- West Virginia, Acts of the Legislature (Charleston: Henry S. Walker, 1872), 104.
- 37. Kyle vs. Jenkins, 6 WV 371 (1873).
- 38. James H. Ferguson Bankruptcy file, RG 21 US District Court, S. District of WV, Charleston; NARA, Philadelphia.
- 39. Burkhart et al. v. Jennings, 2 WV 242 (1867).
- 40. Ibid., 243.
- Chapman Brothers, *Portrait and Biographical Record of Lafayette and Saline Counties, Missouri* (Chicago: Chapman Brothers, 1893), 178. Jennings and his family moved to Missouri in 1867, where he died in 1885.
- 42. Burkhart et al. v. Jennings, 2 WV 249 (1867).
- 43. Virginia, Acts of the General Assembly of the State of Virginia passed in 1865–1866 (Richmond: Allegre and Goode, 1866), 187.

- 44. Burkhart et al. v. Jennings, 2 WV 259-261 (1867).
- 45. Ibid., 263.
- 46. Hawver et al. v. Seldenridge et al., 2 WV 277 (1867).
- 47. Ibid., 282.
- 48. Stephen C. Neff, *Justice in Blue and Gray, A Legal History of the Civil War* (Cambridge: Harvard University Press, 2010), 207–211.
- 49. Quoted in Clay v. Robinson, 7 WV 357 (1874).
- 50. Neff, Justice in Blue and Gray, 213.
- 51. Clay v. Robinson, 7 WV 357 (1874).
- 52. Washington, ex'r v. Burnett, 4 WV 86, 90 (1870).
- 53. Harper, adm'r v. Harvey et al., 4 WV, 542 (1870).
- 54. West Virginia, Constitution and Schedule Adopted In Convention (Charleston: John W. Gentry, Printer, 1874),
- 55. Jarrett's Admrs. v. Ludington, 9 WV 334 (1876).
- 56. Wilson and Long, "Reconstruction in West Virginia," 262.
- 57. Green, "Historical Sketch of West Virginia," 330.