

The Supreme Court of Texas and the Emancipation Cases

BY
ROBERT B. GILBREATH



Some years ago, in search of authority for an obscure legal proposition, I stumbled onto a very old Texas Supreme Court decision involving the sale of a slave. Simultaneously repulsed and fascinated, I vowed to take a closer look at the court's slave jurisprudence. Over the ensuing years, I read a number of the court's slave cases hoping, largely in vain, to find some redeeming words, some sign of revulsion or, at least, distaste for the task of resolving the legal issues arising from the commerce in humans.¹ Finally, I found a case that chronicles one bright spot in those dark days of jurisprudence — a case in which the court sorted out the legal ramifications of the Emancipation Proclamation, described by one of the justices as the “noblest paper since the declaration of independence by our forefathers.”² This is the story of that decision.

“These cases ... in coming ages, will be referred to as a chapter in the history of great events. ... [T]hey will convince the antiquarian of future years that some generations make history so rapidly that they do not understand it themselves.”³ With those words, the Texas Supreme Court's official reporter introduced the court's decision in the Emancipation cases — *Hall v. Keese* and *Dougherty v. Cartwright*, 31 Tex. 504 (Tex. 1868). The Emancipation cases posed a question that preoccupied Texas courts after the Civil War: “Did the proclamation of President Lincoln operate, *ipso facto*, in Texas, so as to liberate the slaves *instantly*, and to deprive the masters of the ability to sell or hire them after that time, and to recover the notes given for their sale or hire?”⁴ Or, as one of the justices put it: “Can an action be sustained ... for the contract price of the purchase or hire of slaves made since the 1st day of January, 1863, the date of the proclamation of emancipation by the president of the United States, and prior to the surrender of the rebel army within its limits?”⁵ The issue sharply divided former law partners and judges of both northern and southern birth, producing some of the most impassioned rhetoric to be found in any decision of the Texas Supreme Court.

CONTINUED ON PAGE 948 ►

The Justices

Four of the Supreme Court's five justices wrote opinions in the Emancipation cases: Chief Justice Amos Morrill, Associate Justices Livingston Lindsay and Albert Latimer, who concurred in the result reached in Morrill's opinion, and Associate Justice Andrew Hamilton, who dissented in an opinion joined by Colbert Caldwell. Morrill, born in Massachusetts, graduated from Bowdoin College in Maine and, in 1838, moved to Clarksville to practice law. He later moved to Austin to become a law partner of Andrew Hamilton.⁶ Hamilton came to Texas from Alabama in 1846. He served in both the Texas Legislature and the U.S. Congress. Hamilton "had a fine physique, a magnificent voice, a command of language surpassed by few, a logical mind, and a wonderful gift of oratory; these factors, added to his great talent as a lawyer, combined to make

him a natural leader."⁷ Hamilton and Morrill both opposed secession and left Texas when the war began. Hamilton received a commission as a brigadier general in the Union Army. In 1868, Union General Philip Sheridan, military commander of Texas, appointed Morrill chief justice of the Supreme Court of Texas and Andrew Hamilton associate justice.⁸

Livingston Lindsay was born in Virginia, educated at the University of Virginia, and, for a time, practiced law and taught school in Kentucky. In 1860, he moved to La Grange to continue his practice.⁹ A critic of the Reconstruction-era Texas Supreme Court observed that "[h]is opinions, owing perhaps to his Southern birth and residence, were considered to be singularly free from the political prejudices with which those of his more narrow-minded brethren abounded."¹⁰ Albert Latimer, born in Tennessee, was a signer of the Texas Dec-

laration of Independence and an opponent of secession who became a Republican following the war's conclusion.¹¹ Colbert Caldwell, also a native of Tennessee, moved to Mansfield in 1859. By the end of the Civil War, Caldwell owned 11 slaves. After the war, his "outspoken Republican partisanship had earned him a reputation among Democrats as a rabble-rouser," and he "survived an assassination attempt by a white mob during a speech before a mostly black audience in Marshall on December 31, 1867."¹² Caldwell, Lindsay and Latimer were also appointed to the Supreme Court by General Sheridan.¹³

The Lawyers

The Supreme Court reporter in 1868 was George W. Paschal, a former justice on the Arkansas Supreme Court,¹⁴ opponent of secession,¹⁵ and "an able lawyer and writer."¹⁶ Paschal "spent part of the

WE'RE NOW HEARING
ARGUMENTS ON BEHALF
OF CANDIDATES FOR
2007 DEAN'S FELLOWS
SCHOLARSHIPS.

Quinnipiac University School of Law is now accepting nominations for our 2007 Dean's Fellows Scholarships. These full-tuition awards will be granted to full-time first-year law students whose outstanding academic records, LSAT scores and commitment to public service demonstrate their potential for outstanding performance in the study of law. To be competitive for a Dean's Fellows Scholarship, applicants should have an LSAT score of 160 or higher, and have an undergraduate GPA of at least 3.0. Those selected will round out an already outstanding student body - our full-time 1L Class for Fall 2006 has a 25th percentile LSAT of 160 and 75th percentile LSAT of 180 with a median GPA of 3.34.

If you know someone on whose behalf you would like to make a case, please visit <http://law.quinnipiac.edu> or call 1-800-467-7944.

[Civil War] under virtual house arrest rather than admit the sovereignty of the Confederacy."¹⁷ Remarkably, Paschal not only reported the Supreme Court's decision but also argued the Emancipation cases, joined by Charles S. West. As Justice Hamilton explained, only West and Paschal responded to the court's call to the bar for lawyers willing to present arguments in the case:

[T]his court, being anxious to arrive at a conclusion resting upon reason and authority, some weeks past invited discussion of the point by the bar generally. It is to be regretted that this invitation was responded to by but two attorneys of the court, and that they both appeared on the affirmative side of the question.¹⁸

In his official report of the court's decision, Paschal set out his own views about the Civil War to set the stage for the court's opinion. Most of Paschal's



George W. Paschal

PICB 06766, AUSTIN HISTORY CENTER, AUSTIN PUBLIC LIBRARY

remarks would still raise ire amongst those Southerners who to this day contend the "War of Northern Aggression" was not fought over the question of slavery. For example:

The secession movement was one avowedly in the interest of slavery. Deeper down and below this were the motives in the minds of many to establish an absolute and arbitrary government. But the great masses had been educated up to the belief that the people in the nineteen states where African slavery did not exist were faithless to their obligations to the constitution, and that at some time or other they would manumit [free] all the slaves of the land. ...

Those who had been loudest to proclaim their purpose to perish in the defense of slavery were the first to reach the provost marshal's and the loudest in their response to the manumission oath. Then they hurried back to contrive some plan to retain the services of those who they had owned. The negroes stood aghast, not knowing whether most to trust

WIN LAWSUITS.
DON'T CAUSE THEM.

BUSINESS-GRADE VoIP BROADBAND T-1 MOBILE SECURE PC BACKUP FOR SMALL BUSINESS

When you have a business that's doing more than ever, you need to protect your client data from the cloud. It's not a matter of if, but when. At CBeyond, you can easily and automatically back up your data to a secure cloud storage location in the event of loss. In case you're not a legal professional, you can also benefit from CBeyond's Cisco-powered network and help protect your business communications from the cloud. It's one provider and one bill.

CBeyond
cbeyond.net/legal
1.800.923.3100

MCisco
powered by

their old masters or their liberators.¹⁹ Paschal then introduced the question before the court:

But *when* had they obtained their freedom? *What* was the effect of that freedom upon thousands of existing contracts for their sale and hiring? Here were grave questions for lawyers. And no sooner were the courts organized than the records were filled with their questions. ...

The questions were presented in different cases, but some of them without argument. The immediate points in this case were, did the manumission of the slaves terminate the contract for hiring? If so, from what date?²⁰

The Arguments

The Emancipation cases involved two transactions. In the first, "the vendor, in January, 1865, sold and delivered

a slave to the vendee, who in consideration thereof executed a promissory note for the payment."²¹ In the second, "a slave at the same time was hired for a year, and promissory note given in consideration of the hire."²² Despite his passionate anti-secession views, Paschal argued that these contracts were not void for having been made after President Lincoln's issuance of the Emancipation Proclamation. "We believe ... that the president's proclamations were war measures; that they were not intended to operate as law; but were in fact designed to invite the slaves to join in the war for their freedom."²³ Paschal espoused the view that slave contracts were enforceable until ratification of the 13th Amendment: "[T]he position that slavery continued in Texas until the adoption of the XIIIth constitutional amendment is impregnable."²⁴ Slavery, Paschal argued, was recognized and

implicitly approved in the Constitution, and the power to change the Constitution belonged to Congress alone: "[I]t is not to be presumed that [President Lincoln] intended to transcend this authority" when he issued the Emancipation Proclamation.²⁵

The Possible Dates

In addition to Jan. 1, 1863, when President Lincoln delivered the Emancipation Proclamation, and Dec. 18, 1865, when the 13th Amendment was ratified, the court had another possible choice for the date when slave contracts became unenforceable in Texas — June 19, 1865. On that date, in Galveston, Union General Gordon Granger — who had seized control of Texas following the end of hostilities — recited the Emancipation Proclamation to a public gathering and issued his General Order No. 3, declaring:

The people of Texas are informed that, in accordance with a proclamation from the Executive of the United States, all slaves are free. This involves an absolute equality of personal rights and rights of property, between former masters and slaves and the connection heretofore existing between them, becomes that between employer and hired labor.²⁶

Afterward, "[t]he tidings of freedom reached slaves gradually as individual plantation owners read the proclamation to their bondsmen over the months following the end of the war. The news elicited an array of personal celebrations."²⁷ These celebrations continue to this day each June 19th or "Juneteenth," as foretold by Justice Lindsay, who predicted that General Granger's arrival "will ever be hallowed in the memories of that enfranchised race within the borders of the state as the true era of their liberty, and, in obeying their own natural impulses, they will ever cherish it as the anniversary of the birth of their freedom."²⁸

The Opinions

Notwithstanding his northern upbringing, Chief Justice Morrill seems to

The Right Malpractice Coverage for Even the *Newest* Texas Attorneys.



At TLIE, we offer the *right* malpractice coverage for even the newest Texas Attorneys. Protection based on *your* exposure, *your* claims experience, *your* area of legal specialization, and the limits that *you* need.

Coverage with the flexibility to protect *you* now and as *your* practice grows, with limits available to insure even the largest firms, at a cost commensurate with *your* risk.

If you would like to know more about the benefits of joining TLIE, please contact Sam Risinger or Jean Sholes at one of the numbers below.



P.O. Box 13325, Austin TX 78711
Phone: 512 480 9074
Toll-free: 1 800 252 9332
FAX: 512 482-8738
e-mail: info@tlie.org

have taken the position that slavery was not officially abolished, so as to invalidate slave contracts, until the latest possible date — ratification of the 13th Amendment.²⁹ Advocating a narrow view of executive power, Morrill explained that President Lincoln's war powers did not give him the authority to change the Constitution, which permitted slavery, because the power to do so was vested solely in the Congress:

If, as contended, the proclamation of the president, *ipso facto*, made all slaves free, it would be in utter disregard of the acts of congress, thus pointing out the manner and conditions of their freedom, and virtually nullify them. And if the judiciary prove subservient to the executive, our boasted republican government is really, *quoad hoc*, an absolute monarchy in times of war. ...

It is to be remarked that the president did not base [the Emancipation Proclamation] upon the constitution or laws of the United States, but solely on his power as commander-in-chief of the army and navy. ...

Congress took a different course, and acted agreeably to their often-repeated declaration, that universal emancipation could not legally take place except by an amendment to all the state constitutions or of the national constitution, which the people, through the states, adopted. Until slavery was abolished no feature of it was destroyed. Owners of slaves had all the rights of property therein, and the one not the least in importance is its vendible quality.³⁰

Justice Latimer's concurring opinion is not reported because, as Paschal explained: "The clerk informs the reporter that Latimer's opinion had unfortunately been lost."³¹ Justice Lindsay agreed with Chief Justice Morrill's conclusion that the contracts in question were enforceable, but only because they were made when traffic in slaves was still lawful under Texas law. Unlike Morrill, Lindsay believed that President Lincoln did have the power, as commander in

chief, to abolish slavery: "I question not the right, nor the justice, nor the wisdom of congress in authorizing, and of the president in proclaiming, the freedom of the slaves in the insurrectionary states, as a war measure."³² But, Lindsay explained, "[S]omething else was needed for its consummation; that something, the further exertion of the national power, was supplied, and the deed was done upon the submission or surrender of the organized forces of the state to the national authority and the enunciation of the fact by its duly-accredited agents."³³ Thus, Lindsay concluded that slave contracts in Texas remained enforceable until issuance of General Granger's General Order No. 3:

My opinion then is, that slavery was not abolished on the 1st day of January, 1863, the date of the final proclamation of the president of the United States, nor yet did it exist in

Texas at the date of the adoption of the XIIIth article of the constitution of the United States; but upon the success of the national forces, in subduing the opposition of those here engaged in the rebellion and its announcement to this people and the world that the purposes of the struggle, according to the war policy which had been proclaimed, was fully achieved, the legal manacles which held that race in bondage in this state were then dissolved, and they stood for the first time disenthralled and completely purged and purified of the factitious character of chattels which force, fraud and violence had entailed upon them.³⁴

Dissenting from his former partner Morrill, Justice Hamilton disagreed with the manner in which the issue had been framed, preferring to put it this way: "Was a sale of negroes in Texas after the

Scott Leather

Handmade Leather Business Cases & Accessories for the Professional who cares about Quality & Durability.

Gift Certificates Available

Give A Christmas Gift that will last a Lifetime!

- Grade A Saddle Leather**
- Lifetime Guarantee**
- Personalized at no charge**

Round Top Case

Square Top Case, also available with a Wheel System

Jumbo Case

Portfolio

Visit... www.scottleather.com **1-800-432-3741**

...for a complete line of products!

1st of January, 1863, opposed to the solemnly-declared will and policy of the United States government, and had the United States the right, under existing circumstances, to declare such policy?"³⁵ Having thus framed the issue, Hamilton concluded that the contracts were unenforceable because they were "entered into against the public policy, rightfully proclaimed in time of war, for the salvation of the government, and should receive no countenance in any court of this country."³⁶ Justice Hamilton's view was that as commander-in-chief of the armed forces during a time of war, President Lincoln had the power to legally abolish slavery:

He was the executive head of the United States, commander-in-chief of the army and navy, sworn to execute the laws, to suppress rebellion and repel evasion; he found himself confronted by a rebellion embracing eleven states in open resistance to the national authority. These states had organized a hostile government, which had initiated and was prosecuting against the United States a gigantic war for its final overthrow; a rebellion and war initiated and carried on in the interests of slavery; a contest in fact between freedom and slavery, and which demanded every energy and resource which the executive possessed or could command to sustain even the existence of the government; and, after long deliberation with his cabinet and the representatives and senators of the loyal states, determined, as a necessary and proper measure of war, to make war upon the institution for the interests of which the national life was assailed. ...

A president, acting under the obligations of his oath of office, in the midst of a war which threatened the existence of the government, and in reference to the very cause of the war, declaring it to be a fit and necessary war measure, that the slaves in the revolting states "are and henceforward shall be free," and then solemn-

ly invoking the considerate judgment of mankind and the gracious favor of Almighty God, was, in my judgment, the most imposing, responsible, and noble act ever performed by a president of the United States, and will ever be so regarded in the history of our country. It received the approbation of the christian world and the favor of the god of battles.³⁷

Despite his southern heritage, Hamilton had little sympathy for those engaged in the slave trade, and to his mind, anyone who traded in slaves after the Emancipation Proclamation was not entitled to the assistance of the courts to recover a debt owed as a result of such disgraceful commerce:

Does the party who sues to recover the purchase-money for persons sold in this state as slaves at that date occupy a better position? I think not. He knew when the sale was made that the United States government, his rightful sovereign, had declared them free; but he put himself upon the chances of the success of the revolution and overthrow of the authority of the United States. There let him rest. He and all others similarly situated ought not to ask the courts of the country to aid them in the consummation of an outrage upon humanity, and a flagrant insult to a much injured and forbearing government. ...

The question here is not as to the moment of time when the former slaves in Texas actually obtained their freedom by the events of the war; but it is whether now the courts will aid in carrying out and enforcing contracts against the public policy of the government, pronounced in the most solemn form as both sovereign and belligerent in a great civil war.³⁸

Justice Caldwell — whose change of heart about the treatment of African Americans after the Civil War had nearly gotten him killed — joined in Justice Hamilton's dissent: "I concur fully in the conclusion, as well as the reasonings by which it is arrived at, and desire the

opinion to be regarded as my dissent from that delivered by the chief justice."³⁹

Conclusion

It is hard to conceive of a time when Americans owned other Americans and, as Chief Justice Morrill put it, "had all the rights of property therein, and the one not the least in importance is its vendible quality."⁴⁰ Yet today, the direct descendants of men and women held in bondage now sit as judges on courts once called upon to decide the enforceability of contracts for the sale of human beings. That, perhaps, is the most poignant answer to Justice Hamilton's question about the Emancipation Proclamation: "And what is the purport of this great instrument, which will through time, no matter what may be said to the contrary, be regarded as the fiat of freedom to four millions of slaves and to their descendants forever?"⁴¹

Notes

1. *But see* A.E. Keir Nash, *The Texas Supreme Court and Trial Rights of Blacks 1845-1860*, 58 *J. Am. Hist.* 622 (1971) (arguing that the Texas Supreme Court had a remarkable antebellum record of fair treatment of blacks) (citing *Calvin v. State*, 25 Tex. 789, 796 (1860) ("The law of the case ... is precisely the same as if the accused were a free white man, and we cannot strain the law even 'in the estimation of a hair,' because the defendant is a slave. ...")); *see also* *Westbrook v. Mitchell*, 24 Tex. 560 (1859) (holding that a former slave could not lawfully sell himself back into slavery; "[t]he recognition of such a right might lead to its exercise for bad purposes.").
2. *Hall v. Keese*, 31 Tex. 504, 548 (Tex. 1868) (Hamilton, J., dissenting).
3. *Id.* at 509.
4. *Id.* at 514.
5. *Id.* 529 (Lindsay, J., concurring). For a comprehensive look at this issue, see Andrew Kull, *The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves*, 70 *CHL-Kent L. Rev.* 493 (1994).
6. Handbook of Texas Online; <http://www.tsha.utexas.edu/handbook/online/articles/MM/fmo54.html>
7. George E. Shelley, "Semicolon Court of Texas," 48 *Southwestern Historical Quarterly Online* No. 4; http://www.tsha.utexas.edu/publications/journals/hq/online/v048/n4/contrib_DIVL7644.html

8. Handbook of Texas Online; <http://www.tsha.utexas.edu/handbook/online/articles/MM/fmo54.html>
9. Handbook of Texas Online; <http://www.tsha.utexas.edu/handbook/online/articles/LL/fli6.html>
10. George E. Shelley, "Semicolon Court of Texas," 48 Southwestern Historical Quarterly Online No. 4; http://www.tsha.utexas.edu/publications/journals/sq/online/v048/n4/contrib_DIVL7644.html
11. The Political Graveyard; <http://politicalgraveyard.com/bio/latimer.html>
12. The Handbook of Texas Online; <http://www.tsha.utexas.edu/handbook/online/articles/CC/fca10.html>
13. Joseph A. Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 Tex. Wesleyan L. Rev. 1, 6, n. 26 (2002) [hereinafter "Ranney"].
14. Handbook of Texas online; <http://www.tsha.utexas.edu/handbook/online/articles/PP/fpa46.html>.
15. *Id.*
16. George E. Shelley, "Semicolon Court of Texas," 48 Southwestern Historical Quarterly Online No. 4; http://www.tsha.utexas.edu/publications/journals/sq/online/v048/n4/contrib_DIVL7644.html. See also Richard L. Aynes, The Bill of Rights, the Fourteenth Amendment, and the Seven Deadly Sins of Legal Scholarship, 8 Wm. & Mary Bill Rights J. 407, 409-10, n. 13 (2000) ("George Washington Paschal was a Supreme Court Justice in Arkansas, a unionist leader in Texas during the Civil War, a reporter for the Texas Supreme Court, counsel for Texas in *White v. Texas*, a leading treatise writer in the 1860s and 1870s, and one of the early faculty members of the Georgetown Law School.").
17. James W. Paulsen, *If At First You Don't Succeed: Ten Reasons Why The "Republic of Texas" Movement is Wrong*, 38 S. Tex. L. Rev. 801, 808 (1997); see also James P. Hart, *George W. Paschal*, 28 Tex. L. Rev. 23 (1949).
18. *Hall v. Keese*, 31 Tex. 504, 534-35 (Tex. 1868).
19. *Id.* at 509, 511.
20. *Id.* at 512.
21. *Id.* at 505.
22. *Id.*
23. *Id.* at 516.
24. *Id.*
25. *Id.* at 517.
26. http://www.juneteenth.com/general_order_no_3.htm
27. The Handbook of Texas Online; <http://www.tsha.utexas.edu/handbook/online/articles/JJ/lkj1.html>
28. *Hall v. Keese*, 31 Tex. 504, 531-32 (Tex. 1868) (Lindsay, J., concurring).
29. Later, Chief Justice Morrill would write: "At the Austin branch of this court, at the last session, this court, with a full bench, after as full


and mature deliberation as practicable, decided that the slaves in this state were practically free from and after the 19th of June, 1865, the time of the proclamation or order of General Granger, on his arrival in this state." *Algier v. Black*, 32 Tex. 168 (Tex. 1869). The Supreme Court was still grappling with the issue as late as 1873. See *Morris v. Ranney*, 37 Tex. 124 (Tex. 1872); *Dowell v. Russell*, 39 Tex. 400 (Tex. 1873); see also Ranney, *supra* n. 13, at 23, n. 132 ("In *Morris v. Ranney*, 37 Tex. 124 (1872-1873), the Semicolon Court stated that Hamilton's position was better reasoned than the majority's position in *Hall* and suggested that if the issue were being presented for the first time, it would have ruled in accord with Hamilton.").

30. *Hall v. Keese*, 31 Tex. 504, 523-26 (Tex. 1868).
31. *Id.* at 506.
32. *Id.* at 530.
33. *Id.* at 531.
34. *Id.* at 533. Justice Lindsay's view ultimately prevailed in subsequent decisions of the Texas Supreme Court. See *McDaniel v. White*, 32 Tex. 488 (Tex. 1870); *Garrett v. Brooks*, 41 Tex. 479 (Tex. 1874).

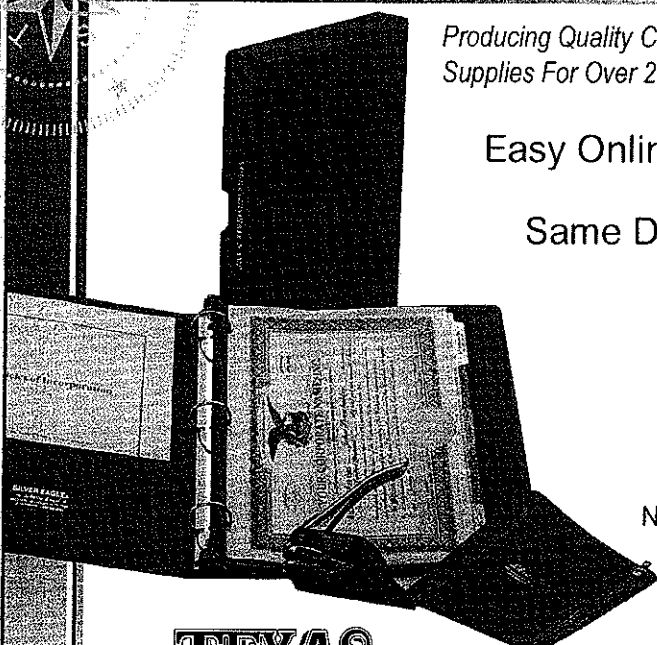
35. *Hall v. Keese*, 31 Tex. 504, 536 (Tex. 1868).
36. *Id.* at 556.
37. *Id.* at 547, 549.
38. *Id.* at 553.
39. *Id.* at 556.
40. *Id.* at 526. For more on this topic, see William E. Wiedhoff, *A Peculiar Humanism: The Judicial Advocacy of Slavery in High Courts of the Old South, 1820-1850* (Univ. of Georgia Press 1996); Thomas D. Morris, *Southern Slavery & The Law 1619-1860* (Univ. of N. Carolina Press 1996).
41. *Id.* at 548.

ROBERT B. GILBREATH

is an appellate lawyer with Hawkins, Parnell & Thackston, L.L.P. in Dallas. He is certified in civil appellate law by the Texas Board of Legal Specialization, and has argued cases before the U.S. Court of Appeals for the Fifth Circuit, the Texas Supreme Court, and 10 of the 14 intermediate Texas appellate courts. After graduating law school, Gilbreath clerked for Texas Supreme Court Justice Raul Gonzalez.



TCS-LibertyLegal.com



Producing Quality Corporate Kits & Supplies For Over 25 Years


Easy Online Ordering

Same Day Service*

Accurate

Reliable

We also offer:
Will Supplies
Notary Supplies
Tabbies
Stamps



Liberty Legal

Contact Our friendly sales staff at:
Ph 713-946-0141 or 800-392-3720
Fx 713-946-2789 or 800-441-7134
Email: sales@tcs-libertylegal.com

*orders received by 1pm cst
PO Box 12695, Houston, TX 77217 or 602 State Street, So Houston, TX 77587