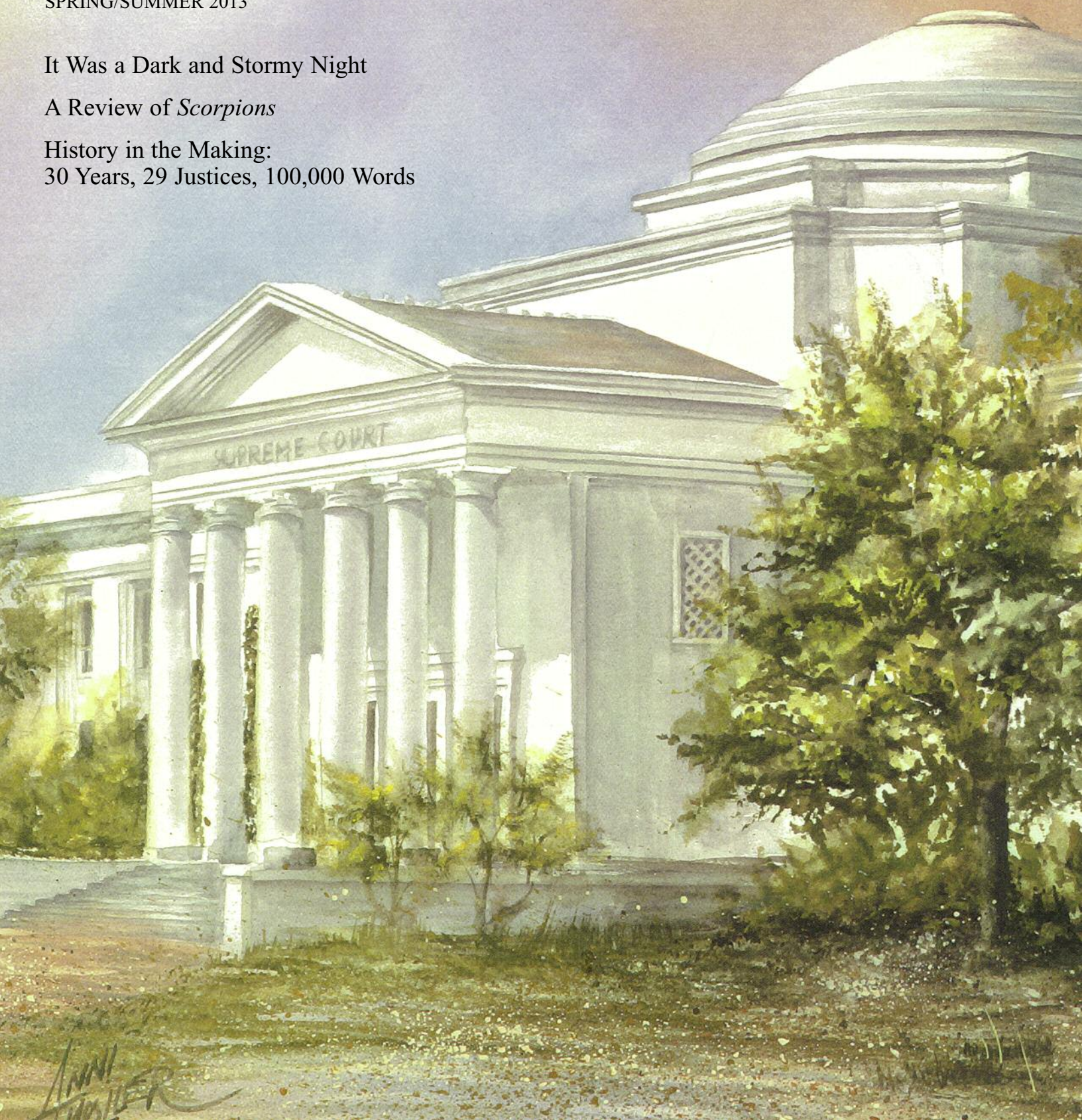
Florida Supreme Court Historical Society

SPRING/SUMMER 2013

It Was a Dark and Stormy Night

A Review of *Scorpions*

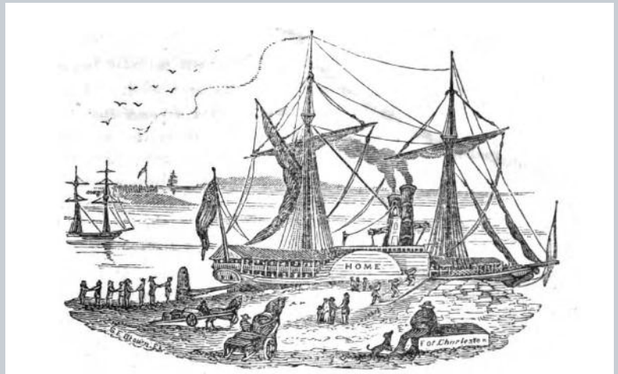
History in the Making:
30 Years, 29 Justices, 100,000 Words



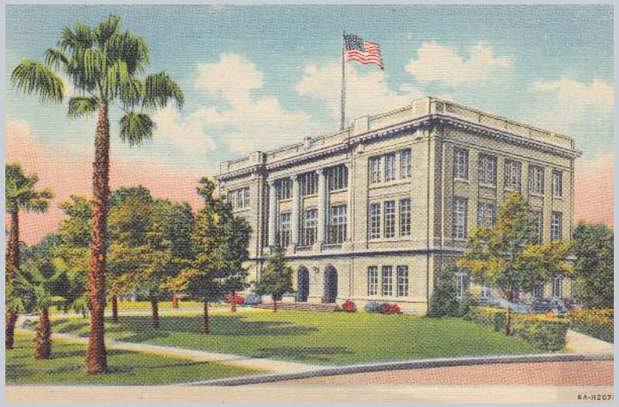
FROM THE EDITOR

Welcome back to the second annual edition of the Florida Supreme Court Historical Society's Magazine. Inside these pages you will find stories regarding the legal ramifications of a North Carolina ship wreck, the political influence of a president on supreme court justices and an update on our society's third volume of the History of the Florida Supreme Court. I hope you enjoy our work.

Jonathan F. Claussen



Depiction of the "Home", ready to embark on its last journey, *Steamboat Disasters and Railroad Accidents in the United States*, by S.A. Howland, 1840.



Postcard rendering of the Florida Supreme Court

Florida Supreme Court Historical Society

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Florida Supreme Court Historical Society

The Florida Supreme Court Historical Society works to save and maintain for future generations the records of the people and events that have shaped the evolution of Florida's court system from the early 1800s, through the 20th Century, and beyond. The Society is committed to making sure people understand the importance of a strong, independent judiciary in our governmental balance of power. The Society's two-fold mission is to (1) educate the public about the critically important work of the courts in protecting personal rights and freedoms, as well as in resolving the myriad of disputes that arise within the state, and (2) preserve the rich history of Florida's judicial system.

This publication has been sponsored by the members of the Florida Supreme Court Historical Society.

Florida Supreme Court Historical Society
Florida Supreme Court Building, 500 S. Duval St.,
Tallahassee, FL 32301

Florida Supreme Court Historical Society Spring/Summer 2013

Front Cover: The Florida Supreme Court building in water color.

Pictured Above (L) to (R): Justice E. C. Perry, Justice Barbara Pariente, Justice Fred Lewis, Justice Jorge Labarga, Justice Peggy Quince, Justice Major Harding, Justice Joseph Hatchett and Justice Parker Lee McDonald at the 2012 Florida Supreme Court Annual Dinner.

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FROM THE PRESIDENT

The past year has been extraordinary in the history of our Supreme Court and the Society. We have experienced intense state and national attention focused on our merit retention process. This model was instituted by former Governor Reubin Askew and it has been tested as never before. Now we have lost not only a great jurist in Justice Ben Overton, but an individual who was the symbol of merit both in selection and retention. Justice Overton was the first Supreme Court appointment by Governor Askew under the new merit selection system.

Budget woes for the Florida Courts have been partially ameliorated by the cooperative actions of all branches of Florida's government. While funding for the entire Court system remains a focus of former Chief Justice Canady's and now Chief Justice Polston, each of us needs to be active in ensuring that our courts are funded through general revenue, and at adequate levels to guarantee justice and access to all Floridians.

Included in this issue is an update on Volume III of the History of the Florida Supreme Court being written by Neil Skene, which covers the Court from 1972 until 2000, and Bush v. Gore. The earlier years in that span represented a tumultuous time for our state and Supreme Court. Partisan politics transitioned to merit, and Florida political strongholds shifted from rural to urban. There was also a dramatic shift in the jurisdiction of our Supreme Court.

At our Annual Dinner on January 31, we are excited to present the Society's Lifetime Achievement Awards to former Governor Reubin Askew and former ABA President, Florida Supreme Court Historical Society Past President, Trustee and Lifetime Member Reece Smith.

The article by Society First Vice President Sylvia H. Walbolt and her husband Daniel R. Walbolt on domicile and decedent's rights following the sinking of the steamboat "Home" in 1837, provides a fascinating look into the structure of our Supreme Court during the early days of the Court. Perhaps some of you will go back and read the full Supreme Court opinion *Smith v. Croom*, 7 Fla. 81, 1857 WL 1537 (Fla. 1857).

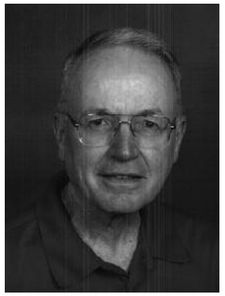
Please enjoy your magazine, and urge others to join your Society to support the rich and continuing history of our Supreme Court.

Hank Coxe

CONTRIBUTORS

Sylvia Walbolt recently published an article she co-authored with Andrew Manko entitled “From Chattel To Justice.” The article, part of the Florida Supreme Court Historical Society's African-American Experience Project, was presented at the 2010 annual Florida Bar Convention. The article follows the history of how the Florida Supreme Court has treated African-Americans throughout its history.

Sylvia has received numerous recognitions for her pro bono service. She was honored with one of five 2010 Pro Bono Publico Awards from the American Bar Association Standing Committee on Pro Bono and Public Service. Other recent recognitions received by Sylvia for her pro bono services include the 2009 Medal of Honor Award by The Florida Bar Foundation, and the 2008 Tobias Simon Pro Bono Service Award by the Chief Justice of the Florida Supreme Court.



Dan Walbolt. The Walbolts met as young lawyers at Carlton Fields and married after the firm hastily modified its anti-nepotism policy. The firm had never contemplated that two lawyers would marry! Dan was the first husband to attend the College’s “Wives’ Luncheon” and he loved every minute of it.

Dan is now retired from the University of South Florida as a professor and administrator and from Best Evidence, Inc., a trial support business owned and operated by his son. Now he lives the good life. He boats, fishes, reads avidly, and plays with his grandkids, while also actively supporting FSU’s History Department and athletic programs.

Education: New York University School of Law (J.D., 1965); Florida State University (B.A., 1962).

Susan Rosenblatt is an appellate attorney practicing in Miami with her husband and partner Stanley. Susan graduated from the University of Miami with a BBA in Economics, a JD cum laude and an LLM in Tax. During law school and as a young lawyer Susan was an associate of the Miami law firm of Colson & Hicks, and considers herself very fortunate to have been mentored by the late legal giants Bill Colson and Bill Hicks. She later devoted her practice to civil appeals, working extensively with another legal giant, the late Bob Orseck.

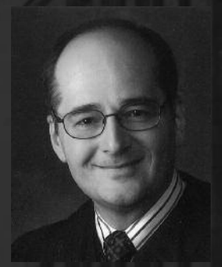
Since 1991 Susan and Stanley have devoted their law practice to handling two major tobacco class actions, Broin and Engle, including the multiple appellate proceedings and related litigation. Having worked nonstop since a teenager and not knowing how to relax or retire, Susan recently refocused her time and energies. She donates the majority of her time assisting a not for profit scientific research foundation, the Flight Attendant Medical Research Institute (FAMRI), that sponsors research to find cures for lung cancer and other cancers and diseases associated with cigarette smoke. Being a part of FAMRI’s mission to save lives from a host of terrible diseases is the highlight of Susan’slong career.

Neil Skene is the author of the Society’s forthcoming third volume of a History of the Florida Supreme Court. He began covering the Supreme Court for the St. Petersburg Times in 1980, when he came to Tallahassee as the newspaper’s bureau chief. He left in 1984 to become editor of St. Petersburg’s afternoon newspaper. In 1986 he became executive editor of Congressional Quarterly in Washington, a publisher of authoritative periodicals and books on government, and rose to editor and president of the company in 1989. In 1997 he became a top executive at an Internet start-up in Boston, and after its acquisition returned to Tallahassee as part of a small management –consulting firm.

He wrote the Tallahassee column for Florida Trend from 2005-2007, then became special counsel to Secretary Bob Butterworth and later Secretary George Sheldon at the Department of Children and Families. He has a B.A. in political science from Vanderbilt University and a Juris Doctor (magna cum laude) from Mercer University Law School.

UNDER THE DOME

BY JUSTICE CANADY



When I speak to civic groups visiting the Supreme Court, I am often asked about court funding, especially in recent years.

I’m always glad to take the question. During my two-year tenure as Florida chief justice, I thought about court funding every day. And I firmly believe that it is a subject that needs to be considered by all thoughtful and responsible citizens.

The importance of the subject stems from the simple truth that court funding is not about judges or courtrooms. Rather, it is about individuals, families and businesses who need the courts’ help to achieve justice and resolve disputes. We must be there to meet that need when they come – as hundreds of thousands do every year.

So I was glad to take questions about court funding, even in tough times, when cash-flow problems forced us to arrange a series of midyear budget “loans” with approval of the governor and Legislature just to make payroll and keep our doors open.

That was during my first year as chief justice. The cash-flow problems we struggled with were caused not by excessive or irresponsible spending but rather by volatility in the source of our funding – filing fees, especially foreclosure filing fees.

When I made my second “State of the Judiciary” address at the annual Bar Convention in the summer of 2012, I was very happy to report that Florida courts were in a better position than a year earlier.

The judiciary still needs help in regaining resources lost since the recession began but, nonetheless, significant progress was achieved in the spring of 2012. Firstly, the Legislature approved adequate and sufficient funding for the courts for the fiscal year that began July 1, 2012. But that wasn’t all. Lawmakers also took the critically important step of restructuring the sources of funding for the judicial branch. Our funding now is going to be based on general revenues, which I think is very appropriate.

For me, any discussion of court funding must include an expression of my heartfelt appreciation and gratitude to so many people, in all three branches of government. Of course, I am grateful to the members of the Legislature and to Gov. Scott, for their support and assistance as our entire government worked to deal with the economic downturn. I am also thankful to the state and local leaders of the Florida Bar who work tirelessly to support our courts and the rule of law, which is the foundation for our society and our democracy.

I extend my deep gratitude to the leaders of the Trial Court Budget Commission and the District Court of Appeal Budget Commission as well as State Courts Administrator Lisa Goodner and her staff. Their diligence and energy are nothing short of remarkable.

Finally, I am grateful to all the men and women who work in our courts for their commitment to use our resources as efficiently as possible. I believe their stewardship is evident at every level of our system.

While I thought about court funding every day of my tenure as chief justice, it was not the only thing I thought about or that the courts worked on. I could discuss many issues but will limit myself to three that touch on the core of what our mission is and how we can best achieve it.

The Florida Innocence Commission released its final report last June after two years of comprehensive study of the causes of wrongful convictions. The judges, lawyers, law enforcement leaders and legal scholars who served on the commission identified several specific causes for wrongful convictions as well as a significant general contributing factor: the underfunding of the criminal justice system in our state. The Commission also came up with concrete recommendations for the Legislature to consider.

As our society increases its reliance on electronic and digital channels of communication, the courts must – and will -- keep pace. Florida’s e-filing portal launched in several counties two years ago and the Supreme Court last year approved e-filing rules. The ability to file cases electronically in every court in the state will be a priority until it is a complete reality.

We are committed to exploring the amazing efficiencies offered by technology but the power of something as simple as civil behavior can never be neglected. To that end, the Florida Supreme Court revised the Oath of Attorney to be sworn by new members of The Florida Bar to include new language emphasizing “the importance of respectful and civil conduct in the practice of law.” The language added to Florida’s oath: “To opposing parties and their counsel, I pledge fairness, integrity and civility, not only in court, but also in all written and oral communications.”

The importance of the day-to-day work of lawyers cannot be overstated. We are indeed a bulwark of liberty. We cannot have constitutional government or a functioning free enterprise system without the legal profession. We could not have the protections of individual liberties. We could not have justice.

IT WAS A DARK AND STORMY NIGHT:

BY SYLVIA H. WALBOLT AND DANIEL R. WALBOLT, SR.

Hardy B. Croom

Previous page: Rendering of the Steamship 'Home" shipwreck, *Steamboat Disasters and Railroad Accidents in the United States*, by S.A. Howland, 1840.

It was a dark and stormy night on October 9, 1837, when Hardy Croom and his wife Frances, together with their three young children, all died in the wreck of the steamboat "Home" on their passage from New York to Charleston, South Carolina. Henrietta Croom, the oldest daughter, was about 16 years old, the son William 13, and the second daughter, Justina, seven. It was to have been a joyous voyage, as the family had been fortunate to secure passage on the steamship "Home" on its third voyage.

On the "Home's" second trip from New York, it made the trip to Charleston in 64 hours, a new record, and, as a consequence, when the third trip was announced, it became "a hot ticket for the wealthy and prominent citizens of the day." The "Home" had been converted from a river going vessel to a steam powered passenger liner, and it was considered the crème de la crème of these new speedy vessels. In an omission during the refitting process, however, the new liner had been equipped with only three life boats and two life preservers.

On its third voyage, the "Home" had 135 passengers and crew, hoping to be part of a new record for the voyage. The passengers were unknowingly heading straight into a hurricane that originated in Jamaica, blew into Texas, and was heading across the southeastern United States to the Grand Banks of North Carolina. The Croom family could not have imagined that their deaths would result in a groundbreaking case of first impression before the Florida Supreme Court on legal questions relating to venue, conflict of laws, and the descent and distribution of Mr. Croom's estate. The deaths of the Crooms and other passengers are vividly depicted in the Coastal Guide cited infra, and *Smith v. Croom*, 7 Fla. 81, 1857 WL 1527 (Fla. 1857), the Florida Supreme Court's decision in the aftermath of this tragedy.

The boat had been in a storm for 36 hours when it ran aground about midnight. The boat "went to pieces in 15 minutes," as waves struck with "tremendous violence." *Smith* at 87-88. Of the approximately 140 passengers onboard, only 40 survived, some by swimming to shore clinging to wreckage.

Mr. Croom died, leaving a "plantation and negroes and most of his property" in Leon County, Florida. *Smith* at 83. At the time of the wreck, however, other slave labor, as well as Mr. Croom's wife and children, were residing in North Carolina, where Mr. Croom had long had a home.

Mr. Croom left no will, and litigation ensued. His surviving brother was appointed the administrator of the estate, but the deceased children's grandmother and aunt petitioned the Circuit Court to represent the children's interests in their father's estate.

The Florida territorial law was decidedly paternalistic. If a man domiciled in Florida survived his wife and children and died intestate, his surviving brothers and sisters would inherit all of his real property. If any children survived the father's death, male children inherited the property, to the exclusion of any female survivors, if the inheritance was deemed to have occurred by way of a "mediate descent" from the father.

If at the time of Mr. Croom's death his legal domicile was North Carolina and any of his children survived him, his non-realty personal estate would pass according to North Carolina law, to the petitioner grandmother and aunt as the children's next of kin. Under Florida law, where the estate was being administered, the petitioners, as the next of kin, would also be entitled to the real estate in Florida. On the other hand, if Mr. Croom survived his children, then his brothers and sisters would inherit his property, regardless of whether his domicile was in North Carolina or Florida.

The Supreme Court's file – all handwritten of course – does not disclose why a case involving a shipwreck in 1837 was not resolved until decades later in 1857. What it does disclose is that, in the interim, and without the benefit of all the resources we have today to locate witnesses and other evidence relevant to the case, the lawyers were nonetheless able to track down and take testimony from eleven of the forty survivors spread around the country. Those particular survivors had knowledge of the actions of the Crooms during the 36 hours of the chaotic shipwreck. The search for these survivors must have involved difficult sleuthing — one witness was not examined until 1855. The lawyers also provided testimony from 25 individuals who knew Hardy Croom during his life in North Carolina and Florida, 67 pieces of correspondence relevant to the issues in the case, and various exhibits, including poll books reflecting Mr. Croom's voting history and a bill of sale for an African American man.

The 11 survivors of the wreck testified about the shipwreck and when members of the Croom family were last seen. As was customary in those days, the testimony before the trial judge is set forth in the pages preceding the Florida Supreme Court's decision. The description of the shipwreck is as enthralling as any novel. The evidence directed to the issue of domicile provides a fascinating glimpse into the old South. Assuming you haven't already put this article down to go read the decision itself, here is an appetizer to prompt you to do so.

On the question of survivorship, the petitioners — the children's grandmother and aunt — presented several medical witnesses who testified to Mr. Croom's poor health. He was thought to be consumptive and incapable of strenuous physical exertion. Several of the passengers on the steamboat that night confirmed he was in feeble health and also testified to the terrifying events as the boat broke apart in the night, as well as the physical effort that would have been required to make it to shore from the shipwrecked boat. In contrast to Mr. Croom, Mrs. Croom and the children were of normal health.

On the specific issue of the efforts of the various members of the Croom family to save themselves, several witnesses described hearing Mr. Croom's son "calling to his father in words like these: 'Father, you will save me, won't you father?' and 'You can swim ashore with me, can't you father'?" *Smith* at 87. One witness heard the father reply that it was impossible to swim. Another witness saw the young boy on a piece of the wreck, and yet another said the boy drowned while trying to reach land on a piece of the wreckage.

One of the witnesses who heard the son ask his father to swim with him later saw Mr. Croom "taken off with the sea at the time the breakers were washing away the cabin...." *Smith* at 90. The witness went to the wheelhouse where he heard the teenage daughter, Henrietta Croom, say she would give $5,000 if someone would help her get ashore, but she was washed off the wheelhouse and lost at sea.

At the conclusion of the testimony, the Chancellor dismissed the petition, finding that Hardy Croom survived his children, that his domicile at the time of his death (and therefore the domicile of his children) was Florida, and therefore all the real estate and personal assets descended Hardy Croom's adult brothers and sisters. The petitioners appealed to the Florida Supreme Court. Its opinion is a fascinating legal who-done-it, an example of superb preparation by the lawyers prior to the trial, and an important history lesson of the early development of opinion writing by the Court.

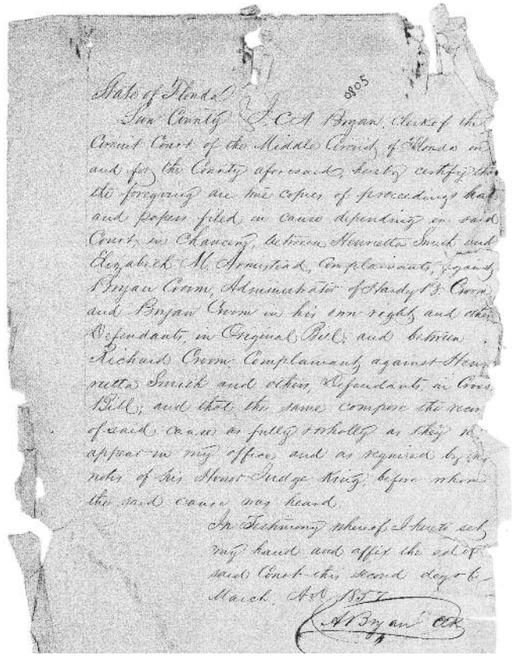
A note of time and place is in order. The "Home" shipwreck disaster occurred in 1837, when Florida was still a Territory, eight years from full statehood. The constitution of 1829, established in preparation for statehood, provided for a Supreme Court with appellate jurisdiction, four circuit courts — the Western, Middle, Eastern and Southern — and justices of the peace. Curiously, the circuit courts were granted all the powers of the Supreme Court.

What a fascinating opinion it is, all 49 pages of it. Remember, this litigation was conducted at the very beginning of Florida's legal system. The state was sparsely populated, with large areas almost completely isolated. The legal profession was also in its infancy; the few lawyers that were practicing at the time had "read the law" and were of uncertain experience and quality. Florida's first law school, what is now Stetson College of Law, did not open its doors until 1900. It is not surprising that the lawyers for the different Croom interests were from Savannah, Georgia and Charleston, South Carolina.

The Supreme Court's decision obviously was of first impression, as were all legal issues that came before the Court at that time, as it commenced formulating the long, rich body of common law that we have today. Of course, the development of law in the country itself was just a few decades into its making.

It is not surprising, then, that the Florida Supreme Court turned to the English common law for much of its guidance. The decision references several laws and opinions from the English courts, as well as American Citations to 1 Bum R. 364, 2 Peters Reports 58, 1 Cheeves Eq. R. 108 and 6 J.J. Marshall 46, that seem quaint today. Reliance by the Court on Kent's Commentaries, Story's Constitutional Law, D.Warris on Statutes, and Stark on Evidence - authorities hardly ever cited today - bring back memories of some older lawyers' first year in law school.

Latin legal terms abound, most unfamiliar today. "In haec verba, domicilium originis," "proprio marte," "animus revertende," "facto et animo," and "jus gentuim," if they appear at all today,



State of Florida
Leon County } ss. I C.A. Bryan, Clerk of the Circuit Court of the Middle Circuit of Florida in and for the County aforesaid, hereby certify that the foregoing are true copies of proceedings had and properly filed in cause depending in said Court in Chancery, between Henrietta Smith and Elizabeth M. Armistead, Complainants, against Bryan Croom, Administrator of Hardy B. Croom and Bryan Croom in his own right, and others, Defendants, in Original Bill and between Richard Croom, Complainant, against Henrietta Smith and others, Defendants, in Cross Bill; and that the same compose the record of said cause as fully & wholly as they appear in my office and as required by the rules of this Honorable Judge Irving, before whom the said cause may stand.
In Testimony whereof I have set my hand and affix the seal of said Court this second day of March A.D. 1857
C.A. Bryan Clk

Copy of page certifying copies of proceeding by C. A. Bryan, Leon County Clerk of the Circuit Court of the Middle Circuit of Florida in Leon County dated "Second day of March, A.D. 1857"

are probably part of a law school skit or a law review article by Justice Scalia. It all makes for fascinating reading, and here is just a brief overview of the Court's lengthy opinion.

On the first issue before it, the Florida Supreme Court declared that, "[u]pon a full review of all the testimony bearing upon the question of survivorship, we have been irresistibly led to the conclusion, that in the common calamity which overtook the highly interesting family, whose melancholy fate has brought mourning and grief to a large circle of relations and friends, the father perished before either his daughter Henrietta Mary, or his son William Henry, and that of the sister and brother, the latter was the last survivor." *Smith* at 149.

The Court began its explanation of the basis for that conclusion by noting "the painful anxiety which is always engendered, when the determination of a fact is made to rest in a great measure upon presumption." *Smith* at 140. It explained that this was not a reference to "the legal presumption recognized by the civil law, which is founded upon the circumstances of age, sex and physical strength," as that presumption is not recognized in Florida. *Id.* Rather, the court meant "the presumption arising from the attendant circumstances, which results in producing the conviction in the mind that the fact is as it is alleged." *Id.* The requisite certainty need not "exclude the possibility that the fact be otherwise; but only that it should be of such a degree induced by appropriate evidence as will produce moral conviction." *Smith at* 140-141.

Then, citing *Underwood vs. Wing* (31 Eng. L. and E Repts., 297), the court said the issue of survivorship in a case of a common calamity had to be proven "as any other question of fact, either by positive or circumstantial evidence," and that it was not enough to say "that if you had to lay a wager you would rather lay it one way rather than the other." *Smith* at 142-143. Declaring *"there must be evidence as to who is the survivor,"* the court said that while there was no legal presumption based on age and sex, "when the calamity, though common to all, consists of a series of successive events, separated from each other in point of time and character, and each likely to produce death upon the several victims according to the degree of exposure to it, in such a case, the difference of age, sex and health becomes a matter of *evidence* and may be relied upon as such." *Smith* at 143-44 (emphasis added). The court further said that where a common danger proved fatal to all parties, "the last one, seen or heard...must be adjudged the survivor, unless there be something in the nature of the circumstances to rebut the presumption." *Smith* at 144.

In the end, the Supreme Court concluded that the father perished before either his daughter Henrietta or his son William. *Smith* at 149. While there was "conjecture" to the contrary within the "range of possibility" that the father survived, it was "of too vague a character to combat a rational presumption which has been deduced from known facts." *Smith* at 148. The court further concluded that the teenage Henrietta Croom survived her father, but not her brother.

The court then turned to the question of domicile. It was undisputed that Mr. Croom's "domicile of origin" had been North Carolina, where he was born and resided until "the date of the removal of his slaves to Florida and the establishment of his agricultural interest" in Florida in 1831. *Smith* at 149-150. "It is the fact of this establishment of his agricultural interest here, and a divided residence consequent thereon, that has raised the question with respect to his "domicile of succession." *Smith* at 150.

The court began its analysis of this issue by rejecting the notion that the term "domicile of succession" is a term that is "not susceptible of a definition and consequently unintelligible." *Smith* at 150. In the court's beautiful words:

> it would be a reproach to our language to suppose that its poverty is so extreme that no apt and appropriate words could be found in its extensive vocabulary sufficiently comprehensive to compass the meaning of a legal term of everyday use. And it would be greater libel on the noble science of law to charge it with the use of a term incapable of definition, and consequently unintelligible to the legal apprehension. *Smith* at 150.

After discussing various definitions of the term, the court summed up by saying the evidence must establish "an actual residence" and "the deliberate intention to make it his home" — i.e., "'an intention to remain there for an unlimited time.'" *Smith* at 150.

The first acts the court considered were Mr. Croom's establishment of plantations in and the removal of his slaves (except for a few house servants) to Florida, the evidence that he had voted in Florida, as well as the establishment of a home in Leon County. As such, "the bulk of his fortune" and "the center of his business" plainly was in Florida. *Smith* at 150. Nonetheless, he had not abandoned his "family mansion" in North Carolina, where his wife and children continued to live prior to the shipwreck "with the accustomed retinue of servants." *Id.* Citing various authorities, the court declared that the act of voting, if admissible at all to establish intention, was of little weight. The court concluded the evidence regarding Mr. Croom's acts did not establish a present intent to make Florida his present domicile of succession.

Moreover, Mr. Croom's oral declarations were "so vague in point of date and expression, and so very contradictory in terms," that the court did not consider them at all. *Smith* at 150. This left the written declarations, which were contained in the family's correspondence between 1830 and 1837. Here too, however, the court found a "vacillation of purpose" in the correspondence. *Smith* at 163. Ultimately, the court was persuaded by a letter from Mrs. Croom telling Mr. Croom "before you settle permanently," to "give yourself time to judge." *Smith* at 101.

Regardless of the definition of "domicile of succession," the court held it was North Carolina, not Florida. The non-abandonment by Mr. Croom of his home in North Carolina and "the continued residence of his family there, surrounded by the entire domestica instrumenta of a gentlemen's establishment" persuaded the court that Mr. Croom had not formed a present intention to make Florida his present home. *Smith* at 166.

Apart from its bearing on the issue of domicile, the Crooms' fulsome correspondence is historically fascinating and shocking in its own right. Mr. Croom's "negroes" are casually accepted as his property, to be moved to a new location as he sees fit. Mrs. Croom bemoans the expense of a "good house" in Florida, saying the expense "would be better in negroes ..." *Smith* at 103. At the same time, she "sends her love to the negroes and [says] to 'tell them to have all things ready against I come out there.' *Smith* at 104. Much of the correspondence relates to the purchase of particular slave labor and the hire of that labor to others.

In one 1835 letter, Mrs. Croom referred to "the wilds of Florida," and her husband answered from Tallahassee, saying of Florida that "[i]t is a good country for planting and merchandise, but I cannot say it is a desirable country to live in..." *Smith* at 103. The Crooms also wrote about their concerns of moving to Charleston, where Mr. Croom could "enjoy a more cultivated society and greater literary means than I can elsewhere find at the South," but where "the cholera has so long prevailed…" *Smith* at 108. Mr. Croom asked his brother to keep him "'advised of the health of Charleston, so that I may be able to judge of the propriety and safety'" of going there with his family. *Smith* at 117.

This small sample of the correspondence will hopefully whet your appetite to read all of the correspondence recited in this case, as well as the testimony regarding Mr. Croom's life in Florida and elsewhere. But it is now time here to turn back to the remaining question in this case: whether the descent of Mr. Croom's property to his surviving children — Henrietta and William — was "an immediate or a mediate descent from the father?" *Smith* at 167.

On this issue, the court pointed to the decisions of the United States Supreme Court in *Gardner v. Collins*, 2 Peter' Rep. 58, and describing Judge Story's opinion for the court in some detail, declared that it was "so strongly on point" that "its authority cannot be easily denied or resisted." *Smith* at 178.

Based on that authority, the Florida Supreme Court held that:
[t]he words "descent from the father," as employed in our statute of descents, must be construed to mean an immediate descent from the father, and that the real estate which William Henry Croom derived by descent from his sister, Henrietta Mary, does not come within the operation of the [statute] so as, upon the death of William Henry, without issue, to secure the descent to the paternal, in exclusion of the maternal kindred. *Smith* at 178.

Thus, the Court held that of the two survivors of Hardy Croom, Henrietta died after her father, and William was the last to die. Upon Hardy Croom's death, the inheritance of both Henrietta's and William's one half of Croom's estate descended immediately. When Henrietta died, the half of the estate she inherited did not descend to William immediately under the statute. Thus, the children's grandmother and aunt were entitled to one half of the Florida realty, and the father's brothers were entitled to the other half.

This decision is worth reading in its entirety for multiple reasons. To begin with, it is a terrific story and shows in a vivid way what life in the South was like in those days for a wealthy plantation family. It also is a wonderful illustration of how differently opinions were written then than now. It also demonstrates a reverence for the law and a scholarly, but fulsome, use of the English language.

Annual Dinner

January 26, 2012

From left to right, starting at top:

- Gwynne Young, Bruce Blackwell, Scott Hawkins, Iowa Justice David Baker and Chris Searcy
- Dawn Allen-Stallworth and Glenda Larry
- Chris Searcy and Ruth McDonald
- Justice E. C. Perry, Justice Barbara Pariente, Justice Fred Lewis, Justice Jorge Labarga, Justice Peggy Quince, Justice Major Harding, Justice Joseph Hatchett and Justice Parker Lee McDonald
- Chris Searcy and Bruce Blackwell
- Michelle Suskauer, Edith Osman, Justice Peggy Quince, David Prather, Renee Thompson and Ward Griffin

From left to right, starting at top:

- Justice Peggy Quince and C.K. Hoftler
- David Prather. Paige Greenlee, Greg Coleman, Justice Major Harding and Jane Harding
- Martha Barnett, Mart Hill and Bob Ervin
- Edith Osman and David Prather
- Charles Scriven and Juliet Roulhac
- Jake Schickel, House Speaker Dean Cannon, Bruce Blackwell, Kelly Overstreet Johnson and Justice Jorge Labarga

Photography by Mark Killian, The Florida Bar

WHEN POLITICS UNDERMINE JUDICIAL INDEPENDENCE

A REVIEW OF *SCORPIONS*: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES

Harvard Law School professor Noah Feldman's *Scorpions* reveals the behind-the-scenes workings of our highest court and its justices under Roosevelt and then following the president's death in 1945. The reader is provided an insider's perspective on FDR's judicial appointment process, beginning with the President's introduction to each future justice, the growth of intimate relationships, and culminating in appointments to the court. Feldman's behind-the-scenes tour introduces us to the President's regular poker games with his appointed buddies, and the many extrajudicial communications and relationships that were routine.

The book's details may be disturbing to readers who are admirers of President Roosevelt and his Supreme Court appointees and may undermine the public's respect for the judicial and executive branches. Even as a seasoned attorney, this reviewer was shocked by the principal role of politics, both pre-and post-judicial appointments, and the routine extra-judicial communications in the United States Supreme Court during this period. *Scorpions* thus serves as a cautionary tale against the influence of politics over the judicial branch. The sordid political process that enabled and then influenced these four legal giants is difficult to reconcile with the legacies of these brilliant and accomplished justices. Legacies that are tarnished by this tell-all book.

Feldman's description of Roosevelt's "court packing" efforts, which are now over 75 years past, brings to mind the recent political campaign that overwhelmingly failed in Florida to unseat three well-qualified Justices from our state Supreme Court because certain special interest groups disagreed with a few decisions of the Court. In 1937, before making the first of his eventual eight appointments to the Court, President Roosevelt sought to rid the Supreme Court of the conservative influence of five of "the nine old men" who had ruled his New Deal legislation unconstitutional. Believing that his difficulties with the Court stemmed from some of its members' mature age, Roosevelt's plan was to add a new seat to the Court for "every sitting justice over 70," – to be filled, of course, by his new appointees. Feldman details Roosevelt's machinations that sought to ensure that any newly appointed Justices would be beholden to him and favor his New Deal legislation. An

Formal group photograph of the Supreme Court as it was comprised from 1943-1945. Seated from left are Justices Stanley Reed and Owen Roberts, Chief Justice Harlan Fiske Stone, and Justices Hugo Black and Felix Frankfurter. Standing from left are Justices Robert H. Jackson, William O. Douglas, Frank Murphy, and Wiley Rutledge.
Photograph by Bachrach, Collection of the Supreme Court of the United States

independent judiciary was undesirable to the President – if it meant having Justices who might interfere with his efforts to lift the country from the economic Depression.

As Feldman notes, "[I]t looked…like a grab for power on the part of a president who would not take no for an answer… [and] ranked as one of the most remarkable pieces of constitutional one-upmanship ever tried." The lesson here is timeless: political attacks against members of our courts – no matter their author or their target – are repugnant to the proper administration of justice and the separation of branches of government.

Roosevelt's plan to pack the Court and nullify the votes of the Justices who were blocking his reforms was unpopular and decried by even the most liberal members of the Court, including Justice Brandeis. Court-packing was, however, backed by Roosevelt's close ally Robert Jackson, then an Assistant U.S. Attorney General. Jackson testified in 1937 before the Senate Judiciary Committee that the existing Supreme Court was, in Feldman's words, "just consistently wrong and intransigent." According to Feldman, Jackson's support for the "court-packing plan would be his route into Roosevelt's inner circle, propelling him… ultimately to the Supreme Court." Felix Frankfurter, then an accomplished Harvard Law professor, also believed "something had to be done about the Court." Frankfurter's alliance with Roosevelt and his "awkward" compromise position on this issue helped sour the relationship between Frankfurter and his mentor, Justice Brandeis.

Feldman devotes much attention to Associate Justice Owen Roberts' famous "switch in time that saved nine," his swing vote reversed in favor of New Deal reforms that effectively halted the court-packing plan. Although Roberts' flip-flop initially led Frankfurter to write that "even a blind man ought to see that the Court is in politics," Feldman explains how Frankfurter and other legal scholars had come to respect Roberts' vote. In this section and throughout, *Scorpions* is evidently well researched and footnoted, with an interesting storyline contained within the footnotes.

Though his court-packing plan failed, Roosevelt later filled vacancies on the Court with close political allies and supporters of the New Deal. In contrast to today, there was essentially no vetting process and Senate confirmations were "with a dispatch that is now difficult to imagine." Thomas Corcoran, a Frankfurter protégé, became the president's designated strategist, operative, and, in his sometime friend William O. Douglas's memorable description, "hatchet-man." With respect to Supreme Court appointments, "Corcoran's fingerprints would appear on every major appointment." This was yet another example of politics controlling the highest judicial appointments.

In short time, the four Justices who started out as Roosevelt allies and confidants, grew to loathe one another and are depicted by Feldman as petty, vindictive, and motivated by personal aspirations and unsavory politics. There was clearly not a collegiate atmosphere on the Court. There is much told about the Justices' personal lives (too much for this reviewer) and their hard-driven political ambitions while sitting justices (e.g., Justice Douglas strove to become President Roosevelt's vice presidential candidate instead of Truman, and then sought the presidency following Roosevelt's death), that also does not endear them to the reader.

It is extraordinary that these four justices were nevertheless able to transcend their differences and serious character flaws to work together and issue many landmark decisions, and ultimately to form a unanimous consensus on *Brown v. Board of Education*, considered by many, including this reviewer, as the most significant Supreme Court decision of the twentieth century. Reaching a consensus in *Brown* took considerable guidance and pressure from Chief Justice Earl Warren. President Eisenhower thought he was appointing a conservative with California Governor Earl Warren, who became the most liberal member of the Court–a fascinating story in its own right.

LIFETIME ACHIEVEMENT AWARD GIVEN TO W. DEXTER DOUGLASS

The Florida Supreme Court Historical Society

Lifetime Achievement Award

Presented to

W. Dexter Douglass

In recognition of his many years as the sustaining force for this organization...his outstanding leadership, wise counsel, unbending loyalty and tireless work for the Society...his guidance as Trustee, Vice President, President, and Executive Committee member...his loyalty, dedication and advocacy of the Society's mission to educate the public about the critically important work of the courts in protecting personal rights and freedoms and to preserve the rich history of Florida's judicial system…his vision in recognizing the importance of the Annual Dinner as the Society's centerpiece event...his extraordinary service to the bench, the bar and the public...his patriotism, exemplary citizenship and service to mankind...and as an expression of profound respect, high esteem and warm affection...the Society presents this Lifetime Achievement Award to W. Dexter Douglass.

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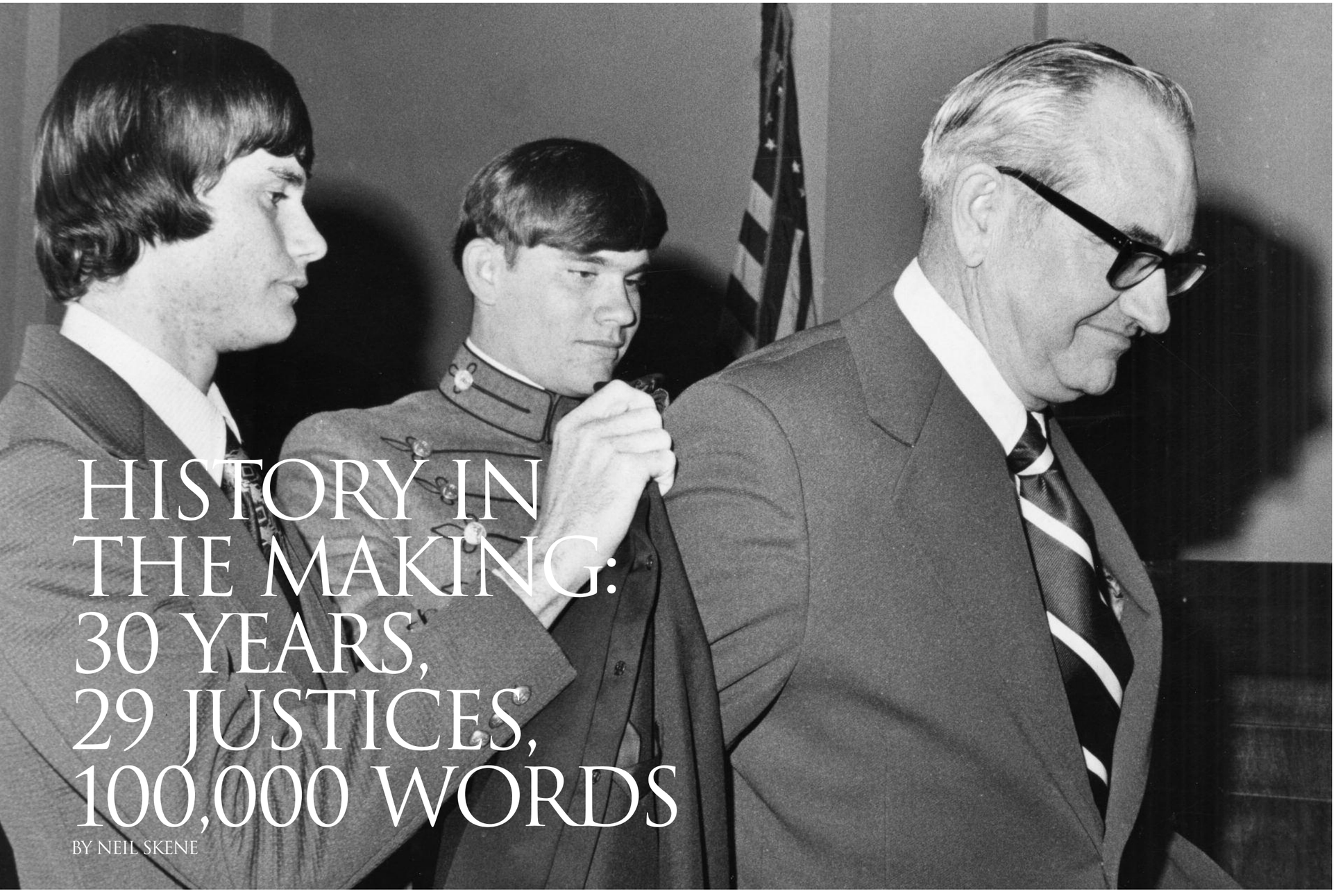
January 26, 2012



HISTORY IN THE MAKING: 30 YEARS, 29 JUSTICES, 100,000 WORDS

BY NEIL SKENE

Robert M. Overton, VMI Cadet William H. Overton are shown helping their father, Supreme Court Justice Ben Overton with his robe at his investiture in 1974. *(State Archives of Florida)*

One sunny Saturday afternoon, I stopped in at Sandy D'Alemberte's office in one of the charming old white houses that were moved to the campus while he was dean of the Florida State University law school. As so many others have done, he asked about "the book," the next volume of the History of the Florida Supreme Court. "You'd better hurry up," he said, "or some of us are going to start forgetting the stories we've been making up about ourselves."

Writing a history of the court from 1972 on presents a marvelous opportunity that Walt Manley and Cantor Brown did not have in their work on the previous volumes: Most of the justices are alive and full of memories and stories. So are others, such as D'Alemberte, who had critical roles or vantage points.

The opportunity is also a challenge: I cannot possibly interview everyone who could contribute some knowledge or insight to the book. The period 1972-2002 comprises 29 justices appointed or elected during the administrations of nine different governors. Some governors, such as Askew, had an astounding effect on the Supreme Court. Other governors, like Jeb Bush, had only a small effect, as his two appointees came and left within little more than six years.

Even more intimidating for a researcher are the rows and rows of boxes of files of individual former justices, organized and indexed. The index alone consumes 645 pages, with everything from justices' notes and vote tallies from conferences – material marked on other sheets as "confidential," to which the court, after a discussion in conference, denied me access – to pack-rat oddities like "handwritten note in greeting card."

Portrait of Supreme Court Justice Alan C. Sundberg,
(State Archives of Florida)

Boxes just from then-Chief Justice Charlie Wells during the 2000 election cases contain 1,919 listed items, some providing a glimpse into the frenetic pace of those weeks. An email refers to plans for getting lunch before oral arguments started. Another email raised the possibility that Thanksgiving leaves would be canceled. A post-it note says, "Judge – Here is outline of opinion as you requested to be cut & pasted. Note some duplicate sections."

A label on an accordion file wearily says simply: "Correspondence" followed by a notation in brackets: "All letters are to Justice Wells; nearly all are positive and approving of his opinions in these cases." I saw Justice Major B. Harding recently and told him about the entry. He wryly indicated that the same could not be said of his letters.

The greatest challenge in capturing the three decades of change is the 1970s. Someone has referred to that period as the "big bang" in Florida government, a reference not really to its expansion – although expand it did – but the far-reaching changes.

In the 1960s, federal court decisions forced repeated reapportionment of the Florida Legislature and gave urban Floridians a dominant voice in government policy for the first time. The opening of Disney World in 1971 accelerated the state's rapid commercialization. The Watergate scandal in Washington invigorated investigative reporting, and at one point five justices of the Florida Supreme Court, three elected members of the state Cabinet and the lieutenant governor were subjects of investigations that would, with the exception of two of the justices, drive all of them from office.

Governor Reubin Askew's focus on integrity had an enduring and powerful effect on Florida government, including the Supreme Court. The appointment of Justice Ben Overton in 1974 brought to the court a strong ally of Askew on merit selection of judges and court modernization, experience in court administration, and a gruff demeanor and reputation for integrity that let him resist being co-opted by B.K. Roberts, long the most powerful influence on the court. Still, Justice Richard Ervin, for whom Overton had once worked in the attorney general's office, warned him upon his arrival in the midst of the scandal, "Be careful."

Later that year, the election of Justice Arthur J. England Jr., a graduate of Wharton and Penn Law, derailed the expected ascendancy of a district court judge allied with the insularity and old-boys-network of north Florida. Behind England came another intellectual powerhouse, Alan C. Sundberg, a Harvard Law grad who had moved to St. Petersburg. Then Askew made the most dramatic appointment of all: Joseph W. Hatchett, who became the first African-American justice on any supreme court in the South.

Overton referred to himself and these three other justices as the "young bucks." He and Sundberg knew each other well; both had practiced law in St. Petersburg, and Sundberg was the campaign manager for Overton's first election as circuit judge in 1966. On the other hand, Sundberg and England had never met before Sundberg arrived at the Supreme Court. A lot of people erroneously assumed they were old friends because they were such good new friends and joined on many public issues. None of the justices knew Hatchett before he arrived – in fact, no one on the Supreme Court Nominating Commission knew him before he showed up in Boca Raton for his interview. (One person at the court who did already know Hatchett was Robert Benton, a brand new law clerk at the Supreme Court who had been a law clerk at the U.S. District Court in Jacksonville, where Hatchett was the federal magistrate. Benton is now chief judge of the First District Court of Appeal.)

It's not that these four new justices voted as a bloc; indeed they often were on different sides. England and Sundberg engaged in extended debates in conference – one fellow justice likened it to a ping-pong match – until the chief would call a halt. But the four had strong personal relationships and a shared commitment to restore the integrity of the court after years of scandal. They all had school-age children – 14 altogether, the two oldest in college. The court moved up its summer recess so that the justices could finish their summer vacations before the public schools opened.

Other traditions changed, too. In a column after Sundberg's death in 2002, Martin Dyckman of the St. Petersburg Times told of a tradition of presenting the newest justice with a bucket and a mop, a wry allusion to the court's perennially leaky roof. Sundberg received the bucket and mop from

Florida Governor Reubin Askew and Florida Supreme Court Justice Arthur England. Back L to R: Andrea England, Morley "Deedee" England, Arthur England, Donna Lou Harper Askew, Reubin Askew.
(State Archives of Florida)

Overton. On the arrival of Hatchett, whose mother had worked as a maid in segregated Clearwater, Sundberg, who had once defied segregationist tradition in helping bring Duke Ellington to perform at an FSU dance in the mid-1950s, declared: "There's no way that I'm going to give Joe Hatchett a mop and a bucket."

Invigorated by these four new justices and the subsequent arrival of Justice Fred Karl in 1977, the court introduced the nation's first statewide use of interest on lawyer trust accounts to fund broader access to legal services and projects to improve the quality of justice in the state. Prompted by a petition from Sandy D'Alemberte on behalf of Miami's Post-Newsweek television stations and led by Sundberg and England, the court established the first statewide mandatory system for cameras in courtrooms. Open government was enforced in decision after decision, as were new rules on campaign finance and government ethics. Other decisions gave consumers new advantages over corporations in litigation, such as the creation of "strict liability" for manufacturers or defective products and the introduction of comparative negligence in personal injury cases so that a plaintiff would not lose a case because of some small fault in the face of a much larger degree of fault by the defendant. Women won a stronger position in the division of property in a divorce.

A new death-penalty law, passed in December 1972 after old laws nationwide were invalidated by the U.S. Supreme Court, added enormously to the court's caseload as the court lurched erratically toward consistency in the 40 or more death appeals that came to the court each year. In 1980, facing a debilitating caseload and still smarting from the abuses of the appellate process by justices of the early 1970s, the court successfully pushed for limitations on its own jurisdiction and gave greater finality to decisions of the district courts of appeal.

The Office of State Court Administrator was created and expanded. Lawyer advertising was legalized. Constitutional initiatives proliferated, and dragged the court into the politicization of the state constitution and the referendum process. The list of changes goes on and on.

A priority for this book is to make the court's history interesting to people – not lawyers, but citizens interested in government. Instead of indistinguishable people in black robes who ask arcane questions in televised oral arguments and send out written rulings, I hope the court will come alive in this book as seven interesting individuals who bring different backgrounds, perspectives and even idiosyncrasies to the resolution of cases.

Two law students are currently helping: Hallee Moore, a third-year at Mercer Law School, fifth in her class and a member of law review (note to law firms: she'd like to work in Florida), and Curtis Filaroski, a second-year on law review at FSU law school. My wife, Madelyn, a former AP reporter and a graduate of American University law school, and my daughter Jennifer, a second-year at Yale Law School, also provide research assistance from time to time.

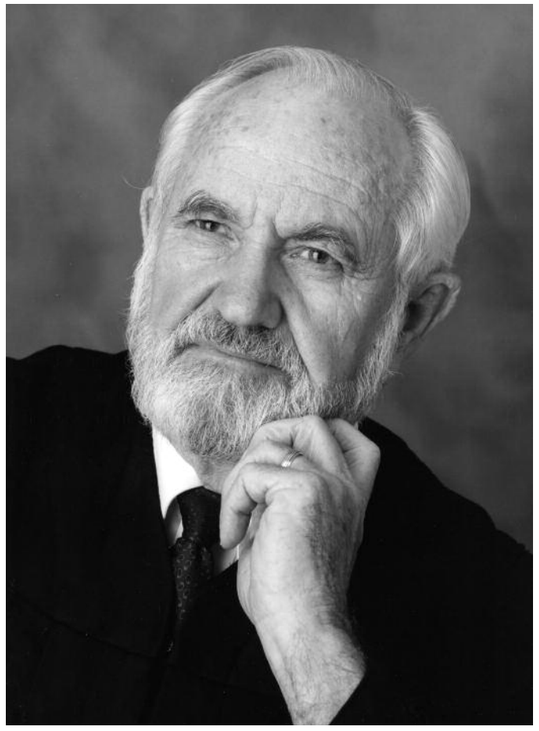
When Robert Caro's new volume came out last summer in his series on the life of Lyndon Johnson, I realized that he spent nearly 10 years writing a book covering five years of LBJ's life. At that rate, I will be another 58 years covering this 30-year period.

But hey, the court's own motto is "Sat cito si recte" – soon enough, if correct.

As deadlines loom in 2013, with a manuscript finished by mid-summer, I have to look past Robert Caro, remember the warning of Sandy D'Alemberte, and hang a sign over my desk with the words of actor Jeff Goldblum in Jurassic Park as the T-rex chases his Jeep (repeated by Goldblum in Independence Day as aliens chase his spaceship):

"Must go faster."
In Latin, that's "Ire necesse est velocius."

IN MEMORIAM



IN LOVING MEMORY,
YOUR FORMER LAW CLERKS

IN MEMORIAM

IN RECOGNITION OF HIS QUIET AND UNSWERVING LEADERSHIP OF THE SOCIETY, HIS CONTINUOUS WISE COUNSEL IN ADVANCING THE SOCIETY'S GROWTH AND MISSION OVER MANY DECADES AS A TRUSTEE, SOCIETY PRESIDENT AND LIFETIME MEMBER
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JANUARY 26, 2012

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Or contact Kathy Arrant at arrantk@earthlink.net or (850) 222-3703.

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A MOMENT IN TIME

L-R: Governor Askew, Justice Hatchett, Mrs. Joseph Hatchett, Cheryl Hatchett and Brenda Hatchett prior to taking the bench. Tallahassee, 1975 *(Florida Photographic Collection)*