Memorandum of Law

Facts:

A report of the opinion in *Chavez v. Chavez* (decided May 2, 1890) was published by West Publishing Co. at page 1018, volume 13, of the *South Western Reporter*. West attributes the case to the "Supreme Court of Texas." *Chavez*, 13 S.W. at 1018. The report of the case also contains the following notes: "Commissioners' decision. Consent case. Error from district court, Bexar county; G. H. NOONAN, Judge." *Id.* The report does not expressly identify the court making the transfer to the Commission of Appeals, nor does it indicate the date of transfer. The opinion is authored by "Acker, J." *Id.* Finally, the LEXIS Advance Research legal database has inserted the following notice in its electronic publication of the case: "**Notice:** PUBLICATION STATUS PENDING. CONSULT STATE RULES REGARDING PRECEDENTIAL VALUE."[1] *Id.*

Questions Presented:

What is the precedential value of *Chavez* and how should it be cited?

Short Answer:

Chavez was implicitly adopted by the Texas Supreme Court. Therefore, it has the same precedential value as an opinion issued by the Texas Supreme Court. Cite *Chavez* as follows: *Chavez v. Chavez*, 13 S.W.108 (Tex. 1890) (consent case, op. implicitly adopted in *Brown v. Payne*, 142 Tex. 102, 108, 176 S.W.2d 306, 309 (Tex. 1943)).

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[1]This notice appears only in *Chavez*. LEXIS did not insert this notice in any of the other twenty-nine consent cases discussed in this memorandum. The report of *Chavez* as published by West in the *South Western Reporter* does not contain this notice. The thirty cases are listed alphabetically on Exhibit "A."

Analysis and Discussion:

1. Chavez *was issued by the Texas Commission of Appeals*.

Although the case is attributed by West (and LEXIS Advance Research) to the Texas Supreme Court, the report makes it clear that the "old" Commission of Appeals[2] actually issued the opinion in the case. According to a note appended to the case, the opinion is a "Commissioners' decision." Furthermore, the opinion identifies the author as "Acker." This was Walter Acker who was appointed on April 4, 1889, to serve as presiding commissioner.[3] No justice named Acker served on the Supreme Court of Texas at this time.[4] Thus, the opinion was issued by the Commission of Appeals, not by the Texas Supreme Court.

2. Chavez *was Transferred by the Texas Supreme Court.*

The published report of *Chavez* provides no direct statement that the case was transferred to the commission by the Texas Supreme Court. However, the report indicates that the appeal was taken from a district court in Bexar County. At that time, only the Texas Supreme Court had jurisdiction to hear appeals in civil cases tried in the district courts.[5]

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[2]As distinguished from the relatively "newer" Commission of Appeals, existing between 1918 and 1945, that was established by Act of March 15, 1917, 35th Leg., R.S., ch. 76, 1917 Tex. Gen. Laws 142, 142-43, superseded by Act of Apr. 3, 1918, 35th Leg., 4th C.S., ch. 181, 1918 Tex. Gen. Laws 171. The Texas Supreme Court determined that the law was constitutional in *San Antonio & Aransas Pass Ry. Co. v. Blair*, 108 Tex. 434, 196 S.W. 502 (1917), despite a lengthy, forty-five page dissent by Justice Hawkins.

[3]C.W. Raines, *Year Book For Texas: 1901*, 116 (Austin: Gammel Book Co. 1902).

[4]*Court History: Justices From 1876–1945*, http://www.txcourts.gov/supreme/about-the-court/court-history (*see* "Justices from 1876 to 1945")

[5]Karl T. Gruben and James E. Hambleton, *A Reference Guide to Texas Law and Legal History* 28 (2nd ed. 1987). The Court of Appeals was granted jurisdiction in all criminal cases and in civil cases tried in *county* courts. *Id.*, James E. Hambleton, *Getting It All Together: Gathering Texas Court Decisions*, 47 Tex. B. J. 572, 573 (1984). Moreover, effective as of March 30, 1887, only cases "now or hereafter pending" in the Supreme Court (to the exclusion of the Court of Appeals) could be referred to the commission. Act of March 30, 1887, 20th Leg., R.S., ch. 95, § 2, 1887 Tex. Gen. Laws 74, 75. Thus, if *Chavez* was transferred to the commission within the three-year period preceding May 2, 1890 (the date *Chavez* was decided), an assumption that seems likely despite the acknowledged

Therefore, only the Texas Supreme Court could refer a civil case like *Chavez* originating in a district court. Finally, West attributed *Chavez* to the Supreme Court of Texas. It is unlikely that West would have done so had the case been transferred by the Court of Appeals. Thus, *Chavez* was referred to the commission by the Texas Supreme Court.

3. Chavez *was transferred to the Commission under the Act of March 30, 1887.*

Prior to the enactment of the 1887 enabling statute, Texas law denied precedential effect to a consent case.[6] Accordingly, consent cases decided under the original 1879 enabling act,[7] and those decided under the 1881[8] and 1883[9] amendments thereto, cannot be

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backlog of cases in the Texas Supreme Court at that time, then *Chavez* was transferred by the Texas Supreme Court.

[6]"The opinions of said commission shall not be published in the reports of the decisions of the supreme court nor the court of appeals, nor shall the same have any further or other effect than to determine the particular cause wherein rendered, and shall have no force or effect or authority as precedent in other causes." Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, § 8, 1879 Tex. Gen. Laws 30, 31. The 1881 and 1883 amendments did not affect this section of the statute. *See* notes 8 and 9 below. *See also Hollingsworth v.* Mexia, 14 Tex. Civ. App. 363, 37 S.W. 455 (Tex. Civ. App.—Houston 1896, no writ). In *Hollingsworth*, the court denigrated the opinion issued by the commissioners of appeal in *Hall v. Pierson*, 1 White & W. 1210 (Tex. Comm'n App. 1881) (consent case, not precedential), as being "one of the decisions made in cases referred to the Commission by consent of parties, which are not binding as precedents." *Id.* 14 Tex. Civ. App. at 366-67, 37 S.W. at 457.

[7]Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30. Shortly after this law was enacted, a divided Texas Supreme Court determined that the law was constitutional. *See Henderson v. Beaton*, 52 Tex. 29, 32 (1879).

[8]Act of February 9, 1881, 17th Leg., R.S., ch. 7, 1881 Tex. Gen. Laws 4. Section 1 of the 1881 amendment replaced section 1 of the 1879 act. Sections 2 through 5 of the 1881 act conferred upon the Texas Supreme Court and the Court of Appeals the power and duty to refer cases to the commissioners of appeal without the consent of the parties. Thus, section 4 of the 1881 act should properly be interpreted as requiring publication only of those opinions of the commissioners that were issued in cases referred to the commission without the consent of the parties. That this interpretation is correct is confirmed by the 1887 act which both *prohibits* the publication of consent cases in section 4 (unless otherwise decided by the Texas Supreme Court) and *requires* the publication of "the opinion of said Commission of Appeals in cases referred to it by the Supreme Court [i.e., without consent], when adopted by said court," in section 7. Act of March 30, 1887, 20th Leg., R.S., ch. 95, §§ 4 and 7, 1887 Tex. Gen. Laws 74, 75. The final clause of section 4 of the 1887 act would be superfluous if consent cases were covered by section 7 of that act.

[9]Act of March 20, 1883, 18th Leg., R.S., ch. 34 1883 Tex. Gen. Laws 25. Section 1 of the 1883 amendment replaced section 1 of the 1879 act, which had previously been replaced by section 1 of the 1881 act. Sections 2 through 5 of the 1883 act conferred upon the Texas Supreme Court and the Court of Appeals the power and duty to refer cases to the commissioners of appeal without the consent of the parties. Thus, section 4 of the 1883 act should properly be interpreted as requiring publication only of those opinions of the commissioners that were issued in cases referred to the commission without the consent of the parties. That this interpretation is correct is confirmed by the 1887 act which both *prohibits* the publication of consent cases in section 4 (unless otherwise decided by the Texas

given precedential effect, at least in theory.[10] But consent cases decided under the 1887 enabling statute can be given precedential effect if the Texas Supreme Court so decides.[11] Thus, we must determine whether *Chavez* was transferred under the 1887 enabling act, or before.

Unfortunately, the report of *Chavez* does not state the date that it was filed in the Texas Supreme Court or the date that it was transferred to the commission.[12] It seems

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Supreme Court) and *requires* the publication of "the opinion of said Commission of Appeals in cases referred to it by the Supreme Court [i.e., without consent], when adopted by said court," in section 7. Act of March 30, 1887, 20th Leg., R.S., ch. 95, §§ 4 and 7, 1887 Tex. Gen. Laws 74, 75. The final clause of section 4 of the 1887 act would be rendered superfluous if consent cases were covered by section 7 of that act.

[10]*But see* note 23 below. Originally, this presented no problem. Since consent cases were not published, they were not readily available to be cited as precedent by the bar or the bench. Even after the publication of volumes I and II of Posey's *Texas Unreported Cases*, containing previously unpublished consent cases, every lawyer knew that the cases published in these volumes were consent cases and had no precedential effect. A problem arose only after West began to publish consent cases in the *South Western Reporter* along with all of the other cases decided by Texas appellate courts. These were published after the 1887 enabling act permitted the Texas Supreme Court to give precedential value to a consent case. Thereafter, one had to review the reported cases carefully to determine whether a particular case was in fact a consent case. At first, for the consent cases reported for 1888, West merely appended a footnote to the last word of the opinion that provided as follows: "Referred to the commission of appeals for final determination, by written consent of the parties." *See, e.g.*, *Bunton v. Palm*, 9 S.W. 182 (Tex. Comm'n App. 1888) (consent case, not yet precedential) (cited as authority in *Adcock v. Nat'l Loan & Inv. Co.*, 96 S.W.2d 530, 531 (Tex. Civ. App.—Amarillo 1936, no writ)). In 1891, West began publishing a notice in the "Prior History" section of the report that a particular case was a "consent case." *See, e.g., E. Tex. Fire Co. v. Crawford*, 16 S.W. 1068, 1068 (Tex. Comm'n App. 1891) (consent case, recognized as precedential in *State & Cnty. Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 292, 93, 319 S.W.2d 297, 299 (1958)). Over time, lawyers and courts seemingly forgot the significance (or lack thereof) of consent cases.

[11]Act of March 30, 1887, 20th Leg., R.S., ch. 95, § 4, 1887 Tex. Gen. Laws 74, 75. *See* part 4 of this memorandum below. The legality of the 1887 enabling act was apparently challenged shortly after it was adopted. The incident is discussed by the Texas Supreme Court in *Williams v. Taylor*, 83 Tex. 667, 19 S.W. 156 (1892).

> When the Commission of Appeals, which was appointed under the Act of March 30, 1887, assembled at Tyler to enter upon their duties, a question was suggested as to the validity of the act, by reason of the fact that the Journals showed that an amendment had passed in one house which was not incorporated in the enrolled bill. We felt it our duty to determine the question before referring any cases to the commission. Our conclusion was, that the bill as signed by the President of the Senate and the Speaker of the House and approved by the Governor was conclusive evidence of the law, and that the act was valid.

Id., 83 Tex. at 674, 19 S.W. at 158. Regrettably, the Court does not cite the earlier case to which it refers.

[12]The opinion does provide the name of the district judge who tried the case—G.H. Noonan. This was George Henry Noonan who served as judge of the 18th District Court of Texas from 1862 until 1894, when he resigned to run (successfully) for Congress. *Biographical Directory of the United States Congress 1774 - Present*,

reasonable to assume, however, that the case did not languish on appeal for more than three years, despite the acknowledged backlog of cases then pending in the Texas Supreme Court.[13] Furthermore, the term of office for the commissioners appointed under the 1883 amendatory act expired on September 30, 1885.[14] There is no indication that the commissioners' authorization was extended by the 19th Texas legislature which began in 1885, so the commissioners were on hiatus between September 30, 1885, and March 30, 1887. Thus, if *Chavez* was not transferred under the 1887 enabling act, then it would have languished on appeal for more than five and half years—a scenario that is highly improbable. Thus, we are confident that *Chavez* was transferred under the 1887 enabling act.

4. *Authority of* Chavez.

The report of *Chavez* indicates that it was a consent case. *Chavez*, 13 S.W. at 1018. As a general rule, the enabling statute then in effect prohibited the publication of consent cases and denied them precedential value. The statute provided, in part, however, as follows:

> SEC. 4. The opinion of said commission in the cases so referred to it by consent, in writing, shall not be published in the reports of the decisions of the Supreme Court, nor shall they have any further or other effect than to determine the particular cause wherein rendered, and shall have no force or

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Noonan, George Henry, (1825 - 1907), http://bioguide.congress.gov/scripts/biodisplay.pl?index=N000131. Since Noonan remained on the bench until 1894, knowing his name does not help us to narrow down the range of dates within which *Chavez* was decided.

[13]According to the 1887 enabling act, "the accumulation of business in the Supreme Court is so great as to prevent, in ordinary course, that speedy determination to litigation which is essential to justice." Act of March 30, 1887, 20th Leg., R.S., ch. 95, § 15, 1887 Tex. Gen. Laws 74, 75.

[14]"[S]ection one of this act which provides for a continuance of the Commission of Appeals for two years from October 1st 1883 shall not take effect until October 1st 1883." Act of March 20, 1883, 18th Leg., R.S., ch. 36, § 6, 1883 Tex. Gen. Laws 25, 26. Thus, the two-year term began on October 1, 1883, and expired on September 30, 1885. The last commission opinion to be adopted by the Texas Supreme Court after the commissioners' term expired was adopted on December 18, 1885, in *Ramey v. Allison*, 64 Tex. 697 (1885). Interestingly, this case was published in the *Texas Reports*, but apparently not in the *South Western Reporter*. *Ramey* was not a consent case.

> effect or authority as precedent in other causes, *unless otherwise decided by the Supreme Court*.

Act of March 30, 1887, 20th Leg., R.S., ch. 95, § 4, 1887 Tex. Gen. Laws 74, 75 (emphasis added). Under this statute, consent cases lack precedential effect "unless otherwise decided by the Supreme Court." *Id.* The statute does not prescribe how the Texas Supreme Court is to decide "otherwise." *Id*. Over the years, it has used three different methods. First, it has expressly adopted the commission's opinion in consent cases.[15] Second, it has expressly adopted the commission's judgment in consent cases.[16] Third, in a subsequent case, it has

[15]The Texas Supreme Court has expressly adopted a commissioners' opinion in a consent case on at least two occasions. *See Smith v. Miller*, 63 Tex. 72, 76 (Tex. 1885) and *House v. Kendall*, 55 Tex. 40, 42-43 (1881). Granted, these cases were decided before the 1887 enabling act was enacted. An opinion by the commissioners, when adopted by the Texas Supreme Court, becomes as authoritative as any decision issued by the Texas Supreme Court itself. *Wooters v. Hollingsworth*, 58 Tex. 371 (1883). The importance attached by the Texas Supreme Court to a commissioner's opinion that has been expressly adopted by the Texas Supreme Court is illustrated in *State & County Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 319 S.W.2d 297 (1958). In *Kinner*, the Texas Supreme Court discussed the commissioners' decision in *E. Tex. Fire Co. v. Crawford*, 16 S.W. 1068 (Tex. Comm'n App. 1891) (consent case, recognized as precedential in *Kinner*), writing: "The opinion by Commissioner Marr has been referred to as one rendered in a Supreme Court case, *but such opinion was apparently never adopted by the Supreme Court* and does not appear in the official reports." *Id.*, 319 S.W.2d at 299 (emphasis added).

[16]In October and November of 1890, the Texas Supreme Court took the unusual step in several consent cases of expressly adopting the commission's judgment. *See Davis v. Hurst*, 14 S.W. 610 (Tex. Comm'n App. 1890) (consent case, judgm't adopted) (recognized as precedential in *Beatty v. O'Harrow*, 109 S.W. 414, 414 (Tex. Civ. App.—Fort Worth 1908, writ ref'd)); *Woolridge v. Rawlings*, 14 S.W. 667 (Tex. Comm'n App. 1890) (consent case, judg't adopted) (recognized as precedent in *Lloyds Cas. Insurer v. McGee*, 141 Tex. 384, 386, 174 S.W.2d 314, 316 (1943)); *Friedlander v. Hillcoat*, 14 S.W. 786 (Tex. 1890) (op. implicitly adopted in *Ingram v. Deere*, 288 S.W.3d 886, 894 (Tex. 2008) (consent case, judgm't adopted); and *Orynski v. Loustaunan*, 15 S.W. 674, 676 (Tex. Comm'n App. 1890) (consent case, judgm't adopted). Of these four opinions, only *Orynski* has never been cited. There is no reason for the Texas Supreme Court to adopt a consent case judgment other than to give the case precedential value. Nevertheless, none of these cases were published in the Texas Reports.

recognized the commission's opinion as precedent either to be used in support of its decision or to be distinguished therefrom,[17] sometimes claiming the opinion as one of its own.[18]

Clearly, *Chavez* is a consent case that was not published in the *Texas Reports*.[19] Furthermore, the Texas Supreme Court did not expressly adopt the opinion or judgment in *Chavez*. But the analysis does not stop there. *Chavez* is one of a group of thirty[20] known consent cases that were published in the *South Western Reporter*[21] and attributed to the "Supreme Court of Texas." Yet, despite the statute's command that these consent cases shall have no "further or other effect than to determine the particular cause wherein rendered, and shall have no force or effect or authority as precedent in other causes,"[22] all but four of them

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[17]*See, e.g.*, *Woolridge,* 14 S.W. 667 (Tex. Comm'n App. 1890) (consent case, judg't adopted) (recog'd as precedential and implicitly adopted in *Lloyds Cas. Insurer v. McGee*, 141 Tex. 384, 386, 174 S.W.2d 314, 316 (1943)); *E. Tex. Fire Co. v. Crawford*, 16 S.W. 1068, 1068 (Tex. Comm'n App. 1891) (consent case, recog'd as precedential in *State & Cnty. Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 292, 93, 319 S.W.2d 297, 299 (1958)).

[18]*See, e.g., Ladd v. Farrar*, 17 S.W. 55 (Tex. 1891) (consent case, implicitly adopted in *Davis v. Magnolia Petroleum Co.*, 134 Tex. 201, 206, 134 S.W.2d 1042, 144 (1940) and *Magnolia Petroleum Co. v. Still*, 163 S.W.2d 268, 271 (Tex. Civ. App.—Texarkana 1942, writ ref'd)); *Friedlander v. Hillcoat*, 14 S.W. 786 (Tex. 1890) (op. implicitly adopted in *Ingram v. Deere*, 288 S.W.3d 886, 894 (Tex. 2008)) (consent case, judgm't adopted).

[19]Neither West Publishing Co. nor LEXIS Advance Research offers a parallel citation of *Chavez* to the *Texas Reports*. Thus, one may conclude that *Chavez* was not published in the *Texas Reports*.

[20]*See* Exhibit "A" attached hereto for an alphabetical index of these cases.

[21]West began to publish consent cases in Volume 9 of the *South Western Reporter* with the publication of *Newman v. Blum*, 9 S.W. 178 (Tex. 1888) (consent case, op. implicitly adopted in *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011)). Volume II of *Posey's Unreported Cases* included consent cases through 1884. Thus, it is possible that unpublished consent cases may yet be discovered that the commission issued after Posey sent his second volume to the publisher, but before West started to publish them.

[22]Act of March 30, 1887, §4. Judging, however, from the number of times that courts have cited to Posey's two volumes of consent cases, especially in the early years, this is perhaps a rule "[m]ore honor'd in the breach than the observance." William Shakespeare, *Hamlet*, Act 1, scene 4, ln. 6. *See, e.g.*, *Hodge v. Donald*, 55 Tex. 344 (1881). In *Hodge*, the Texas Supreme Court distinguishes "the very elaborate opinion of Presiding Judge Walker, in the case of McReynolds v. Bowlly, submitted by consent to the commissioners of appeals and decided at the Austin term, 1880." *Id.* at 354. *See McReynolds v. Bowlby*, 1 Posey 452 (Tex. Comm'n App. 1880).

have been cited as authority by a Texas court at least once.[23] When so cited, they are usually attributed to the Texas Supreme Court.[24] Eight of these cases—including *Chavez*—have been recognized as precedent by the Texas Supreme Court.[25] Eight others have been recognized as precedent by the courts of civil appeals in cases where the Texas Supreme Court subsequently refused the writ of error.[26] This accounts for more than half of these consent

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[23]The exceptions are *Thiers v. Holmes*, 9 S.W. 191 (Tex. Comm'n App. 1888) (consent case, not yet precedential); *McClennand v. Fallon*, 14 S.W. 295 (Tex. Comm'n. App. 1890) (consent case, not yet precedential); *Orynski v. Loustaunan*, 15 S.W. 674 (Tex. Comm'n App. 1890) (consent case, judgm't adopted); and *Lockhart v. Keller*, 9 S.W. 179 (Tex. Comm'n App. 1888) (consent case, not yet precedential). As recently as four years ago, however, *Newman* belonged on this list. *Newman v. Blum*, 9 S.W. 178 (Tex. 1888) (consent case, op. implicitly adopted in *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011)). Then, out of the blue, *Newman* was recognized and implicitly adopted by the Texas Supreme Court in *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011).

[24]*But see Altgelt v. Harris*, 11 S.W. 857 (Tex. 1889), which cited *Murrah* as "*Murrah v. Brichta*, 9 S.W. 185 (consent case, decided by the commission of appeals, Austin term 1888)"; *Southwest Bank & Trust Co. v. Exec. Sportsman Ass'n.*, 477 S.W.2d 920, 924 (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.), which cited *Ballew* as "*Ballew v. Casey*, 9 S.W. 189 (Tex. Comm'n. App. 1888)"; and *Loftus v. Williams*, 59 S.W. 291, 292 (Tex. Civ. App.—Fort Worth 1900, no writ) which says of *Leroux v. Baldus*, 13 S.W. 1019 (Tex. Comm'n App. 1890) (consent case, not yet precedential) (cited as authority in *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372, 382 (Tex. App.—San Antonio 1992, writ denied) and in other cases), that it was "a consent case tried by the Commissioners of Appeals, and is not authority."

[25]*Newman v. Blum*, 9 S.W. 178 (Tex. 1888) (consent case, op. implicitly adopted in *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011)); *Murrah v. Brichta*, 9 S.W. 185 (Tex. Comm'n App. 1888) (consent case, recognized as precedential in *Altgelt v. Harris*, 11 S.W. 857, 858 (Tex. 1889)); *Chavez v. Chavez*, 13 S.W. 108 (Tex. Comm'n App. 1890) (consent case, op. implicilty adopted in *Brown v. Payne*, 142 Tex. 102, 108, 176 S.W.2d 306, 309 (Tex. 1943)); *Woolridge v. Rawlings*, 14 S.W. 667 (Tex. Comm'n App. 1890) (consent case, recognized as precedent in *Lloyds Cas. Insurer v. McGee*, 141 Tex. 384, 386, 174 S.W.2d 314, 316 (1943); *Friedlander v. Hillcoat*, 14 S.W. 786 (Tex. 1890) (op. implicitly adopted in *Ingram v. Deere*, 288 S.W.3d 886, 894 (Tex. 2008); *E. Tex. Fire Co. v. Crawford*, 16 S.W. 1068, 1068 (Tex. Comm'n App. 1891) (consent case, recognized as precedential in *State & Cnty. Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 292, 93, 319 S.W.2d 297, 299 (1958)); *Ladd v. Farrar*, 17 S.W. 55 (Tex. 1891) (consent case, op. implicitly adopted in *Davis v. Magnolia Petroleum Co.*, 134 Tex. 201, 206, 134 S.W.2d 1042, 1044 (1940)); and *Levy v. Campbell*, 19 S.W. 438 (Tex. Comm'n App. 1892) (consent case, recognized as precedential in *Gulf, Colo. & Santa Fe Ry. Co. v. Conley*, 113 Tex. 472, 479-80, 260 S.W. 561, 564 (1924) and *Int'l & Great. N. Ry. Co. v. Welch*, 86 Tex. 203, 205, 24 S.W. 390, 391 (Tex. 1893)), *rev'd on reh'g*, *Levy v. Campbell*, 20 S.W. 196 (June 21, 1892).

[26]*Ballew v. Casey*, 9 S.W. 189 (Tex. Comm'n. App. 1888) (consent case, recognized as precedential in *Henson v. Corpus Christi*, 258 S.W.2d 343, 344 (Tex. Civ. App.—San Antonio 1953, writ ref'd)); *Wassenick v. Ireland*, 9 S.W. 203 (Tex. Comm'n App. 1888) (consent case, recognized as precedential in *Friedman-Shelby Shoe Co. v. Davidson*, 189 S.W. 1029, 1032 (Tex. Civ. App.—Amarillo 1916, writ ref'd)); *Tex. Homestead Bldg. & Loan Ass'n v. Kerr*, 13 S.W. 1020 (Tex. Comm'n App. 1890) (consent case, recognized as precedential in *Eastland Bldg. & Loan Ass'n v. Williamson*, 78 S.W.2d 703, 705 (Tex. Civ. App.—Eastland 1934, writ ref'd)*; St. Louis, A. & T. Ry. Co. v. Jones*, 14 S.W. 309 (Tex. Comm'n App. 1890) (consent case, recognized as precedential in *Dall. Ry. & Terminal Co. v. Curtis*, 53 S.W.2d 85, 87 (Tex. Civ. App.—El Paso 1932, writ ref'd)); *Ellerman v. Wurz*, 14 S.W. 333 (Tex. Comm'n App. 1890) (consent case, recognized as precedential in *Girardeau v. Perkins*, 59 Tex. Civ. App.

cases. Of those remaining, two have had their judgments adopted by the Texas Supreme Court,[27] and one was cited as precedent in a commissioners' opinion whose judgment was

552, 559, 126 S.W. 633, 636 (Tex. Civ. App.—Galveston 1910, writ ref'd) and *Bldg. & Loan Ass'n of Dakota v. Logan*, 33 S.W. 1088, 1089 (Tex. Civ. App.—San Antonio 1896, writ ref'd)); *Davis v. Hurst*, 14 S.W. 610 (Tex. Comm'n App. 1890) (consent case, judgm't adopted) (recognized as precedential in *Beatty v. O'Harrow*, 109 S.W. 414, 414 (Tex. Civ. App.—Fort Worth 1908, writ ref'd)); *Int'l & Great N. Ry. Co. v. Smith*, 14 S.W. 642 (Tex. Comm'n. App. 1890) (consent case, recognized as precedential in *Johnson v. Sullivan*, 163 S.W. 1015, 1015 (Tex. Civ. App.—Austin 1914, writ ref'd) and *Galveston, H. & S. A. R. Co. v. Davis*, 27 Tex. Civ. App. 279, 280, 65 S.W. 217, 217 (Tex. Civ. App.—San Antonio 1901, writ ref'd)); *Halbert v. Alford*, 16 S.W. 814 (Tex. Comm'n App. 1891) (consent case, recognized as precedential in *Clements v. Texas Co*., 273 S.W. 993, 1003 (Tex. Civ. App.—Galveston 1925, writ ref'd)).

The treatment of *Crawford* by the Texas Supreme Court is instructive. *See State & County Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 319 S.W.2d 297 (1958). In *Kinner*, after noting that Crawford was a consent case decided by the commission, and after quoting the statute that denied consent cases precedential effect, the Texas Supreme Court nevertheless noted that the opinion in Crawford "had been cited with approval in subsequent appellate decisions and particularly in Mercury Fire Insurance Co. v. Dunaway, [74 S.W.2d 418, 418 (Tex. Civ. App.—Waco 1934, writ ref'd)], in which this Court refused a writ of error." *Id.*, 319 S.W.2d 299-300. Accordingly, the Court determined that "at this late date we can not ignore nor disregard the holding" in *Crawford*. *Id.*

To determine the precise meaning attributed by the Texas Supreme Court to the notation "writ refused," one must consider the date of a particular decision. *See, generally,* Dylan O. Drummond, *Citation Writ Large*, 20, No. 2 The Appellate Advocate, State Bar of Texas Appellate Section Report 89 (Winter 2007); Dylan O. Drummond, *Texas Citation Writ Large[r]: Consequential Necessity or "Tyranny of the Inconsequential"?*, State Bar of Tex. Prof. Dev. Program, Legal Writing to Win 2015 Course, ch. 5 (2015). For cases decided after June 13, 1927, the notation means that the "judgment of the Court of Civil Appeals [was] a correct one and . . . the principles of law declared in the opinion of the court [were] correctly determined." Act of Mar. 25, 1927, 40th Leg., R.S., ch. 144, 1927 Tex. Gen. Laws 214, 215 (eff. as of June 14, 1927, the 90th day after the legislature adjourned *sine die* on Mar. 16, 1927). *See The Greenbook: Texas Rules of Form* App. E at 111 (Texas Law Review Ass'n ed., 12th ed. 2010). *Cf.* Tex. R. App. P. 56.1(c). Such cases have equal precedential value with the Texas Supreme Court's own opinions. *Id.; Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006). But the period from September 1, 1892, to June 14, 1927, was "an amorphous time" in the Court's writ practice. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 754 n.52 (Tex. 2006). During that era, the notation usually "signified an agreement with the judgment of the court of appeals, but not adoption of the opinion." *Id.*; *Fleming v. Tex. Loan Agency*, 87 Tex. 238, 241, 27 S.W. 126, 127 (Tex. 1894). It meant "that the Supreme Court was satisfied with the correctness of the judgment rendered," *Ulbricht v. Friedsam*, 159 Tex. 607, 325 S.W.2d 669, 674 (Tex. 1959), "but did not necessarily approve the reasoning used." *Brackenridge v. Cobb*, 85 Tex. 448, 450, 21 S.W. 1034 1035 (1893). In some cases, the Court treated as binding precedent a lower court's opinion with respect to which it had refused an application for writ of error. *See Burrell v. Adams*, 104 Tex. 183, 185, 135 S.W.1156, 1157 (1911). Unfortunately, however, during the period from February 20, 1916, to June 13, 1327, the notation could also be used in cases where the alleged error was not properly preserved and presented to the Court. *See City of San Angelo v. Deutsch*, 126 Tex. 532, 540, 91 S.W.2d 308, 312 (1936) (application for writ contained no assignment of error on question of estoppel); *Terrell v. Middleton*, 108 Tex. 14, 17, 191 S.W. 1138, 1139 (Tex. 1917) (Hawkins, J., concurring). *See, generally*, Gordon Simpson, *Notations on Applications for Writs of Error*, 12 Tex. B. J. 547, 571 (Dec. 1949) and *Texas Rules of Form* App. A at 41 (Tex. Law Review Ass'n ed., 6th ed. 1988).

[27]*See Orynski v. Loustaunan*, 15 S.W. 674 (Tex. Comm'n App. 1890) (consent case, judgm't adopted) and *S. Ins. Co. v. Wolverton Hardware Co.*, 19 S.W. 615 (Tex. Comm'n App. 1892) (consent case, judgm't adopted). *See also* note 16 above.

adopted by the Texas Supreme Court.[28] In fact, in only one known instance has any of these thirty consent cases been denigrated as lacking authority.[29] Given this treatment of these consent cases over the past hundred and thirty years, "at this late date we can not ignore nor disregard" these cases. *See Kinner*, 159 Tex. at 290, 319 S.W.2d at 297.

Regardless, however, of the precedential value, if any, that should be accorded these cases based upon the nearly universal way that Texas courts have treated them as being precedential, it is nevertheless proper to cite *Chavez* as a precedent because the Texas Supreme Court implicitly adopted *Chavez* as one of its own cases when it adopted the opinion in *Brown. Brown v. Payne*, 142 Tex. 102, 108, 176 S.W.2d 306, 309 (1943) (citing *Chavez* as "Chavez v. Chavez, *Tex. Sup.*, 13 S.W. 1018, 1019") (emphasis added). In *Brown*, the Texas Supreme Court determined that it was unnecessary "to discuss at length the cases cited by the Court of Civil Appeals. None contain pronouncements at variance with those here made. Chavez v. Chavez, Tex. Sup., 13 S.W. 1018, 1019." *Id.*, 176 S.W.2d at 309. In its opinion, the court of civil appeals had expressly attributed *Chavez* to the Texas Supreme Court: "In Chavez v. Chavez, *Tex.Sup.*, 13 S.W. 1018, in construing an instrument similar to the one here . . . *our Supreme Court* held the instrument was a deed." *Payne v. Brown*, 172 S.W.2d 352, 355 (Tex. Civ. App.—Dallas 1943) *rev'd* 142 Tex. 102, 108, 176 S.W.2d 306,

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[28]*See Glass v. Wiles*, 14 S.W. 225 (Tex. Comm'n. App. 1890) (consent case, not yet precedential) (cited as authority in *Chipley v. Smith*, 292 S.W. 209, 210 (Tex. Comm'n App. 1927, judg't adopted)).

[29]*See Loftus v. Williams*, 59 S.W. 291, 292 (Tex. Civ. App.—Fort Worth 1900, no writ) ("The only Texas case apparently in point cited by the appellant is Leroux v. Baldus, 13 S.W. 1019. That was a consent case tried by the Commissioners of Appeals, and is not authority.") *Loftus* was written by Justice Garrett, a former member of the commission. Subsequently, the Fort Worth court has been less persnickety, citing various consent cases as precedent in at least eight different opinions. *See, e.g., Jackson v. Peters*, 251 S.W.2d 544 (Tex. Civ. App.—Fort Worth 1952, no writ). In *Jackson*, the court not only cited *Phoenix Assurance Co. v. Freedman*, 19 S.W. 1010 (Tex. Comm'n. App. 1892) (consent case, not yet precedential), as authority, but also attributed it to the Texas Supreme Court. *Id.* at 545 (citing *Phoenix* as "Phoenix Assurance Co. v. Freedman, Tex. Sup., 19 S.W. 1010").

309 (1943) (emphasis added). After discussing *Chavez* at some length, the Texas Supreme Court determined that "the rule applied in the Chavez case is the same as is applied here." *Id.* Implicit in its extended discussion of *Chavez* is a recognition by the Court that *Chavez* is binding precedent to be distinguished as necessary. Otherwise, the Court would simply have cited the enabling act of 1887 and cavalierly dismissed *Chavez* as a non-precedential consent case.

5. How to Cite *Chavez*.

The Texas Supreme Court in *Brown* implicitly adopted *Chavez* as one of its own opinions. Therefore, the case should properly be cited as follows: *Chavez v. Chavez*, 13 S.W.108 (Tex. 1890) (consent case, op. implicitly adopted in *Brown v. Payne*, 142 Tex. 102, 108, 176 S.W.2d 306, 309 (Tex. 1943)).

Note on Citation Forms:

Texas law does not forbid the citation of consent cases. Thus, a lawyer may cite any consent case, provided that an appropriate parenthetical remark is appended to the citation. *The Greenbook: Texas Rules of Form* (Texas Law Review Ass'n ed., 12th ed. 2010), however, does not mention that consent cases decided after March 30, 1887, may have precedential value. Nor does it provide any rules for citing to these cases. Therefore, for consent cases decided after March 30, 1887, we suggest that the following citation forms be used:

1. If the Texas Supreme Court expressly adopted the opinion in a consent case, then cite the case as an opinion of that court, just as is done when the Texas Supreme Court adopts the opinion in a non-consent case. *E.g.*, *House v. Kendall*, 55 Tex. 40, 42-43 (1881).

2. If the Texas Supreme Court implicitly adopts the opinion in a consent case by citing it as precedential and claiming it as one of its own opinions, then cite the case as an opinion of that court with a parenthetical note that (a) acknowledges that the case is a consent case and (b) cites the opinion in which it was implicitly adopted. *E.g.*, *Newman v. Blum*, 9 S.W. 178 (Tex. 1888) (consent case, op. implicitly adopted in *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011)).

3 If the Commission of Appeals implicitly adopted the opinion in a consent case by citing it as precedential and attributing it to the Texas Supreme Court, and the Texas Supreme Court adopted the opinion of the Commission of Appeals, then cite the case as an opinion of the Texas Supreme Court with a parenthetical note that (a) acknowledges that the case is a consent case and (b) cites the opinion in which it was implicitly adopted. *E.g.*, *Chavez v. Chavez*, 13 S.W. 108 (Tex. 1890) (consent case, op. implicitly adopted in *Brown v. Payne*, 142 Tex. 102, 108, 176 S.W.2d 306, 309 (Tex. 1943)).

4. If the Texas Supreme Court neither expressly nor implicitly adopts the opinion in a consent case, but does subsequently recognize the case as precedential, then cite the case to the Texas Commission of Appeals with a parenthetical note that (a) acknowledges that the case is a consent case and (b) cites the opinion that recognizes it as precedential. *E.g., E. Tex. Fire Co. v. Crawford*, 16 S.W. 1068 (Tex. Comm'n App. 1891) (consent case, recognized as precedential in *State & Cnty. Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 292-93, 319 S.W.2d 297, 299 (1958)).

5. If the Texas Supreme Court expressly adopts the *judgment* in a consent case, then cite the case to the Commission of Appeals with a parenthetical note that (a) acknowledges that the case is a consent case and (b) indicates that the judgment was adopted. *E.g.*, *Davis v. Hurst*, 14 S.W. 610 (Tex. Comm'n App. 1890) (consent case, judgm't adopted) (recognized as precedential in *Beatty v. O'Harrow*, 109 S.W. 414, 414 (Tex. Civ. App.—Fort Worth 1908, writ ref'd)).

6a. If the Texas Supreme Court neither expressly nor implicitly adopts the opinion or judgment in a consent case, but does subsequently refuse the writ of error with respect to an opinion of the court of civil appeals that recognizes the case as precedential, then cite the case to the

Texas Commission of Appeals with a parenthetical note that (a) acknowledges that it is a consent case and (b) cites the opinion that recognizes it as precedential. *E.g.*, *Tex. Homestead Bldg. & Loan Ass'n v. Kerr*, 13 S.W. 1020 (Tex. Comm'n App. 1890) (consent case, recognized as precedential in *Eastland Bldg. & Loan Ass'n v. Williamson*, 78 S.W.2d 703, 705 (Tex. Civ. App.—Eastland 1934, writ ref'd)).

6b. If the Texas Supreme Court neither expressly nor implicitly adopts the opinion or judgment in a consent case nor claims the opinion therein as one of its own, but does subsequently refuse the petition for review of an opinion issued by a court of appeals that recognizes the case as precedential, then cite the case to the Texas Commission of Appeals with a parenthetical note that (a) acknowledges that it is a consent case and (b) that cites the opinion that recognizes it as precedential. No example is available at this time.

7a. If none of the foregoing apply, but a consent case has been cited as authority by the old or new Commission of Appeals in an opinion that was not adopted by the Texas Supreme Court, then cite the case to the Texas Commission of Appeals with a parenthetical note acknowledging that it is a consent case and that it is not yet precedential. Add a second parenthetical note citing the Commission opinion that previously cited the case as authority. *E.g.*, *Glass v. Wiles*, 14 S.W. 225 (Tex. Comm'n. App. 1890) (consent case, not yet precedential) (cited as authority in *Chipley v. Smith*, 292 S.W. 209, 210 (Tex. Comm'n App. 1927, judg't adopted)).

7b. If none of the foregoing apply, but a consent case has been cited as authority by an intermediate Texas appellate court, then cite the case to the Texas Commission of Appeals with a parenthetical note acknowledging that it is a consent case and that it is not yet precedential. Add a second parenthetical note citing to the most favored opinion that has previously cited the case as authority. *E.g.*, *Hamilton v. Glasscock*, 9 S.W. 207 (Tex. Comm'n. App. 1889) (consent case, not yet precedential) (cited as authority in *Zachry & Gearhart v. Peterson & Avant*, 171 S.W. 494, 496 (Tex. Civ. App.—San Antonio 1914, no writ)).

8. Otherwise, cite a consent case to the Texas Commission of Appeals with a parenthetical note acknowledging that it is a consent case that is not yet precedential. *E.g.*, *Thiers v. Holmes*, 9 S.W. 191 (Tex. Comm'n App. 1888) (consent case, not yet precedential). This form distinguishes such a case from consent cases decided before March 30, 1887, that, in theory at least, can never be recognized as precedential by the Texas Supreme Court.

Exhibit "A"

CONSENT CASES PUBLISHED IN THE *SOUTH WESTERN REPORTER*, BUT NOT IN THE *TEXAS REPORTS*

(Listed in Alphabetical Order)

Exhibit "B"

CONSENT CASES PUBLISHED IN THE *SOUTH WESTERN REPORTER*, BUT NOT IN THE *TEXAS REPORTS*

(Listed in Order of Publication)

1. *Newman v. Blum*, 9 S.W. 178 (Tex. 1888) (consent case, op. implicitly adopted in *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011)). **Per citation rule 2.**

2. *Lockhart v. Keller*, 9 S.W. 179 (Tex. Comm'n App. 1888) (consent case, not yet precedential). **Per citation rule 8.**

3. *Bunton v. Palm*, 9 S.W. 182 (Tex. Comm'n App. 1888) (consent case, not yet precedential) (cited as authority in *Adcock v. Nat'l Loan & Inv. Co.*, 96 S.W.2d 530, 531 (Tex. Civ. App.—Amarillo 1936, no writ)). **Per citation rule 7b.**

4. *Murrah v. Brichta*, 9 S.W. 185 (Tex. Comm'n App. 1888) (consent case, recognized as precedential in *Altgelt v. Harris*, 11 S.W. 857, 858 (Tex. 1889)). **Per citation rule 4.**

5. *Ballew v. Casey*, 9 S.W. 189 (Tex. Comm'n. App. 1888) (consent case, recognized as precedential in *Henson v. Corpus Christi*, 258 S.W.2d 343, 344 (Tex. Civ. App.—San Antonio 1953, writ ref'd)). **Per citation rule 6a.**

6. *Thiers v. Holmes*, 9 S.W. 191 (Tex. Comm'n App. 1888) (consent case, not yet precedential). **Per citation rule 8.**

7. *Wassenick v. Ireland*, 9 S.W. 203 (Tex. Comm'n App. 1888) (consent case, recognized as precedential in *Friedman-Shelby Shoe Co. v. Davidson*, 189 S.W. 1029, 1032 (Tex. Civ. App.—Amarillo 1916, writ ref'd)). **Per citation rule 6a.**

8. *Hamilton v. Glasscock*, 9 S.W. 207 (Tex. Comm'n. App. 1889) (consent case, not yet precedential) (cited as authority in *Zachry & Gearhart v. Peterson & Avant*, 171 S.W. 494, 496 (Tex. Civ. App.—San Antonio 1914, no writ)). **Per citation rule 7b.**

9. *Sutherland v. Williams*, 11 S.W. 1067 (Tex. Comm'n. App. 1889) (consent case, not yet precedential) (cited as authority in *Collier v. Valley Bldg. & Loan Ass'n.*, 62 S.W.2d 82, 84 (Tex. Comm'n App. 1933, holding approved)). **Per citation rule 7a.**

10. *Chavez v. Chavez*, 13 S.W. 108 (Tex. Comm'n App. 1890) (consent case, op. implicitly adopted in *Brown v. Payne*, 142 Tex. 102, 108, 176 S.W.2d 306, 309 (Tex. 1943)). **Per citation rule 3.**

11. *Leroux v. Baldus*, 13 S.W. 1019 (Tex. Comm'n App. 1890) (consent case, not yet precedential) (cited as authority in *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372, 382 (Tex. App.—San Antonio 1992, writ denied) and in other cases). **Per citation rule 7b.**

12. *Tex. Homestead Bldg. & Loan Ass'n v. Kerr*, 13 S.W. 1020 (Tex. Comm'n App. 1890) (consent case, recognized as precedential in *Eastland Bldg. & Loan Ass'n v. Williamson*, 78 S.W.2d 703, 705 (Tex. Civ. App.—Eastland 1934, writ ref'd)). **Per citation rule 6a.**

13. *Norton v. Conner*, 14 S.W.193 (Tex. Comm'n. App. 1890) (consent case, not yet precedential) (cited as authority in *Ogilvie v. Hill*, 563 S.W.2d 846, 849 (Tex. Civ. App.—Texarkana 1918, writ ref'd n.r.e.)). **Per citation rule 7b.**

14. *Cordova v. Lee*, 14 S.W. 208 (Tex. Comm'n. App. 1890) (consent case, not yet precedential) (cited as authority in *Erminger v. Daniel*, 185 S.W. 148, 149 (Tex. Civ. App.—San Antonio 1945, writ ref'd w.o.m.) and in other cases). **Per citation rule 7b.**

15. *Glass v. Wiles*, 14 S.W. 225 (Tex. Comm'n. App. 1890) (consent case, not yet precedential) (cited as authority in *Chipley v. Smith*, 292 S.W. 209, 210 (Tex. Comm'n App. 1927, judg't adopted)). **Per citation rule 7a.**

16. *Phelan v. Boyd*, 14 S.W. 290 (Tex. Comm'n. App. 1890) (consent case, not yet precedential) (cited as authority in *Shelton v.Piner*, 126 S.W. 65, 66 (Tex. Civ. App.—Texarkana 1910, no writ)). **Per citation rule 7b.**

17. *McClelland v. Fallon*, 14 S.W. 295 (Tex. Comm'n. App. 1890) (consent case, not yet precedential). **Per citation rule 8.**

18. *St. Louis, A. & T. Ry. Co. v. Jones*, 14 S.W. 309 (Tex. Comm'n App. 1890) (consent case, recognized as precedential in *Dall. Ry. & Terminal Co. v. Curtis*, 53 S.W.2d 85, 87 (Tex. Civ. App.—El Paso 1932, writ ref'd)). **Per citation rule 6a.**

19. *Ellerman v. Wurz*, 14 S.W. 333 (Tex. Comm'n App. 1890) (consent case, recognized as precedential in *Girardeau v. Perkins*, 59 Tex. Civ. App. 552, 559, 126 S.W. 633, 636 (Tex. Civ. App.—Galveston 1910, writ ref'd) and *Bldg. & Loan Ass'n of Dakota v. Logan*, 33 S.W. 1088, 1089 (Tex. Civ. App.—San Antonio 1896, writ ref'd)). **Per citation rule 6a.**

20. *Davis v. Hurst*, 14 S.W. 610 (Tex. Comm'n App. 1890) (consent case, judgm't adopted) (recognized as precedential in *Beatty v. O'Harrow*, 109 S.W. 414, 414 (Tex. Civ. App.—Fort Worth 1908, writ ref'd)). **Per citation ruled 5 and 6a.**

21. *Int'l & Great N. Ry. Co. v. Smith*, 14 S.W. 642 (Tex. Comm'n. App. 1890) (consent case, recognized as precedential in *Johnson v. Sullivan*, 163 S.W. 1015, 1015 (Tex. Civ. App.—Austin 1914, writ ref'd) and *Galveston, H. & S. A. R. Co. v. Davis*, 27 Tex. Civ. App. 279, 280, 65 S.W. 217, 217 (Tex. Civ. App.—San Antonio 1901, writ ref'd)). **Per citation rule 6a.**

22. *Woolridge v. Rawlings*, 14 S.W. 667 (Tex. Comm'n App. 1890) (consent case, judg't adopted) (recognized as precedent in *Lloyds Cas. Insurer v. McGee*, 141 Tex. 384, 386, 174 S.W.2d 314, 316 (1943)). **Per citation rules 4 and 5.**

23. *Friedlander v. Hillcoat*, 14 S.W. 786 (Tex. 1890) (op. implicitly adopted in *Ingram v. Deere*, 288 S.W.3d 886, 894 (Tex. 2008)) (consent case, judg't adopted). **Per citation rules 2 and 5.**

24. *Orynski v. Loustaunan*, 15 S.W. 674 (Tex. Comm'n App. 1890) (consent case, judgm't adopted). **Per citation rule 8.**

25. *Halbert v. Alford*, 16 S.W. 814 (Tex. Comm'n App. 1891) (consent case, recognized as precedential in *Clements v. Tex. Co.*, 273 S.W. 993, 1003 (Tex. Civ. App.—Galveston 1925, writ ref'd)). **Per citation rule 6a.**

26. *E. Tex. Fire Co. v. Crawford*, 16 S.W. 1068 (Tex. Comm'n App. 1891) (consent case, recognized as precedential in *State & Cnty. Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 292-93, 319 S.W.2d 297, 299 (1958)). **Per citation rule 4.**

27. *Ladd v. Farrar*, 17 S.W. 55 (Tex. 1891) (consent case, op. implicitly adopted in *Davis v. Magnolia Petroleum Co.*, 134 Tex. 201, 206, 134 S.W.2d 1042, 1044 (1940)). **Per citation rule 3.**

28. *Levy v. Campbell*, 19 S.W. 438 (Tex. Comm'n App. 1892) (consent case, recognized as precedential in *Gulf, Colo. & Santa Fe Ry. Co. v. Conley*, 113 Tex. 472, 479-80, 260 S.W. 561, 564 (1924) and *Int'l & Great. N. Ry. Co. v. Welch*, 86 Tex. 203, 205, 24 S.W. 390, 391 (Tex. 1893)), *rev'd on reh'g*, *Levy v. Campbell*, 20 S.W. 196 (June 21, 1892). **Per citation rule 4.**

29. *S. Ins. Co. v. Wolverton Hardware Co.*, 19 S.W. 615 (Tex. Comm'n App. 1892) (consent case, judgm't adopted per curiam). **Per citation rule 5.**

30. *Phoenix Assurance Co. v. Freedman*, 19 S.W. 1010 (Tex. Comm'n. App. 1892) (consent case, not yet precedential) (cited as authority in *Jackson v. Peters*, 251 S.W.2d 544, 545 (Tex. Civ. App.—Fort Worth 1952, no writ). **Per citation rule 7b.**