

Texas Groundwater Law from Its Origins in Antiquity to Its Adoption in Modernity

By Dylan O. Drummond

Introduction¹

As Justice Oliver Wendell Holmes remarked just seven years before the Texas Supreme Court issued its opinion in *Houston & Texas Central Railroad Co. v. East*,² the “rational study of law is still to a large extent the study of history.”³ Before groundwater property rights (“ownership in place”)⁴ and tortious immunity (the “rule of capture”)⁵ were first recognized in Texas over a century ago in *East*,⁶ the underpinnings of the debate between the

¹ The author would like to extend special thanks to Professor Megan Benson, Ph.D., whose exhaustive and engaging work on the *East* case has been invaluable in drafting this article; and Robert E. Mace, Cynthia Ridgeway, John M. Sharp, Jr., Robert F. Flores, and Edward S. Angle, whose authoritative and comprehensive efforts analyzing the factual background to the *East* case, as well as compiling most of the original case materials, have been crucial to the research of this presentation. See Megan Benson, *Railroads, Water Rights and the Long Reach of Houston and Texas Central Railroad Company v. W. A. East (1904)*, 116 S.W. HIST. Q. 261 (Jan. 2013) [hereinafter *Long Reach*]; Robert E. Mace *et al.*, *Groundwater Is No Longer Secret and Occult—A Historical and Hydrogeologic Analysis of the East Case, in 100 Years of the Rule of Capture: From East to Groundwater Management*, TEX. WATER DEV. BD. REP. 361 (2004) [hereinafter *East Historical Analysis*].

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² 98 Tex. 146, 81 S.W. 279 (1904).

³ Hon. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (March 1897) [hereinafter *Path of the Law*]. Justice Holmes served as an Associate Justice on the United States Supreme Court for three decades from December 1902 until his retirement in January 1932. FEDERAL JUDICIAL CENTER, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES: HOLMES, OLIVER WENDELL JR., <http://www.fjc.gov/servlet/nGetInfo?jid=1082&cid=999&ctype=na&instate=na> (last visited Feb. 12, 2013).

⁴ While it used to be a matter of much dispute in Texas, it now appears settled that “a landowner owns the groundwater below the surface of the landowner’s land as real property,” TEX. WATER CODE § 36.002(a), and that such groundwater is owned in place, *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831–32 (Tex. 2012).

⁵ As the Texas Supreme Court confirmed in *Day*, the rule of capture means the same today as it did in 1904 when it was first adopted by the Court in *East*:

That the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor’s well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

Day, 369 S.W.3d at 825 (quoting *East*, 98 Tex. at 149, 81 S.W. at 280; *Acton v. Blundell*, 152 Eng. Rep. 1223, 1235 (1843)). Put another way, the rule of capture means that “absent malice or willful waste, landowners have the right to take all the water they can capture under their land and do with it what they please, and they will not be liable to neighbors even if in doing so they deprive their neighbors of the water’s use.” *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999).

⁶ *East*, 98 Tex. at 150, 81 S.W. at 281 (quoting *Pixley v. Clark*, 35 N.Y. 520, 527 (1866)) (relying upon ownership in place); *East*, 98 Tex. at 149, 81 S.W. at 280 (citing *Acton v. Blundell*, 152 Eng. Rep. 1223, 1230 (1843)) (relying upon the rule of capture).

two legal concepts had already raged for some 2,000 years.⁷ Because the historical formulation of these two doctrines trace a uniquely-direct lineage to the Court's decision in *East*, they bear some investigation in this historical exposition of Texas groundwater jurisprudence.

Ancient Legal Development

Although Rome was founded in 753 B.C., the first written expression of Roman law was not completed until 300 years later in 451 B.C.⁸ This first written code is referred to as the "Twelve Tables" after the twelve bronze tablets upon which it was inscribed.⁹

A few hundred years after the promulgation of the *Twelve Tables*, a system of nationally renowned jurists developed in Rome during the first century B.C. who interpreted the *Twelve Tables*, as well as edicts of Roman emperors.¹⁰ Because the writings of these jurists were drafted mainly as a critique of or in response to the Imperial edicts and the Twelve Tables, such writings were called *responsa*.¹¹ These jurists were akin to modern-day law professors except that their written legal critiques were accorded precedential weight and applied by Roman judges of the day,¹² thereby becoming legally binding in many instances.¹³

The *responsa* of these jurists were eventually collected into a single comprehensive code

⁷ See, e.g., Dylan O. Drummond, *Groundwater Ownership in Place: Fact or Fiction?* at 4–5, in UTCLE, TEXAS WATER LAW INSTITUTE (2008) [hereinafter *Fact or Fiction*]; Dylan O. Drummond, Lynn Ray Sherman, and Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 15–29 (Winter 2004) [hereinafter, *Still So Misunderstood*].

⁸ ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 10, 13 (1970) [hereinafter LAW OF THE ANCIENT ROMANS]; PHARR ET AL., THE THEODOSIAN CODE AND NOVELS AND SIRMONDIAN CONSTITUTIONS xxiii (1952) [hereinafter [THEODOSIAN CODE]].

⁹ LAW OF THE ANCIENT ROMANS, at 13. A commission, charged with the task of "writing down the laws," produced the *Twelve Tables* in order to settle authoritatively many controversial cases that had arisen under the application of the unwritten, customary law of the time. Peter Stein, Interpretation and Legal Reasoning in Roman Law, 70 CHI.-KENT L. REV. 1539, 1539–40 (1995) [hereinafter *Legal Reasoning in Roman Law*]. The *Twelve Tables* were so crucial to the later development of modern property law that they have been called "the foundation of modern Western jurisprudence." Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 492–93 (1996) (quoting ALAN WATSON, *ROME OF THE XII TABLES: PERSONS AND PROPERTY* 3 (1975)).

¹⁰ W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 21–23 (3d ed. 1966) [hereinafter ROMAN LAW TEXTBOOK]; LAW OF THE ANCIENT ROMANS, at 26–27.

¹¹ See *Still So Misunderstood*, 37 TEX. TECH L. REV. at 19 n.71, 21 n.91; BLACK'S LAW DICTIONARY, *Responsa Prudentium* (10th ed. 2014) (the legal opinions of leading jurists were called *responsa*).

¹² See, e.g., BLACK'S LAW DICTIONARY, *Responsa Prudentium* (10th ed. 2014) (quoting HANNIS TAYLOR, THE SCIENCE OF JURISPRUDENCE 90–91 (1908)) ("the *judex*, or as we would call him, the referee, might have no technical knowledge of law whatever. Under such conditions[,] the unlearned judicial magistrates naturally looked for light and leading to the *jurisconsults* who instructed them through their *responsa prudentium*, the technical name given to their opinions as experts"). At Roman law, a *judex* was a "private person appointed by a praetor or other magistrate to hear and decide a case," who was "drawn from a panel of qualified persons of standing." BLACK'S LAW DICTIONARY, *Judex* (10th ed. 2014).

¹³ During the reign of Emperor Augustus from 31 B.C. to A.D. 14., he issued the right of public *respondere* (referring to the Juristic Responses to the Imperial Edicts) to certain jurists, which made their *responsa* binding. ROMAN LAW TEXTBOOK, at 23. Around a century later, when jurists of equal stature would issue conflicting opinions, Emperor Hadrian settled the resulting quandary by declaring *responsa* binding only if they were in agreement with each other. *Id.* Some may argue modern-day law professors believe this to currently be the case.

some 600 years later in 533¹⁴ by the Roman Emperor Justinian¹⁵—along with previous Roman codes,¹⁶ constitutions, and Imperial edicts—called the *Digest of Justinian* (the “*Digest*”).¹⁷ As part of this monumental effort,¹⁸ a sort of legal textbook for students—not unlike a first-year law student’s casebook—called the *Institutes of Justinian* (the “*Institutes*”) was also promulgated.¹⁹ Indeed, the *Institutes* later formed the basis of much of Western jurisprudence, including being relied upon by common-law judges in England and throughout Europe,²⁰ in addition to forming the basis of Spanish mainland law.²¹

¹⁴ The *Institutes* and the *Digest* were issued on December 30, 533. LAW OF THE ANCIENT ROMANS, at 93.

¹⁵ Justinian officially became emperor in April 527, but he was forced to share his reign until the death of the former emperor (his uncle, Justin) on August 1, 527. A.M. Honore, *The Background to Justinian’s Codification*, 48 TUL. L. REV. 859, 864 (1974) [hereinafter *Justinian’s Codification*].

¹⁶ The Roman Empire split in two during the fourth century A.D. THEODOSIAN CODE, at xxiv. This schism began around 305 under the rule of the Emperor Diocletian and was finalized in 395 during the reign of Theodosius I. *Id.* Two distinct yet connected empires resulted, which were ruled from two capitals—Constantinople in the East and Rome in the West—until the fall of the Western Empire in 476. *Id.* at xxiv, xxvi. The Eastern Empire, founded by the Emperor Constantine in 330, survived until 1453 when the Turks captured Constantinople. *Id.* Theodosius II ruled the Eastern Empire from 408–50. *Id.*

Theodosius II issued a decree at Constantinople on March 26, 429 appointing a commission of nine scholars to collect and combine all of the previous imperial edicts, constitutions, and the three then-existing codes—Gregorianus, Hermogenianus, and Theodosianus—and then to publish them together in one single code. *Id.* at xvii; *Justinian’s Codification*, 48 TUL. L. REV. at 866. The Theodosian Code, as it is now known, was completed nine years later and was formally adopted by the Empire on Christmas Day 438. THEODOSIAN CODE, at xvii.

¹⁷ LAW OF THE ANCIENT ROMANS, at 92–93; ROMAN LAW TEXTBOOK, at 40–41. Through the intervening centuries, the *Digest* has sometimes been referred to as the Pandects. ROMAN LAW TEXTBOOK, at 41.

¹⁸ In February 528, Justinian appointed a ten-member commission to compile and update the many existing Imperial constitutions. *Justinian’s Codification*, 48 TUL. L. REV. at 866; LAW OF THE ANCIENT ROMANS, at 92; ROMAN LAW TEXTBOOK, at 40. This commission successfully issued a code fourteen months later in April 529, but it was replaced in 534 by a second code because the inordinate amount of legislation passed during the intervening years had already made the first code obsolete. *Justinian’s Codification*, 48 TUL. L. REV. at 866; LAW OF THE ANCIENT ROMANS, at 92–93; ROMAN LAW TEXTBOOK, at 47.

In order to draft the *Digest* and *Institutes*, Justinian gave instructions to one of his trusted legal advisors to organize another commission to accomplish the task, and the result was a sixteen-member body comprised of some of the greatest legal minds of the day. ROMAN LAW TEXTBOOK, at 41; LAW OF THE ANCIENT ROMANS, at 91. Justinian’s aim in this pursuit was not to alter or even modernize the old writings, but to conflate them and make the law less unwieldy. ROMAN LAW TEXTBOOK, at 41; LAW OF THE ANCIENT ROMANS, at 92–93. As such, Justinian instructed the commission to delete only that which was obsolete or superfluous. LAW OF THE ANCIENT ROMANS, at 92. This goal of staying true to the original texts was evidenced by the express citation to each jurist’s work in the *Digest*. *Id.* at 93. Throughout the following three years, the commission reduced some 3,000,000 lines of legal text, taken from around 2,000 separate books, to just some 150,000 lines comprised of 800,000 words eventually included in the *Digest*. *Justinian’s Codification*, 48 TUL. L. REV. at 866, 879; LAW OF THE ANCIENT ROMANS, at 92–93.

¹⁹ ROMAN LAW TEXTBOOK, at 28; LAW OF THE ANCIENT ROMANS, at 17, 93.

²⁰ See, e.g., *Acton v. Blundell*, 152 Eng. Rep. 1223, 1234 (1843) (allowing that, while “Roman law forms no rule, binding in itself, upon the subject these realms,” it has nevertheless formed the “fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe”); IV SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 221 (1926) [hereinafter HISTORY OF ENGLISH LAW] (“The text of Justinian was both the Aristotle and the Bible of the lawyers.”); ALAN WATSON, ROMAN AND COMPARATIVE LAW 167 (1991) (“[t]hroughout many centuries, when Continental lawyers had to find a ruling, they looked for it in Justinian’s Corpus Juris Civilis”) [hereinafter ROMAN AND COMPARATIVE LAW]. The *Corpus Juris Civilis* was comprised of Justinian’s *Institutes*, *Digest*, and second *Code*. Hans W. Baade, *The Historical Background of Texas Water Law: A Tribute to Jack Pope*, 18 ST. MARY’S L.J. 1, 57–87 (1986) [hereinafter *Tribute to Jack Pope*]; LAW OF THE ANCIENT ROMANS, at 93.

²¹ Harbert Davenport & J. T. Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande*, 8 BAYLOR L. REV. 138, 157–58 (1956) (the “law as declared in the Las Siete Partidas [which governed peninsular Spain], ... was taken almost bodily from the Roman Law; and, more particularly, from the



Fig. 1 – This page is from the *Pandectarum codex Florentinus*, and is the oldest existing edition of the *Digest*, copied just after its promulgation in the sixth century A.D.²²

A. Groundwater-Related Juristic Excerpts

Although several jurists wrote extensively on groundwater-law concepts,²³ only two directly influenced Texas groundwater jurisprudence: Marcellus and Ulpian.

Institutes) [hereinafter *Law of Flowing Waters*]; LAS SIETE PARTIDAS lii, liv (Samuel Parsons Scott trans., 1931); *Still So Misunderstood*, 37 TEX. TECH L. REV. at 1, 31, 31 n.196, 32; see also *State v. Balli*, 144 Tex. 195, 248, 190 S.W.2d 71, 99 (1944) (referring to the *Institutes* as the foundational text of the LAS SIETE PARTIDAS); *Valmont Plantations I*, 346 S.W.2d at 857.

²² A.D. ROMAN LEGAL TRADITION AND THE COMPILATION OF JUSTINIAN, THE ROBBINS COLLECTION, SCHOOL OF LAW (BOALT HALL), UNIVERSITY OF CALIFORNIA AT BERKELEY, <http://www.law.berkeley.edu/library/robbins/RomanLegalTradition.html#just> (last visited Feb. 27, 2013).

²³ One such jurist was Quintus Mucius, who reached the zenith of his influence during his service as Consul around 95 B.C. See *Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. at 1544; *Comparative Law*, 48 AM. J. COMP. L. at 21. He wrote that a downstream property owner would have no recourse against a spring-owner who diverts or uses the water before it reaches the downstream property owner's land. See DIG. 39.3.21 (Pomponius, *Quintus Mucius* 32) (as translated in 3 THE DIGEST OF JUSTINIAN 402 (Theodor Mommsen & Paul Krueger trans., Alan Watson ed., 1985) [hereinafter DIG.].

Pomponius was another first-century A.D. jurist who, along with Ulpian, was one of the “principal writers on water law” that appear in the *Digest*. See EUGENE F. WARE, ROMAN WATER LAW: TRANSLATED FROM THE PANDECTS OF JUSTINIAN 23 (1905) [hereinafter PANDECTS OF JUSTINIAN]. His contributions to groundwater law mainly center on his commentary describing the legal theories of Quintus Mucius Scaevola from more than a century earlier. DIG. 39.3.21 (Pomponius, *Quintus Mucius* 32); see also *Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. at 1544; *Comparative Law*, 48 AM. J. COMP. L. at 21. Specifically, Pomponius wrote of Quintus Mucius’s earlier *responsum*, recounting that:

If water which has its sources on your land bursts onto my land and you cut off those sources with the result that the water ceases to reach my land, you will not be considered to have acted with force, provided that no servitude was owed to me in this connection, nor will you be liable to the interdict against force or stealth.

DIG. 39.3.21 (Pomponius, *Quintus Mucius* 32).

1. Marcellus's *responsum*

The jurist most pertinent to the exploration of current groundwater law in Texas is Marcus Claudius Marcellus, who died in 45 B.C. and was a contemporary of Cicero.²⁴ Marcellus was made *Curule Aedile* in 56 B.C. (the sixth-highest elected office in Rome) and was named *Consul* five years later in 51 B.C. (the second-highest elected office in Rome).²⁵

His original formulation of the rule of capture—the first ever recorded—held that:

[N]o action, not even the action for fraud, can be brought against a person who, while digging on his own land, diverts his neighbor's water supply.²⁶

2. Ulpian's *responsa*

While Marcellus's musings on what would become the modern-day rule of capture were no doubt important in their day, their subsequent inclusion in the *Digest* and recounting by perhaps the most famed jurist in antiquity made Marcellus's work immortal.²⁷

Ulpian was one of the most renowned jurists to ever live, and even served as the *Praefectus Praetorio* (commander of the Praetorian Guard and chief advisor to the Emperor) for a time.²⁸ Not only do his works form the basis for approximately one-third²⁹ to one-half³⁰ of the *Digest*, the name Ulpian was almost synonymous with Roman law during the Middle Ages.³¹ Ulpian was among five noted jurists whose writings were made authoritative due to their inclusion in the *Law of Citations*,³² which was issued in 426.³³ He is also considered to be one of the three "principal writers on water law" featured in the *Digest*.³⁴ Indeed, after his death at the hands of his own guards in 228, the study and development of Roman law went into decline until the publication of the *Theodosian Code* in the fifth century A.D.³⁵

In Book 53 of his collection, *Ad Edictum*, Ulpian reasoned that "anyone who fails to protect himself in advance ... against anticipated injury [by work carried out on neighboring land] has only himself to blame."³⁶ Construing the *responsum* of another jurist—Trebatius—who lived some

²⁴ COLUM. ENCYCLOPEDIA 1752 (6th ed. 2000).

²⁵ *Id.*

²⁶ DIG. 39.3.1.12 (Ulpian, *Ad Edictum* 53).

²⁷ *See Still So Misunderstood*, 37 TEX. TECH L. REV. at 22.

²⁸ LAW OF THE ANCIENT ROMANS, at 93 ("Ulpian was the most popular jurist."); ROMAN LAW TEXTBOOK, at 32–33.

²⁹ *See* ROMAN LAW TEXTBOOK, at 32.

³⁰ *See* LAW OF THE ANCIENT ROMANS, at 93.

³¹ *See* ROMAN LAW TEXTBOOK, at 33.

³² *See* LAW OF THE ANCIENT ROMANS, at 91; ROMAN LAW TEXTBOOK, at 32. This group of honored jurists was sometimes referred to as the "favoured five." *See* ROMAN LAW TEXTBOOK, at 32.

³³ *See* LAW OF THE ANCIENT ROMANS, at 91; *Justinian's Codification*, 48 TUL. L. REV. at 862.

³⁴ *See* PANDECTS OF JUSTINIAN at 23.

³⁵ LAW OF THE ANCIENT ROMANS, at 90; ROMAN LAW TEXTBOOK, at 32.

³⁶ DIG. 39.3.3.3 (Ulpian, *Ad Edictum* 53).

250 years before him,³⁷ Ulpian explained how this theory of damage without injury—described some 1,600 years later by the maxim, *damnum absque injuria*³⁸—applied to groundwater rights:

Again, let us consider when injury is held to be caused; for the stipulation covers such injury as is caused by defect of house, site, or work. Suppose that I dig a well in my house and by doing so I cut off the sources of your well. Am I liable? Trebatius says that I am not liable on a count of anticipated injury [because] I am not to be thought of as having caused you injury as a result of any defect in the work that I carried out, seeing that the matter is one in which I was exercising my rights.³⁹

As Ulpian commented regarding the *responsum* of the jurist Proculus,⁴⁰ no action may lie:

[U]nder this stipulation; the grounds for this are that a person who prevents somebody from enjoying an advantage which he has hitherto enjoyed should not be held to be causing injury, there being a great difference between the causing of injury and the prevention of enjoyment of an advantage previously enjoyed.⁴¹

The late-1600s French legal scholar Jean Domat summarized Ulpian and Proculus's property rights *responsa*, cautioning that an aggrieved landowner ought to have acted "so as to be out of danger of this inconvenience, which he had no right to hinder, and which he might have easily foreseen."⁴² Specific to groundwater law, Domat wrote that a landowner "may dig for water on his own ground, and if he should thereby drain a well or spring in his neighbor's ground, he would be liable to no action of damages on that score."⁴³

Interestingly, Ulpian even foretold the legal remedies arising from subsidence caused by

³⁷ Trebatius lived from 84 B.C. to A.D. 4. Alan Watson & Khaled Abou El Fadl, *Fox Hunting, Pheasant Shooting, and Comparative Law*, 48 AM. J. COMP. L. 1, 21 (2000) [hereinafter *Comparative Law*].

³⁸ Although the *Acton* and *East* courts are more famously known for applying *damnum absque injuria* to groundwater law, the maxim was first applied to this debate by the Massachusetts Supreme Court in its 1836 opinion in *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117, 123 (1836). Incidentally, *Greenleaf* was issued in March 1836, the same month and year that some 190 militiamen bravely stood against 2,400 Mexican troops for thirteen days in an old, crumbling Spanish mission just outside of San Antonio de Béxar. Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of Its Defenders*, 36 S.W. HIST. Q. 251, 265 (April 1933); Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of Its Defenders*, 37 S.W. HIST. Q. 237, 237–38 (1934); see also JAMES A. MICHENER, *TEXAS* 325 (Univ. Tex. Press 1985).

³⁹ DIG. 39.2.24.12 (Ulpian, *Ad Edictum* 81).

⁴⁰ Proculus was an active jurist in the first century A.D. *Comparative Law*, 48 AM. J. COMP. L. at 25. His writings were held in such high regard around A.D. 27 that one of the two dominant schools of juridical thought in Rome—the more liberal and interpretative school—was named after him (the "Proculians"). *Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. at 1545. The other dominant school—the Sabinians—were more conservative and textualist. *Id.*; ROMAN LAW TEXTBOOK, at 27. Although the Proculians took their name from Proculus, the school was actually founded by Antistius Labeo (a republican—in the Roman sense) who died around 21. *Id.*; *Comparative Law*, 48 AM. J. COMP. L. at 25. In fact, Proculus was a follower of Nerva, who was himself a follower of Labeo. ROMAN LAW TEXTBOOK, at 27.

⁴¹ DIG. 39.2.26 (Ulpian, *Ad Edictum* 81).

⁴² JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* § 1047 (William Strahan trans. Luther S. Cushing ed. 1980) (1850).

⁴³ *Id.*, § 1581.

overpumping,⁴⁴ opining that, “if I dig so deeply on my land that one of your walls cannot stand upright, a stipulation against anticipated injury will become operative.”⁴⁵

B. “Recent” Legal Development

Roman law was instrumental in influencing much of the law throughout Western Europe nearly a millennium after Justinian promulgated his *Digest*,⁴⁶ including the laws of Spain and England. The laws of Spain bear powerfully upon Texas jurisprudence today because of Texas’s former colonial status to the Spanish Crown.⁴⁷ Although Britain never actually held title to Texas soil,⁴⁸ the Texas Republic expressly recognized and adopted English common law in 1840,⁴⁹ and explicitly relied on the common law of England just over sixty years later in *East* (citing, quoting and discussing the 1843 British Exchequer-Chamber court decision in *Acton v. Blundell*).⁵⁰

Indeed, “[l]ands in Texas have been granted by four different governments, namely, the Kingdom of Spain, the Republic of Mexico, the Republic of Texas, and the State of Texas.”⁵¹

1. Spanish derivation

Spain laid legal claim to Mexico, and subsequently present-day Texas, when Hernan Cortés

⁴⁴ See *Friendswood Dev. Co. v. Smith-S.W. Indust., Inc.*, 576 S.W.2d 21, 30 (Tex. 1978).

⁴⁵ DIG. 39.2.24.12 (Ulpian, *Ad Edictum* 81).

⁴⁶ GEORGE TOUMBOUROS, *PARALLEL LEGISLATIONS OF ENGLAND, U.S.A., FRANCE, GERMANY, ITALY AND COMPARATIVE LAW: VOLUME I: THE LAWS OF THE ANCIENT GREECE* 21 (1959).

⁴⁷ See *State v. Sais*, 47 Tex. 307, 318 (1877); JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986*, 2–3 (Univ. Tex. Press 2013) [hereinafter *SCOTX NARRATIVE HISTORY*]; David A. Furlow, “*The Separation of Texas from the Republic of Mexico Was the Division of an Empire: The Continuing Influence of Castilian Law on Texas and the Texas Supreme Court, Part I: Spanish Texas, 1541–1821*,” J. TEX. SUP. CT. HIST. SOC’Y, Winter 2011, at 1 [hereinafter *Influence of Castilian Law*].

⁴⁸ See *S. Pac. Co. v. Porter*, 160 Tex. 329, 334, 331 S.W.2d 42, 45 (1960).

⁴⁹ Act approved Jan. 20, 1840, 4th Cong., R.S., reprinted in 2 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822–1897*, at 177, 177–78 (Austin, Gammel Book Co. 1898). However, as the Texas Supreme Court clarified twelve decades later, English common law was only adopted so far as it was consistent with Texas’s constitutional and legislative enactments, as well as the “rule of decision” in Texas. *Porter*, 160 Tex. at 334, 331 S.W.2d at 45. No English statutes were similarly adopted, and the Republic’s congressional act adopting English common law “was not construed as referring to the common law as applied in England in 1840, but rather to the English common law as declared by the courts of the various states, of the United States.” *Id.* This adoption is still enshrined in Texas statute to this day. See TEX. CIV. PRAC. & REM. CODE § 5.001 (“The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, and the laws of this state.”).

This distinction may be largely without jurisprudential difference because Texas did not address groundwater rights either legislatively or judicially until *East* in 1904, and American courts from 1836 to 1861 largely held consistently with the Texas Supreme Court’s later pronouncements in *East*. See *Still So Misunderstood*, 37 TEX. TECH L. REV. at 38–41; *Fact or Fiction* at 7–8, in UTCLE, *TEXAS WATER LAW INSTITUTE*. Put another way, from the time of the English common law’s adoption in 1840 until *East* was delivered in 1904, both the English common law itself, as well as the “English common law as declared by the courts of the various states[] of the United States,” was generally consistent the explicit framing of Texas groundwater law in *East*. See *Still So Misunderstood*, 37 TEX. TECH L. REV. at 38–41; *Fact or Fiction*, at 7–8.

⁵⁰ *Fact or Fiction*, at 9–10.

⁵¹ *Miller v. Letzerich*, 121 Tex. 248, 253, 49 S.W.2d 404, 407 (1932) (citations omitted). “Where one government succeeds another over the same territory, in which rights of real property have been acquired, the preceding government is not a foreign government, whose laws must be proved in the courts of the succeeding government.” *Sais*, 47 Tex. at 318.

discovered New Spain in 1518.⁵² Ten years later in 1528, Álvar Núñez Cabeza de Vaca⁵³ became the first Spaniard to set foot on Texas soil.⁵⁴ Spanish Texas was essentially rectangular in shape, with the coastal strip stretching from modern-day Corpus Christi, Texas, to Lake Charles, Louisiana, surrounded by the Nueces and Calcasieu Rivers and extending from that point inland to the Medina River slightly west of the City of San Antonio to the Arroyo Hondo, just west of Natchitoches.⁵⁵ This area, added to the rest of the northern frontier of New Spain south of the Nueces River, stretched more than 2,000 miles from east to west and almost 1,500 miles from north to south, encompassing some 960,000 square miles in total.⁵⁶

During the 1600s, Spanish settlers referred to the westernmost of the Caddo Native-American peoples as “the great kingdom of Tejas.”⁵⁷ “Tejas” was the way Spanish soldiers and colonial administrators spelled the Caddo word, *taysha*, which meant “friend” or “ally.”⁵⁸ Tejas then, or early Spanish Texas, referred to the realm of Spain’s allies,⁵⁹ and was the friendly buffer zone that protected the Spanish Empire from unfriendly Native Americans to the north and east.⁶⁰

Nearly two hundred years after Cabeza de Vaca first landed near what is now Galveston, Texas first appeared as a geographical designation in 1691 when the governor of the Spanish territory of Coahuila, in northern Mexico, received an appointment to serve as the governor of the territory.⁶¹ The first written mention of Texas came a few years before in 1689 when a Spanish priest named Father Damián Massanet described the region by a Hasinai Indian word that meant friends or allies—*techas* or *thechas*.⁶²

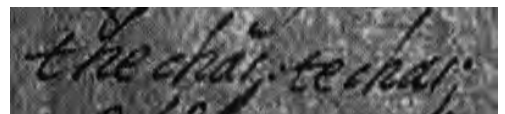
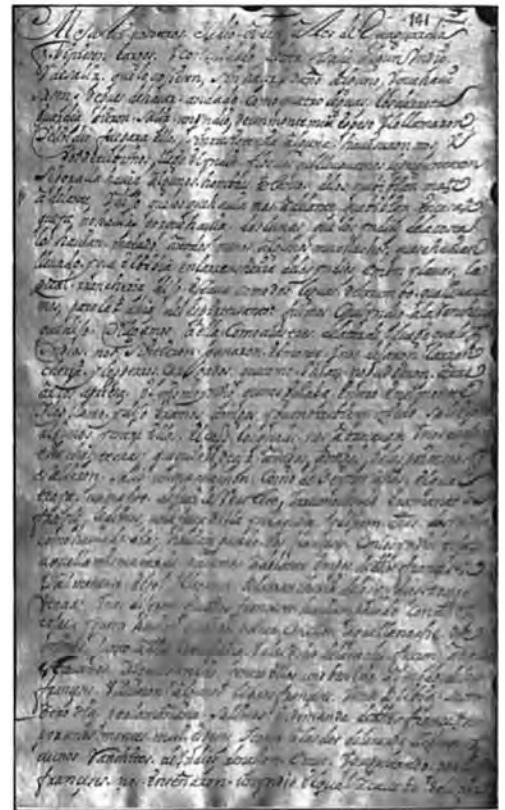


Fig. 2 – 1689 correspondence from Father Damián to Spanish officials documenting the La Salle Expedition, containing the first mention of Texas—*techas* or *thechas*.⁶³

⁵² *Influence of Castilian Law*, J. TEX. SUP. CT. HIST. SOC'Y, Winter 2011, at 2; Robert L. Dabney, Jr., *Our Legal Heritage, in Two Parts: Part One: Texas—The Land of the Brave (1518–1821)*, 39 HOUS. LAW. 12, 14 (2002).

⁵³ Cabeza de Vaca's surname came from his mother's side, and originated from an ancestor's marking of a strategic pass with a cow's skull ("cabeza de vaca"). SCOTX NARRATIVE HISTORY, at 3.

⁵⁴ *Id.*

⁵⁵ *Influence of Castilian Law*, at 2; *Tribute to Jack Pope*, 18 ST. MARY'S L.J. at 26.

⁵⁶ *Influence of Castilian Law*, at 2; MICHAEL C. MEYER, WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY 1550–1850, 3 (1984) [hereinafter SOCIAL AND LEGAL HISTORY].

⁵⁷ *Influence of Castilian Law*, at 2.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Andrew Walker, *Mexican Law and the Texas Courts*, 55 BAYLOR L. REV. 225, 232 (2003); *Influence of Castilian Law*, at 5.

⁶² Hon. Jason Boatright, *Thechas to Texas: The History of Our Word*, J. TEX. SUP. CT. HIST. SOC'Y, Winter 2017, at 53, 54 n.6.

⁶³ *Id.*

In early May 1718, the first permanent settlement in Texas was established along the banks of the San Antonio River at the eastern edge of a range of limestone hills—San Fernando de Béxar.⁶⁴ The settlement included a Franciscan mission (later and more popularly known as the “Alamo”) as well as the chartered municipality itself, best described as a *villa* (a *villa* was more than a mere village, but not yet a *ciudad* (city)).⁶⁵ Playing politics, Fray Antonio de San Buenaventura de Olivares named the villa after the Duc de Béjar, the brother of the Viceroy of New Spain.⁶⁶ The villa’s *notario*,⁶⁷ Francisco de Arocha, was called upon to devise a system to prepare cases for legal process.⁶⁸ Because of this, Arocha has been called Texas’s “first lawyer.”⁶⁹

Spanish law governing Texas was contained in two distinct, yet related sources: (1) *Las Siete Partidas* (*Partidas*)—compiled in 1265 by King Alfonso X,⁷⁰ which governed peninsular Spain;⁷¹ and (2) the *Recopilación de Leyes de los Reynos de las Indias* (*Recopilación*)—promulgated in 1681,⁷² which governed New Spain.⁷³ Both these codes were authoritative in New Spain because of a passage in the *Recopilación* that provided, “when colonial law [was] silent on a topic, one must look to the laws of peninsular Spain.”⁷⁴

The *Partidas* was founded upon the works of Justinian.⁷⁵ The influence of Roman law upon

⁶⁴ SCOTX NARRATIVE HISTORY, at 6; see also *Influence of Castilian Law*, at 5.

⁶⁵ *Influence of Castilian Law*, at 5.

⁶⁶ *Id.*

⁶⁷ Secretary to the ayuntamiento (town council). SCOTX NARRATIVE HISTORY, at 7.

⁶⁸ *Id.* The system he devised was shorter by many steps than what was then required under the common law of England. See *Id.* Instead, he required only that a “plaintiff who came to court set down who he was, what wrong had been done him and by whom, and what redress he sought.” *Id.*

⁶⁹ *Id.* But “Texas’s first legal advocate in recorded history” might very well have been an anonymous Karankawa warrior who successfully lobbied a Native-American court called a mitote to spare what was left of Cabeza de Vaca’s crew in early 1529 near present-day Galveston. SCOTX NARRATIVE HISTORY, at 3–4.

⁷⁰ See M. Diane Barber, *The Legal Dilemma of Groundwater Under the Integrated Environmental Plan for the Mexican-United States Border Area*, 24 ST. MARY’S L.J. 639, 639, 656–58 (1993) [hereinafter *Legal Dilemma of Groundwater*]. King Alfonso was also referred to as “Alfonso the Wise of Castile.” See also *Law of Flowing Waters*, 8 BAYLOR L. REV. at 157. Like Justinian before him, Alfonso “the Learned” took up the compilation of the *Partidas* almost immediately after his ascension to the throne. See *LAS SIETE PARTIDAS I* (Samuel Parsons Scott trans., 1931). Ironically, while the *Digest* took only roughly three years to complete, the *Partidas* took three times as long to finish—nine years. See *Id.* at li n.21.

⁷¹ *In re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250, 252 (Tex. 1984). Indeed it was termed “the essence of the law of Peninsular Spain after 1348.” *State v. Valmont Plantations*, 346 S.W.2d 853, 857 (Tex. Civ. App.—San Antonio 1961, writ granted) (op. adopted) [hereinafter “*Valmont Plantations I*”], *aff’d*, 163 Tex. 381, 355 S.W.2d 502 (1962) [hereinafter “*Valmont Plantations II*”]; see *LAS SIETE PARTIDAS*, at lii–liii.

⁷² *Legal Dilemma of Groundwater*, 24 ST. MARY’S L.J. at 657–58. The drafting of the *Recopilación* was a colossal task that distilled over 400,000 *cedulas* down to just under 6400 provisions. *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 30. *Cedulas* were royal and special edicts. *Valmont Plantations I*, 346 S.W.2d at 866.

⁷³ *Medina River*, 670 S.W.2d at 252; *Valmont Plantations I*, 346 S.W.2d at 860 n.13.

⁷⁴ *Medina River*, 670 S.W.2d at 252 (quoting Book 2, Title 1, Law 1 of the *Recopilación*).

⁷⁵ Some sources, including the Texas Supreme Court, refer specifically to the *Institutes* as the foundational text. *State v. Balli*, 144 Tex. 195, 248, 190 S.W.2d 71, 99 (1944); *Manry v. Robinson*, 122 Tex. 213, 223, 56 S.W.2d 438, 442 (1932); *Law of Flowing Waters*, 8 BAYLOR L. REV. at 157. Additional sources refer only to “Justinian’s sixth century code.” See *Valmont Plantations I*, 346 S.W.2d at 857. This may have referred to all three components of the *Corpus Juris Civilis* or to only the second *Code* itself. Other sources explicitly state that the *Partidas* was based on the *Corpus Juris Civilis*. *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 31; SOCIAL AND LEGAL HISTORY, at 107; see *LAS SIETE PARTIDAS*, at liv. Still other sources simply recount that the *Partidas* was derived generally from Roman law. See *Legal Dilemma of*

Castilian Spain was so great that the *Institutes* formed the “substance[] of civil law instruction at the Spanish and [Colonial]⁷⁶ universities,” and even furnished the text.⁷⁷

However, as great as Justinian’s influence was over its promulgation, the *Partidas* was much more than just a “[p]oor copy of the pandects of Justinian.”⁷⁸ The *Partidas* was a modification, not a recitation, of Justinian’s writings in that it was “modified by custom and usage in medieval Spain,” and Justinian’s texts were only used to clarify the corresponding provisions of the *Partidas*.⁷⁹ While the whole of peninsular Spain was governed by the *Partidas*, the *Partidas* itself was supplemented by provincial codes and laws enacted in each region of the country.⁸⁰

In particular, one such provincial code was the *Constitutiones de Cataluna*, which governed 13th-century Cataluna and provided that “live springs” belonged, not in common, but to the lords of the land “without impediment or contradiction from anybody.”⁸¹ This ownership right was described as exclusive and hostile to others.⁸²

Indeed, New Spain and the entirety of Colonial Spain were the private property of the King,⁸³ and ownership of land could only be achieved by virtue of a grant from the Crown.⁸⁴ One example of such a royal grant was exemplified by the territorial gift made to Hernan Cortés on July 6, 1529,⁸⁵ which expressly ceded title to the “running, stagnant, and percolating waters” found thereon.⁸⁶ The grant to Cortés made imminent sense in context with the provisions of the *Partidas*, which plainly mandated that springs and waters that originated on land went with it in sale.⁸⁷

Just before Christmas 1820, a former lead-mine operator from Missouri named Moses

Groundwater, 24 ST. MARY’S L.J. at 656; LAS SIETE PARTIDAS, at lii, liv. Still other authorities cite Spanish jurisprudence as arising from both the *Institutes* and the *Pandects*. See *Law of Flowing Waters*, 8 BAYLOR L. REV. at 158.

⁷⁶ Throughout the literature, the territories of New Spain are described interchangeably as colonial, ultramarine, or the Indies. See, e.g., *Medina River*, 670 S.W.2d at 252; *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 31–32.

⁷⁷ *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 31–32; see LAS SIETE PARTIDAS, at liii. Indeed, the Texas Supreme Court “has uniformly held that . . . the law as declared in *Las Siete Partidas*, . . . was taken almost bodily from the Roman Law; and, more particularly, from the *Institutes*....” *Law of Flowing Waters*, 8 BAYLOR L. REV. at 157 (emphasis added); see LAS SIETE PARTIDAS, at lii, liv.

⁷⁸ *Law of Flowing Waters*, 8 BAYLOR L. REV. at 158 (citation omitted).

⁷⁹ *Id.*

⁸⁰ *Valmont Plantations I*, 346 S.W.2d at 858.

⁸¹ *Id.* at 858 n.6.

⁸² *Id.* at 858 n.7.

⁸³ All of New Spain, including present-day Texas, was privately owned by the Crown of Castille by virtue of the Bull of Donation (also called the “*Bull Inter Cetera*”) of Pope Alexander VI, issued on May 4, 1493. See *In re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250, 253 (Tex. 1984); *Valmont Plantations I*, 346 S.W.2d at 859.

⁸⁴ *Medina River*, 670 S.W.2d at 253; see also *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 70–71.

⁸⁵ See *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 68.

⁸⁶ *Medina River*, 670 S.W.2d at 253 (quoting the royal grant that transferred title to a large portion of Central Mexico to Hernan Cortés) (emphasis added); see also *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 67–68; Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY’S L.J. 1281, 1292 (1986).

⁸⁷ *Valmont Plantations I*, 346 S.W.2d at 860 n.14 (citing Law 19, Title 32, Part 3 of the *Partidas* because the *Recopilación* did not have a provision dealing explicitly with the alienation of groundwater property rights).

Austin appeared in the provincial capital then-known as San Antonio de Béxar seeking approval to settle Anglo-American colonists from the newly-minted United States in the largely vacant wilderness of Texas.⁸⁸ Seeking to populate the province with Catholic Americans who would swear allegiance to Spain, and who might unwittingly serve as a barrier to hostile Indian tribes, the Spanish authorities approved the proposal.⁸⁹ Unfortunately, Moses died shortly after returning to the United States to organize potential settlers.⁹⁰

2. Mexican influence

Mexico achieved its independence from Spain in September 1821,⁹¹ and Stephen F. Austin—who had taken over his father’s settlement efforts in Texas—obtained the Mexican Emperor’s approval for the “Austin Colony” just two years later on February 18, 1823.⁹²

After its independence, Mexico retained much of the same water law that existed under Spanish rule.⁹³ Indeed, the legal system in Coahuila y Tejas remained largely rooted in ancient Roman law.⁹⁴ What new legislation the Mexican Republic enacted did not elaborate on nor modify groundwater law, but did concern the law of flowing waters, as was ably and exhaustively recounted by future Texas Supreme Court Chief Justice Andrew Jackson (“Jack”) Pope while he was a Justice on the Fourth Court of Appeals in *State v. Valmont Plantations*.⁹⁵

One Mexican scholar, in describing Spanish colonial land grants with and without water rights, framed the existence of a private property right in groundwater as follows: “Private property in waters not only existed, but the legislation of [the] Indies fostered the reduction of unappropriated waters to private ownership,” revealing that private ownership of water was not only possible, but encouraged.⁹⁶ The express grants of springs described in early twentieth-century Mexico also aided the private ownership of water.⁹⁷

⁸⁸ SCOTX NARRATIVE HISTORY, at 9. Despite two and half centuries of dominion over the nearly million square acres of Texas, a 1783 Spanish census found only 2,819 subjects residing north of the Rio Grande river. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 47; *Law of Flowing Waters*, 8 BAYLOR L. REV. at 176.

⁹² See *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 48.

⁹³ *Valmont Plantations I*, 346 S.W.2d at 863.

⁹⁴ SCOTX NARRATIVE HISTORY, at 11.

⁹⁵ *Valmont Plantations I*, 346 S.W.2d at 863. Chief Justice Pope’s intermediate-appellate court opinion so impressed Texas Supreme Court Justice Bob Hamilton—who authored the Court’s opinion adopting Chief Justice Pope’s lower court ruling—that he remarked, “it would serve no good purpose to write further on the subject” because Chief Justice Pope’s opinion was so “exhaustive and well documented.” *Valmont Plantations II*, 355 S.W.2d at 503. It marked the first—and perhaps only—time the Court adopted wholesale a lower court’s opinion without refusing writ of application. See SCOTX NARRATIVE HISTORY, at 199. Chief Justice Pope’s opinion in *Valmont Plantations* has more recently been described as a “lengthy, punctiliously scholarly history lesson.” *Id.* at 198. Because it deftly dodged the troublesome Court precedent set in *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926), it had the welcome effect of giving Texas a “fresh start” regarding riparian water law. *Id.*

⁹⁶ *Valmont Plantations I*, 346 S.W.2d at 862 (quoting ANDRÉS MOLINA ENRIQUEZ, LOS GRANDES PROBLEMAS NACIONALES 171 (1909)).

⁹⁷ *Id.* at 862–63 (citing PENA, PROPIEDAD INMUEBLE EN MEXICO 146 (1921)).

3. British derivation

Much of British water law developed from Justinian's works as well.⁹⁸

a. Bracton & Blackstone

Henry of Bracton's seminal 13th-century work, *The Laws and Customs of England*, is the "earliest scientific exposition of the English common law," and relies heavily upon the *Digest*, even to the extent that the first third of *The Laws and Customs of England* contains "quotations from almost two hundred different sections of Justinian's *Digest*."⁹⁹ In turn, William Blackstone's *Commentaries on the Laws of England*, published some 500 years later in 1766, relied upon the previous works of many other early legal scholars, including Bracton.¹⁰⁰ In addition, the "fundamental structure" of Blackstone's *Commentaries on the Laws of England* was "a direct descendant of Justinian's *Institutes*."¹⁰¹

Blackstone is sometimes credited with introducing into western jurisprudence the legal tenet central to the modern Texas groundwater legal concept of ownership in place: absolute ownership¹⁰²—long described by the Latin maxim, *cujus est solum ejus est usque ad coelum et ad infernos*.¹⁰³ It is translated to mean "[w]hoever owns the soil owns everything up to the sky and down to the depths."¹⁰⁴ However, this axiom was apparently first recorded at common law in the 1586 case of *Bury v. Pope*,¹⁰⁵ but therein, the King's Bench court indicated it had been applied

⁹⁸ PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 152 (1988) [HISTORICAL ESSAYS]; PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 64 (1999) ("[m]any passages echo the language of [the] *Digest* and *Code*[,] ... [t]hey show that he had made Roman law part of his way of thinking as a lawyer"); *Law of Flowing Waters*, 8 BAYLOR L. REV. at 157 ("The English Common Law of Waters ... derive ... from the *Institutes* of Justinian, the ancient Roman Law.").

⁹⁹ HISTORICAL ESSAYS, at 152. In addition to being a 13th-century legal scholar, Bracton also served as Justice of the King's Bench. See *ENCYCLOPEDIA BRITANNICA* 369 (11th ed. 1910).

¹⁰⁰ *ROMAN AND COMPARATIVE LAW*, at 166.

¹⁰¹ *Id.* at 173, 175–76 (noting Book 2 of William Blackstone's *Commentaries on the Laws of England*, addressing the law of things, corresponds to books 2 and 3 of Justinian's *Institutes*).

¹⁰² 2 WILLIAM BLACKSTONE, *COMMENTARIES* *18; *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 11 n.30 (Tex. 2008); John G. Sprankling, *Owning the Center of the Earth*, 55 U.C.L.A. L. REV. 979, 982–83 (April 2008) [hereinafter *Owning the Center of the Earth*].

¹⁰³ See, e.g., *Wheatly v. Baugh*, 25 Pa. 528, 530 (1855). While it is unlikely *cujus est solum ejus est usque ad coelum et ad infernos* comes as directly from Roman law as does *damnum absque injuria*, Roman law certainly recognized the concept of absolute ownership. See W.W. BUCKLAND & ARNOLD D. McNAIR, *ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE* 67, 69 (2d ed. 1952) ("[f]or the Roman lawyers ownership was absolute ... [because] a positive root of title, with nothing relative about it ... gave absolute ownership"). But see *Owning the Center of the Earth*, 55 U.C.L.A. L. REV. at 982–83 (although "Blackstone boldly proclaimed the doctrine in his famous treatise *Commentaries on the Laws of England* ... [i]t was not a principle of Roman law"). Indeed, Professor Goudy of Oxford even attributed some sections of the *Digest* as the theoretical forebears of the doctrine. H. Goudy, *Two Ancient Brocards*, in *ESSAYS IN LEGAL HISTORY* 230–31 (Paul Vinogradoff, ed., 2004) (2013) [hereinafter *ESSAYS IN LEGAL HISTORY*].

¹⁰⁴ *BLACK'S LAW DICTIONARY*, *Ad Coelum Doctrine* (10th ed. 2014); see, e.g., *Acton v. Blundell*, 152 Eng. Rep. 1223, 1235 (1843) (ownership of groundwater "falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that he land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water"). It is an "ancient doctrine that at common law ownership of the land extended to the periphery of the universe." *United States v. Causby*, 328 U.S. 256, 260–61 (1946).

¹⁰⁵ 78 Eng. Rep. 375 (1586); Robert R. Wright, *Development of Policy for Use of Airspace*, in *LEGAL, ECONOMIC, AND ENERGY CONSIDERATIONS IN THE USE OF UNDERGROUND SPACE* 7 (1974) (stating *Bury v. Pope* "is the first case to enunciate the maxim") [hereinafter *Development of Policy*]. Prior to 1865 there was no official series of law reports in England. *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION*, at 413. (Columbia Law Review Ass'n et al. eds., 19th ed.). Instead, cases were

even since the time of Edward I in the late thirteenth century.¹⁰⁶

b. Hammond & Acton

The first English case to address tortious immunity for groundwater drainage was *Hammond v. Hall* in 1840.¹⁰⁷ While the court did not ultimately reach the merits of the groundwater arguments because the claim was not yet ripe, it did recognize that the “question [pertaining to drainage of one well by another, deeper well] ... was said never to have been discussed before, namely, whether a right or easement could be claimed with respect to subterranean water.”¹⁰⁸ In its opinion, the court expressly recognized Marcellus’s writing in the *Digest* by quoting the original Latin phrasing, which translated to read that “no action ... can be brought against a person who, while digging on his own land, diverts his neighbor’s water supply.”¹⁰⁹

Just three years after the *Hammond* decision, the Exchequer Chamber Court¹¹⁰ heard the case of *Acton v. Blundell*.¹¹¹ In *Acton*, a coal-mining company dug a coal pit in 1837, which was a little less than a mile away from a neighboring cotton-mill owner, and a second pit three years later a little closer to the mill.¹¹² When the coal pits reached 105 feet in depth, the cotton-mill’s well water began to run dry.¹¹³

reported in numerous commercial reporters, commonly referred to as the “nominate reporters.” *Id.* at 413–14. Subsequently, most of the nominate reporters were reprinted in the English Reports. *Id.* at 414.

¹⁰⁶ *Bury*, 78 Eng. Rep. at 375 (“Nota. *Cujus est solum, ejus est summitas usque ad coelum*. Temp. Ed. I.”); *Development of Policy*, at 7 (“*Bury v. Pope* does make reference, however, to the existence of the maxim during the time of Edward I (1239–1307),” and explaining that “Temp. Ed. I” means the maxim stemmed from that time); VII HISTORY OF ENGLISH LAW, at 485 (“This maxim is referred to in Croke’s reports in 1586, and is there said to be as old as Edward I.”); ESSAYS IN LEGAL HISTORY, at 230 (“It is cited in Croke’s Reports, in an action for stopping lights, as *Cujus est solum ejus est summitas usque ad coelum*, and a reference is there made to its use at the time of Edward I.”). This is plausible, because Blackstone himself acknowledged the influence of Bracton, whose *Laws and Customs of England* was published in the same century that Edward I ruled England. See ROMAN AND COMPARATIVE LAW, at 166. For his efforts “of ordering, of methodizing, [and] of arranging” the “too luxuriant growth” of English law, Edward I was even known as the “English Justinian.” FREDERIC W. MAITLAND AND FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 91 (James F. Colby ed. 1915). Of more recent notoriety, Edward I is perhaps better known to modern audiences as the villainous English king “Longshanks” in 1995’s *Braveheart*. IMDB.COM, SYNOPSIS FOR BRAVEHEART, <http://www.imdb.com/title/tt0112573/synopsis> (last visited Feb. 26, 2013).

¹⁰⁷ *Hammond v. Hall*, 59 Eng. Rep. 729 (1840).

¹⁰⁸ *Id.* at 730, 730 n.1.

¹⁰⁹ *Id.* at 730 n.2 (providing the untranslated version of this quote); see DIG. 39.3.1.12 (Ulpian, *Ad Edictum* 53).

¹¹⁰ The Exchequer Chamber court was an intermediate appellate court, established in 1822, which heard appeals from English common law courts (Court of King’s Bench, Court of Common Pleas, and the Court of Exchequer), and from which appeal could only be had to the parliamentary House of Lords. See A.T. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 93 (1902) [hereinafter ENGLISH LEGAL HISTORY]; BLACK’S LAW DICTIONARY, Exchequer Chamber (10th ed. 2014). The Court of Exchequer derived its name from the checkered cloth, which was said to resemble a chef’s board, that covered the bench. II JOHN ADOLPHUS, THE POLITICAL STATE OF THE BRITISH EMPIRE 481 (1818). The “King’s Bench” was the highest common-law court in England, presided over by the reigning monarch. BLACK’S LAW DICTIONARY, King’s Bench (10th ed. 2014) (citing 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 156 (2d ed. 1826)). During a queen’s reign, the court is renamed the “Queen’s Bench.” *Id.*

¹¹¹ 152 Eng. Rep. 1223 (1843).

¹¹² *Id.* at 1224–25, 1232–33; see *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 824 n.40 (Tex. 2012); see also *Long Reach*, 116 S.W. HIST. Q. at 269.

¹¹³ See *Acton*, 152 Eng. Rep. at 1224–25; *Long Reach*, 116 S.W. HIST. Q. at 269.

Perhaps more fascinating than the facts underlying the dispute are some of the excerpts from the oral argument delivered in the case, which are preserved in the *English Reports* reprinting of the opinion.¹¹⁴ Acton's counsel began by acknowledging that "water is the party's as long as it is on his land, as every thing is his that is above or below it."¹¹⁵ However, he may have gone too far in his argument when he cited as controlling authority only cases where surface water was at issue.¹¹⁶ In addition, at the end of his surface-water recitation, Acton's counsel mistakenly included a citation to Marcellus's writings in the *Digest*;¹¹⁷ at which point one of the justices on the panel—Justice Maule—interrupted him and responded, "It appears to me that what Marcellus says is against you. The English of it I take to be this: if a man digs a well in his own field, and thereby drains his neighbour's, he may do so, unless he does it maliciously."¹¹⁸ The exchange continued as Acton's attorney cited to more English law adjudicating surface watercourses until Justice Maule again posed a pointed question, asking whether subterranean water could be legally defined as a watercourse?¹¹⁹ Acton's counsel replied, positing that "the term 'watercourse [s]' [whether subterranean or surface] must apply to all streams," but the court did not reach this point in its decision.¹²⁰

In his response, Blundell's attorney cited to the maxim that defined the rule of capture—*damnum absque injuria*—explaining that, in order "[t]o constitute a violation of that maxim, there must be *injuria* as well as *damnum*. There are many cases in which a man may lawfully use his own property so as to cause damage to his neighbour, so as it be not *injuriousum*."¹²¹ In the same paragraph that the court cited to the *Digest* and its recital of Marcellus's *responsum*, the court noted that "[t]he authority of one at least of the learned Roman lawyers [that is, Marcellus] appears decisive upon the point in favour of the defendants; of some others the opinion is expressed with more obscurity."¹²²

Chief Justice Tindal¹²³ delivered the opinion of the court, and concluded by holding that

¹¹⁴ *Acton*, 152 Eng. Rep. at 1226–32.

¹¹⁵ *Id.* at 1226.

¹¹⁶ *See Id.* at 1227–28.

¹¹⁷ *Id.* at 1226; *see* DIG. 39.3.1.12 (Ulpian, *Ad Edictum* 53).

¹¹⁸ *Id.* at 1228. Justice Maule's interjection was particularly important because it represented perhaps the first formal jurisprudential restriction on the operation of the rule of capture due to a pumper's malicious conduct. *See Still So Misunderstood*, 37 TEX. TECH L. REV. at 35.

¹¹⁹ *Id.* at 1229.

¹²⁰ *Id.* at 1229–30.

¹²¹ *Id.* at 1230. Blundell's counsel then described the analogous situation where a wall built by one neighbor on his own land that blocks out the light of another is not held to be injurious. *Id.* Notably, he took this example almost verbatim from the *Digest*, wherein Ulpian quotes Proculus for the proposition that buildings increased in height such that they block the light reaching a neighbor's land result in "no action [for injury being] available" to the neighbor. *See* DIG. 39.2.26 (Ulpian, *Ad Edictum* 81).

¹²² *Acton*, 152 Eng. Rep. at 1235.

¹²³ Chief Justice Nicholas Conyngham Tindal was a 19th-century British jurist who served with great distinction. WIKIPEDIA, NICHOLAS CONYNGHAM TINDAL, http://en.wikipedia.org/wiki/Nicholas_Conyngham_Tindal (last visited Feb. 27, 2013). However, he was perhaps best known not for his posthumous contributions to Texas groundwater law, but for successfully defending the then-Queen of the United Kingdom—Caroline of Brunswick—at her trial for adultery in 1820, as well as for introducing the special verdict of "not guilty by reason of insanity" into English jurisprudence. *Id.* Unfortunately though, Chief Tindal's conception of the insanity defense came at the expense of one of the author's ancestors—Edward Drummond—whose murderer Chief Tindal found not guilty in 1843 by reason of insanity. *Id.*; WIKIPEDIA, EDWARD DRUMMOND, http://en.wikipedia.org/wiki/Edward_Drummond (last visited Feb. 27, 2013).

the case before them was:

[N]ot to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.¹²⁴

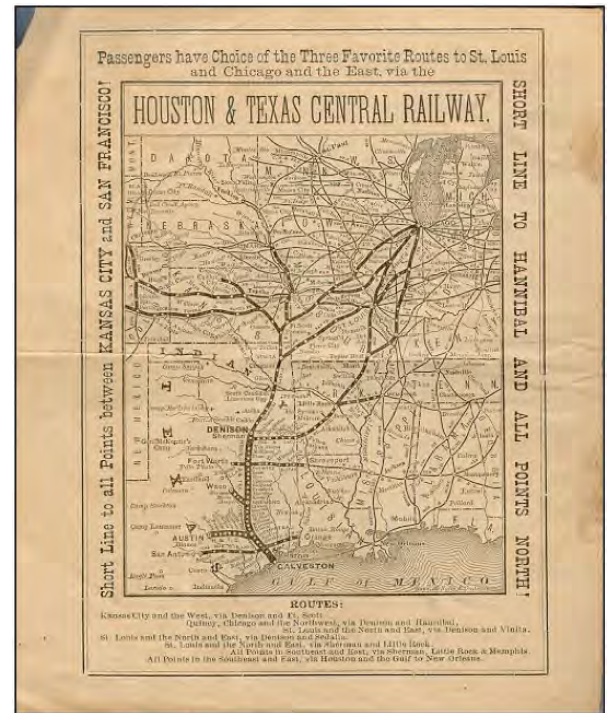


Fig. 3 – A railroad route map from the early 1900s, showing Denison as one of its major hubs.¹³¹

East's Direct Reliance on Acton and Marcellus

Because the Texas Supreme Court hinged its adoption of the rule of capture in its seminal 1904 decision in *Houston & Texas Central Railroad Co. v. East*¹²⁵ directly on the 1843 Exchequer Chamber Court's decision in *Acton v. Blundell*¹²⁶—which in turn based its holding on Marcellus's groundwater *responsa* from the first century B.C.¹²⁷—the events surrounding *East* bear particular significance.

A. Factual Background

The Houston & Texas Central Railroad Company (the "Railroad") was first established in 1853 as the Galveston & Red River Railway ("G&RR") by Thomas William House and two other partners.¹²⁸ House was a Houston planter who originally constructed the G&RR to transport his crops from Houston to the Brazos River.¹²⁹ The Railroad later reached Denison in the 1870s, from where it connected with rail lines to the north.¹³⁰

After Thomas died in 1880, his youngest son, Edward M. House, took over his father's

¹²⁴ *Acton*, 152 Eng. Rep. at 1235.

¹²⁵ 98 Tex. 146, 81 S.W. 279 (1904).

¹²⁶ 152 Eng. Rep. 1223 (1843).

¹²⁷ *East*, 98 Tex. at 149, 151, 81 S.W. at 280–82 (citing *Acton*, 152 Eng. Rep. at 1226, 1228 (citing Dig. 39.3.1.12 (Ulpian, *Ad Edictum* 53))).

¹²⁸ *Long Reach*, 116 S.W. Hist. Q. at 265.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Railroad map from the early 1900s (on file with author, courtesy of Professor Megan & Benson, Ph.D.).

railroad empire.¹³² Edward soon became heavily involved in Texas politics, and was a charter member of a group comprised of the wealthiest businessmen in Texas that came to be known as “Our Crowd.”¹³³ So influential was House that he was thought to sway virtually every appointment made by Texas Governors Stephen Hogg, Charles Culberson, Joseph Sayers,¹³⁴ and Samuel Lanham—including all three Justices sitting on the Texas Supreme Court when W.A. East’s suit against House’s railroad came before the Court in 1904.¹³⁵

In 1872, the town of Denison, Texas was established by the Missouri, Kansas, and Texas Railroad (“KATY”), and named after its vice-president, George Denison.¹³⁶ By 1901, Denison had grown to more than 10,000 residents and was a bustling railroad town that served as a shipping center and stopping point for more than 10 railways.¹³⁷

William Alexander East was born in Grayson County in 1851, two years before the Railroad was formed.¹³⁹ He owned four lots near the intersection of Lamar Avenue and Owings Street in Denison. Sometime prior to 1901, East sunk a well on one of his lots that was 33 feet deep and 5 feet in diameter.¹⁴¹

During 1901, there were newspaper accounts of a drought plaguing Denison, and the recorded

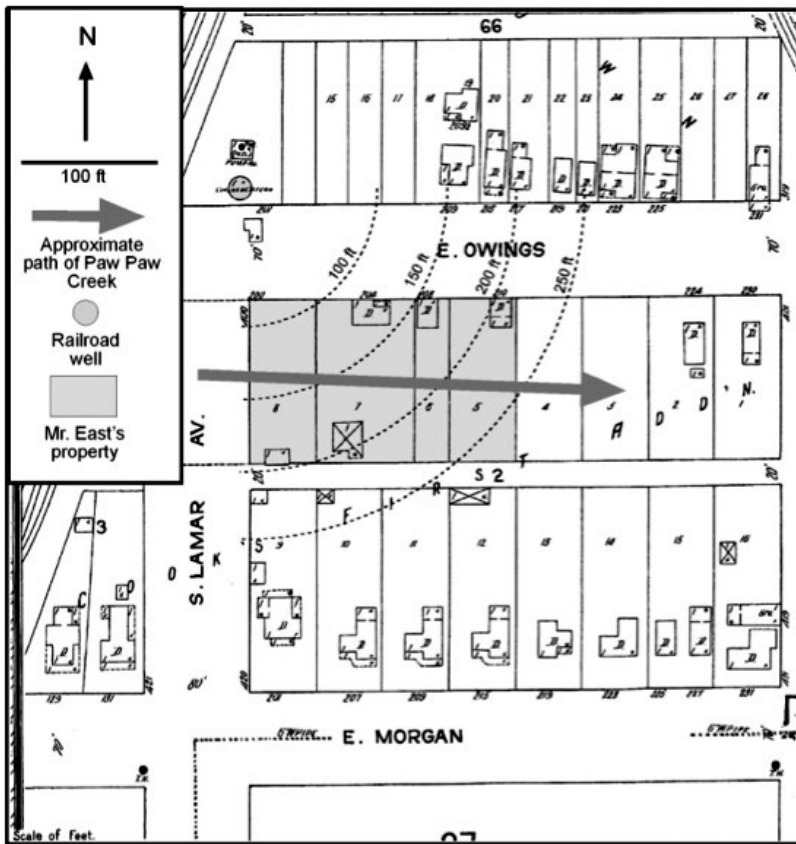


Fig. 4 – 1914 Sanborn fire-insurance map of East’s property relative to the Railroad’s well, overlaid with pertinent annotations and legend by Robert E. Mace, *et al.*¹³⁸

¹³² *Id.*

¹³³ *Id.* at 266.

¹³⁴ In August 1898, Governor Sayers wrote to House, promising that he would “not commit myself to any person on anything, in my own mind, until we shall have canvassed it fully and thoroughly together.” *Long Reach*, 116 S.W. Hist. Q. at 275.

¹³⁵ *Id.* at 266.

¹³⁶ *East Historical Analysis*, at 63.

¹³⁷ *Id.*

¹³⁸ *Id.* at 73.

¹³⁹ Compare *Id.* at 87 n.6, with *Long Reach*, 116 S.W. Hist. Q. at 265.

¹⁴⁰ *East Historical Analysis*, at 71. While East’s pleadings in the case state he owned only two and a half lots on the corner of Lamar Avenue and Morgan Street, the deed records show he owned four lots on the corner of Lamar Avenue and Owings Street. Compare *East Historical Analysis*, at 71, with *Id.* at 100.

¹⁴¹ *East Historical Analysis*, at 71; see *Long Reach*, 116 S.W. Hist. Q. at 266; see also *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 823 (Tex. 2012); *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 148, 81 S.W. 279, 280 (1904).

rainfall was about 30% lower than normal that year.¹⁴² In need of water for its passengers at the station, water for its machine shops, and water for the steam boilers in its locomotives,¹⁴³ the Railroad went searching during the summer of 1901 for nearby land upon which to drill a groundwater well.¹⁴⁴ Finding several wells already in place near the intersection of Owings Street and Lamar Avenue—including East’s—which indicated accessible groundwater below, the Railroad drilled a well that August which measured 20 feet in diameter and 66 feet deep, just some 100 to 250 feet away from East’s well.¹⁴⁵ While the Railroad’s new well was producing 25,000 gallons a day,¹⁴⁶ it was by no means the largest railroad well nearby.¹⁴⁷ The newspaper, the *Sunday Gazeteer*, reported that KATY had sunk a well two and a half miles from Denison that was piping 750,000 gallons per day.¹⁴⁸



Fig. 5 – Looking north at the intersection of Owings Street and Lamar Avenue in Denison, Texas, with the probable location of the Railroad’s well circled.¹⁴⁹

B. District Court Proceedings

Sometime between August 1901 and April 1902, East and his neighbors’ wells began to run dry, prompting him to file suit in which he sought \$1,100 in damages.¹⁵⁰ In December, just days after East filed his First Amended Original Petition, Judge Rice Maxey of the 15th District Court in Grayson County (sitting in Sherman) found in favor of the Railroad, concluding that no “correlative rights exist between the parties as to underground, percolating waters, which do not run in any defined channel.”¹⁵¹

C. Review by the Dallas Court of Civil Appeals

After Judge Maxey denied East’s motion for new trial, East sought review in the Dallas Court

¹⁴² *East Historical Analysis*, at 80–81.

¹⁴³ *Day*, 369 S.W.3d at 824.

¹⁴⁴ *East Historical Analysis*, at 63.

¹⁴⁵ *Id.* at 63, 71; see *Long Reach*, 116 S.W. Hist. Q. at 267; see also *Day*, 369 S.W.3d at 824.

¹⁴⁶ *Day*, 369 S.W.3d at 824.

¹⁴⁷ *East Historical Analysis*, at 63, 81.

¹⁴⁸ *Id.* at 81.

¹⁴⁹ *Id.* at 74.

¹⁵⁰ *Id.* at 63. The historical record is not clear when East first filed suit, but it is certain that the Railroad sank their well in August 1901, and filed their Original Answer to East’s suit on April 5, 1902. *Id.* at 87 n.7, 104.

¹⁵¹ *Id.* at 63, 107–08; see *Long Reach*, 116 S.W. Hist. Q. at 266, 268.



Fig. 6 – East file coversheet in the Dallas Court of Appeals, with annotations by the clerk showing eventual disposition at the Texas Supreme Court.¹⁵²

of Civil Appeals in early 1903.¹⁵³ On appeal, the Railroad retained the law firm of Baker, Botts, Baker & Lovett (now more commonly known as Baker Botts) as appellate counsel.¹⁵⁴ Even in 1903, Baker Botts was a venerable Texas law firm based out of Houston that counted among its clientele railroad company and businesses just beginning to brave the burgeoning oil and gas industry.¹⁵⁵ The contrast between East’s local counsel, Moseley & Eppstein, and Baker Botts was evident: the Railroad’s briefs “were professionally printed and leather bound,” while East’s were “roughly typed.”¹⁵⁶

While acknowledging that Acton governed in England and had even been adopted by some American states, authoring justice John Bookhout reasoned in the court’s November 1903 opinion that, to apply the rule stated in Acton to the case before him would “shock our sense of justice.”¹⁵⁷ Recognizing that the question before it had “not been passed upon by any of the appellate courts of this State,” the Dallas Court of Appeals chose to rely on the reasoning from an 1862 case issued by the Supreme Court of New Hampshire¹⁵⁸ that expressly rejected the tenets of ownership in place and the rule of capture as laid out in Acton, and which founded

¹⁵² *East Historical Analysis*, at 97.

¹⁵³ *Id.* at 64.

¹⁵⁴ *Id.* at 113.

¹⁵⁵ Compare *Long Reach*, 116 S.W. Hist. Q. at 271, with Baker Botts, *History*, <http://www.bakerbotts.com/about/history/> (last visited Feb. 27, 2013).

¹⁵⁶ *Long Reach*, 116 S.W. Hist. Q. at 271.

¹⁵⁷ *East v. Houston & T. Cent. Ry. Co.*, 77 S.W. 646, 648 (Tex. Civ. App.—Dallas 1903), *rev'd*, 98 Tex. 146, 151, 81 S.W. 279, 282 (1904); *Long Reach*, 116 S.W. Hist. Q. at 273; *East Historical Analysis*, at 129.

¹⁵⁸ *Bassett v. Salisbury Mfg.*, 43 N.H. 569, 573–79 (1862).

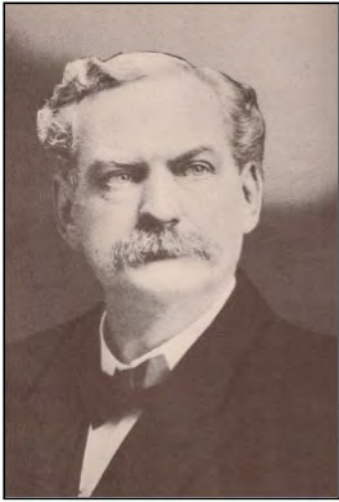


Fig. 7 – Justice John Bookhout of the Dallas Court of Appeals.¹⁶⁰

what is now known as the American branch of the Reasonable-Use doctrine.¹⁵⁹

Upon reversing the district court's judgment, Justice Bookhout rendered judgment awarding East \$206.25 in damages.¹⁶¹ The Railroad immediately moved for rehearing on December 10, 1903, which was denied nine days later on December 19, 1903.¹⁶²

D. The Texas Supreme Court's Opinion

During the era of the Texas Supreme Court in which the *East* case was decided, the Court became known as the "Consensus Court," due to the near unanimity with which it almost invariably issued its opinions.¹⁶³

The Railroad filed its application for writ of error at the Texas Supreme Court on January 16, 1904, which the Court granted on April 28, 1904.¹⁶⁴ Just over six

¹⁵⁹ *East*, 77 S.W. at 647–48, *rev'd*, 98 Tex. at 151, 81 S.W. at 282; *Long Reach*, 116 S.W. HIST. Q. at 273; *East Historical Analysis*, at 127–29. For an extended discussion of the American branch of the Reasonable-Use Doctrine, please see Dylan O. Drummond, Comment, *Texas Groundwater Law in the 21st Century: A Compendium of Historical Approaches, Current Problems, and Future Solutions Focusing on the High Plains Aquifer and the Panhandle*, 4 TEX. TECH ADMIN. L.J. 173, 197–99 (Summer 2003) [hereinafter *21st Century Groundwater Law*].

¹⁶⁰ *Long Reach*, 116 S.W. HIST. Q. at 274. Justice Bookhout served on the Dallas appellate bench for nearly fifteen years, being first appointed in October 1897 and submitting his resignation in early 1912. Compare W.J. CLAY, STATISTICAL REPORT: 1904, 18 (Von Boeckmann-Jones Co.—State Printers, 1904), available at <http://books.google.com/books?id=19g9AAAAYAAJ&pg=PA13&ots=H3PZrsPXST&dq=justice%20%22john%20bookhout%22&pg=PA13#v=onepage&q=justice%20%22john%20bookhout%22&f=false> (last visited Feb. 28, 2013), with Domestic, THE BASTROP ADVERTISER, February 2, 1912, at 1, available at <http://texashistory.unt.edu/ark:/67531/metaph029/m1/1/zoom/> (last visited Feb. 28, 2013). Of note, in 1881, Justice Bookhout became the first telephone subscriber in Dallas. *Why Dallas?*, TEXAS MONTHLY, December 1973, at 58 (incidentally, 1973 marked the inaugural volume for TEXAS MONTHLY, whose first issue published earlier that year in February, *From the Publisher*, TEXAS MONTHLY, February 1973, at 1, 3 (TEXAS MONTHLY'S original publisher, Michael R. Levy, penned a spirited introduction to the magazine, vowing not to compete with "vapid Sunday supplements ..., with the promotional magazines with their prostitutional story-for-an-ad format, or with the chamber of commerce magazines with their Babbitt perspectives.")).

¹⁶¹ *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 824 (Tex. 2012); *East*, 77 S.W. at 648, *rev'd* 98 Tex. at 151, 81 S.W. at 282; *Long Reach*, 116 S.W. HIST. Q. at 273; *East Historical Analysis*, at 64, 129.

¹⁶² Compare *East Historical Analysis*, at 130, with *Id.* at 148.

¹⁶³ SCOTX NARRATIVE HISTORY at 140. Chief Justice Reuben Gaines, Justice Williams, and Justice T.J. Brown served together for nearly twelve years. *Id.* During this time—encompassing a dozen volumes of the Texas Reports—only six dissents were filed (one by Chief Gaines, two by Justice Williams, and three by Justice Brown), and only one concurrence (by Justice Williams). *Id.* at 139–40.

While some have said that the Consensus Court "escorted Texas from the frontier into the industrial age with wisdom, discretion, and impeccable judicial temperament," other historians have taken a more critical view of that Court's legacy. Compare SCOTX NARRATIVE HISTORY at 150, with *Long Reach*, 116 S.W. HIST. Q. at 278–79.

¹⁶⁴ *East Historical Analysis*, at 147. Until 1997, the mechanism to invite the Texas Supreme Court to review a case was by filing at the Court an application for writ of error under former Texas Rule of Appellate Procedure ("TRAP") 133(a). See, e.g., Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 104 (Winter 2007). After the massive overhaul of the TRAPs in September 1997, Rule 133(a) was supplanted by Rule 56.1(b)(1), which introduced the current process of petitioning the Court for review. *Id.*; see TEX. R. APP. P. 56.1(b)(1), reprinted in *Texas Rules of Appellate Procedure*, 60 TEX. B.J. 878, 936 (Oct. 1997).

weeks later on June 13, 1904, the Court issued its unanimous opinion reversing the Dallas Court of Appeals and affirming the original judgment of the district court.¹⁶⁵

Writing for a unanimous Court, Justice Williams began by noting that Acton was then “recognized and followed ... by all the courts of last resort in this country before which the question has come, except the Supreme Court of New Hampshire”¹⁶⁶—the one jurisdiction Justice Bookhout relied upon below.¹⁶⁷ Therefore, the Court found to be persuasive Acton’s passage restating the rule of capture.¹⁶⁸ In the closing paragraphs of the *East* opinion, the Court explained that, because the Railroad was “making ... use of the water which it takes from its own land ..., [n]o reason exists why the general doctrine [(as stated in *Acton* and *Pixley*)] should not govern this case.”¹⁶⁹

Justice Williams did caution, though, that East had made “no claim of malice or wanton conduct of any character,” so no such inquiry was before the Court.¹⁷⁰ The jurisprudential import of this statement was to—at the same moment Texas formally adopted the rule of capture—simultaneously limit its operation in cases where a withdrawing landowner acted maliciously or wantonly (*i.e.*, wastefully).¹⁷¹

Although East initially moved for rehearing on June 28, 1904, just days after the opinion issued, he subsequently requested the Court dismiss his motion for rehearing the following month.¹⁷² And with that, *East* became enshrined in Texas jurisprudence.

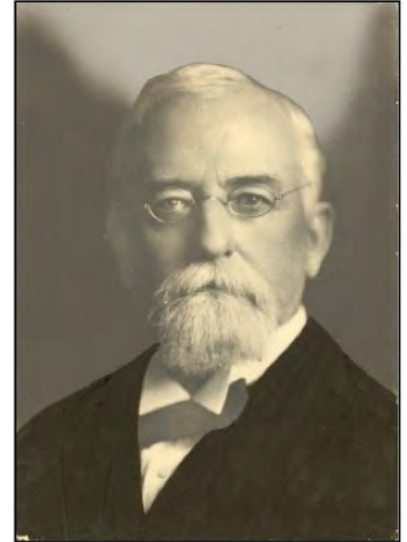


Fig. 8 – Justice F.A. Williams of the Texas Supreme Court.¹⁷³ Photo courtesy of the University of Texas Tarlton Law Library.

¹⁶⁵ *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904).

¹⁶⁶ *Id.* at 149, 280; see *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 825 (Tex. 2012).

¹⁶⁷ *East*, 77 S.W. at 647–48, *rev'd*, 98 Tex. at 151, 81 S.W. at 282.

¹⁶⁸ *East*, at 149, 280 (quoting *Acton*, 152 Eng. Rep. at 1235); see *Day*, 369 S.W.3d at 826 (distinguishing and putting into context the *East* Court’s quotation to *Pixley v. Clark*, 35 N.Y. 520, 527 (1866)).

¹⁶⁹ *East*, 98 Tex. at 151, 81 S.W. at 281–82.

¹⁷⁰ *Id.* at 151, 282; see *Day*, 369 S.W.3d at 825.

¹⁷¹ Justice Williams was undoubtedly referring to *Acton*’s earlier incorporation of a malicious restriction to the concept of *damnum absque injuria*. See *Acton v. Blundell*, 152 Eng. Rep. 1223, 1228 (1843).

¹⁷² *East Historical Analysis*, at 167–73.

¹⁷³ *Long Reach*, 116 S.W. HIST. Q. at 276. Justice Williams was from an antebellum Mississippi planter family but did not fight in the Civil War because he was only nine years old when it began. SCOTX NARRATIVE HISTORY at 139, 143. After being orphaned at sixteen, Williams migrated to Texas four years later to live with his sister in Crockett, Texas. *Id.* at 139. There, he read law with his sister’s husband, and practiced for twelve years in private practice. *Id.* Justice Williams was highly experienced when Governor Joe Sayers appointed him to the Texas Supreme Court, having already served eight years on the Austin Court of Appeals and another seven years on the newly-created Galveston Court of Appeals. *Id.* During his time on the Court, Justice Williams and Chief Justice Reuben Reid Gaines became close friends, often joining one another on hunting trips along with the Court clerk, deputy clerk, and the Court’s porter. *Id.* at 141.

After being reelected three times to his office, Justice Williams retired from the Court in 1911, just two and a half months after his longtime friend and colleague, Chief Gaines. *Id.* at 279; SCOTX NARRATIVE HISTORY at 155, 242.

Conclusion

Texas is unique in that it can trace its adoption of the rule of capture 100 years ago directly to the pronouncement of a Roman jurist some 1,900 years before that. The historical context surrounding the formulation of each informs a fuller understanding of the practical operation of modern Texas groundwater jurisprudence today.



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