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Arbitration Comes to Texas

By Tasha Lea Willis

Arbitration has been a part of the Texas justice system for the past two centuries—from Spanish jurisprudence brought by the Conquistadors.

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A Conquistador

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Interestingly, the first person to compile and distribute the decisions of the Supreme Court of Texas was never officially sanctioned as the Court's reporter. [Read more...](#)



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The Supreme Court of Texas convened in special session to receive the first book published on the history of the Court in almost a century.

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The release of the new history book on the Texas Supreme Court pointed out a glaring omission in our efforts to preserve the Court's history.

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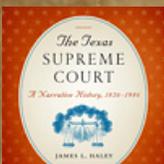


David J. Beck

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The Society reaches a new milestone with the release of its definitive history of the Texas Supreme Court.

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The first woman to serve on the U.S. Supreme Court will be the keynote speaker at the dinner next June.

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Justice O'Connor

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Guests packed the Capitol extension auditorium to see Gov. Perry swear in two new justices along with two reelected ones.

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Gov. Perry

Meet Justice Jeff Boyd

By David A. Furlow

Few people know the reasons the Court's most recently appointed Justice decided to pursue a life in public service.

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Justice Boyd

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By Amy Saberian

The former Justice has a long history of exemplary leadership and laudatory public service.

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Justice Wainwright

Abel Acosta Appointed Clerk of Texas Court of Criminal Appeals

Acosta is the eighth Clerk of the Court of Criminal Appeals since 1918, when the legislature gave each court its own clerk.

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Abel Acosta

Carol Vance Speaks at March Board Meeting

The former Harris County District Attorney and author of *Boomtown DA* was the luncheon speaker at the meeting.

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Carol Vance

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Ray Hemphill, a descendant of Judge Hemphill, reprinted the book. [Read more...](#)

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Haley and Phillips

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Arbitration Comes to Texas—and Flourishes

By Tasha Lea Willis

Arbitration has been a part of the Texas justice system for the past two centuries—from Spanish jurisprudence brought by the Conquistadors to recent law issued by both the Texas Supreme Court and the Texas Legislature.

Arbitration came to Texas with the Conquistadors. Joe McKnight and other scholars of Texas law assert that arbitration in Texas reflects the influence of Spanish jurisprudence.¹ The concept of arbitration under Spanish law was deeply rooted in Roman tradition.² Expressions of this Spanish-Roman influence can be found early in Texas history in Article 178 of the 1827 Constitution of Coahuila and Texas, which provided that “[e]very inhabitant of the state shall be perfectly free to terminate his controversies, whatever be the state of the trial, by means of arbitrators [jueces árbitros], or in any other extrajudicial manner...”³ This Mexican state statute governed Texas arbitrations until the Lone Star Republic’s Ninth Congress enacted a law authorizing and regulating arbitration on February 1, 1845.⁴

The Lone Star Republic, and then the Lone Star State, embraced arbitration as a means of dispute resolution. While the 1836 Constitution of the Republic of Texas made no reference to arbitration, it decreed that all laws of the Spanish-Mexican period that did not contradict the constitution would remain in force.⁵ This continued until the Act of January 20, 1840 effectively introduced the common law, which was interpreted to include and provide for arbitration.⁶ The Congress of the Republic passed three acts regulating arbitration between 1840 and 1845.⁷ Then, with the Texas Constitution of 1845, legislators revealed a renewed interest in arbitration. During the Constitutional Convention of July 1845, the Committee on General Provisions recommended that disputes be decided through arbitration whenever possible.⁸ Additionally, the delegates drafted a constitutional provision stating that, “[i]t shall be the duty of the Legislature, to pass such laws as may be necessary and proper, to decide differences by arbitration, when the parties shall elect that method of trial.”⁹ The first legislature of the State of Texas accepted the constitutional mandate and enacted a law to authorize the settlement of disputes by conciliation or arbitration in 1846.¹⁰

As early as July 28, 1845, the Texas Legislature was charged to “pass such laws as may be necessary and proper to decide differences by arbitration.”¹¹ In 1846, Texas lawmakers introduced statutory language calling for

¹ See Joseph Webb McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24, 41 (1959).

² See McKnight, *supra* note 1 at 41.

³ LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 254, 337–38 (J.P. Kimball, trans., The Lawbook Exchange, Ltd. 2010) (1839) (quoting section 2 of Decree No. 277 of April 17, 1834, commonly known as “Chambers’ Jury Law”).

⁴ Act approved February 1, 1845, *reprinted in* 2 H.P.N. GAMMEL, LAWS OF TEXAS 1822-97, 1126 (Austin, Gammel Book Co. 1898).

⁵ Repub. Tex. Const. of 1836, Schedule, § 1, *reprinted in* 1 H.P.N. GAMMEL, LAWS OF TEXAS 1822-97, 1077 (Austin, Gammel Book Co. 1898).

⁶ Act approved Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-78 (Austin, Gammel Book Co. 1898).

⁷ See McKnight, *supra* note 1 at 42.

⁸ John Cornyn, *The Roots of the Texas Constitution: Settlement of Statehood*, 26 TEX. TECH L. REV. 1089 (1995).

⁹ TEX. CONST. of 1845, art. VII, § 15.

¹⁰ Act approved April 25, 1846, §§ 1-9, *reprinted in* 2 H.P.N. GAMMEL, LAWS OF TEXAS 1822-97, 1433-35 (Austin, Gammel Book Co. 1898).

arbitration as a means to resolve disputes efficiently. This legislation did not permit the mandate that agreements to arbitrate potential disputes would be specifically enforceable,¹² and the absence of enforceability allowed a party to legally withdraw from an arbitration agreement any time before the rendering of the award.¹³

Despite the then-flimsy nature of an arbitral endeavor, the Legislature intended to leave arbitration legislation open-ended in terms of enforceability for fear the common-law courts would have their jurisdiction side-stepped, while the parties with superior bargaining power could demand arbitration on favorable terms.¹⁴ Coincidentally, this open-ended provision left the statutory language as vague as the common law in terms of ability to seek enforcement.

As Texas headed toward the twentieth century, the remaining influence of Spanish law on colonial Texas was, in large part, attributable to the earliest judges on the Supreme Court.¹⁵ In 1846, when the Court truly began to function, this was quite apparent.¹⁶ The civil law traditions revered by Chief Justice Hemphill were of particular importance.¹⁷ Even with Chief Justice Hemphill's affinity for civil law and the Mexican law influence, however, he would not go so far as to make arbitration compulsory. In 1857, he declared part of the arbitration legislation unconstitutional by ruling that a litigant had no power to compel a dispute to arbitration.¹⁸

In addition to statutory authorization of arbitration, the common law in Texas authorized parties to resolve their disputes through arbitration.¹⁹ To arbitrate an existing dispute or potential dispute was legal unless the terms were deemed unfair; nevertheless, the arbitral award could not be specifically enforced and the recovery for breach was nominal.²⁰ More importantly, the common law, like the statutory language of the time, held that an arbitration clause was revocable at any time prior to the final award.²¹ The 1846 arbitration statute, having strong civil and common law roots, only departed from the common-law rule regarding the use of arbitration in the case of existing disputes.²² As with the statutory language of 1846, such an open-ended component failed to render Texas an ideal forum for arbitration, a situation that continued for more than a century.

The 1960s brought sweeping change to Texas arbitration law. Texas arbitration law began changing quickly in 1961 when the State Bar presented the Legislature with a draft arbitration act based on the Uniform Arbitration Act of 1955 (UAA),²³ which sought to provide uniformity of practice between Federal Arbitration Act (FAA) and state arbitral procedures.²⁴ Legislators analyzed and scrutinized the State Bar's draft

¹¹ J. Const. Convention (July 28, 1845), available at <http://tarlton.law.utexas.edu/constitutions/pdf/images/00000021.pdf> (last visited January 14, 2013).

¹² Act approved April 25, 1846, §§ 1-9, reprinted in 2 H.P.N. GAMMEL, LAWS OF TEXAS 1822-97, 1433-35 (Austin, Gammel Book Co. 1898).

¹³ Andre J. Brunel, *A Proposal to Adopt Uncitral's Model Law on Commercial International Arbitration as Federal Law*, 25 TEX. INT'L L.J. 43 (Winter 1990).

¹⁴ Robert Coulson, *Texas Arbitration-Modern Machinery Standing Idle*, 25 Sw.L.J. 290, 290 (1971).

¹⁵ See McKnight, *supra* note 1 at 25.

¹⁶ See *id.* at 26.

¹⁷ See *id.*

¹⁸ See *Hern v. Camp*, 18 Tex. 546, 550 (1857).

¹⁹ See TEX. REV. CIV. STAT. ANN. art. 238 (Vernon 1948); see also, J. Chrys Dougherty and Don Graf, *Should Texas Revise Its Arbitration Statutes?*, 41 TEX. L. REV. 229 (December 1962).

²⁰ See *Id.*

²¹ See Brunel, *supra* note 13 at 56.

²² See Paul Carrington, *Commercial Arbitration in Texas*, 4 TEX. L. REV. 450, 453 (1926) (tracing the Texas statute to the Napoleonic Code rather than to the English common law); see generally McKnight, *supra* note 1 at 41-45 (noting that the Spanish and Mexican law in force in Texas prior to 1836 provided for compulsory arbitration as a predicate to formal court action).

²³ See Dougherty and Graf, *supra* note 19, at 233.

²⁴ The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1964), has basically the same provisions as the Uniform Arbitration Act, and nine states in addition to Texas have enacted statutes which are substantially the same as the Uniform Act. ARIZ. REV. STAT. ANN. §§ 12-1501-16 (Supp. 1964); CAL. CIV. PROC. ANN. §§ 1280-93 (Deering Supp. 1964); FLA. STAT. §§ 57.01-31 (1963); ILL. COMP. STAT. ANN. ch. 10,

during the 1962 and 1963 legislative sessions,²⁵ and made significant changes to the text, including the 1965 amendment resulting in the addition of provisions for the enforcement of arbitration awards.²⁶

In 1965, the Legislature passed the Texas Arbitration Act (TAA), which was the first significant Texas legislation in the field of arbitration since the state's initial enactment in 1846.²⁷ The Texas statute, modeled after the UAA, made arbitration agreements enforceable and provided a mechanism for arbitration to become an effective supplement to the state's judicial process.²⁸ In particular stand-alone Texas fashion, the legislation contained a requirement unlike that of any other state in including a mandate that written agreements to arbitrate existing or future disputes would be valid only if "concluded upon the advice of counsel to both parties as evidenced by counsels' signatures"²⁹

The TAA remained in its original form until substantial additions and amendments were made in 1997. All of those revisions may now be found in Texas Civil Practice and Remedies Code, sections 171.001–171.098. Today the Texas General Arbitration Act (TGAA) tracks the relevant substantive parts of the FAA and similar state acts.³⁰

The TGAA excludes from its coverage several types of claims, including collective bargaining agreements and claims for workers' compensation benefits.³¹ However, the FAA does not contain such exceptions, and whenever the FAA applies, the Supremacy Clause ensures that it will trump the TGAA.³² Like the FAA, the TGAA requires a court to order parties to arbitrate their dispute upon a showing that an agreement to arbitrate the claims exists and is enforceable.³³ As with the FAA, a trial court has no discretion to refuse to order arbitration.³⁴ Also like the FAA, the proper procedure after entry of an order referring a dispute to arbitration is to stay the case.³⁵

The Legislature internationalized Texas arbitration law in 1989. Even before the TAA was enacted in 1965, it was becoming clear that the need for uniformity in arbitration laws would extend itself to issues of international trade to avoid litigating in foreign courts. In the early 1960s, Petroleos Mexicanos—the Mexican federal government's oil monopoly, also known as Pemex—announced that it was willing to utilize arbitration as a means for dispute resolution when contracting with businesses from the United States.³⁶ Twenty-six years before the TAA would contain an international component, a 1962 article entitled "Should Texas Revise Its Arbitration

§§ 101–23 (Smith-Hurd Supp. 1964); 1965 Md. Laws, ch. 231, at 243; MASS. ANN. LAWS ch. 251, §§ 1–19 (Supp. 1964); MINN. STAT. ANN. §§ 572.08–.30 (Supp. 1964); N.Y. C.P.L.R. art. 75, §§ 7501–14; WYO. STAT. ANN. §§ 1-1048.1–.21 (Supp. 1965).

²⁵ See generally *id.*

²⁶ See *Carpenter v. N. River Ins. Co.*, 436 S.W.2d 549, 551 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (citing TEX. CONST. of 1845, art. VII, § 15).

²⁷ See Act approved April 25, 1846, §§ 1-9, reprinted in 2 H.P.N. GAMMEL, LAWS OF TEXAS 1822-97, 1433-35 (Austin, Gammel Book Co. 1898).

²⁸ See Dougherty and Graf, *supra* note 19 at 233.

²⁹ See Paul Carrington, *The 1965 General Arbitration Statute of Texas*, 20 Sw. L.J. 21, 33 (1966); see also TEX. REV. CIV. STAT. ANN. art. 224 (Vernon 1973) (amended 1979).

³⁰ See TEX. CIV. PRAC. & REM. CODE § 171.001 (noting that a "written agreement to arbitrate is valid and enforceable" and may be avoided "only on a ground that exists at law or in equity for the revocation of a contract").

³¹ See TEX. CIV. PRAC. & REM. CODE § 171.002(a).

³² Compare *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984), and *Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215, 219 (5th Cir. 1997), with *In re Nexion Health*, 173 S.W.3d 67 (Tex. 2005).

³³ See TEX. CIV. PRAC. & REM. CODE § 171.021.

³⁴ See, e.g., *In re MHI P'ship, Ltd.*, 7 S.W.3d 918, 923 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (holding trial court had no authority to defer ruling on motion to compel arbitration pending completion of discovery).

³⁵ TEX. CIV. PRAC. & REM. CODE § 171.025.

³⁶ See generally Dougherty and Graf, *supra* note 19 at 233.

Statutes?” acknowledged that Texas counsel would have a stronger bargaining position in international trade if they could alleviate foreign fears of being subjected to long, drawn-out litigation in the United States.³⁷

In 1989, the Texas Legislature included an international component to the TGAA modeled after then-recent California legislation.³⁸ In doing so, Texas sought to attract more arbitration business by demonstrating an openness to the type of arbitration mentioned in “Should Texas Revise Its Arbitration Statutes?”³⁹ The Legislature sought to accomplish two goals: (1) attract more arbitration business; and (2) encourage other countries to select Texas as a favorable forum in which to do business.⁴⁰ It can be argued that instituting a definitive international component to the TGAA significantly strengthened the effectiveness of the act.

Recent Texas Supreme Court opinions address the appealability of arbitration awards.

In *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, the U.S. Supreme Court held that, under the FAA, the grounds for vacating an arbitration award are “exclusive” and cannot be supplemented by an arbitration agreement to allow for more plenary appellate review.⁴¹ In marked contrast, the Supreme Court of Texas took an independent path when it decided *Nafta Traders v. Quinn*.⁴² The Court sought to answer two questions when it granted review:

1. Did the TGAA, like the FAA, preclude an agreement for judicial review of an arbitration award for reversible error, and, if not,
2. Did the FAA preempt enforcement of such an agreement.⁴³

It answered both questions in the negative.⁴⁴ The Supreme Court of Texas now permits parties to agree, through contract, for courts to provide appellate review of arbitral decisions.⁴⁵ In *Nafta Traders*, the Court held that the TGAA permits parties to contract for expanded judicial review of arbitration awards. The Court declined to follow U.S. Supreme Court precedent because the FAA prohibits parties from contracting for expanded judicial review of those awards.⁴⁶ The parties in *Nafta Traders* attempted to contract around the statutory limitations in the FAA and the TAA that preclude vacating arbitration awards for errors of law or fact.⁴⁷ They agreed that “[t]he arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.”⁴⁸

After the district court confirmed an arbitration award in Quinn’s favor, the U.S. Supreme Court issued *Hall Street*, which held that the FAA’s grounds for vacating an arbitration award “are exclusive” and may not be “supplemented by contract.”⁴⁹ The Texas Supreme Court distinguished *Hall Street* on the basis that it was

³⁷ See *id.*

³⁸ See Texas General Arbitration Act, TEX. REV. CIV. STAT. ANN. art. 224–49 (Vernon Supp. 1989); see also CAL. CIV. PROC. CODE §§ 1297.11–.432 (West Supp. 1989).

³⁹ See generally Brunel, *supra* note 13; see also correspondence from Richard J. Graving and Ewell E. Murphy, Jr. to Frank W. Blue, Chairman of the International Law Section, Texas Bar Association (June 5, 1987) (discussing whether the International Law Section should form a committee to propose amendments to the Texas General Arbitration Act) (copy on file with the Texas International Law Journal).

⁴⁰ *Foreign Trade: Texas Needs International Arbitration Rules*, DALLAS MORNING NEWS, Mar.6, 1989, at 12A.

⁴¹ See *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

⁴² See generally *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

⁴³ See generally *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

applying not the FAA, but rather the TAA. After critiquing the *Hall Street* analysis, the Texas Supreme Court held that the TAA permits parties to agree to expanded judicial review of arbitration awards, and the FAA does not preempt state law permitting such expanded review.⁵⁰

It could be argued that the *Nafta Traders* case eroded what proponents of arbitration in Texas spent over a century attempting to remedy. Under *Nafta Traders*, Texas litigants no longer have to choose between an unreviewable arbitration that could produce an unfavorable award or lengthy court litigation.⁵¹ Instead, Texas law offered a combination of arbitration with extended judicial review.

Just a year before it issued *Nafta Traders*, the Texas Supreme Court in *East Texas Salt Water Disposal Co. Inc. v. Werline* considered whether a party could appeal a trial court decision that denied confirmation of an award in its favor.⁵² The Court overturned the judgment directing that a new arbitration be conducted and held that the winning party in an arbitration has appellate rights should a trial court vacate an award.⁵³ After *Werline* won the underlying arbitration, *East Texas Salt* petitioned the district court to vacate, modify, or correct the ruling, which *Werline* counterclaimed to confirm.⁵⁴ The trial court denied confirmation, vacated the award, made fact findings, and ordered a new arbitration.⁵⁵ As expected, *Werline* appealed, and *East Texas Salt* argued that the appellate court lacked jurisdiction because the trial court had vacated the judgment and ordered a rehearing.⁵⁶

In *Werline*, at issue was the enforceability of section 171.098(a)(3) of the TGAA, which provides for the confirmation of an award.⁵⁷ The appellate court reversed and rendered judgment upholding the ruling.⁵⁸ The Texas Supreme Court affirmed, holding that the trial court's judgment was appealable because it fell within section 171.098(a)(3).⁵⁹ The Supreme Court recognized that the right to appeal assures that the factfinder does not exceed its authority in reviewing an arbitration award and further noted that the TGAA's purpose would be skirted if a trial court's order for rehearing could not be appealed immediately.⁶⁰ The *Werline* opinion protects parties' rights to contract when they have agreed to "final and binding" arbitration of their disputes. *Werline* demonstrates that Texas arbitration law is still evolving.

Arbitration will continue to be a valuable tool in the resolution of disputes in Texas. But whether the process forged over the years since 1845 continues to thrive is an open question. Some predictions forecast that "[a]rbitration will be seen not as an end in itself, but as part of an overall process that affords all parties the benefits of fast, private and better-controlled resolution of disputes."⁶¹ This means two things for arbitration in Texas: first, that arbitration will not become an end in itself; and second, that the parties and courts will gain better control of disputes. As for arbitration no longer being an end in itself, *Nafta Traders* has already paved the way for the appeal of arbitration awards in Texas. Furthermore, the alternative dispute resolution component of the new Texas Supreme Court rule regarding expedited trials described below limits the ability of trial courts to order mediation. Many would argue this provision was aimed at beginning to gain stricter control of the use of dispute resolution in Texas.

⁵⁰ *See id.*

⁵¹ *See generally Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

⁵² *See E. Tex. Salt Water Disposal Co., Inc. v. Werline*, 307 S.W.3d 267 (Tex. 2010).

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See E. Tex. Salt Water Disposal Co., Inc. v. Werline*, 307 S.W.3d 267 (Tex. 2010).

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ DYKEMA GOSSETT PLLC, ARBITRATION EXPERT PREDICTS 21ST CENTURY TRENDS (March 26, 2008), available at <http://corporate.findlaw.com/litigation-disputes/arbitration-expert-predicts-21st-century-trends.html> (last visited January 14, 2013).

The effect of House Bill 274's call for prompt, efficient, and cost-effective resolution of civil actions on alternative dispute resolution. The face of arbitration in Texas is changing. In 2011, the Texas Legislature passed House Bill 274, which mandates the promulgation of rules to promote the prompt, efficient, and cost-effective resolution of civil actions in which the amount in controversy does not exceed \$100,000.00.⁶² In 2012, the Texas Supreme Court adopted the rules required by House Bill 274.⁶³ Under these rules, Texas county, district, and probate courts will no longer be allowed to order to mediation (and most other alternative dispute resolution processes) in cases with an amount in controversy that does not exceed \$100,000.00.⁶⁴ If the amount in controversy is \$100,000.00 or less, that law now bars judges from doing the very thing section 154.002 of the Texas Civil Practice and Remedies Code has encouraged since enactment of the alternative dispute resolution statute in 1987: promotion by court order of mediation and other dispute resolution procedures.⁶⁵

Dispute resolution going forward. What this provision will ultimately mean for mediation (and alternative dispute resolution in general) in Texas will take time to discern. There are still many unresolved questions. After years of utilizing mediation, will lawyers continue to recognize the value of the process and engage in the endeavor voluntarily, or will trial lawyers view this as an opportunity to push more cases through to trial? Will proponents of mediation dealing with small claims begin contracting for arbitration as an alternative means of the dispute resolution? And if so, will the changes in Texas arbitration law provide the dispute resolution mechanism they seek to utilize?

The answers to these questions will likely depend on who is being asked. Many advocates of the increased use of litigation view alternative dispute resolution procedures as unnecessary and costly barriers to getting a case to trial. Even when alternative dispute resolution effectively resolves parties' claims, it is often still viewed as an obstacle to the litigation process. Conversely, many proponents of alternative dispute resolution will see this new legislation as eroding a statutory construct that has provided quick, cost-effective, and private means of resolving disputes in Texas for over twenty years.⁶⁶

In a 2004 symposium on problem-solving for the *Texas Wesleyan Law Review*, Judge Frank G. Evans counseled his audience that, “[w]e in the legal community, like our friends in the automotive field, must be prepared to refine and adjust our focus to meet new challenges.”⁶⁷ Judge Evans went on to say, “To do this, we will have to use our collaborative efforts to develop new and innovative conflict resolution methods and to build more efficient, effective, and affordable dispute resolution systems.”⁶⁸ Just as arbitration law in Texas has evolved over the last two centuries, it must further develop to meet the changing needs of clients, counsel, and the justice system as technological growth and globalization of industry continue to change the way the entire world functions. According to Judge Evans, “We will need to carefully monitor these systems to be sure they are consistent with our traditional notions of equity and fairness.”⁶⁹ He explained that, “while it is good to see the business community expanding its use of ADR processes, it is somewhat alarming to note the proliferation of one-sided arbitration clauses in consumer and employment contracts. So, even while we are looking at new horizons

⁶² See Act of May 25, 2011, 82nd Leg., R.S., ch. 203, § 2.01, 2011 Tex. Gen. Laws 757, 757-58.

⁶³ Order of Nov. 13, 2012, Misc. Docket No. 12-9191, available at <http://www.supreme.courts.state.tx.us/MiscDocket/12/12919100.pdf> (last visited January 14, 2013).

⁶⁴ See *id.*

⁶⁵ See TEX. CIV. PRAC. & REM. CODE § 154.002 (Vernon 1987).

⁶⁶ See *id.*

⁶⁷ Frank G. Evans, *Introduction to Symposium, Problem Solving Progress: Peacemakers and the Laws*, 11 TEX. WESLEYAN L. REV. 1 (2004) (providing a history of Texas alternative dispute resolution).

⁶⁸ *Id.*

⁶⁹ *Id.* (citing Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice got to do with it?* 79 WASH. U. L.Q. 787, 858-61 (2001)).

in ADR, we must take care not to undo the accomplishments that have been made in the justice system over the years.”⁷⁰

Despite the passing of nearly two centuries of growth and expansion of the arbitration process in Texas, the primary focus of arbitration remains the same as it was when the Lone Star Republic became the Lone Star State in 1845. Texans must make efficient use of the arbitration process without undermining the traditional justice system.



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⁷⁰ *Id.*

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Dallam's Digest and the Unofficial First Reporter of the Supreme Court of Texas

By Dylan O. Drummond

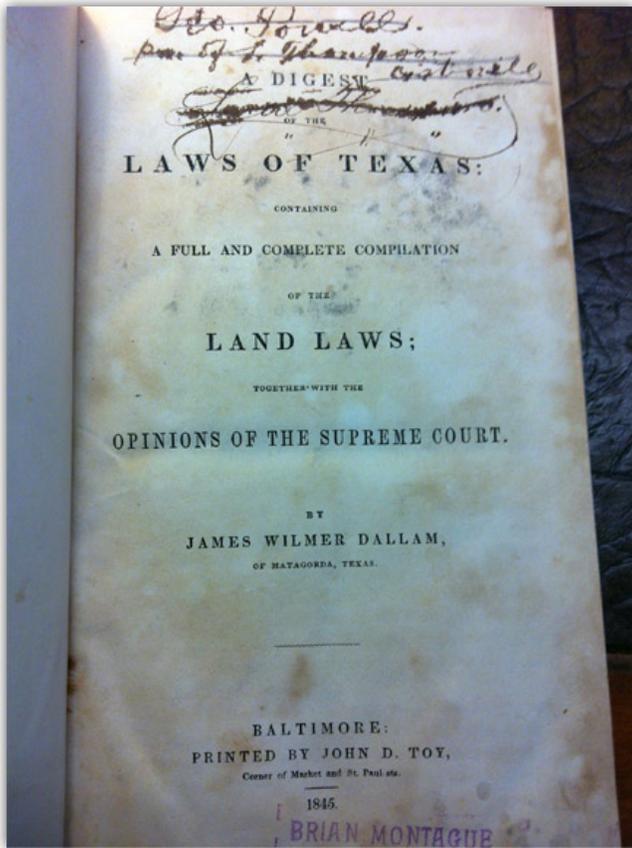
The Texas Supreme Court has benefited from a long lineage of distinguished court reporters whose line lasted for over a century from 1840 to 1962.¹ But the first person to compile and distribute the decisions of the Supreme Court of Texas was never officially sanctioned by the Republic as the Court's reporter.² Yet, while James Dallam was never formally appointed to the task, his groundbreaking efforts in publishing a digest of the first four years of decisions issued by the Court remains one of the most significant contributions of any official reporter in Texas jurisprudential history.³ This article is the first in a series examining some of the most influential and more colorful Texans to hold the office of Court reporter.

Formation of the Supreme Court of the Republic of Texas

Several months after the adoption of the Republic's Constitution on March 17, 1836—Article IV of which provided for the establishment of “one Supreme Court”⁴—the first Congress of the Republic passed legislation that implemented Article IV's mandate and formally established the Court on December 15, 1836.⁵ The following day, Congress elected the Court's first Chief Justice⁶ and four⁷ Associate Judges.⁸ Because section 7 of Article IV made every district judge in the Republic an *ex officio* member of the Republic Supreme Court, that Court has been described as a “temporary committee composed of the district judges, presided over by a permanent chief justice.”⁹ Given the difficulties of travel at the time, this structure led to inherent quorum and majority issues.¹⁰

However, it was not until some three years later in January 1840 before the Court actually held its first session.¹¹ The reasons for this delay include the failure of the Court to achieve a quorum in 1837, the suicide of its Chief Justice in 1838, and the absence of its third Chief Justice from the bench due to military campaigns in 1838 and 1839 against the Cherokee, Kickapoo, and Caddo Indian tribes.¹² The January 1840 term convened in the home of Major Asa Brigham, who was then the Treasurer of the Republic and would later serve as Mayor of Austin, whose residence was located on what is now the southwest corner of Congress Avenue and Second Street.¹³ During the January 1840 session, the Court issued its first opinion, *Texas v. McCulloch*, which was penned by Chief Justice Thomas Jefferson Rusk and perhaps prophetically dismissed the first writ of error ever brought before the Court for lack of jurisdiction.¹⁴

During the Republic years, “there were practically no authorities accessible to the court.”¹⁵ Because Associate Judges would “ride [the] circuit” as district judges during part of the year,¹⁶ much of what reference materials a district judge possessed were limited by what he could fit in his saddlebags.¹⁷ Even the stationary Chief Justice was often forced to rely on his own personal library, which was rarely augmented because of frequent Indian raids of overland shipments.¹⁸ Indeed, for any Republic-Court jurist, gaining access to previous decisions of the Court (at least from a prior panel on which the authoring Judge did not sit)¹⁹ was problematic because no official reprinting of Court decisions was undertaken until 1848.²⁰



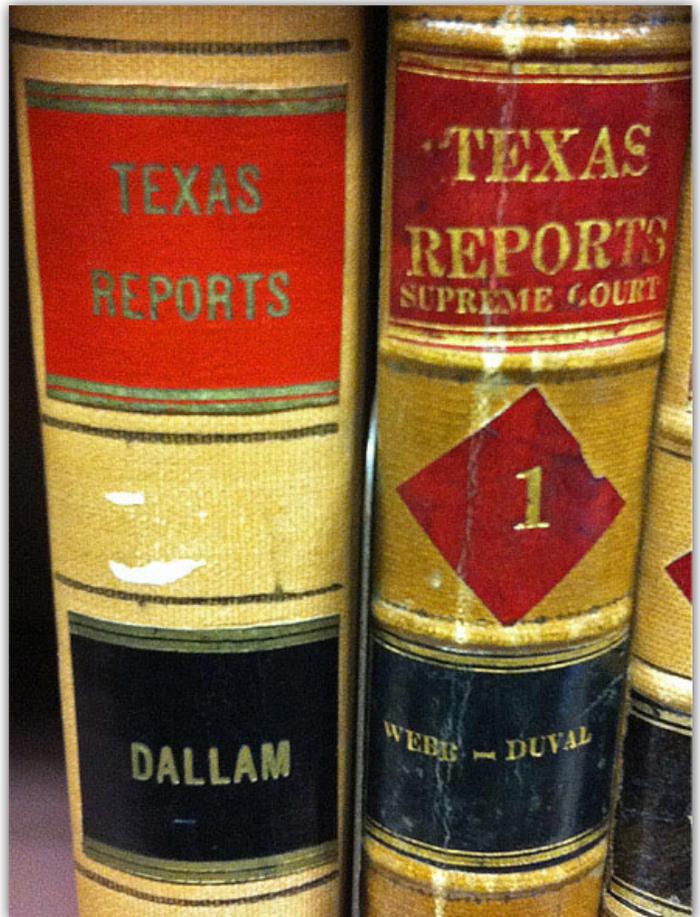
Dallam's Digest

The challenges that plagued and delayed the establishment of the Republic Court similarly affected the institution of the Court's first official reporter. While the fourth Republic Congress authorized the appointment of a reporter for the Court in January 1840,²¹ it did not allow for the first publication of Court decisions until there were enough opinions issued to fill 400 pages.²² Unfortunately, the Republic expired long before this minimum requirement was met.²³

In response to the Congress's January 1840 legislation authorizing the appointment of a Republic Court reporter, the Court appointed George W. Horton to the post.²⁴ Because of the Republic Congress's minimum-page requirement, however, Horton never oversaw the publication of a single Court decision.²⁵ Nevertheless, the Court issued some 140 decisions between 1840 and 1844.²⁶ Specifically, the January 1840 term—the Court's first—produced 18 opinions; 30 decisions were issued during the Court's term in January 1841; 19 during the January 1842 term; 38 during the June 1843 term; and 35 during the June

1844 term.²⁷ During this time, the bench, bar, and public could only read truncated synopses of Court decisions in select newspapers across the region.²⁸

So into this jurisprudential void stepped a young attorney from Matagorda named James Wilmer Dallam.²⁹ Dallam was from Baltimore, Maryland, graduated from Brown University in 1837, and read law in Baltimore under future United States Attorney General Reverdy Johnson until his admittance to the Maryland Bar sometime around 1839.³⁰ By 1840, Dallam had relocated to Matagorda, Texas, where he founded the law firm of Henshaw and Dallam on July 4th of that year.³¹ However, by November 1840, Dallam had already moved his practice to the new firm of Dallam and Kerr.³² Dallam was said to be witty, even being called the "life of the social circle in which he moved."³³ Perhaps as his changing firm affiliation attested,³⁴ Dallam had little legal business at hand, and so passed the winter of 1844 in the Republic capital of Washington-on-the Brazos, where he set about compiling a digest of the laws of the Republic³⁵—what was to become known as *Dallam's Digest*.³⁶ He was just 26.³⁷



His digest contained not only the Republic Constitution of 1836 and the Republic statutes, both of which were already in print and readily available, but the text of the Republic Court’s 140 opinions issued from 1840 to 1844, which were not.³⁸ Missing from its 632 pages were only one majority decision from the 1841 term, and two dissenting opinions from the 1844 term.³⁹ The result was a single volume, the end of which was appended with the text of Court decisions.⁴⁰ This is why the first reported decision ever issued by the Court appears at page 357 of the digest.⁴¹ In the preface to the digest, Dallam dryly remarked that the “pioneer in any enterprise toils wholly at a disadvantage,”⁴² and explained some of his motivation in drafting the tome: “Evils which have opposed me in professional labor, arising from the defective situation of the laws, I have sought to remedy, *first and most effectually*.” Dallam finished his digest in spring of 1845, and it was published at a cost of \$6 per copy by John D. Toy—a preeminent publisher in Dallam’s native Baltimore—and subsequently released to the public on September 1, 1845.⁴³

It was enthusiastically received by the Republic press. One month after the digest was published, the *Houston Telegraph & Texas Register* remarked that it “is the only one of the kind that has ever been published and is highly recommended by competent judges.”⁴⁴ In December 1845, the *LaGrange Intelligencer* opined that “[s]uch a work will prove of infinite value to the members of the bar, and should be placed in every law library of the Republic.”⁴⁵ It was also eagerly purchased by the Republic bar, and was soon regarded amongst Republic lawyers as virtually “indispensable in the practice of their profession.”⁴⁶ Perhaps the most impressive praise of *Dallam’s Digest* came from the Republic Court itself, which cited Dallam in December 1845, just three months after his digest was published.⁴⁷

Following publication of the digest, Dallam married the daughter of the Republic’s Secretary of the Navy, Ann Pleasants Fisher, in October 1845.⁴⁸ Soon thereafter, Dallam became the editor and publisher of a small newspaper in Matagorda, the *Colorado Herald*.⁴⁹ While attempting to extend his newspaper interests in New Orleans, Dallam contracted yellow fever and succumbed to the malady within just three days in August 1847⁵⁰—just two years after the publication of his digest. He was buried in a family plot in the Matagorda cemetery, and was survived by his wife and infant daughter, Annie Wilmer Dallam.⁵¹



Dallam’s Jurisprudential Impact

Even as many as 130 years ago, it was said that “Dallam must be attributed the merit of being the only lawyer in the Republic who conceived the idea of the enterprise” of compiling the digest.⁵² Ironic that his digest was never officially sanctioned despite its universal acclaim, yet Dallam’s work remains the only source cataloguing the first 140 opinions issued by the Texas Supreme Court. Beginning with its first citation by the Court in 1845, *Dallam’s Digest* has been continually cited by Texas courts nearly 600 times over a span of more than 165 years.⁵³ In this, it alone has served as the sole catalog of the state’s foundational jurisprudence upon which nearly 170 years of common law have been built.

Appendix⁵⁴

Name	Volumes	Court Terms Reported	Appointed
George W. Horton	na	na ⁵⁵	Yes
James Wilmer Dallam	“0”	January 1840 to June 1844	No
James Webb & Thomas H. Duval	1 – 3	December 1846 to December 1848	Yes
Oliver Cromwell Hartley	4 – 10	December 1849 to 1853	Yes
Oliver Cromwell Hartley & R.K. Hartley	11 – 21	1853 to 1858	Yes
George F. Moore & Richard S. Walker	22 – 24	1858 to 1860	Yes
Richard S. Walker	25	1860	Yes
George W. Paschal	25 Supp. ⁵⁶	1860	Yes
Charles L. Robards ⁵⁷ & A.M. Jackson ⁵⁸	26 – 27	1861 to 1865	Yes
George W. Paschal	28 – 31 ⁵⁹	1866 to 1869	Yes
E.M. Whitlock	32 – 37	1869 to December 1872	Yes
Alexander W. Terrell & Alexander S. Walker	38 – 51	December 1872 to 1879	Yes
Alexander W. Terrell	52 – 71	1879 to 1888	Yes
Alexander S. Walker	72 – 88	1888 to December 1895	Yes
A.E. Wilkinson	89 – 119	December 1895 to January 1931	Yes
A.E. Wilkinson ⁶⁰ & L.K. Smoot	120	January 1931 to June 1931	Yes
L.K. Smoot	121 – 161	June 1931 to March 1961	Yes
L.K. Smoot ⁶¹ & Ghent Sanderford	162	March 1961 to November 1961	Yes
Ghent Sanderford ⁶²	163	November 1961 to October 1962	Yes
James W. Paulsen	na	December 1845	Yes



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- ¹ See Appendix, *infra*; see also, e.g., Jonathan P. Graham & David A. Greenblatt, *Editors' Foreword*, 65 TEX. L. REV. (Dec. 1986) (noting James W. Paulsen was specially appointed by the Texas Supreme Court on April 28, 1985 to serve as the Court's reporter for the December-1985 term); James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 275 n.232 (Dec. 1986) (noting the appointment of George W. Horton in 1840) [hereinafter *Short History*]; James Hambleton & Jim Paulsen, *The "Official" Texas Court Reports: The Rest of the Story*, 49 TEX. B.J. 842, 842 (Sept. 1986) (noting L.K. Smoot, held the post from 1932 to 1961) [hereinafter *Rest of the Story*]; Jim Paulsen & James Hambleton, *Whatever Happened to 1845? The Missing Decisions of the Texas Supreme Court*, 48 TEX. B.J. 830, 830 (July 1985) (noting the first reporters of the Supreme Court of the State of Texas) [hereinafter *Whatever Happened*]; J.H. DAVENPORT, *THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS* 307–19 (1917) (listing the first ten official reporters of the Supreme Court of the State of Texas).
- ² JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986* 263 n.31 (Austin, Univ. Tex. Press 2013). Although *Dallam's Digest* is often found bound with a red and gold "Texas Reports" on its spine and occasionally listed as Volume "0," it is not part of the official *Texas Reports* series. *Whatever Happened*, 48 TEX. B.J. at 830.
- ³ HALEY at 52, 263 n.31; *Short History*, 65 TEX. L. REV. at 276.
- ⁴ TEX. CONST. art. IV, § 1 (1836); HALEY at App'x A.
- ⁵ Act approved Dec. 15, 1836, 1st Cong., R.S., § 1, *reprinted in* 1 H.P.N. GAMMEL, *LAWS OF TEXAS 1822–97*, 1139 (Austin, Gammel Book Co. 1898); HALEY at App'x A; MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS 15–16* (Lubbock, Tex. Tech Press, 2011); DAVENPORT at 7–8.
- ⁶ James W. Paulsen, *The Judges of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 305, 308 (Dec. 1986) (noting the Court's first Chief Justice, James T. Collinsworth, never wrote an opinion and never presided over a session of the Court) [hereinafter *Republic Judges*]; *Short History*, 65 TEX. L. REV. at 250; DAVENPORT at 9–10.
- ⁷ Article IV mandated that the Court would consist of a Chief Justice as well as Associate Judges composed of the Republic's district judges, and the first Republic Congress established four judicial districts covering the Republic's 22 counties on December 22, 1836. *Compare* TEX. CONST. art. IV, §§ 1, 7 (1836), *with* Act approved Dec. 22, 1836, 1st Cong., R.S., § 1, *reprinted in* 1 H.P.N. GAMMEL, *LAWS OF TEXAS 1822–97*, 1258 (Austin, Gammel Book Co. 1898); see also HALEY at 15–16, 19, APP'X A.
- ⁸ *JOURNALS OF THE SENATE OF THE REPUBLIC OF TEXAS: FIRST CONGRESS—FIRST SESSION 95-96* (Columbia, Texas 1836).
- ⁹ *Short History*, 65 TEX. L. REV. at 241; HALEY at 18; ARIENS at 16 (The 1836 Constitution "disqualified from any case heard by the supreme court the district judge who signed the judgment after the trial"); see also James W. Paulsen, *A Sesquicentennial Celebration: The Establishment of a Unique Texas Institution*, 53 TEX. B.J. 43, 43 (Jan. 1990) [hereinafter *Sesquicentennial Celebration*].
- ¹⁰ HALEY at 18; ARIENS at 16, 19 (a majority of the Associate Judges and the Chief Justice constituted a quorum); *Sesquicentennial Celebration*, 53 TEX. B.J. at 43.
- ¹¹ HALEY at 18, App'x A; ARIENS at 20; *Short History*, 65 TEX. L. REV. at 248–49; AUSTIN CITY GAZETTE, Jan. 15, 1840, at 2, col. 4 ("We congratulate the country on the commencement of a new era in the judicial annals of this Republic; we allude to the opening of the Supreme Court, and the commencement of its first session.").
- ¹² HALEY at 19-20, App'x A; ARIENS at 19–20; *Sesquicentennial Celebration*, 53 TEX. B.J. at 43; *Short History*, 65 TEX. L. REV. at 252; *Republic Judges*, 65 TEX. L. REV. at 316; DAVENPORT at 10, 13. While the Court's third Chief Justice, Thomas Jefferson Rusk, may not have been a "learned judge or a profound lawyer," he was acclaimed as the most heroic combatant at the Battle of San Jacinto, where he rallied the Texian troops after General Sam Houston was wounded in the ankle by shouting, "Remember the Alamo! Remember Goliad!" *Compare Republic Judges*, 65 TEX. L. REV. at 316 (quoting JAMES D. LYNCH, *THE BENCH AND BAR OF TEXAS* 67 (St. Louis, Nixon-Jones Printing Co. 1885)), *with* DAVENPORT at 12–13 n.1. Indeed, it was said that Chief Justice Rusk won the laurels of the Battle of San Jacinto, while other men wore them. DAVENPORT at 13 n.1.
- ¹³ *Sesquicentennial Celebration*, 53 TEX. B.J. at 43; Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, APP. ADVOC., Spring 2006, at 8-9 n.12 (noting that street corner is now occupied by the 22-story 100 Congress office building).
- ¹⁴ *Dallam* 357 (Tex. 1840) (cause number "I").
- ¹⁵ DAVENPORT at 15; see also ARIENS at 20.

- 16 *Sesquicentennial Celebration*, 53 TEX. B.J. at 43; *Short History*, 65 TEX. L. REV. at 241.
- 17 *Id.* at 270.
- 18 *Id.* at 270–71. There are accounts of one hijacked shipment of Chief Justice John Hemphill’s law books being used by the Comanche to torture their captives by forcing the prisoners to read the books aloud. *Id.* at 271. An observer remarked, “[d]eath would have been preferable” to such treatment. *Id.* When not using the law books as torture aids, the Comanche tore out the pages to roll into cigarettes. *Id.*
- 19 See *Short History*, 65 TEX. L. REV. at 275, 275 n.236.
- 20 Compare *Short History*, 65 TEX. L. REV. at 275, with *Whatever Happened*, 48 TEX. B.J. at 830.
- 21 Act approved Jan. 21, 1840, 4th Cong., R.S., reprinted in 2 H.P.N. GAMMEL, LAWS OF TEXAS 1822-97, 401 (Austin, Gammel Book Co. 1898); see also HALEY at 263 n.31.
- 22 Act approved Jan. 21, 1840, § 1, 4th Cong., R.S., reprinted in 2 H.P.N. GAMMEL, LAWS OF TEXAS 1822-97, 401, 402 (Austin, Gammel Book Co. 1898).
- 23 HALEY at 263 n.31; *Short History*, 65 TEX. L. REV. at 275. At the time of the Republic’s demise, the Court had only issued approximately 276 pages of opinions. *Id.* at 275 n.234.
- 24 *Short History*, 65 TEX. L. REV. at 275 n.232.
- 25 See *id.* at 274–75.
- 26 Daffan Gilmer, *Early Courts and Lawyers of Texas*, 12 TEX. L. REV. 435, 449 (1934).
- 27 Gilmer, 12 TEX. L. REV. at 449.
- 28 *Short History*, 65 TEX. L. REV. at 275; *Whatever Happened*, 48 TEX. B.J. at 830; Bowen C. Tatum, Jr., *A Texas Portrait: James Wilmer Dallam*, 34 TEX. B.J. 257, 258 (Mar. 1971).
- 29 *Short History*, 65 TEX. L. REV. at 275; Tatum, 34 TEX. B.J. at 257–58.
- 30 LYNCH at 251; see also HALEY at 51; Tatum, 34 TEX. B.J. at 257.
- 31 Tatum, 34 TEX. B.J. at 257–58; LYNCH at 251.
- 32 Tatum, 34 TEX. B.J. at 258.
- 33 LYNCH at 253.
- 34 *Id.*
- 35 LYNCH at 251; see also HALEY at 51; *Short History*, 65 TEX. L. REV. at 275.
- 36 *Short History*, 65 TEX. L. REV. at 275 n.239; Tatum, 34 TEX. B.J. at 257; LYNCH at 251.
- 37 Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 91 n.15 (Winter 2007); *Short History*, 65 TEX. L. REV. at 275 (describing how Dallam began to compile his digest of Republic Court opinions in 1844); see also HALEY at 51; Tatum, 34 TEX. B.J. at 257 (noting Dallam’s birth in 1818).
- 38 ARIENS at 19; *Short History*, 65 TEX. L. REV. at 275; Tatum, 34 TEX. B.J. at 258.
- 39 *Short History*, 65 TEX. L. REV. at 276, 373–74. All three missing opinions were finally published some 141 years later when South Texas College of Law Professor Jim Paulsen was appointed by the Court to compile and publish missing opinions from the Court’s 1845 term. James W. Paulsen, *The Missing Cases of the Republic: Reporter’s Introduction*, 65 TEX. L. REV. 372 (1986) (the Court’s order appointing Paulsen as Reporter for the 1845 term appears in the unnumbered preceding pages of volume 65 of the *Texas Law Review*, issue no. 2); see *Hall v. Aldridge* (Tex. 1841), 65 TEX. L. REV. 429 (Paulsen rep. 1986); *H.H. Williams & Co. v. Borden* (Tex. 1844), 65 TEX. L. REV. 432, 433 (Paulsen rep. 1986) (Jones, J., dissenting); *Republic v. Skidmore* (Tex. 1844) 65 TEX. L. REV. 441, 445 (Paulsen rep. 1986) (Ochiltree, J., dissenting).
- 40 *Whatever Happened*, 48 TEX. B.J. at 830; Tatum, 34 TEX. B.J. at 259.
- 41 See *Texas v. McCulloch*, Dallam 357 (Tex. 1840) (cause number “I”); *Whatever Happened*, 48 TEX. B.J. at 830. The 140 decisions issued by the Republic Court contained in *Dallam’s Digest* comprised only 276 pages, from page 357 to page 632. *Short History*, 65 TEX. L. REV. at 275 n.234.
- 42 DALLAM, A DIGEST OF THE LAWS OF TEXAS: CONTAINING A FULL AND COMPLETE COMPILATION OF THE LAND LAWS; TOGETHER WITH THE OPINIONS OF THE SUPREME COURT IV (Baltimore 1845). James Haley, who has recently published an authoritative narrative history of the Court, has observed that Dallam was clever to include in the title of his digest the claim that it contained a “full accounting of Texas’s byzantine land laws.” HALEY at 52.
- 43 Jim Paulsen & James Hambleton, *The “Official” Texas Court Reports: Birth, Death and Resurrection*, 49 TEX. B.J. 82, 82 (Jan. 1986); *Whatever Happened*, 48 TEX. B.J. at 830; Tatum, 34 TEX. B.J. at 259; LYNCH at 252. In 1881, Dallam’s digest was reprinted in larger typeface with the inclusion of headnotes. J. DALLAM, OPINIONS OF THE SUPREME COURT OF TEXAS: FROM 1840 TO 1844 INCLUSIVE (1881); see *Short History*, 65 TEX. L. REV. at 239 n.5, 275 n.234.
- 44 *Short History*, 65 TEX. L. REV. at 275; Tatum, 34 TEX. B.J. at 258.
- 45 Tatum, 34 TEX. B.J. at 259.
- 46 LYNCH at 252.
- 47 *Short History*, 65 TEX. L. REV. at 276, 276 n.245, 399; see *Mitchell v. Barton* (Tex. 1845), 65 TEX. L. REV. 397, 399 (Paulsen rep. 1986).
- 48 HALEY at 52; Tatum, 34 TEX. B.J. at 259–60; LYNCH at 252.
- 49 HALEY at 52; Tatum, 34 TEX. B.J. at 259; LYNCH at 252.
- 50 HALEY at 52; Tatum, 34 TEX. B.J. at 259–60; LYNCH at 252.

- 51 Tatum, 34 TEX. B.J. at 260; LYNCH at 252–53.
- 52 LYNCH at 252.
- 53 HALEY at 52, 263 n.31; *Short History*, 65 TEX. L. REV. at 276. The author performed an electronic search of all Texas cases citing *Dallam's Digest* on January 7, 2013, which returned 568 cases.
- 54 The dates (and, in some instances, the reporters themselves) noted in this table differ somewhat from that in previous accounts from authors much more learned than the present scrivener. *Contra Rest of the Story*, 49 TEX. B.J. at 842; DAVENPORT at 307–19. Nonetheless, the dates and identities of Court reporters in this table were taken directly from the *Texas Reports* volumes stored at the State Law Library.
- 55 As is explained, *supra*, George W. Horton was appointed as Court reporter in 1840 but never published any decisions of the Court. *Short History*, 65 TEX. L. REV. at 275 n.232.
- 56 In the preface to this volume, George Paschal explains the greater political and military forces at work that lead to the incomplete compilation of decisions and disjunctive printing of volumes 25 through 30. 25 Supp. Tex. vii-x. Alas, a further examination of this history will have to wait for another installment of this series.
- 57 Charles Robards is himself the editor of another compilation of Court cases found nowhere else in print, *Robards' Texas Conscript Cases*. Jim Paulsen & James Hambleton, *Brother, Can You Spare a Cite? Robards' Texas Conscript Cases, The Official Texas Reporter That Has Never Been Cited* 50 TEX. B.J. 1256, 1256 (Dec. 1987). This is yet another historical quirk that may be explored in a subsequent article in this series.
- 58 Removed from office 1867 by federal authorities because he was deemed an “impediment to reconstruction.” DAVENPORT at 313.
- 59 George Paschal included in an appendix to volume 29 several cases from the Court’s 1861 term that were never published in volume 26. 29 Tex. 487–521.
- 60 Died in office on July 15, 1932. 120 Tex. i.
- 61 Retired in October 1961. 162 Tex. i; *Rest of the Story*, 49 TEX. B.J. at 842. In an unnumbered flyleaf included in the initial pages of volume 163, L.K. Smoot penned a literary epitaph for the *Texas Reports*. See 163 Tex., at preface (“[I]t seems that the official reports are no longer necessary. THEREFORE, with this volume, they bid adieu to the legal profession, although they may be helpful archives to the historical welfare of the State.”).
- 62 Apparently, Ghent was hired with the understanding that the Court was in the process of eliminating the position of Court reporter. *Rest of the Story*, 49 TEX. B.J. at 842.

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Warren W. Harris

On Making History *by the Book*

The Supreme Court of Texas convened in special session to receive the first book published on the history of the Court in almost a century: *The Texas Supreme Court: A Narrative History, 1836-1986*, by James L. Haley. The Court held this special session on February 11 in the Historic Courtroom in the Texas Capitol. There was no more appropriate place to hold the ceremony because the Court met in that courtroom from 1888 to 1959, and fully half of the Court's history discussed in this new book happened while the Court heard oral arguments there. The Court had not convened in this courtroom since 1959, and we are pleased that the occasion of the release of Court's history book returned the Court to the Historic Courtroom.

The Society wanted a history book that would capture the interest of everyone, from the appellate lawyer to the history buff, from the middle school teacher to the law school professor, and the general public here and beyond the great state of Texas. **Jim Haley** accomplished that mission. This book is not a history of the law, but of the Court and of the men and women who ascended to it. As Jim Haley aptly states in the Preface: This is "a fascinating story populated by fascinating people, and ... the goal is to give general readers an appreciation of their unique judicial heritage." The mission of the Society is to spread this story to classrooms and libraries across the state, so that students and the public can learn of the rich history of our Supreme Court of Texas.

All of the interesting details of how the book came about are in the book. Our Executive Director, **Bill Pugsley**, has done a wonderful job of telling that story in the Foreword. When you get a copy of the book, please do read that story. But how did this wonderful idea to showcase the rich history of our Supreme Court become a reality? One person was at the center of it all: **Larry McNeill**. Simply put, without Larry's leadership, we would not have this book. Larry McNeill was President of the Society and he realized that for this book to become a reality, the Society needed to raise the money for the project—more than the Society had ever raised—to secure the right author. We were so fortunate to retain an award-winning author like Jim Haley (there is more about Jim in the article in this issue on the book). But when it came to fundraising for this project, Larry knew right where to start: with **Harry Reasoner**. Harry immediately agreed to contribute—and to get others to contribute—to this book. The first person Harry called was **Joe Jamail**, and what a duo they are to get a project off the ground. Harry continued to contact firms and lawyers to contribute. And we all know how this story turns out, because no one can say no to Harry Reasoner.

Marilyn Duncan served as consulting editor for this book. As Jim Haley points out, he has worked with some good editors, but never one who combined the editorial eye and instinct with Marilyn's efficiency of finding key materials. He asked Marilyn to assume coauthor status, but if you know Marilyn, you would also know she would decline.

Finally, we could not have done this without the support of the many donors to the book project. They are all listed in the book and in this issue of the Journal, and we thank each of them for their contributions, large and small. On behalf of the Society, I hope you all enjoy reading the history of the Supreme Court of Texas. Society members can find the order form on the Society's website to purchase the book at a 40 percent discount.

Another exciting event is our upcoming symposium on the *History of Texas Supreme Court Jurisprudence* on April 11 in Austin. This is a must-attend event for appellate and other practitioners who have complex cases in the Supreme Court. The program will feature a number of topics that give a great overview of the development in an area of the law, but the program is also designed to include topics that are fun and interesting to all lawyers. The faculty is an all-star lineup, with the majority of the Supreme Court and many of the most respected practitioners in the state giving presentations. This event is sure to be one that is talked about afterwards, so don't be someone who missed out on this wonderful program. Members receive a discount on registration (further details are in the article in this issue on the symposium). Thanks go to course directors **Lynne Liberato** and **Richard Orsinger** for planning this program. I hope to see you there.

The Society is beginning work on the 18th Annual Hemphill Dinner. The keynote speaker for the 2013 Dinner will be **Justice Sandra Day O'Connor**. The Hemphill Dinner will be chaired by **Macey Reasoner Stokes** and held at the Four Seasons Hotel in Austin on June 14. Tables for the dinner are on sale now, and it will be another sell-out event. The table order form is on the Society's website. Order your table early because this is sure to be a great dinner you won't want to miss!

— *Warren W. Harris*, Bracewell & Giuliani LLP

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Fellows Column

By David J. Beck, Chair of the Fellows



Photo by Alexander's Fine Portrait Design-Houston

The release of the new history book on the Texas Supreme Court pointed out a glaring omission in our efforts to preserve the Court's history. Neither the Society nor the Court had a copy of the last history book published about the Court 96 years ago. This triggered a search for a copy of that book which would be suitable for us to acquire. I am pleased to report that the Fellows have been able to secure an original copy of the 1917 publication on the history of the Court, *The History of the Supreme Court of the State of Texas (With Biographies of the Chief and Associate Justices)*, by Jewett H. Davenport. The generous support of the Fellows made this acquisition possible. Because of the contributions of the Fellows, we now have this book in the Society's archives.

As a benefit for our Fellows, we are offering complimentary admission to the upcoming *History of Texas Supreme Court Jurisprudence* symposium in Austin on April 11. We hope all of you will be able to attend what will surely be a great program. I also want to report that we are currently planning a dinner exclusively for the Fellows. Details will be sent to all Fellows very soon.

On behalf of the Society, I want to thank each of the Fellows for your support. The Fellows are a critical part of the annual fundraising by the Society and we greatly appreciate your generous contributions.

If you are interested in becoming a Fellow of the Society, please contact me or the Society's office.

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Long-Awaited History of the Texas Supreme Court Published in February

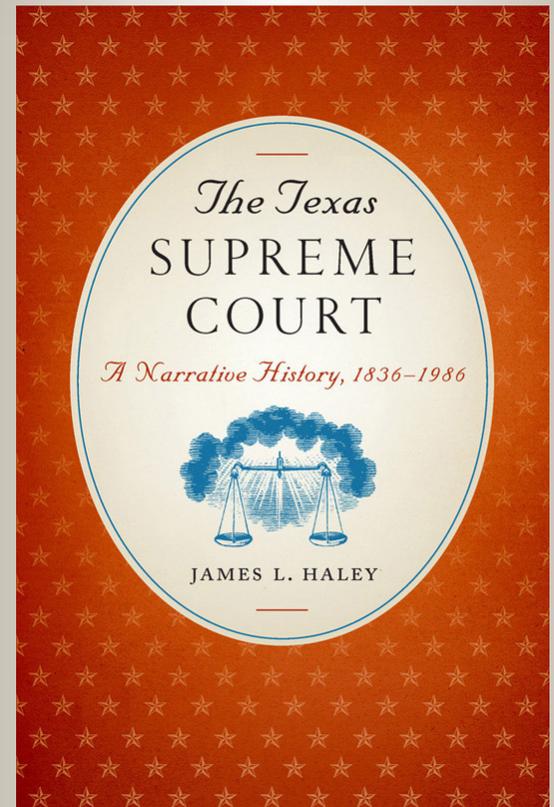
The Society celebrates an important milestone in its history and in the history of the Texas Supreme Court with the publication of the first book-length history of the Court in almost a century.

The book, titled *The Texas Supreme Court: A Narrative History, 1836–1986*, was published by the University of Texas Press in February as part of its Texas Legal Studies Series, which is sponsored by the Society.

Written by award-winning author and historian James L. Haley, the book tells the story of the Supreme Court from its origins in the Republic of Texas to the political and philosophical upheavals of the mid-1980s. The last history of the Court was written in 1917 by Harbert Davenport and was largely biographical. Haley's narrative focuses on the personalities and judicial philosophies of the Court's justices as well as on the interplay between the Court's rulings and the state's unique history in such areas as slavery, women's rights, Prohibition, water law, and consumer protection. The book draws heavily on research and archival materials compiled under the auspices of the Society's History Book Project.

Haley is the author of thirteen other books, including *Wolf: The Lives of Jack London* (Basic Books), which won the Spur Award from Western Writers of America, *Passionate Nation: The Epic History of Texas* (Free Press), and *Sam Houston: A Biography* (University of Oklahoma Press), which won nine awards, including the T. R. Fehrenbach Award from the Texas Historical Commission, the Coral Horton Tullis Memorial Prize from the Texas State Historical Association, and the Spur Award.

TSCHS members may obtain copies of the book through the Society at a 40 percent discount off the \$29.95 list price. To order, download the form on p. 20, complete and mail it to the Society office. Members may also buy discounted copies at various Society-sponsored events that feature James Haley as speaker (see [calendar of events](#)).



***The Texas Supreme Court:
A Narrative History, 1836–1986***

By James L. Haley

University of Texas Press

February 2013

Texas Legal Studies Series,
Texas Supreme Court Historical Society

6 x 9 in.

350 pp., 57 b&w photos

www.utexas.edu/utpress/books/haltex.html

**Donors to
The Texas Supreme Court:
A Narrative History, 1836–1986**

\$10,000

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*

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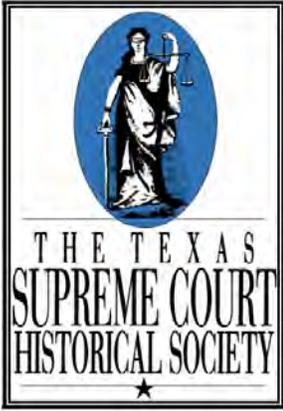
S. Shawn Stephens

W. Frank Newton

Justice Jeff Brown

William S. Pugsley

Alfred Mackenzie



History Book Order Form

The Texas Supreme Court: A Narrative History, 1836-1986, by James L. Haley, was published in February under the sponsorship of the Texas Supreme Court Historical Society. The book is the culmination of a sixteen-year project undertaken by the Society to expand public awareness and appreciation of the Texas Supreme Court.

Society members receive a discount of 40% off the list price of \$29.95.

Name: _____

Firm/Court: _____

Building: _____

Address: _____ Suite: _____

City: _____ State: _____ ZIP: _____

Telephone: _____ Email: _____

Member Price \$ 20 # of copies _____ Extended amount: _____

(Please note: sales tax is included in the price of the book)

Postage per book \$ 5 # of copies _____ Extended amount: _____

Total amount due: _____

Payment options:

- Cash
- Check enclosed -- payable to the Texas Supreme Court Historical Society
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- Bill me

Amount: \$ _____

Card Type (Circle): Visa MasterCard American Express Discover

Credit Card No: _____

Expiration Date: _____

Cardholder Signature: _____

Please return this form with your check or credit card information to:

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Texas Supreme Court Historical Society
P.O. Box 12673
Austin, Texas 78711-2673

Court Holds Book Presentation Ceremony in Historic Courtroom

Photos by Mark Matson except where indicated.



On Monday, February 11, the Supreme Court of Texas held a formal session in the Historic Courtroom of the Capitol for the first time in fifty-three years. Called to order by Clerk Blake Hawthorne, the nine members of the Court entered through the doors to the left and right of the original three-person bench and took their seats behind three counselor's tables arranged at the front of the room. As expected, they all wore black robes for this official occasion, but those in the know recognized that this, too, was a "first." Before the Court moved into the new air-conditioned building in 1959, the justices presiding over sessions in the Courtroom in the Capitol always wore business suits.



All these firsts occurred during a formal Book Presentation Ceremony in which the Court received from the Texas Supreme Court Historical Society a copy of the first book-length history of the Court to be written in nearly a century. The ceremony began with **Chief Justice Wallace B. Jefferson** (*in photo at left, speaking*)

welcoming guests and thanking John Sneed, Executive Director of the State Preservation Board, for allowing the Court to utilize the old Courtroom for this special occasion. The Courtroom was deemed the ideal setting for the ceremony, since the State Preservation Board had restored the room to the way it looked in 1917, the same year the first history of the Supreme Court was published.



Photo by Ty Meighan

In his opening remarks, Society President **Warren W. Harris** (*photo at left*) noted that by presenting the Court with a copy of *The Texas Supreme Court: A Narrative History, 1836-1986*, the Society was closing the circle begun with the publication of Harbert Davenport's history of the Court ninety-six years earlier. Harris thanked those who made the book possible, especially the many contributors who helped finance the research and writing, with a special note of thanks to Joe Jamail and Harry Reasoner. He concluded by expressing his appreciation to Larry McNeill, former Board President and Chair of the History Book Committee, for his leadership in heading the fundraising drive and overseeing the book promotion team.

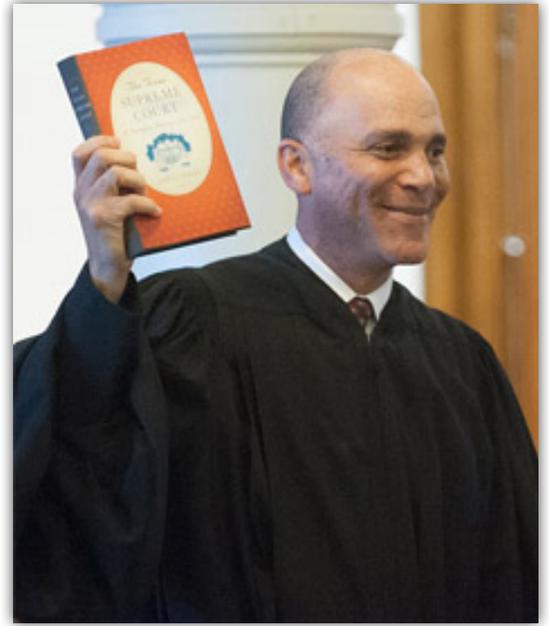


Larry McNeill (*photo at left*) introduced award-winning Texas historian and author James L. Haley. McNeill explained that he learned about Haley years before joining the History Book Project, having read and enjoyed several of Haley's books on Texas subjects, particularly his biography of Sam Houston. In Haley's prose, McNeill recognized a writer who possessed an exceptional knack for vivid narrative history, unlike many historians with a more academic background. McNeill catalogued the ways in which Haley was the ideal person to bring one hundred and fifty years of judicial history to life and draw new readers to appreciate the Court's contribution to the state's history.

Author **James Haley** (*photos below*) began his talk on "What Stories This Room Could Tell" by explaining that he once worked for the State Preservation Board as a tour guide. He then gave the audience a tour of the room, explaining the significance of furniture and decorations in the old Courtroom. He pointed to various portraits on the walls and recounted anecdotes about the justices. (**Chief Justice Woodie Jones**, *below right*, attended Haley's talk.)



At the conclusion of Haley’s talk, Warren Harris stepped forward and presented an inscribed copy of the book to Chief Justice Jefferson, who held it up for the audience members to see.



Then **Justice Paul W. Green** (*in photo below left, speaking*) expressed the Court’s appreciation for the sixteen-year effort the Society had devoted to preparing the manuscript.



When Justices departed the Courtroom, they did so through the frosted glass doors that led into the legislative office of **Texas Representative Harold**

Dutton (*photo above, right, from the Texas House of Representatives website*). Knowing the importance of that traditional access, Rep. Dutton graciously invited the Court to use his office as a gathering place and robing room for this event.

Following the ceremony, James Haley greeted guests (**Joe Jamail**, *at right in top photo*) and signed books purchased by attendees (**Reagan Simpson**, *at right in bottom photo*).



One final “first” that took place at the Book Presentation Ceremony. The entire event was webcast, in real time, the first time any webcasting has taken place in the old courtroom. You may view the ceremony by going to this link: <http://www.texasbarcle.com/CLE/TSCSearchResults2.asp?bRecent=1>

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Register Now! April 11 Symposium Features All-Star Cast of Speakers, Outstanding Program, CLE Credit

Seventeen of the state's premier judges, attorneys, and legal historians are slated to speak on topics ranging from the evolution of expert testimony to the judicial legacy of the Republic of Texas Supreme Court at a major symposium cosponsored by the Society and the State Bar of Texas.

The *History of Supreme Court of Texas Jurisprudence* symposium will take place on Thursday, April 11, at the Mansion at Judges' Hill in Austin. A companion course sponsored by the State Bar, *Practice Before the Texas Supreme Court*, is scheduled for Friday, April 12, at the same location. Both programs offer MCLE credit (see details below). View or download the brochure for both courses here: <http://www.texasbarcle.com/materials/Programs/2740/Brochure.pdf>.

Former Society President Lynne Liberato (Haynes and Boone, L.L.P.) and Society Board member Richard Orsinger (McCurley Orsinger McCurley Nelson and Downing L.L.P.) created the program, which is the first of its kind. Liberato is the course director for the symposium and Orsinger is the course director for the practice course.

The idea of sponsoring a symposium series to expand the Society's role in legal history education was that of Larry McNeill, who as Board President in 2010-11 led a fall symposium on ethics in Houston.

Society members receive a \$50 discount if they register by March 28, 2013 or a \$25 discount if they register later. Also, Fellows of the Supreme Court Historical Society may attend the program for free as a part of their membership. Hemphill members should register by contacting the Society directly to facilitate their registration. Register online at <http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&IID=12180>.

See the next page for an overview of the program.

History of Supreme Court of Texas Jurisprudence

Thursday, April 11, 2013 Austin Mansion at Judges' Hill MCLE Credit: 6.5 hours including .75 hour ethics

- 8:00 **Registration - Coffee & Pastries Provided**
- 8:50 **Welcoming Remarks**
Course Director
Lynne Liberato, *Houston*
Haynes and Boone
- 9:00 **History's Mixed Legacy .25 hr**
Hon. Wallace B. Jefferson, *Austin*
Chief Justice, Supreme Court of Texas
- 9:15 **The Supreme Court of the Lone Star Republic:
A Compass Pointing to the Future .5 hr**
David A. Furlow, *Houston*
Thompson & Knight
- 9:45 **Jack Pope & the End of the Non-partisan Court,
1964-1985 .5 hr**
Bill Chriss, *Austin*
Gravely & Pearson
- 10:15 **Break**
- 10:30 **Elections, Politics and the Supreme Court of Texas:
1988-2004 .5 hr (.25 ethics)**
Mike A. Hatchell, *Austin*
Locke Lord
- Hon. Thomas R. Phillips, *West Lake Hills*
Former Chief Justice, Supreme Court of Texas
Baker Botts
- Prof. L. Wayne Scott, *San Antonio*
St. Mary's University
- 11:00 **The Daubert Revolution: Evolution of Expert
Testimony .5 hr**
Hon. Priscilla R. Owen, *Austin*
Judge, U.S. Fifth Circuit Court of Appeals
Former Justice, Supreme Court of Texas
- 11:30 **Women and the Supreme Court .5 hr**
Hon. Eva Guzman, *Austin*
Justice, Supreme Court of Texas
- Kent Rutter, *Houston*
Haynes and Boone
- 12:00 **Break - Lunch Provided**
- 12:15 **Luncheon Presentations:
Moderator**
Hon. John P. Devine, *Tomball*
Justice, Supreme Court of Texas
- The Supreme Court Historical Society** *No MCLE credit*
Warren W. Harris, *Houston*
Bracewell & Giuliani
President, Texas Supreme Court Historical Society
- History of the Supreme Court of Texas .5 hr**
James L. Haley, *Austin*
Author, *The Supreme Court of Texas: A Narrative
History, 1836-1986*
- 12:50 **Break**
- Afternoon Moderator*
Hon. Paul W. Green, *Austin*
Justice, Supreme Court of Texas
- 1:05 **The Supreme Court's Role in Developing Rules of
Court .5 hr**
Prof. William V. Dorsaneo III, *Dallas*
Southern Methodist University
- 1:35 **170 Years of Texas Contract Law .5 hr**
Richard R. Orsinger, *San Antonio*
McCurley, Orsinger, McCurley, Nelson & Downing
- 2:05 **Important Cases Revealed Through Documents .75 hr**
Hon. Mark D. Davidson, *Houston*
Judge, Multi-District Litigation Civil Court
- 2:50 **Break**
- 3:05 **Texas Groundwater Rights and Immunities: From
East to Day and Beyond .5 hr**
Dylan O. Drummond, *Austin*
Davidson Troilo Ream & Garza, P.C.
- 3:35 **Jury Charge: The Swinging Pendulum of Broad Form
Submission .5 hr**
Hon. Scott A. Brister, *Austin*
Justice, Supreme Court of Texas (ret.)
Andrews Kurth
- 4:05 **The Development of Judicial Ethics in Texas .5 hr ethics**
Kevin Dubose, *Houston*
Alexander Dubose & Townsend
- 4:35 **The Supreme Court: Looking Forward .25 hr.**
Hon. Debra Lehrmann, *Austin*
Justice, Supreme Court of Texas
- 4:45 **Adjourn**

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18th Annual John Hemphill Dinner:
Justice Sandra Day O'Connor is Keynote Speaker



This year's John Hemphill Dinner will feature an address by former U.S. Supreme Court Justice Sandra Day O'Connor, memorial tributes to two former Texas Supreme Court justices, and the presentation of an annual award honoring former Chief Justice Jack Pope.

Justice O'Connor, born in Texas and raised in Arizona, was nominated to the U.S. Supreme Court by President Ronald Reagan in 1981 and served as Associate Justice until her retirement in 2006. She was the first woman in history to serve on the Court.

Another program highlight will be the delivery of memorials to two former justices who passed away in the last year. Former Chief Justice Thomas R. Phillips will give the memorial for Justice William W. Kilgarlin and former Justice Craig T. Enoch will speak for Justice Bob Gammage.

Also on the program is the presentation of the Fifth Annual Chief Justice Jack Pope Professionalism Award by the Texas Center for Legal Ethics.

The event is scheduled for Friday, June 14, at the Four Seasons Hotel in Austin. See the next two pages for details and a dinner table registration form.

TEXAS SUPREME COURT HISTORICAL SOCIETY
The Eighteenth Annual John Hemphill Dinner
FACT SHEET

- WHEN:** Friday, June 14, 2013
- WHERE:** Grand Ballroom, downstairs
Four Seasons Hotel (San Jacinto and Cesar Chavez Streets)
Austin, Texas
- TIME:** 6:00 p.m. Invitation-Only Reception with dinner speaker
6:30 p.m. Reception with Host Bar
7:15 p.m. Dinner
- TICKET PRICES:** \$10,000 – Hemphill Sponsorship (seats 20)
\$8,400 is a tax deductible contribution to TSCHS
\$5,000 – Pope Sponsorship (seats 10)
\$4,200 is a tax deductible contribution to TSCHS
\$2,500 – Advocate Sponsorship (seats 10)
\$1700 is a tax deductible contribution to TSCHS
\$200 – Individual ticket
\$120 is a tax deductible contribution to TSCHS
- Wine service during dinner included in price
- DRESS:** Business suits and dinner dress
- SPEAKER:** Hon. Sandra Day O’Connor
Former Justice, United States Supreme Court
- PROGRAM:** Presentation of Chief Justice Jack Pope Professionalism Award
For more program information visit our website:
www.texascourthistory.org
- INVITATIONS:** Formal invitations will be mailed in April.
- GUESTS:** Members of the Court and their spouses are guests of the Society.
- QUESTIONS:** Contact TSCHS Office (512) 481-1840
Bill Pugsley, Executive Director
tschs@sbcglobal.net

The Eighteenth Annual John Hemphill Dinner
TABLE RESERVATION FORM

TSCHS is an approved 501(c)(3) non-profit organization.
IRS confirmation letter will be provided. **Table Reservation deadline March 22, 2013**

Firm Name: _____ City _____

Contact Person: _____

Direct Phone: _____

Email: _____

Please indicate number of tables:

- _____ Hemphill Sponsorship --- \$10,000
- Seating for 20 guests at 2 tables (10 guests at each) with priority placement for both tables
 - Tickets for 6 guests to invitation-only reception with the speaker
 - Wine service at dinner
 - Recognition in Society publications and at the dinner

- _____ Pope Sponsorship --- \$5,000
- Seating for 10 guests at 1 table with priority placement
 - Tickets for 2 guests to invitation-only reception with the speaker
 - Wine service at dinner
 - Recognition in Society publications and at the dinner
 -

- _____ Advocate Sponsorship --- \$2,500
- Seating for 10 guests at 1 table
 - Wine service at dinner
 - Recognition in Society publications and at the dinner

Payment options:

- Check enclosed
 Check by separate cover

Amount: \$ _____

Mail check payable to Texas Supreme Court Historical Society to:

Texas Supreme Court Historical Society P. O. Box 12673 Austin, Texas 78711-2673

So that preprinted nametags will be ready, firms will be asked to e-mail to tschs@sbcglobal.net.
a complete list of attendees in advance of the dinner.

Rev 3-12-13

Investiture for Incoming Justices Jeff Boyd and John Devine

Photos by Ty Meighan courtesy of the State Bar of Texas

On Monday afternoon, January 14, guests packed the Capitol extension auditorium as the Supreme Court of Texas presided over the investiture of the two newest justices to join the Court along with two justices reelected to another term.

Governor Rick Perry administered the oath of office to **Justice Jeffrey S. Boyd** (*at left in photo*), who was appointed to the Court by Perry in December to replace outgoing Justice J. Dale Wainwright.



Governor Perry also swore in **Justice John P. Devine** (*at left in photo*), who was elected in November, replacing Justice David Medina.

Justice Nathan L. Hecht (*at left in photo*) was sworn in for his fifth term, and by the end of this term he will be the justice with the longest continuous service in the history of the Supreme Court. **Justice Don Willett** (*at center in photo*) returns for his second term in office.



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Meet Justice Jeff Boyd

By David A. Furlow



On December 3, 2012, Governor Perry appointed Jeffrey S. Boyd as a Justice of the Texas Supreme Court, succeeding former Justice Dale Wainwright in Place 7. Many people know of Justice Boyd from his service as Texas Attorney John Cornyn’s Deputy Attorney General for General Litigation, as Governor Perry’s General Counsel, or as the Governor’s Chief of Staff, but few people know the reasons the Court’s most recently appointed Justice decided to pursue a life in public service.

In an interview in his new Supreme Court office on January 4, 2013, Justice Boyd described his childhood as one in which he and his family were continually on the move:

My dad went into the Air Force when he was eighteen and ended up spending twenty-five years in the Air Force. So the whole time I was growing up we just moved, [first] to Rockport and Biloxi, Mississippi, then Oklahoma and Tokyo for a few years when I was little. The year my dad was in Vietnam, we lived in Del Rio, Texas, then in San Antonio from fifth through eighth grade, then high school in Germany. We spent three years there and then he got transferred to Bergstrom and we moved here and I spent one year in Round Rock High School. So I just grew up all over the place.... It was a great way to grow up.

Boyd said he reacted to constant change by planting firm roots: “All that moving made me appreciate that anywhere you go you have your family and, in our case, church. Those were the two things that were constant, no matter where we went. We would find a church to become a part of and our family brought our traditions with us. That’s good living.”

Boyd was a Bible major at Abilene Christian University. “I moved back to Austin to serve as a Youth and Family Minister right out of college and did that for five years before I went to law school. Interestingly enough, my wife is now the Children’s Minister at Brentwood Oaks Church of Christ here in Austin and has been for seven or eight years now. Brentwood got the better end of the deal.”

Boyd might have remained in the ministry to this day if an old friend had not suggested that they take the LSAT together:

A college friend called one day back in 1987 and said, “Hey, you remember back in college you used to think about going to law school?” I said, “Yeah.” And he said, “Well, I’m going to take the LSAT. Why don’t we take it together?” I said “Okay,” and paid my \$150 to take the LSAT. I knew two lawyers, literally two lawyers, from church and that’s all I knew about the law except what you learn at the movies and on TV. I signed up to take the LSAT, but then forgot all about it. And, he called me one day on, like, a Monday or Tuesday, and said “Hey, are you taking the LSAT Saturday?” And I said, “This Saturday?” And he said, “Yes, this Saturday.” I said, “Yeah.” And, he

said, “Well, I’m not. I needed to spend time preparing and I’m not prepared. And I can’t afford to get a bad score.” And I said, “ I can’t afford to lose that \$150, so I’m taking the test.” He ended up not taking it. But I took it and did well.

Boyd did well in law school, too. He earned his law degree *summa cum laude* from Pepperdine University, where he graduated second in his law school class.

After graduation, Boyd clerked for Judge Thomas M. Reavley on the Fifth Circuit U.S. Court of Appeals. In 2000 he left private practice to work as a Deputy Attorney General for Attorney General John Cornyn. He returned to private practice as a senior partner at Thompson & Knight in 2003. In January 2011, he joined Governor Perry’s office as General Counsel, then moved up to serve as the Governor’s Chief of Staff. Two years later, he moved from the executive branch to the judicial branch of Texas government. At the time of the interview, he was reading a modern reprint of Harbert Davenport’s 1917 *History of the Supreme Court of the State of Texas; with Biographies of the Chief and Associate Justices*. Now that he serves on that Court, Justice Jeff Boyd can help shape its history.



DAVID FURLOW is a partner with the Houston office of Thompson & Knight LLP. His research and writing reflect interests in both U.S. and Texas history. In addition to articles published this past year in this journal, he and Fifth Circuit Reference Librarian Amy Hale-Janeke presented “A Brief History of the Fifth Circuit” at the DRI Annual Meeting on October 25, 2012, and his article entitled “Ten Myths and Legends of Texas Law” appeared in the April 2012 issue of the Tarrant County Bar Association Bulletin.

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An Interview with Former Justice Dale Wainwright: Insights on His Service on the Texas Supreme Court

By Amy Saberian



Former Justice Dale Wainwright, now head of the Austin appellate section at Bracewell & Giuliani, has a long history of exemplary leadership and laudatory public service.

On September 30, 2012, Justice Wainwright left the Supreme Court of Texas after ten years of public service to move back into private practice. At the time of his departure, he was the third longest-serving justice on the Court, and thus had served on the Court with fourteen different justices. Justice Wainwright was initially elected to the Supreme Court on November 5, 2002, and was reelected in 2008. Previously, he served as presiding judge of the 334th Civil District Court in Harris County. He was well-respected by the local bar association, which gave him a 90 percent approval rating in the judicial evaluation poll—with nearly two-thirds rating him “outstanding.”

Prior to his time on the bench, Justice Wainwright practiced in the trial sections of Haynes and Boone and Andrews & Kurth in Houston. Not surprisingly, he has a stellar academic record, earning his law degree from the University of Chicago Law School, studying at the London School of Economics, and earning his undergraduate degree from Howard University, *summa cum laude*.

With such rich experiences both on and off the bench, the *Journal of the Texas Supreme Court Historical Society* had a few interview questions for Justice Wainwright to gain some insight on his time on the Court.

Justice Wainwright said he always had a clear vision of his judicial philosophy while serving on the Court, and this vision remained steadfast. “For cases involving interpretation of written law, constitutions, statutes and regulations,” he said, “I rely heavily on the text so long as it is unambiguous. For common law issues, consistency, predictability, and common sense were my touchstones, so following precedents was a priority. It was important to me to decide the legal issue correctly following consistent modes of reasoning, while recognizing that legislation can change policies and must be followed, whether I personally agreed with the policies or not.”

Justice Wainwright stated that he “worked with outstanding jurists at the Court in the development of the law and made and solidified life-long friendships.” Thus, not surprisingly, his favorite activity at the Court was the lively intellectual debate at conference. Particularly there, Justice Wainwright believes his extensive trial experience, in both the private and public sectors, was valuable to his service on the Supreme Court, allowing for a deeper comprehension of many of the appellate issues by giving him a stronger understanding of the initial trial matters. Additionally, his business experience prior to attending law school provided him a unique and useful perspicacity on many of the cases before the Court, especially those involving business or economic matters.

In his lengthy tenure on the Court, he worked with many different justices and reviewed and pondered countless appeals, and thus he observed a few trends over the past decade. First, there is a burgeoning and cohesive group of appellate specialists among lawyers, and Justice Wainwright believes this development is helpful to the Court. He also noticed that more and more business-related cases are being filed with the Court, and the issues presented in those appeals have significance for the jurisprudence of Texas as well as the Texas economy.

As Justice Wainwright embarks on a new phase of his commendable and varied career, he is confident that he brings an uncommon and exclusive skill set to his “new job” in private practice: incisive analysis of error from the trial court and the court of appeals in cases, having applied this skill in some 12,000 cases in discussion and debate with Court colleagues and his staff. He also brings a deep understanding of strategy and tactics for structuring an appeal and briefing a case, having authored more than 125 opinions issued by the Court and otherwise participated in the issuance of over 1,000 opinions.

Justice Wainwright’s decade of service on the Texas Supreme Court earned him the respect and admiration of all of us associated with the Court. We wish him all the best in this next stage of his career.



AMY SABERIAN, a Senior Associate with Enoch Keever PLLC in Austin, was a law clerk for Justice Wainwright during the 2005-06 term. Prior to joining Enoch Keever, she was an attorney at George & Brothers LLP and at Strasburger Price LLP. Saberian earned a B.A. in Plan II from UT Austin and a J.D. from the UT School of Law.

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Abel Acosta Appointed Clerk of Texas Court of Criminal Appeals



Abel Acosta was sworn in as Clerk of the Texas Court of Criminal Appeals on December 3, 2012, replacing Louise F. Pearson. Acosta is the eighth Clerk of the Court of Criminal Appeals since 1918, when the legislature gave each court its own clerk.

Before joining the Court of Criminal Appeals in 1990, Acosta worked as a research and record retrieval liaison for the Texas Attorney General's Office. He was appointed Chief Deputy Clerk in 1999.

In May he will celebrate 23 years with the Court. When asked if he had any plans to retire in a few years, he laughed, "I have two daughters, aged five and seven. That should answer your question."

Born and raised in Andrews County near the New Mexico border, Acosta resides in Austin with his wife Jennifer and daughters Cecilia and Isabella.

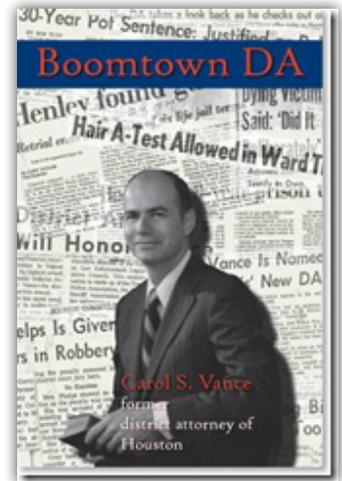
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Carol Vance Speaks at March Board Meeting



Former Harris County District Attorney Carol S. Vance was the luncheon speaker at the TSCHS Board of Trustees meeting on Friday, March 8 in Houston. His book *Boomtown DA*, published in 2010, recounts his experiences during his 21 years in the DA's Office. Some of the trials Vance was involved in, either as prosecutor or as district attorney, include the Elmer Wayne Henley serial murder case, the Deep Throat v. Vance Supreme Court case, and the Texas Supreme Court Justice Don Yarbrough impeachment case. Vance is a retired senior partner at Bracewell & Giuliani.

Justice Jeff Brown of the 14th Court of Appeals hosted the Society in the 1910 Courthouse, where the Board of Trustees meeting will be held. Led by Board President Warren W. Harris, the meeting covered a range of agenda items related to Society-sponsored projects and events as well as Treasurer's and committee reports.



The annual meeting of the General Membership to elect trustees was held immediately after the Board meeting adjourned. Four new Trustees were elected to terms beginning June 1, 2013: Bob Black, Ben Mesches, Bill Ogden, and Cynthia Timms.

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Society Acquires 300 Copies of Hemphill Biography

In March, the Society will receive a donation of 300 copies of the Rosalee Morris Curtis biography of John Hemphill. Entitled *John Hemphill: First Chief Justice of the State of Texas*, the book was originally published in 1971 by Jenkins Publishing Company. Ray L. Hemphill, a descendent of Judge Hemphill now living in Woodstock, Georgia, acquired the rights from Rosalee Curtis in 1997 and reprinted the book through the Hemphill Historical Society after correcting several errors. A copy was later presented to Judge Jack Hightower during a meeting of the Hemphill Historical Society.

These unsold copies have been stored at Ray Hemphill's home, and he offered to donate them to the Society for the cost of shipping.

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Haley and Phillips Headed Society Session at 2013 TSHA Conference

Author **James L. Haley** and former Chief Justice **Thomas R. Phillips** presented papers on the history of the Texas Supreme Court at the Society's joint session of the Texas State Historical Association (TSHA) in Fort Worth on March 1.

Haley regaled the audience with stories drawn from his book *The Texas Supreme Court: A Narrative History, 1836-1986*, sponsored by the Society and published by University of Texas Press in February.

Judge Phillips offered new information and insights on the history of judicial elections in Texas.

More about the session will appear in the May issue of the TSCHS Journal.

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To profit from the past, we must first preserve it.

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Calendar of Events

Spring 2013

* **March 21**

Houston Bar Association Appellate Section meeting, 11:30-1:00
James Haley, luncheon speaker (MCLE credit)

Society Fellows Reception: Meet James Haley 1:00-2:00

* **April 11**

Symposium on the History of Texas Supreme Court Jurisprudence
Mansion at Judge's Hill, Austin (MCLE credit)

* **May 3**

San Antonio Bar Association Law Day
James Haley, luncheon speaker

* **May 16**

Austin Bar Association Annual Meeting, Austin
James Haley, luncheon speaker (MCLE credit)

* **June 14**

18th Annual John Hemphill Dinner
Hon. Sandra Day O'Connor, Keynote Speaker
Four Seasons Hotel, Austin

* James Haley, author of the Society's Texas Supreme Court book, will be signing copies.

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2012 Membership Upgrades

The following Society members moved to a higher dues category since June 1, 2012.

GREENHILL FELLOW

L. Wayne Scott

TRUSTEE

Harry M. Reasoner

PATRON

Thomas S. Leatherbury

CONTRIBUTING

Marialyn Barnard

Catherine Smith

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2012-13 New Member List

The Society has added forty-six new members since June 1, 2012.
Among them are eighteen Law Clerks for the Court (*).

GREENHILL FELLOW

Shannon H. Ratliff

TRUSTEE

Robin C. Gibbs

Robert A. Black

PATRON

Wanda McKee Fowler

CONTRIBUTING

Jenny and Brent Bailey

Gina Fulkerson

Bruce Harlan

Rachel Palmer Hooper

William W. Ogden

Michael John Ramirez

Jason M. Ryan

REGULAR

David Armendariz*

Graham Baker

Stephane Beckett*

Justin Lewis Bernstein*

James D. Blacklock

Judge Bill Boyce

Maria Wycoff Boyce

Ellen Burkholder*

Kristina Campbell*

William Christian

Morgan Craven*

Texanna Davis

Daniel Durell*

Will Feldman

Joe Greenhill*

Sharon Hemphill

Kyle Highful*

Yvonne Y. Ho

Alex W. Horton

Linda Hunsaker

Kathy and Jimmy Kull

Jaclyn Lynch*

Danielle Mirabal*

Jason Muriby*

Charlotte Nall*

Melanie Kemp Okon

Kinchen C. Pier

Casey Potter*

Kent Rutter

Scott P. Stolley

Lee Roberts Thompson

Katherine Tsai*

Nathan White*

Jennifer Wu*

Andrew Wynans*

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Membership Benefits & Application

Hemphill Fellow - \$5,000

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating and Recognition in Program at Annual Hemphill Dinner
- All Benefits of Greenhill Fellow

Greenhill Fellow - \$2,500

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of All Society Publications
- Preferred Individual Seating and Recognition in Program at Annual Hemphill Dinner
- Recognition in All Issues of Quarterly *Journal of the Supreme Court Historical Society*
- All Benefits of Trustee Membership

Trustee Membership - \$1,000

- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- Complimentary Admission to Society's Symposium
- All Benefits of Regular Membership

Patron Membership - \$500

- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Contributing Membership - \$100

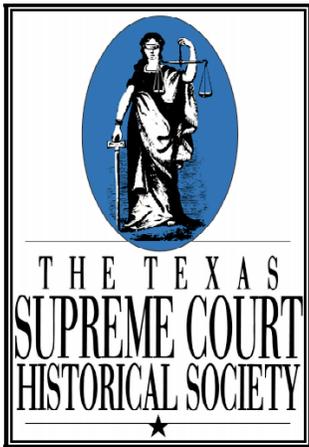
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Regular Membership - \$50

- Receive Quarterly *Journal of the Supreme Court Historical Society*
- Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs

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Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education.

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