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The Common Law is Not Dead

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1. Introduction.

It is no surprise that the Texas Supreme Court concentrates on code and statutory construction. After all, both the Constitution and legislative directives requires the Court to do so.

Nonetheless, the development of the common law is still alive and well in the Texas Supreme Court. This paper analyzes the opinions from the Texas Supreme Court from January 1, 2017 to May 17, 2017. The PowerPoint presentation at the course will update the paper for subsequently decided cases.

We will analyze the Texas Supreme Court common law trends. For example, the Texas Supreme Court has concentrated heavily on the causation element. Those decisions, once relegated to personal injury cases, are now being made in commercial cases. This paper will discuss those trends as well as others.

2. Cattle Rustling: That's the Way It is Out Here in the West.

Tom Bennett, Randy Reynolds and Larry Grant were involved in a dust-up worthy of a Zane Grey novel. Their western epic was eventually told in three appellate opinions that are worth the read. The most recent is an April 28, 2017 opinion, but the history is better read from the start.

A. *Bennett v. Reynolds*, 242 S.W.3d 866 (Tex. App.—Austin 2007), *rev'd*, 315 S.W.3d 867 (Tex. 2010): Bob Pemberton wrote an extensive opinion about two ranchers and cross-accusations of cattle rustling:

- Both Bennett and Reynolds ranched adjoining properties bordering the Colorado River.
- Due to drought conditions in the fall of 2000, the Colorado River dried up.
- This meant that fences that once went to the river, could easily be walked around.
- Thirteen head of Reynolds' cattle meandered onto Bennett's ranch.

- After seeing at least some of his cattle across the fence, Reynolds ventured on Bennett's ranch attempting to retrieve them.
- His efforts were unsuccessful and Reynolds asked Bennett if he had seen the missing cattle.
- Bennett then accused Reynolds of stealing his cattle.
- Bennett went to the sheriff's department and swore that he had seen Reynolds taking his cattle. At the same time, Bennett denied that he had any knowledge of the whereabouts of Reynolds' cattle.
- Bennett, however, did not tell the sheriff that he ordered his employee, Grant, to round up Reynolds' cattle, take them to the local cattle auction, and sell them for Bennett's account.
- Grant, worried that he was being roped into cattle rustling, took a picture of the cattle, which displayed Reynolds' brands.
- Eventually, Grant told Reynolds about the photographs and Reynolds requested that he turn the photographs over to law enforcement.
- When Bennett learned of the photographs, he offered to pay Grant for the photos and later claimed that Reynolds tried to blackmail him.
- In the eventual trial between Bennett and Reynolds, the jury found that Bennett had converted Reynolds' cattle, that Bennett had done it with malice and the reasonable cash value of the converted cattle was \$5,327.11.
- The jury also found exemplary damages in the amount of \$250,000 against Bennett and \$1 million against Bonham Corporation, a corporation solely owned by Bennett.
- The trial court entered judgment on the jury's verdict and the court of appeals affirmed, noting that the findings of conversion and malice were fully supported by the evidence.
- In dealing with the exemplary damage ratio, the court of appeals reasoned that it should consider "the *potential* harm likely to have resulted from the appellants' conduct." *Id.* at 905.

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