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## Texas groundwater rights and immunities: from *East to Day* and beyond

Dylan O. Drummond<sup>1, 2\*</sup>

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**Abstract:** For well over a century, the debate has raged over what interest, if any, landowners possess in the groundwater beneath their property, as well as what degree of tortious immunity a neighboring landowner enjoys for draining adjoining groundwater. After the Texas Supreme Court's 2012 decision in *Edwards Aquifer Authority v. Day*, and the Texas Legislature's 2011 amendments to the Texas Water Code, these debates appear to have been finally settled—for now!

This article traces the jurisprudential development of Texas groundwater law, from its earliest origins in ancient Rome through to the most influential and substantive decisions of the Texas Supreme Court and legislation from the Texas Legislature. It also examines what cases are on the horizon that may yet affect Texas groundwater law in the coming years.

**Keywords:** groundwater law, rule of capture, absolute ownership, Day, East, Supreme Court of Texas

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<sup>2</sup> The author would like to extend special thanks to: (1) the reviewers and staff of the *Texas Water Journal*, whose exhaustive efforts greatly improved upon this work; (2) Professor Megan Benson, Ph.D., whose exhaustive and engaging work on the *East* case has been invaluable in drafting this article; and (3) 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 has 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 *SOUTHWESTERN HISTORICAL QUARTERLY* 261 (Jan. 2013); 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*, TEXAS WATER DEVELOPMENT BOARD REP. 361 (2004).

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## Terms used in paper

<b>Short name or acronym</b>	<b>Descriptive name</b>
EAA	Edwards Aquifer Authority
Act	Edwards Aquifer Authority Act
GCDA	Groundwater Conservation District Act
HCUWDC	Hudspeth County Underground Water Conservation District
MCUWCD	Medina County Underground Water Conservation District
PRPRPA	Private Real Property Rights Preservation Act
PUC	Public Utility Commission
Railroad	Houston & Texas Central Railroad Company
TIA	takings impact assessment
TCEQ	Texas Commission on Environmental Quality

## INTRODUCTION<sup>1</sup>

Few states have as robustly developed and hotly debated an area of law so central to the rights and immunities of its citizens as does Texas in groundwater law. From the Texas Supreme Court's first groundwater decision in *Houston & Texas Central Railroad Co. v. East* in 1904<sup>2</sup> to its most recent opinion in *Edwards Aquifer Authority v. Day*,<sup>3</sup> well over a century of debate has raged in the literature, the courts,<sup>4</sup> and the legislature.<sup>5</sup>

But where does Texas groundwater stand after *Day* in 2012 and the Legislature's sweeping changes to the Texas Water Code in 2011, and what are the next cases and issues that might continue to shape groundwater jurisprudence in the years to come?

<sup>1</sup> See Megan Benson, *Railroads, Water Rights and the Long Reach of Houston and Texas Central Railroad Company v. W. A. East (1904)*, 116 *SOUTHWESTERN HISTORICAL QUARTERLY* 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*, TEXAS WATER DEVELOPMENT BOARD REPORT 361 (2004) [hereinafter *East Historical Analysis*].

<sup>2</sup> 98 Tex. 146, 81 S.W. 279 (1904).

<sup>3</sup> 369 S.W.3d 814 (Tex. 2012).

<sup>4</sup> Of minor note, some 288 volumes of cases were published in the *Southwestern Reports* between *East* and *Day*. Compare *East*, 81 S.W. 279, with *Day*, 369 S.W.3d 814. Of perhaps even less note, a little over 40 years elapsed between the first Texas case published in the first series of the *Southwestern Reports* (*Poole v. Jackson*, 66 Tex. 380, 1 S.W. 75 (1886)) and the first Texas case published in the second series (*Sovereign Camp W.O.W. v. Boden*, 117 Tex. 229, 1 S.W.2d 256 (1927)), and just over 70 years between *Boden* and the first Texas case published in the third series—a groundwater law case (*Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999)). Compare *Poole*, 1 S.W. 75, *Boden*, 1 S.W.2d 256, with *Sipriano*, 1 S.W.3d 75. Put another way, between pages 75 of the first and third series of the *Southwestern Reports*, over 11 decades passed. *Id.* As of September of this year, the most recent Texas case published in the third series of the *Southwestern Reports* is *In re J.D.*, 436 S.W.3d 105 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Therefore, in just over 15 years, a little less than half of the current series of the *Southwestern Reports* has been filled. While it took 70 years for Texas jurisprudence to consume the second series of the *Southwestern Reports*, it appears the third series, if it keeps up with its current pace, will exhaust itself in about half that time.

<sup>5</sup> For a comprehensive—if now somewhat dated—compendium of the relevant literature, cases, and laws touching upon the groundwater debate in Texas, please see 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 *TEXAS TECH LAW REVIEW* 1, 3 n.3, 4 n.5, 8 n.7 (Winter 2004) [hereinafter *Still So Misunderstood*].

## PRELIMINARY HISTORICAL CONTEXT INFLUENCING TEXAS GROUNDWATER LAW

As Justice Oliver Wendell Holmes remarked just 7 years before the Texas Supreme Court issued its opinion in *East*, the “rational study of law is still to a large extent the study of history.”<sup>6</sup> Before the rule of capture was first recognized and the concept of groundwater ownership in place was first discussed more than a century ago in *East*,<sup>7</sup> the underpinnings of the debate between these 2 legal concepts had already raged for some 2,000 years.<sup>8</sup> Because the historical formulation of these 2 doctrines trace a uniquely direct lineage to *East*, some investigation of this historical exposition of Texas groundwater development is necessary.

### 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.<sup>9</sup> Rome's first written code is referred to as the *Twelve Tables* after the 12 bronze tablets upon which it was inscribed.<sup>10</sup>

A few hundred years after the promulgation of the *Twelve*

<sup>6</sup> Hon. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARVARD LAW REVIEW* 457, 469 (March 1897) [hereinafter *Path of the Law*]. Justice Holmes served as an Associate Justice on the United States Supreme Court for 3 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).

<sup>7</sup> *East*, 98 Tex. at 150, 81 S.W. at 281–82. The Court later said of this passage that, in it, it “adopted the absolute ownership doctrine of underground percolating waters.” *Friendswood Dev. Co. v. Smith-S.W. Indus., Inc.*, 576 S.W.2d 21, 25 (Tex. 1978).

<sup>8</sup> 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*]; *Still So Misunderstood*, 37 *TEXAS TECH LAW REVIEW* at 15–29.

<sup>9</sup> 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*].

<sup>10</sup> *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 *CHICAGO-KENT LAW REVIEW* 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 *BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW* 471, 492–93 (1996) (quoting ALAN WATSON, *ROME OF THE XII TABLES: PERSONS AND PROPERTY* 3 (1975)).

*Tables*, a system of nationally renowned jurists developed in Rome during the first century B.C., who interpreted the *Twelve Tables*, as well as the numerous edicts of the Roman emperors.<sup>11</sup> Because the writings of these jurists were drafted mainly as a critique of or in response to Imperial edicts and the *Twelve Tables*, such writings were called *responsa*.<sup>12</sup> These jurists were somewhat akin to modern-day law professors except that their written legal critiques were accorded precedential weight and applied by Roman judges of the day,<sup>13</sup> thereby becoming legally binding in many instances.<sup>14</sup>

The *responsa* of these jurists were eventually collected into a single comprehensive code some 600 years later by the Roman Emperor Justinian<sup>15</sup> in 533<sup>16</sup>—along with previous Roman codes,<sup>17</sup> constitutions, and Imperial edicts—called the *Digest*

<sup>11</sup> 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.

<sup>12</sup> See *Still So Misunderstood*, 37 TEXAS TECH LAW REVIEW at 19 n.71, 21 n.91; BLACK'S LAW DICTIONARY 1427 (9th ed. 2010) (the legal opinions of leading jurists were called *responsa*).

<sup>13</sup> Some may argue modern-day law professors believe this to currently be the case as well! See, e.g. BLACK'S LAW DICTIONARY 1427 (9th ed. 2010) (quoting HANK 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 916 (9th ed. 2010).

<sup>14</sup> During the reign of Emperor Augustus from 31 B.C. to 14 A.D., 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 opposing jurists were in agreement with each other. *Id.*

<sup>15</sup> Justinian officially became emperor in April 527, but he was forced to share his reign until the death of the former emperor (his uncle) on August 1, 527. A.M. Honore, *The Background to Justinian's Codification*, 48 TULANE LAW REVIEW 859, 864 (1974) [hereinafter *Justinian's Codification*].

<sup>16</sup> The *Institutes* and the *Digest* were issued on December 30, 533. LAW OF THE ANCIENT ROMANS, at 93.

<sup>17</sup> The Roman Empire split in half 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 2 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.*

of Justinian (*Digest*).<sup>18</sup> As part of this monumental effort,<sup>19</sup> a sort of legal textbook for students—not unlike a first-year law student's casebook—called the *Institutes of Justinian* (*Institutes*) was also promulgated (Figure 1).<sup>20</sup> Indeed, the *Institutes* later formed the basis of much of Western jurisprudence, including being relied upon by common law judges in England

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Theodosius II issued a decree at Constantinople on March 26, 429 appointing a commission of 9 scholars to collect and combine all of the previous imperial edicts, constitutions, and the 3 then existing codes—*Gregorianus*, *Hermogenianus*, and *Theodosianus*—and then to publish them together in one single code. *Id.* at xvii; *Justinian's Codification*, 48 TULANE LAW REVIEW at 866. The *Theodosian Code*, as it is now known, was completed 9 years later and was formally adopted by the Empire on Christmas Day 438. THEODOSIAN CODE, at xvii.

<sup>18</sup> 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.

<sup>19</sup> In February 528, Justinian appointed a 10-member commission to compile and update the many existing Imperial constitutions. *Justinian's Codification*, 48 TULANE LAW REVIEW at 866; LAW OF THE ANCIENT ROMANS, at 92; ROMAN LAW TEXTBOOK, at 40. This commission successfully issued a code 14 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 TULANE LAW REVIEW 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 16-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 3 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 TULANE LAW REVIEW at 866, 879; LAW OF THE ANCIENT ROMANS, at 92–93.

<sup>20</sup> ROMAN LAW TEXTBOOK, at 28; LAW OF THE ANCIENT ROMANS, at 17, 93.



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

and throughout Europe,<sup>21</sup> in addition to forming the basis of Spanish mainland law.<sup>22</sup>

### Groundwater-related juristic excerpts

Although several jurists wrote extensively on groundwater law concepts,<sup>23</sup> only 2 merit examination here because of their

<sup>21</sup> 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 LAW JOURNAL 1, 57–87 (1986) [hereinafter *Tribute to Jack Pope*]; LAW OF THE ANCIENT ROMANS, at 93.

<sup>22</sup> Harbert Davenport & J. T. Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande*, 8 BAYLOR LAW REVIEW 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 *Institutes*”) [hereinafter *Law of Flowing Waters*]; LAS SIETE PARTIDAS lii, liv (Samuel Parsons Scott trans., 1931); *Still So Misunderstood*, 37 TEXAS TECH LAW REVIEW 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.

<sup>23</sup> One such jurist was Quintus Mucius, who reached the zenith of his influence during his service as *Consul* around 95 B.C. *Legal Reasoning in Roman Law*, 70 CHICAGO-KENT LAW REVIEW at 1544; *Comparative Law*, 48 AMERICAN JOURNAL OF COMPARATIVE LAW at 21. He wrote that a downstream property owner would have no recourse against a spring owner who

direct influence upon Texas jurisprudence: Marcellus and Ulpian.

### 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.<sup>24</sup> Marcellus was made *Curule Aedile* in 56 B.C. (the sixth-highest elected office in Rome) and was named *Consul* 5 years later in 51 B.C. (the second-highest elected office in Rome).<sup>25</sup>

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.<sup>26</sup>

### 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.<sup>27</sup>

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

diverts or uses the water before it reaches the downstream property owner’s land. See DIGEST 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 DIGEST]).

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. DIGEST 39.3.21 (Pomponius, Quintus Mucius 32); see also *Legal Reasoning in Roman Law*, 70 CHICAGO-KENT LAW REVIEW at 1544; *Comparative Law*, 48 AMERICAN JOURNAL OF COMPARATIVE LAW 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.

DIGEST 39.3.21 (Pomponius, Quintus Mucius 32).

<sup>24</sup> COLUMBIA ENCYCLOPEDIA 1752 (6th ed. 2000).

<sup>25</sup> *Id.*

<sup>26</sup> DIGEST 39.3.1.12 (Ulpian, Ad Edictum 53).

<sup>27</sup> See *Still So Misunderstood*, 37 TEXAS TECH LAW REVIEW at 22.

a time.<sup>28</sup> Not only do his works form the basis for approximately one-third<sup>29</sup> to one-half<sup>30</sup> of the *Digest*, the name Ulpian was almost synonymous with Roman law during the Middle Ages.<sup>31</sup> Ulpian was among 5 noted jurists whose writings were made authoritative due to their inclusion in the *Law of Citations*,<sup>32</sup> which was issued in 426.<sup>33</sup> He is also considered to be one of the 3 “principal writers on water law” featured in the *Digest*.<sup>34</sup> 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.<sup>35</sup>

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.”<sup>36</sup> Construing the *responsum* of another jurist—Treatius—who lived some 250 years before him,<sup>37</sup> Ulpian explained how this theory of damage without injury—described some 1,600 years later by the maxim, *damnum absque injuria*<sup>38</sup>—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

<sup>28</sup> LAW OF THE ANCIENT ROMANS, at 93 (“Ulpian was the most popular jurist.”); see ROMAN LAW TEXTBOOK, at 32–33.

<sup>29</sup> See ROMAN LAW TEXTBOOK, at 32.

<sup>30</sup> See LAW OF THE ANCIENT ROMANS, at 93.

<sup>31</sup> See ROMAN LAW TEXTBOOK, at 33.

<sup>32</sup> 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. Not to be confused of course with the “Furious Five” that gained some repute (if only fictional) much later. See generally, KUNG FU PANDA (Dreamworks Animation 2008).

<sup>33</sup> See LAW OF THE ANCIENT ROMANS, at 91; *Justinian’s Codification*, 48 TULANE LAW REVIEW at 862.

<sup>34</sup> See PANDECTS OF JUSTINIAN at 23.

<sup>35</sup> LAW OF THE ANCIENT ROMANS, at 90; ROMAN LAW TEXTBOOK, at 32.

<sup>36</sup> DIGEST 39.3.3.3 (Ulpian, Ad Edictum 53).

<sup>37</sup> Trebatius lived from 84 B.C. to 4 A.D. Alan Watson & Khaled Abou El Fadl, *Fox Hunting, Pheasant Shooting, and Comparative Law*, 48 AMERICAN JOURNAL OF COMPARATIVE LAW 1, 21 (2000) [hereinafter *Comparative Law*].

<sup>38</sup> 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 13 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 SOUTHWESTERN HISTORICAL QUARTERLY 251, 265 (April 1933); Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of its Defenders*, 37 SOUTHWESTERN HISTORICAL QUARTERLY 237, 237–38 (1934); see also JAMES A. MICHENER, TEXAS 325 (Univ. Tex. Press 1985).

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.<sup>39</sup>

As Ulpian commented regarding the *responsum* of the jurist Proculus,<sup>40</sup> 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.<sup>41</sup>

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.”<sup>42</sup> 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.”<sup>43</sup>

### “Recent” legal developments

Roman law was instrumental in influencing much of the law throughout Western Europe nearly a millennia after Justinian promulgated his *Digest*,<sup>44</sup> including the laws of Spain and

<sup>39</sup> DIGEST 39.2.24.12 (Ulpian, Ad Edictum 81).

<sup>40</sup> Proculus was an active jurist in the first century A.D. *Comparative Law*, 48 AMERICAN JOURNAL OF COMPARATIVE LAW at 25. His writings were held in such high regard around 27 that one of the 2 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 CHICAGO-KENT LAW REVIEW 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 AMERICAN JOURNAL OF COMPARATIVE LAW at 25. In fact, Proculus was a follower of Nerva, who was himself a follower of Labeo. ROMAN LAW TEXTBOOK, at 27.

<sup>41</sup> DIGEST 39.2.26 (Ulpian, Ad Edictum 81).

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

<sup>43</sup> *Id.* § 1581.

<sup>44</sup> 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).

England.<sup>45</sup> The laws of Spain bear powerfully upon Texas jurisprudence today because of Texas's former colonial status to the Spanish Crown.<sup>46</sup> Although Britain never actually held title to Texas soil,<sup>47</sup> the Texas Republic expressly recognized and adopted English common law in 1840<sup>48</sup> and explicitly relied on the common law of England just over 60 years later in *East* (citing, quoting, and discussing the 1843 British Exchequer-Chamber court decision in *Acton v. Blundell*).<sup>49</sup>

Indeed, “[l]ands in Texas have been granted by 4 different governments, namely, the Kingdom of Spain, the Republic of Mexico, the Republic of Texas, and the State of Texas.”<sup>50</sup>

<sup>45</sup> Although, “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. JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986*, 3–4 (Univ. Tex. Press 2013) [hereinafter SCOTX NARRATIVE HISTORY].

<sup>46</sup> See *State v. Sais*, 47 Tex. 307, 318 (1877); SCOTX NARRATIVE HISTORY at 2–3; 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*, JOURNAL OF TEXAS SUPREME COURT HISTORICAL SOCIETY, Winter 2011, at 1 [hereinafter *Influence of Castilian Law*].

<sup>47</sup> See *S. Pac. Co. v. Porter*, 160 Tex. 329, 334, 331 S.W.2d 42, 45 (1960).

<sup>48</sup> 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 12 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. TEXAS CIVIL PRACTICE AND REMEDIES 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 TEXAS TECH LAW REVIEW 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 TEXAS TECH LAW REVIEW at 38–41; *Fact or Fiction*, at 7–8.

<sup>49</sup> *Fact or Fiction*, at 9–10.

<sup>50</sup> *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.

### Spanish derivation

Spain laid legal claim to Mexico, and subsequently present-day Texas, when Hernan Cortés discovered New Spain in 1518.<sup>51</sup> Ten years later in 1528, Álvar Núñez Cabeza de Vaca<sup>52</sup> became the first Spaniard to set foot on Texas soil.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

During the 1600s, Spanish settlers referred to the westernmost of the Caddo Native American peoples as “the great kingdom of Tejas.”<sup>56</sup> “Tejas” was the way Spanish soldiers and colonial administrators spelled the Caddo word, *tayssha*, which meant “friend” or “ally.”<sup>57</sup> Tejas then, or early Spanish Texas, referred to the realm of Spain’s allies<sup>58</sup> and was the friendly buffer zone that protected the Spanish Empire from decidedly unfriendly Native Americans to the north and east.<sup>59</sup>

Texas first appeared as a geographical designation in 1691 nearly 200 years after Cabeza de Vaca first landed near what is now Galveston, when the governor of the Spanish territory of Coahuila in northern Mexico received an appointment to serve as the governor of the territory.<sup>60</sup> Twenty-seven years later in early May 1718, the first permanent settlement was established about halfway across the breadth of Texas, along

<sup>51</sup> *Influence of Castilian Law*, JOURNAL OF TEXAS SUPREME COURT HISTORICAL SOCIETY, 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 THE HOUSTON LAWYER 12, 14 (2002).

<sup>52</sup> His 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.

<sup>53</sup> *Id.*

<sup>54</sup> *Influence of Castilian Law*, at 2; *Tribute to Jack Pope*, 18 ST. MARY’S LAW JOURNAL at 26.

<sup>55</sup> *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*].

<sup>56</sup> *Influence of Castilian Law*, at 2.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Andrew Walker, *Mexican Law and the Texas Courts*, 55 BAYLOR LAW REVIEW 225, 232 (2003); *Influence of Castilian Law*, at 5.

the banks of the San Antonio River at the eastern edge of a range of limestone hills—San Fernando de Béxar.<sup>61</sup> 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)).<sup>62</sup> 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.<sup>63</sup> The villa’s *notario*,<sup>64</sup> Francisco de Arocha, was called upon to devise a system to prepare cases for legal process.<sup>65</sup> Because of this, Arocha has been called Texas’s “first lawyer.”<sup>66</sup>

Spanish law governing Texas was contained in 2 distinct, yet related sources: (1) *Las Siete Partidas* (*Partidas*), compiled in 1265 by King Alfonso X<sup>67</sup> and which governed peninsular Spain;<sup>68</sup> and (2) the *Recopilacion de Leyes de los Reynos de las Indias* (*Recopilacion*), promulgated in 1681,<sup>69</sup> which governed New Spain.<sup>70</sup> Both these codes were authoritative in New Spain because of a passage in the *Recopilacion* that provided, “when

<sup>61</sup> SCOTX NARRATIVE HISTORY, at 6; see also *Influence of Castilian Law*, at 5.

<sup>62</sup> *Influence of Castilian Law*, at 5.

<sup>63</sup> *Id.*

<sup>64</sup> Secretary to the *ayuntamiento* (town council). SCOTX NARRATIVE HISTORY, at 7.

<sup>65</sup> *Id.* The system he devised was shorter by many steps than what was then required under the common law of England. See *Id.* 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.*

<sup>66</sup> *Id.*

<sup>67</sup> 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 LAW JOURNAL 639, 639, 656–58 (1993) [hereinafter *Legal Dilemma of Groundwater*]. King Alfonso was also referred to as “Alfonso the Wise of Castile.” *Law of Flowing Waters*, 8 BAYLOR LAW REVIEW 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 3 years to complete, the *Partidas* took 3 times as long to finish—9 years. See *Id.* at li n.21.

<sup>68</sup> *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.

<sup>69</sup> *Legal Dilemma of Groundwater*, 24 ST. MARY’S LAW JOURNAL at 657–58. The drafting of the *Recopilacion* was a colossal task that distilled over 400,000 *cedulas* down to just under 6400 provisions. *Tribute to Jack Pope*, 18 ST. MARY’S LAW JOURNAL at 30. *Cedulas* were royal and special edicts. *Valmont Plantations I*, 346 S.W.2d at 866.

<sup>70</sup> *Medina River*, 670 S.W.2d at 252; *Valmont Plantations I*, 346 S.W.2d at 860 n.13.

colonial law [was] silent on a topic, one must look to the laws of peninsular Spain.”<sup>71</sup>

The *Partidas* were founded upon the works of Justinian.<sup>72</sup> The influence of Roman law upon that of Castilian Spain was so great that the *Institutes* formed the “substance[] of civil law instruction at the Spanish and [Colonial]<sup>73</sup> universities” and even furnished the text.<sup>74</sup>

However, as great as Justinian’s influence was over its promulgation, the *Partidas* were much more than just a “[p]oor copy of the pandects of Justinian.”<sup>75</sup> The *Partidas* were a modification, not a recitation, of Justinian’s writings in that they were “modified by custom and usage in medieval Spain,” and Justinian’s texts were only used to clarify the corresponding provisions of the *Partidas*.<sup>76</sup> 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.<sup>77</sup>

In particular, one such provincial code was the *Constituciones 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.”<sup>78</sup> This ownership right was described as exclu-

<sup>71</sup> *Medina River*, 670 S.W.2d at 252 (quoting Book 2, Title 1, Law 1 of the *Recopilacion*).

<sup>72</sup> 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 LAW REVIEW 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 3 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 LAW JOURNAL 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 Groundwater*, 24 ST. MARY’S LAW JOURNAL 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 LAW REVIEW at 158.

<sup>73</sup> Throughout the literature, the territories of New Spain are described interchangeably as colonial, ultramarine, or as the Indies. See, e.g., *Medina River*, 670 S.W.2d at 252; *Tribute to Jack Pope*, 18 ST. MARY’S LAW JOURNAL at 31–32.

<sup>74</sup> *Tribute to Jack Pope*, 18 ST. MARY’S LAW JOURNAL 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 LAW REVIEW at 157 (emphasis added); see LAS SIETE PARTIDAS, at lii, liv.

<sup>75</sup> *Law of Flowing Waters*, 8 BAYLOR LAW REVIEW at 158 (citation omitted).

<sup>76</sup> *Id.*

<sup>77</sup> *Valmont Plantations I*, 346 S.W.2d at 858.

<sup>78</sup> *Id.* at 858 n.6.

sive and hostile to others.<sup>79</sup>

Indeed, New Spain and the entirety of Colonial Spain were the private property of the King,<sup>80</sup> and ownership of land could only be achieved by virtue of a grant from the Crown.<sup>81</sup> One example of such a royal grant was exemplified by the territorial gift made to Hernan Cortés on July 6, 1529,<sup>82</sup> which expressly ceded title to the “running, stagnant, and percolating waters” found thereon.<sup>83</sup> The grant to Cortés made eminent 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.<sup>84</sup>

Just before Christmas 1820, a former lead-mine operator from Louisiana named Moses Austin appeared in the provincial capital, 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.<sup>85</sup> Seeking to populate the province with Catholic Americans, who would swear allegiance to Spain and might unwittingly serve as a barrier to hostile Indian tribes, the Spanish authorities approved the proposal.<sup>86</sup> Unfortunately, Moses died shortly after returning to the United States to organize potential settlers.<sup>87</sup>

### *Mexican influence*

Mexico achieved its independence from Spain the following year in September 1821,<sup>88</sup> 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 2 years later on February 18, 1823.<sup>89</sup>

After its independence, Mexico retained much of the same water law that existed under Spanish rule.<sup>90</sup> Indeed, the legal system in Coahuila y Tejas remained largely rooted in ancient Roman law.<sup>91</sup> 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 former 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*.<sup>92</sup>

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.<sup>93</sup> The express grants of springs described in early 20th-century Mexico also aided the private ownership of water.<sup>94</sup>

### *British derivation*

Much of British water law developed from Justinian’s works as well. Indeed, the English common law of waters “derive[s] . . . from the Institutes of Justinian, the ancient Roman Law.”<sup>95</sup>

<sup>79</sup> *Id.* at 858 n.7.

<sup>80</sup> 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.

<sup>81</sup> *Medina River*, 670 S.W.2d at 253; see *Tribute to Jack Pope*, 18 ST. MARY’S LAW JOURNAL at 70–71.

<sup>82</sup> See *Tribute to Jack Pope*, 18 ST. MARY’S LAW JOURNAL at 68.

<sup>83</sup> *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 *Tribute to Jack Pope*, 18 ST. MARY’S LAW JOURNAL at 67–68; Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY’S LAW JOURNAL 1281, 1292 (1986).

<sup>84</sup> *Valmont Plantations I*, 346 S.W.2d at 860 n.14 (citing Law 19, Title 32, Part 3 of the *Partidas* because the *Recopilacion* did not have a provision dealing explicitly with the alienation of groundwater property rights).

<sup>85</sup> SCOTX NARRATIVE HISTORY, at 9. Despite 2 1/2 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.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See *Tribute to Jack Pope*, 18 ST. MARY’S LAW JOURNAL at 47; *Law of Flow-*

*ing Waters*, 8 BAYLOR LAW REVIEW at 176.

<sup>89</sup> See *Tribute to Jack Pope*, 18 ST. MARY’S LAW JOURNAL at 48.

<sup>90</sup> *Valmont Plantations I*, 346 S.W.2d at 863.

<sup>91</sup> SCOTX NARRATIVE HISTORY, at 11.

<sup>92</sup> *Valmont Plantations I*, 346 S.W.2d at 863. Chief Pope’s intermediate-appellate court opinion so impressed Texas Supreme Court Justice Bob Hamilton—who authored the Court’s opinion adopting Chief Pope’s lower court ruling—that he remarked, “it would serve no good purpose to write further on the subject” because Chief Pope’s opinion was so “exhaustive and well documented.” *Valmont Plantations II*, 355 S.W.2d at 503. It marked the first time the Court had ever adopted wholesale a lower court’s opinion without refusing writ of application. See SCOTX NARRATIVE HISTORY, at 199. Chief 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 *Mott 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.*

<sup>93</sup> *Valmont Plantations I*, 346 S.W.2d at 862 (quoting ANDRÉS MOLINA ENRIQUEZ, *LOS GRANDES PROBLEMAS NACIONALES* 171 (1909)).

<sup>94</sup> *Id.* at 862–63 (citing PENA, *PROPIEDAD INMUEBLE EN MEXICO* 146 (1921)).

<sup>95</sup> *Law of Flowing Waters*, 8 BAYLOR LAW REVIEW at 157.

### Bracton and 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."<sup>96</sup> Many passages in Bracton's work "echo the language of [the] Digest and Code[,] . . . [and] show that he had made Roman law part of his way of thinking as a lawyer."<sup>97</sup> 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.<sup>98</sup> In addition, the "fundamental structure" of Blackstone's *Commentaries on the Laws of England* was "a direct descendant of Justinian's *Institutes*."<sup>99</sup>

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 ownership<sup>100</sup>—long described by the Latin maxim, *cujus est solum ejus est usque ad coelum et ad infernos*.<sup>101</sup> It is translated to mean "[w]hoever owns the soil owns everything up to the sky and down to the depths."<sup>102</sup> However, this axiom

<sup>96</sup> PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 152 (1988) [hereinafter *HISTORICAL ESSAYS*]. In addition to being a 13-century legal scholar, Bracton also served as Justice of the King's Central Court—or King's Bench as it is sometimes referred. See *ENCYCLOPEDIA BRITANNICA* 369 (11th ed. 1910).

<sup>97</sup> *HISTORICAL ESSAYS*, at 152.

<sup>98</sup> *ROMAN AND COMPARATIVE LAW*, at 166.

<sup>99</sup> *Id.* at 173, 175–76 (noting Book 2 of Blackstone's *Commentaries on the Laws of England*, addressing the law of things, corresponds to books 2 and 3 of Justinian's *Institutes*).

<sup>100</sup> 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 *UCLA LAW REVIEW* 979, 982–83 (April 2008) [hereinafter *Owning the Center of the Earth*].

<sup>101</sup> 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 *UCLA LAW REVIEW* 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*].

<sup>102</sup> *BLACK'S LAW DICTIONARY* 1712 (8th ed. 2004); 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

was apparently first recorded at common law in the 1586 case of *Bury v. Pope*,<sup>103</sup> but therein, the King's Bench court indicated it had been applied even since the time of Edward I in the late 13th century.<sup>104</sup>

### Hammond and Acton

The first English case to address tortious immunity for groundwater drainage was *Hammond v. Hall* in 1840.<sup>105</sup> 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."<sup>106</sup> In its opinion, the court expressly recognized Marcellus's writing in the *Digest* by quoting the original Latin phrasing, which translated to read

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).

<sup>103</sup> 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 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.

<sup>104</sup> *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 from 1996's *Braveheart*. *IMDB.COM, SYNOPSIS FOR BRAVEHEART*, <http://www.imdb.com/title/tt0112573/synopsis> (last visited Feb. 26, 2013).

<sup>105</sup> *Hammond v. Hall*, 59 Eng. Rep. 729 (1840).

<sup>106</sup> *Id.* at 730, 730 n.1.

that “no action . . . can be brought against a person who, while digging on his own land, diverts his neighbor’s water supply.”<sup>107</sup>

Just 3 years after the *Hammond* decision, the Exchequer Chamber Court<sup>108</sup> heard the case of *Acton v. Blundell*.<sup>109</sup> In *Acton*, a coal mining company (Acton) dug a coal pit in 1837 a little less than a mile away from a neighboring cotton mill owner (Blundell), and a second pit 3 years later a little closer to the mill.<sup>110</sup> When the coal pits reached 105 feet in depth, the cotton mill’s well water began to run dry.<sup>111</sup>

Perhaps more fascinating than the facts underlying the dispute are some of the excerpts from the oral argument delivered in the case, preserved in the *English Reports* reprinting of the opinion.<sup>112</sup> 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.”<sup>113</sup> However, he may have gone too far in his argument when he cited as controlling authority only cases where surface water was at issue.<sup>114</sup> In addition, at the end of his surface water recitation, Acton’s counsel mistakenly included a citation to Marcellus’s writings in the *Digest*,<sup>115</sup> 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.”<sup>116</sup> The exchange continued as Acton’s attorney cited 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.<sup>117</sup> Acton’s counsel replied, positing that “the term ‘watercourse’ [whether subterranean or surface] must apply to all streams,” but the court did not reach this point in its decision.<sup>118</sup>

In his response, Blundell’s attorney cited 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*.”<sup>119</sup> 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.”<sup>120</sup>

Chief Justice Tindal<sup>121</sup> delivered the opinion of the court and concluded that 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

<sup>107</sup> *Id.* at 730 n.2 (providing the untranslated version of this quote); see DIGEST 39.3.1.12 (Ulpian, Ad Edictum 53).

<sup>108</sup> 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 645 (9th ed. 2010). 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).

<sup>109</sup> 152 Eng. Rep. 1223 (1843).

<sup>110</sup> *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 SOUTHWESTERN HISTORICAL QUARTERLY at 269.

<sup>111</sup> See *Acton*, 152 Eng. Rep. at 1224–25; *Long Reach*, 116 SOUTHWESTERN HISTORICAL QUARTERLY at 269.

<sup>112</sup> *Id.* at 1226–32.

<sup>113</sup> *Id.* at 1226.

<sup>114</sup> See *Id.* at 1227–28.

<sup>115</sup> *Id.* at 1226; see DIGEST 39.3.1.12 (Ulpian, Ad Edictum 53).

<sup>116</sup> *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 TEXAS TECH LAW REVIEW at 35.

<sup>117</sup> *Id.* at 1229.

<sup>118</sup> *Id.* at 1229–30.

<sup>119</sup> *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 DIGEST 39.2.26 (Ulpian, Ad Edictum 81).

<sup>120</sup> *Acton*, 152 Eng. Rep. at 1235.

<sup>121</sup> 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](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](http://en.wikipedia.org/wiki/Edward_Drummond) (last visited Feb. 27, 2013).

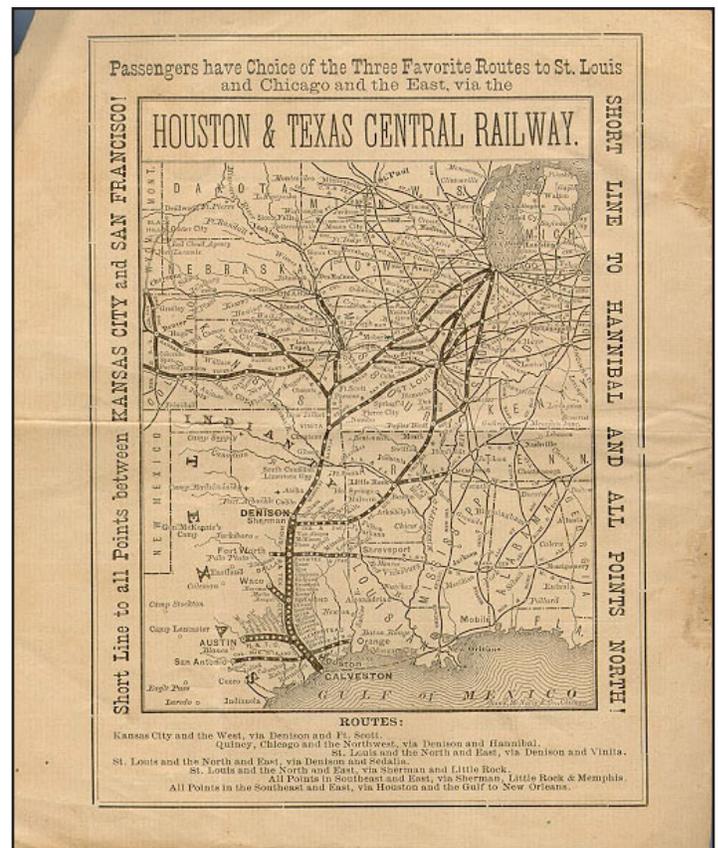
neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.<sup>122</sup>

## JURISPRUDENTIAL DEVELOPMENT OF GROUNDWATER LAW IN TEXAS

Long after the general development of groundwater law from inception in antiquity through to its informal arrival on Texan shores, it was formally ushered into Texas common law and subsequently developed in both groundwater and oil and gas cases,<sup>123</sup> constitutional amendment, and legislative mandate.

### *Houston & Tex. Cent. Ry. Co. v. East* (1904)

The nearly 110-year-old lineage of Texas groundwater law begins with the Texas Supreme Court's 1904 decision in *East*.<sup>124</sup> However, before the case ever reached the desk of the opinion's author, Justice Frank Alvin Williams,<sup>125</sup> it had already followed a long and tortuous path.



**Figure 2.** A Houston & Texas Central Railroad Company route map from the early 1900s, showing Denison as one of its major hubs (on file with author, courtesy of Professor Megan Benson, Ph.D.).

<sup>122</sup> *Acton*, 152 Eng. Rep. at 1235.

<sup>123</sup> As the Court recounted in *Day*, it considered the rule of capture as it applies to groundwater in 4 cases after *East*. However, through its line of oil and gas cases, the Court has also refined its approach both to the rule of capture and ownership in place, each of which have had a direct impact on the evolution of Texas groundwater law. See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 826, 828–32 (Tex. 2012) (listing the 4 decisions: *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999); *City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681 (Tex. 1983); *Friendswood Dev. Co. v. Smith-S.W. Indus., Inc.*, 576 S.W.2d 21 (Tex. 1978); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955)); see also Robert A. McCleskey, Comment, *Maybe Oil and Water Should Mix—At Least in Texas Law: An Analysis of Current Problems with Texas Ground Water Law and How Established Oil and Gas Law Could Provide Appropriate Solutions*, 1 TEXAS WESLEYAN LAW REVIEW 207, 213 (1994) (“*East* influenced early oil and gas law as well as water law.”); Hon. Joe R. Greenhill & Thomas Gibbs Gee, *Ownership of Ground Water in Texas: The East Case Reconsidered*, 33 TEXAS LAW REVIEW 620, 621 (1955) (“Beyond doubt the [*East*] decision influenced the formative stages of the Texas law of oil and gas as the courts developed the ownership-in-place rationale.”).

<sup>124</sup> 98 Tex. 146, 81 S.W. 279 (1904).

<sup>125</sup> Justice Williams was from an antebellum Mississippi planter family but did not fight in the Civil War because he was only 9 years old when it began. SCOTX NARRATIVE HISTORY at 139, 143. After being orphaned at 16, Williams migrated to Texas 4 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 12 years. *Id.* Justice Williams was highly experienced when Governor Joe Sayers appointed him to the Texas Supreme Court, having already served 8 years on the Austin Court of Appeals and another 7 years on the newly created Galveston Court of Appeals. *Id.* During his time on the Texas Supreme 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.

### Factual background

The Houston & Texas Central Railroad Company (Railroad) was first established in 1853 as the Galveston & Red River Railway (G&RR Railway) by Thomas William House and 2 other partners.<sup>126</sup> House was a Houston planter who originally constructed the G&RR Railway to transport his crops from Houston to the Brazos River.<sup>127</sup> The Railroad later reached Denison in the 1870s, where it connected with rail lines to the north<sup>128</sup> (Figure 2).

After Thomas died in 1880, his youngest son, Edward M. House, took over his father's railroad empire.<sup>129</sup> 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.”<sup>130</sup> So influ-

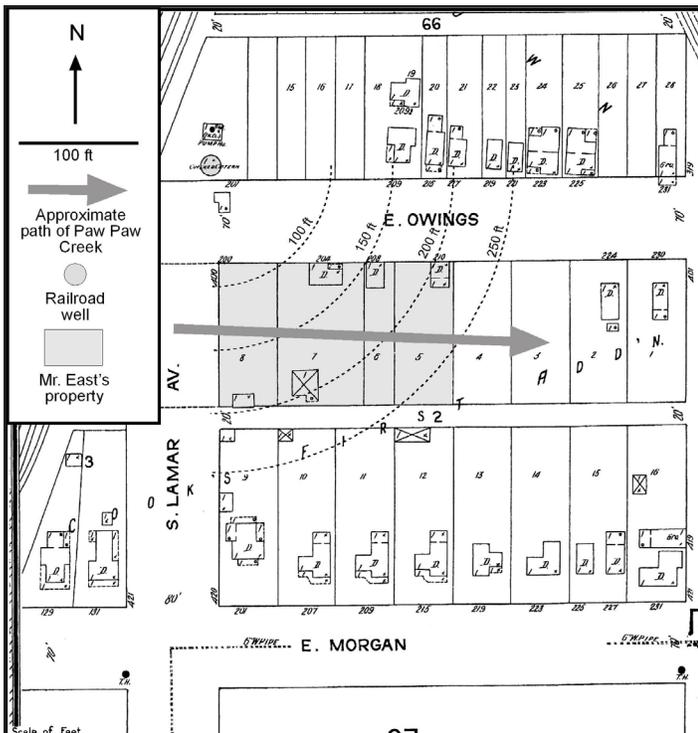
<sup>126</sup> *Long Reach*, 116 SOUTHWESTERN HISTORICAL QUARTERLY at 265.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 266.



**Figure 3.** 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., *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*, TEXAS WATER DEVELOPMENT BOARD REPORT 73 (2004).

ential was House that he was thought to sway virtually every appointment made by Texas Governors Stephen Hogg, Charles Culberson, Joseph Sayers,<sup>131</sup> and Samuel Lanham—including all 3 Justices sitting on the Texas Supreme Court when W.A. East's suit against House's railroad came before the Court in 1904.<sup>132</sup>

In 1872, the Missouri, Kansas, and Texas Railroad (Mo-Kan Railroad) established the town of Denison, Texas and named it after its vice-president, George Denison.<sup>133</sup> 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.<sup>134</sup>

William Alexander East was born in Grayson County in

<sup>131</sup> 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 *SOUTHWESTERN HISTORICAL QUARTERLY* at 275.

<sup>132</sup> *Id.* at 266.

<sup>133</sup> *East Historical Analysis*, at 63.

<sup>134</sup> *Id.*

1851, 2 years before the Railroad was formed.<sup>135</sup> He would later own 4 lots near the intersection of Lamar Avenue and Owings Street in Denison<sup>136</sup> (Figure 3). Sometime prior to 1901, East sunk a well on one of his lots that was 33 feet deep and 5 feet in diameter.<sup>137</sup>

During 1901, there were newspaper accounts of a drought plaguing Denison, and the recorded rainfall was about 30% lower than normal that year.<sup>138</sup> In need of water for its passengers at the station, its machine shops, and the steam boilers in its locomotives,<sup>139</sup> the Railroad went searching during the summer of 1901 for nearby land upon which to drill a groundwater well.<sup>140</sup> Finding several wells already in place near the intersection of Owings Street and Lamar Avenue—including East's—that indicated accessible groundwater below, the Railroad drilled a well that August, measuring 20 feet in diameter and 66 feet deep, just some 100 to 250 feet away from East's well<sup>141</sup> (Figure 4). While the Railroad's new well was producing 25,000 gallons a day,<sup>142</sup> it was by no means the largest railroad well nearby.<sup>143</sup> The *Sunday Gazeteer* newspaper reported that Mo-Kan Railroad had sunk a well 2 1/2 miles from Denison that was piping 750,000 gallons per day.<sup>144</sup>

### *Trial Court proceedings*

Sometime between August 1901 and April 1902, East and his neighbors' wells began to run dry, prompting him to file suit seeking \$1,100 in damages<sup>145</sup> (Figure 5). In December, just days after East filed his First Amended Original Petition, Judge

<sup>135</sup> *Compare Id.* at 87 n.6, with *Long Reach*, 116 *SOUTHWESTERN HISTORICAL QUARTERLY* at 265.

<sup>136</sup> *East Historical Analysis*, at 71. While East's pleadings in the case state he owned only 2 1/2 lots on the corner of Lamar Avenue and Morgan Street, the deed records show he owned 4 lots on the corner of Lamar Avenue and Owings Street. *Compare East Historical Analysis*, at 71, with *id.* at 100.

<sup>137</sup> *East Historical Analysis*, at 71; see *Long Reach*, 116 *SOUTHWESTERN HISTORICAL QUARTERLY* at 266; see also *Edwards Aquifer Auth. 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).

<sup>138</sup> *East Historical Analysis*, at 80–81.

<sup>139</sup> *Day*, 369 S.W.3d at 824.

<sup>140</sup> *East Historical Analysis*, at 63.

<sup>141</sup> *Id.* at 63, 71; see *Long Reach*, 116 *SOUTHWESTERN HISTORICAL QUARTERLY* at 267; see also *Day*, 369 S.W.3d at 824.

<sup>142</sup> *Day*, 369 S.W.3d at 824.

<sup>143</sup> *East Historical Analysis*, at 63, 81.

<sup>144</sup> *Id.* at 81.

<sup>145</sup> *Id.* at 63. The historical record is not clear when East first filed suit, but it is certain that the Railroad sank its well in August 1901 and filed its Original Answer to East's suit on April 5, 1902. *Id.* at 87 n.7, 104.



**Figure 4.** Looking north at the intersection of Owings Street and Lamar Avenue in Denison, Texas, with the probable location of the Railroad's well circled. 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*, TEXAS WATER DEVELOPMENT BOARD REPORT 74 (2004).

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.”<sup>146</sup>

### Review by the Dallas Court of Appeals

After Judge Maxey denied East's motion for new trial, East sought review in the Dallas Court of Appeals in early 1903.<sup>147</sup> On appeal, the Railroad retained the law firm of Baker, Botts, Baker & Lovett (now more commonly known as Baker Botts, L.L.P.) as appellate counsel.<sup>148</sup> Even in 1903, Baker Botts was a venerable Texas law firm based in Houston that counted among its clientele railroad companies and businesses just beginning to brave the burgeoning oil and gas industry.<sup>149</sup> 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.”<sup>150</sup>

While acknowledging that *Acton* governed in England and

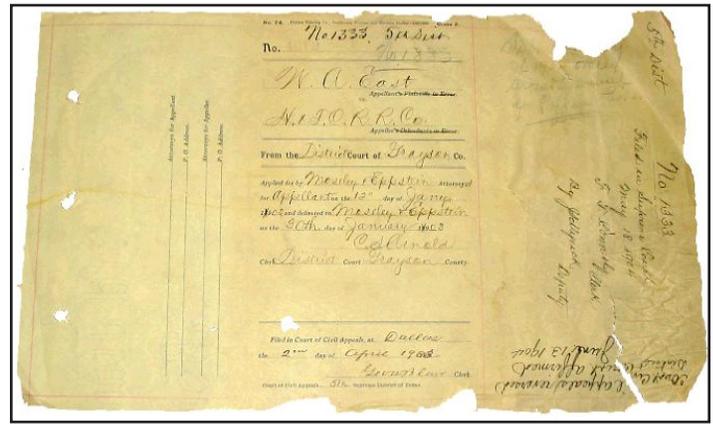
<sup>146</sup> *Id.* at 63, 107–08; see *Long Reach*, 116 SOUTHWESTERN HISTORICAL QUARTERLY at 266, 268.

<sup>147</sup> *East Historical Analysis*, at 64.

<sup>148</sup> *Id.* at 113.

<sup>149</sup> Compare *Long Reach*, 116 SOUTHWESTERN HISTORICAL QUARTERLY at 271, with Baker Botts, History, <http://www.bakerbotts.com/about/history/> (last visited Feb. 27, 2013).

<sup>150</sup> *Long Reach*, 116 SOUTHWESTERN HISTORICAL QUARTERLY at 271.



**Figure 5.** Dallas Court of Appeals's file coversheet in East with annotations by the clerk showing eventual disposition at the Texas Supreme Court. 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*, TEXAS WATER DEVELOPMENT BOARD REPORT 97 (2004).

had even been adopted by some American states, authoring justice John Bookhout<sup>151</sup> reasoned in the court's November 1903 opinion that applying the rule stated in *Acton* to the case before him would “shock our sense of justice”<sup>152</sup> (Figure 6). 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 Hampshire.<sup>153</sup> That case expressly rejected the tenets of ownership in place and the rule of capture as laid out in *Acton* and founded what is

<sup>151</sup> *Long Reach*, 116 SOUTHWESTERN HISTORICAL QUARTERLY at 274. Justice Bookhout served on the Dallas appellate bench for nearly 15 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=DABDAQAAMAAJ&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com/books?id=DABDAQAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&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/metaph206029/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”).

<sup>152</sup> *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 SOUTHWESTERN HISTORICAL QUARTERLY at 273; *East Historical Analysis*, at 129.

<sup>153</sup> *Bassett v. Salisbury Mfg.*, 43 N.H. 569, 573–79 (1862).

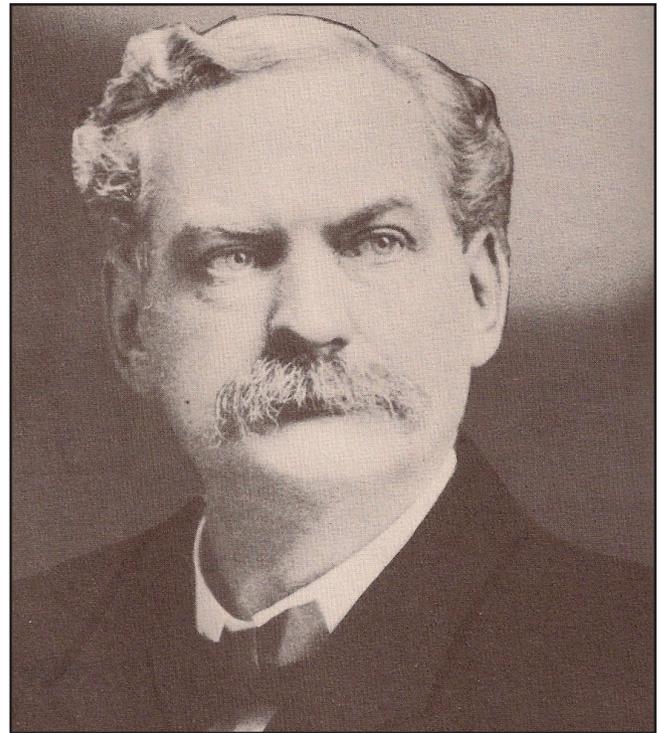
now known as the American branch of the Reasonable-Use doctrine.<sup>154</sup>

Upon reversing the district court's judgment, Justice Bookhout rendered judgment awarding East \$206.25 in damages.<sup>155</sup> The Railroad immediately moved for rehearing on December 10, 1903, which was denied 9 days later on December 19, 1903.<sup>156</sup>

### *The Texas Supreme Court's opinion*

During the era of the Court in which the *East* case was decided, the Court became known as the "Consensus Court," due to the near unanimity with which the Court almost invariably issued its opinions.<sup>157</sup>

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.<sup>158</sup> Just over 6 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.<sup>159</sup>



**Figure 6.** Justice John Bookhout of the Dallas Court of Appeals. Megan Benson. *Railroads, Water Rights and the Long Reach of Houston and Texas Central Railroad Company v. W. A. East (1904)*, 116 SOUTHWESTERN HISTORICAL QUARTERLY 261, 274 (Jan. 2013).

<sup>154</sup> *East*, 77 S.W. at 647–48, *rev'd* 98 Tex. at 151, 81 S.W. at 282; *Long Reach*, 116 SOUTHWESTERN HISTORICAL QUARTERLY 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 TEXAS TECH ADMINISTRATIVE LAW JOURNAL 173, 197–99 (Summer 2003) [hereinafter *21st Century Groundwater Law*].

<sup>155</sup> *Edwards Aquifer Auth. 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 SOUTHWESTERN HISTORICAL QUARTERLY at 273; *East Historical Analysis*, at 64, 129.

<sup>156</sup> Compare *East Historical Analysis*, at 130, with *id.* at 148.

<sup>157</sup> SCOTX NARRATIVE HISTORY at 140. Chief Justice Reuben Gaines, Justice Williams, and Justice T.J. Brown served together for nearly 12 years. *Id.* During this time—encompassing a dozen volumes of the *Texas Reports*—only 6 dissents were filed (1 by Chief Gaines, 2 by Justice Williams, and 3 by Justice Brown), and only 1 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 SOUTHWESTERN HISTORICAL QUARTERLY at 278–79.

<sup>158</sup> *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 TEXAS RULES OF APPELLATE PROCEDURE 56.1(b)(1), reprinted in *Texas Rules of Appellate Procedure*, 60 TEXAS BAR JOURNAL 878, 936 (Oct. 1997).

<sup>159</sup> *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904).

Writing for a unanimous Court, Justice F.A. Williams<sup>160</sup> 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”<sup>161</sup>—the one jurisdiction Justice Bookhout relied upon below<sup>162</sup> (Figure 7). Therefore, the Court found to be persuasive *Acton’s* passage restating the rule of capture.<sup>163</sup>

The Court quoted extensively from a passage in a decision by the high court of New York in *Pixley v. Clark*, opining that: An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or

<sup>160</sup> *Long Reach*, 116 SOUTHWESTERN HISTORICAL QUARTERLY at 276. After being re-elected 3 times to his office, Justice Williams retired from the Court in 1911, just 2 1/2 months after his longtime friend and colleague, Chief Justice Gaines. *Id.* at 279; SCOTX NARRATIVE HISTORY at 155, 242.

<sup>161</sup> *Id.* at 149, 280; see *Day*, 369 S.W.3d at 825.

<sup>162</sup> *East*, 77 S.W. at 647–48, *rev'd* 98 Tex. at 151, 81 S.W. at 282.

<sup>163</sup> *East*, 98 Tex. at 149, 81 S.W. at 280 (quoting *Acton*, 152 Eng. Rep. at 1235).

destroying percolating or circulating water under the earth's surface.<sup>164</sup>

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.”<sup>165</sup>

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.<sup>166</sup> 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).<sup>167</sup>

Although *East* initially moved for rehearing on June 28, 1904, he subsequently requested the Court dismiss his motion for rehearing the following month.<sup>168</sup> And with that, *East* became enshrined in Texas jurisprudence.

### *Tex. Co. v. Daugherty* (1915)

Although it is an oil and gas case, *Texas Co. v. Daugherty* is notable in groundwater law lineage for 2 reasons: (1) it represented the first opportunity the Court had just 11 years after its decision in *East* to narrow its discussion of absolute ownership (which it declined to do); and (2) it contains one of the most masterful explanations before or since of the real property interest that attaches to fugacious or fleeting substances while in place.<sup>169</sup> Therein, the first Chief Justice Phillips to preside over the Court<sup>170</sup> reasoned that the mere:

<sup>164</sup> *Id.* at 150, 281–82 (quoting *Pixley v. Clark*, 35 N.Y. 520, 527 (1866)). Although the Court flatly rejected in *Day* that “any issue of ownership of groundwater *in place* was presented in *East*,” it stated some 3 decades before that it “adopted the absolute ownership doctrine of underground percolating waters.” Compare *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 826 (Tex. 2012), with *Friendswood Dev. Co. v. Smith-S.W. Indus., Inc.*, 576 S.W.2d 21, 25 (Tex. 1978).

<sup>165</sup> *East*, 98 Tex. at 151, 81 S.W. at 281–82.

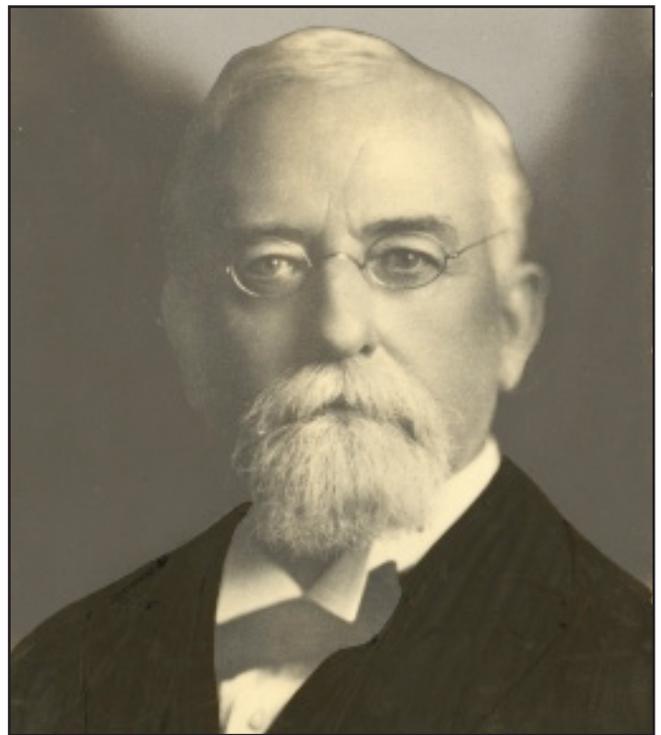
<sup>166</sup> *Id.* at 151, 282; see *Day*, 369 S.W.3d at 825.

<sup>167</sup> 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).

<sup>168</sup> *East Historical Analysis*, at 167–73.

<sup>169</sup> 107 Tex. 226, 231, 235–36, 176 S.W. 717, 719–20 (1915).

<sup>170</sup> Chief Justice Nelson Phillips sat on the Court as Justice from 1912 to 1915 and as Chief Justice from 1915 to 1921. SCOTX NARRATIVE HISTORY at 240, 242. After he came to the Court, one change Chief Phillips wrought was to have the deputy clerk organize a tennis club, which competed on 2 courts that the deputy clerk had laid out on a nearby vacant lot. *Id.* at 156. In turn, Chief Justice Thomas R. Phillips served as Chief Justice from 1988 to 2004. *Id.* at 244.



**Figure 7.** Justice F.A. Williams of the Texas Supreme Court. Megan Benson. *Railroads, Water Rights and the Long Reach of Houston and Texas Central Railroad Company v. W. A. East* (1904), 116 SOUTHWESTERN HISTORICAL QUARTERLY 261, 276 (Jan. 2013).

[P]ossibility of the escape of the oil and gas from beneath the land before being finally brought within actual control may be recognized, as may also their incapability of absolute ownership, in the sense of positive possession, until so subjected. But nevertheless, while they are in the ground, they constitute a property interest.<sup>171</sup>

Chief Justice Phillips concluded that a landowner’s “right to the oil and gas beneath his land is an exclusive and private property right . . . inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property.”<sup>172</sup>

### The Conservation Amendment (1917)

Following severe droughts in 1910 and 1917, Article XVI, Section 59 of the Texas Constitution was adopted in 1917,

<sup>171</sup> *Daugherty*, 107 Tex. at 236, 176 S.W. at 720; see *Day*, 369 S.W.3d at 829.

<sup>172</sup> *Daugherty*, 107 Tex. at 237, 176 S.W. at 720; see *Day*, 369 S.W.3d at 829.

commonly referred to as the “Conservation Amendment.”<sup>173</sup> It provides that:

The conservation and development of all of the natural resources of this State, . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.<sup>174</sup>

The Conservation Amendment makes it incumbent upon the Legislature to implement public policy in accord with its provisions,<sup>175</sup> and—for the first time—empowered the Legislature to “promulgate laws creating conservation districts and water regulations.”<sup>176</sup> It was intended, at least in part, to provide citizens and lawmakers with a remedy to water depletion.<sup>177</sup> Designed to ameliorate the effects of cyclical floods and droughts that had plagued Texas landowners, the Conservation Amendment “promised stable water usage for the future.”<sup>178</sup>

### **Tex. Co. v. Burkett (1927)**

The first chance the Court had to re-evaluate its groundwater law holdings in *East* arose in *Texas Co. v. Burkett*.<sup>179</sup> In *Burkett*, the Court briefly examined the nature of “percolating” groundwater.

Therein, the Court reasoned that, if groundwater was not either “add[ing] perceptibly to the general volume of water in the bed of [a] stream” (underflow), or “of sufficient magni-

tude to be of any value to riparian proprietors” (underground streams), it is presumed to be percolating.<sup>180</sup> It confirmed as well that percolating groundwater was “the exclusive property of [the landowner], who had all the rights incident to them that one might have as to any other species of property.”<sup>181</sup>

Of note, the ultimate holding in *Burkett* was an important one—that a “landowner has the absolute right to sell percolating ground water for industrial purposes off the land.”<sup>182</sup>

### **Brown v. Humble Oil & Ref. Co. (1935)**

Although *East* is commonly and accurately cited as the conceptual genesis of the rule of capture in Texas, the actual phrase appears nowhere in the opinion.<sup>183</sup> It would not be until 30 years after it decided *East* that the Texas Supreme Court would first pen the phrase, “law of capture,” in the oil and gas decision in *Brown v. Humble Oil & Refining Co.*<sup>184</sup>

In doing so, the Court also elaborated on its previous discussion in *Daugherty*, explaining that:

The rule in Texas recognizes the ownership of oil and gas in place. . . . Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one’s land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one’s land by the exercise of the same right of capture.<sup>185</sup>

Implicitly recognizing the Conservation Amendment’s impact on groundwater law nearly 3 decades earlier, the Court held that “[b]oth rules are subject to regulation under the police power of a state.”<sup>186</sup>

### **Elliff v. Texon Drilling Co. (1948)**

Yet another oil and gas case that came later to shed light on modern Texas groundwater law was *Elliff v. Texon Drill-*

<sup>173</sup> TEXAS CONSTITUTION art. XVI, § 59 (amended 2003); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996); *In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 440 (Tex. 1982) (“The droughts in 1910 and 1917 prompted the citizens of Texas to adopt the ‘Conservation Amendment’ to the Texas Constitution, mandating the conservation of public waters.”); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 304, 276 S.W.2d 798, 808 (1955) (Wilson, J., dissenting) (noting the Conservation Amendment’s passage in 1917).

<sup>174</sup> TEXAS CONSTITUTION art. XVI, § 59(a); see also *Barshop*, 925 S.W.2d at 626 (the Conservation Amendment “provides that the conservation, preservation, and development of the state’s natural resources[—including groundwater—]are public rights and duties.”), citing TEXAS CONSTITUTION art. XVI, § 59(a).

<sup>175</sup> *Corpus Christi*, 154 Tex. at 296, 276 S.W.2d at 803.

<sup>176</sup> Stephanie E. Hayes Lusk, *Texas Groundwater: Reconciling the Rule of Capture with Environmental and Community Demands*, 30 ST. MARY’S LAW JOURNAL 305, 322 (1998) (citing TEXAS CONSTITUTION art. XVI, § 59).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> 117 Tex. 16, 296 S.W. 273 (1927). The opinion’s author, Chief Justice Calvin Maples Cureton, had served first as Texas Attorney General before accepting nomination to the Court, which he would serve as Chief Justice longer than any other (19 years), before or since. SCOTX NARRATIVE HISTORY at 164, 173, 235–39, 243–44.

<sup>180</sup> *Burkett*, 117 Tex. at 28–29, 296 S.W. at 278.

<sup>181</sup> *Id.* at 29, 278.

<sup>182</sup> *Friendswood Dev. Co. v. Smith-S.W. Indus., Inc.*, 576 S.W.2d 21, 25–26 (Tex. 1978) (citing *Burkett*, 117 Tex. at 29, 296 S.W. at 278).

<sup>183</sup> *Fact or Fiction* at 3, in UTCLE, TEXAS WATER LAW INSTITUTE.

<sup>184</sup> 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935). *Brown* was authored by Justice John Henry Sharp, a Central Texan who served on the Court for 18 years from 1934 to 1953. SCOTX NARRATIVE HISTORY at 170–71, 243–44.

<sup>185</sup> *Brown*, 126 Tex. at 305, 83 S.W.2d at 940; see *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 829 n.86 (Tex. 2012).

<sup>186</sup> *Brown*, 126 Tex. at 305, 83 S.W.2d at 940.

ing Co.<sup>187</sup> Being now 44 years after *East* and 33 years after *Daugherty*, the Court sought the opportunity to restate the law regarding ownership of oil and gas in place:

In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.<sup>188</sup>

However, for the next 64 years, the Court declined to directly apply this construction of ownership in place to groundwater,<sup>189</sup> deferring instead to the Legislature to address such questions.<sup>190</sup>

### Groundwater Conservation District Act (1949)

Just 1 year after the Court issued *Elliff* and some 3 decades after passage of the Conservation Amendment, the Legislature first exercised its constitutional authority related to groundwater regulation under the Texas Constitution. During the 51st Legislative Session in 1949, the Legislature enacted the Groundwater Conservation District Act (GCDA), which established groundwater conservation districts throughout the state.<sup>191</sup>

After the predecessor agency to the Texas Water Development Board issued a report in 1934 calling for underground water to be “subject to the same control as surface water” and a statutory declaration that the “underground water of the State [is] the property of the State,” public opposition to such action

by the Legislature was pronounced.<sup>192</sup> One more colorful High Plains farmer said that even just the proposition of creating groundwater conservation districts “should be met with 30-30s (rifles) and its sponsors not only driven back to the City of Austin, but on south across the San Jacinto battlefield and into the Gulf of Mexico where they can get their fill of water.”<sup>193</sup> This landowner continued:

You can say you prefer local control to state control or federal control. I don't want any control by anybody but the landowner. That's like asking who you'd rather be hanged by. I don't want to be hanged. . . . All the water under my land belongs to me . . . nobody can tell me how to use it. . . . If my neighbor wants to drill wells right next to me, that's all right with me. If the wells go dry, we will all run out together.<sup>194</sup>

Needless to say, in order to enact any bill that would fulfill the Conservation Amendment's mandate, a compromise would have to be struck between the state's regulators and those they sought to oversee. The Texas Farm Bureau provided just such a compromise by suggesting the creation of locally controlled groundwater conservation districts similar to the soil conservation districts with which many farmers were already well acquainted.<sup>195</sup> The general sentiment during this time toward passage of the GCDA was best approximated by the comment offered by another High Plains man: “I favor no control, but if we must have it, let it be local.”<sup>196</sup>

Local control won the day. The GCDA was subsequently enacted and created local groundwater districts that would provide for the “conservation, preservation, protection, recharging, and prevention of waste of underground water.”<sup>197</sup> In doing so, the Legislature recognized the “ownership and rights of the owner of the land, his lessees and assigns, in

<sup>187</sup> 146 Tex. 575, 210 S.W.2d 558 (1948). The opinion's author, Justice A.J. Folley of Amarillo, served the Court just 4 years between 1945 and 1949, but would later serve as State Bar president. See SCOTX NARRATIVE HISTORY at 194, 252. As the State Bar president, Justice Folley dedicated the new Texas Supreme Court building located on the northwest corner of the Capitol grounds. *Id.* at 194.

<sup>188</sup> *Elliff*, 146 Tex. 580, 210 S.W.2d at 561 (internal citations omitted).

<sup>189</sup> *But see Day*, 369 S.W.3d at 831–32.

<sup>190</sup> *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21, 30 (Tex. 1978) (“Providing policy and regulatory procedures in this field is a legislative function”).

<sup>191</sup> Act of May 23, 1949, 51st Leg., R.S., ch. 306, 1949 Texas General Laws 559 (codified at TEXAS REVISED CIVIL STATUTES ANNOTATED art. 7880–3c(D), later codified as TEXAS WATER CODE § 52.002) [hereinafter GCDA]; see *Day*, 369 S.W.3d at 832; *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 79 (Tex. 1999).

<sup>192</sup> See John T. Dupnik, A Policy Proposal for Regional Aquifer-Scale Management of Groundwater in Texas, at 5 (Dec. 2012) (unpublished M.S. thesis, University of Texas at Austin), available at [https://repositories.lib.utexas.edu/bitstream/handle/2152/19658/dupnik\\_thesis\\_20129.pdf?sequence=1](https://repositories.lib.utexas.edu/bitstream/handle/2152/19658/dupnik_thesis_20129.pdf?sequence=1) (last visited Sept. 25, 2014) (quoting DONALD E. GREEN, LAND OF THE UNDERGROUND RAIN: IRRIGATION ON THE TEXAS HIGH PLAINS, 1910–1970, at 172 (1973)).

<sup>193</sup> *Id.* at 5 n.14 (quoting GREEN, at 181, 183).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 6 (citing GREEN, at 189).

<sup>196</sup> *Id.*

<sup>197</sup> GCDA; *Friendswood Dev. Co. v. Smith-S.W. Indus., Inc.*, 576 S.W.2d 21, 26 (Tex. 1978).

underground water,<sup>198</sup> which would come to reside in section 36.002 of the Water Code from 1995 to 2011.<sup>199</sup>

### *City of Corpus Christi v. City of Pleasanton* (1955)

In the midst of a sustained drought in the 1950s,<sup>200</sup> *City of Corpus Christi v. City of Pleasanton* came before the Court.<sup>201</sup> Indeed, because a drought in the early 1900s prompted the *East* suit,<sup>202</sup> droughts in 1910 and 1917 helped to create the requisite public outcry to pass the Conservation Amendment,<sup>203</sup> and the drought of the 1950s led to the Court's consideration of *Corpus Christi*, “[t]he story of water law in Texas is also the story of its droughts.”<sup>204</sup>

While the Court enshrined a waste exception to the rule of capture in *East*,<sup>205</sup> it had not been called upon in the intervening half century to address the contours of that exception. In *Corpus Christi*, the Court finally got its opportunity.

The parties in the case each owned wells pumping from the same groundwater formation.<sup>206</sup> The Lower Nueces River Supply District, though located in Atascosa County,<sup>207</sup> was under contract to furnish groundwater to the city of Corpus Christi, which it did by transporting withdrawn groundwater down the Nueces River and Lake Corpus Christi some 118

miles to a settling basin at Calallen.<sup>208</sup> Evidence in the case showed that “63 to 74% of the water discharged into the river escaped through evaporation, transpiration and seepage and never reached its destination to be put to a beneficial use.”<sup>209</sup> Because the majority of the withdrawn groundwater admittedly never reached its destination, the city of Pleasanton in Atascosa County brought suit, alleging waste.<sup>210</sup>

Writing for the majority, then-Justice Robert W. Calvert<sup>211</sup> reasoned that the Legislature—in enacting 2 statutes allowing for the transport of groundwater via “‘river, creek or other natural water course or drain, superficial or underground channel, [or] bayou,’”<sup>212</sup>—certainly conceived that some of the water might be lost in transport and “could hardly have intended that what it had approved as legal should become illegal. . . .”<sup>213</sup> The Court also noted that it was unaware of any “judicial modification in this state of the rule of the *East* case.”<sup>214</sup>

In response to a vigorous dissent by Justice Meade F. Griffin<sup>215</sup> (one of 2 dissenting opinions filed in the case)<sup>216</sup> that was perhaps understandably indignant that the Court could find the loss of some 70% of transported groundwater did not constitute waste,<sup>217</sup> Justice Calvert admonished that the Conservation Amendment mandated the Legislature to preserve Texas's natural resources—including water—but “[n]

<sup>198</sup> GCDA at § 1, 1949 Texas General Laws at 562.

<sup>199</sup> See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012); compare Act of May 29, 1995, 74th Leg., R.S., ch. 933, § 2, 1995 Texas General Laws 4673, 4680 (adopting TEXAS WATER CODE § 36.002) (“The ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, subject to rules promulgated by a district.”), with Act of May 29, 2011, 82nd Leg., R.S., ch. 1207, 2011 Texas General Laws 3224 (codified at TEXAS WATER CODE § 36.002) (“The Legislature recognizes that a landowner owns the groundwater beneath the surface of the landowner's land as real property.”).

<sup>200</sup> SCOTX NARRATIVE HISTORY at 189; *Still So Misunderstood*, 37 TEXAS TECH LAW REVIEW at 42.

<sup>201</sup> See 154 Tex. 289, 276 S.W.2d 798 (1955).

<sup>202</sup> See *East Historical Analysis*, at 80–81.

<sup>203</sup> See *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996).

<sup>204</sup> In re *Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 441 (Tex. 1982).

<sup>205</sup> *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 151, 81 S.W. 279, 282 (1904); see *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 825 (Tex. 2012).

<sup>206</sup> *Day*, 369 S.W.3d at 826.

<sup>207</sup> SCOTX NARRATIVE HISTORY at 190.

<sup>208</sup> *Corpus Christi*, 154 Tex. at 290, 276 S.W.2d at 799–800; SCOTX NARRATIVE HISTORY at 190; *Still So Misunderstood*, 37 TEXAS TECH LAW REVIEW at 47.

<sup>209</sup> *Corpus Christi*, 154 Tex. at 291, 276 S.W.2d at 800.

<sup>210</sup> *Id.*

<sup>211</sup> Justice Calvert—a former Speaker of the Texas House—was first appointed to the Court in 1950 and later became one of the Court's most respected and distinguished Chief Justices from his election to the post in 1960 until his retirement in 1972. SCOTX NARRATIVE HISTORY at 186, 244–45. Calvert is said to have credited, in part, his first election to the Court to a timely and unrelated advertising campaign in the state for Calvert Whiskey. *Id.* at 186.

<sup>212</sup> *Corpus Christi*, 154 Tex. at 295, 276 S.W.2d at 802 (citation omitted).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 294, 802.

<sup>215</sup> *Id.* at 297, 804 (Griffin, J., dissenting). Justice Griffin hailed from the Texas Panhandle, was a past president of the Texas Bar, and served as a prosecution subsection chief during the Nazi war crimes trials. SCOTX NARRATIVE HISTORY at 185. Following his appointment to the Court in 1949, Justice Griffin was elected 3 times to keep his seat until his retirement in 1968. *Id.* at 252.

<sup>216</sup> See *Corpus Christi*, 154 Tex. at 299, 276 S.W.2d at 805 (Wilson, J., dissenting, joined by Culver, J.).

<sup>217</sup> Justice Griffin rebuked the majority opinion, arguing that its reasoning would hold that, if only .0001% of transported groundwater reached its destination, there still could be no finding of waste. *Corpus Christi*, 154 Tex. at 298, 276 S.W.2d at 804 (Griffin, J., dissenting).

o such duty was or could have been delegated to the courts.”<sup>218</sup> He continued, noting that the “Legislature is now in session. It will have this opinion before it before adjournment. It will recognize the problem. If it wishes to declare that the transportation of water in conduits which permit the escape of a large percentage is wasteful and unlawful it will have ample time in which to do it.”<sup>219</sup>

### *Friendswood Dev. Co. v. Smith-S. W. Indus., Inc.* (1978)

In 1978, the Court recognized another, albeit narrow, exception to the immunity granted under rule of capture in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*—that of negligent subsidence.<sup>220</sup>

Five years before the Court’s opinion was issued, several landowners in Harris County, including Smith-Southwest Industries, Inc., brought suit against Friendswood Development Co. and its parent company, Exxon Corp., alleging that withdrawals of large quantities of groundwater from nearby lands caused severe subsidence on their land.<sup>221</sup>

While the suit was pending that same year, and likely not by coincidence, the 63rd Legislature amended the original 1949 legislation that enabled the creation of groundwater conservation districts to include subsidence control among the list of purposes for which a district could be created to address.<sup>222</sup>

When the Court finally heard the merits of the case in 1978 after 2 intervening legislative sessions worth of changes to the Water Code, the Court proceeded cautiously. It went to great pains to rule only prospectively that a landowner could be liable for the “negligent, willfully wasteful, or . . . malicious[ly] injur[ious]” withdrawal of groundwater that was the “proximate cause of the subsidence of land of others.”<sup>223</sup>

<sup>218</sup> *Id.* at 295–96, 803.

<sup>219</sup> *Id.* at 296, 803.

<sup>220</sup> 576 S.W.2d 21, 30 (Tex. 1978). “Subsidence” occurs when a reservoir of groundwater is overdrafted intensely and long enough to drain a sufficient quantity of the water out of the aquiferous soil strata, thereby weakening the structural latticework of the soil by leaving air in place of water. David Todd, *Common Resources, Private Rights and Liabilities: A Case Study on Texas Groundwater Law*, 32 NATURAL RESOURCES JOURNAL 233, 238 (1992). This, in turn, causes the drained soil to collapse, thereby lowering each higher level of soil sediment up to the surface. *Id.* “Overdrafting” is a process by which water is withdrawn from an underground reservoir at a rate greater than that of the natural recharge. *21st Century Groundwater Law*, 4 TEXAS TECH ADMINISTRATIVE LAW JOURNAL at 193.

<sup>221</sup> *Friendswood*, 576 S.W.2d at 21–22.

<sup>222</sup> See Act of May 26, 1973, 63rd Leg. R.S., ch. 598, 1973 Texas General Laws 1641. During the following legislative session in 1975, the Legislature created the first underground water conservation district specifically tasked with managing subsidence. See Act of May 12, 1975, 64th Leg., R.S., ch. 284, 1975 Texas General Laws 672.

<sup>223</sup> *Friendswood*, 576 S.W.2d at 30; see *Edwards Aquifer Auth. v. Day*, 369

Cautious though the application of the Court’s holding may have been, the holding itself creating the first new common law exception to the rule of capture since the rule’s adoption three-quarters of a century before was amply bold.

### *City of Sherman v. Pub. Util. Comm’n* (1983)

After Luella Water Supply Corporation sought to have the Public Utility Commission (PUC) prohibit the city of Sherman from drilling wells on the city’s own land, but within Luella’s service area, the PUC asserted jurisdiction to regulate the city’s groundwater withdrawal.<sup>224</sup>

The dispute reached the Court in *City of Sherman v. Public Utility Commission*.<sup>225</sup> Observing that the “only possible order which the PUC could issue with respect to Luella’s complaint, other than dismissing the complaint altogether, would involve restricting or otherwise conditioning City’s right to produce its groundwater,” the Court flatly rejected the notion that the PUC had any authority “to regulate groundwater production or adjudicate correlative groundwater rights.”<sup>226</sup> Notably, *Sherman* was the first time the Court explicitly held that a

S.W.3d 814, 827 (Tex. 2012).

The opinion’s author, M. Price Daniel, was a former U.S. Senator from Texas, Texas Attorney General, and Texas Governor. SCOTX NARRATIVE HISTORY at 204. In fact, when *Friendswood* was being deliberated in 1978, Daniel was in the unique position as authoring Justice to persuade his fellow Justices to join his opinion—2 of whom he appointed (future Texas Supreme Court Chief Justice Joe Greenhill in 1957 and Justice Zollie Steakley in 1961). See *Id.* at 245, 251.

However, Justice Daniel would fail to persuade another future Chief Justice of the Court—Jack Pope—who dissented in *Friendswood* by keenly arguing that the matter was not a groundwater ownership case at all, but was instead a *lateral-support* dispute. *Friendswood*, 576 S.W.2d at 31 (Pope, J., dissenting, joined by Johnson, J.). Justice Pope analogized the fatal flaw in the Court’s logic as he saw it: “It is no more logical to say that this is a case concerning the right to ground water than it would be correct in a case in which an adjoining landowner removed lateral support by a caterpillar to say that the case would be governed by the law of caterpillars.” *Id.*

The realization that his illustrious past would not aid him at the Court set in early for Justice Daniel, as Chief Justice Calvert—who insisted on punctuality—began Justice Daniel’s own swearing-in ceremony without him when Justice Daniel failed to be seated and ready at the appointed time. SCOTX NARRATIVE HISTORY at 199.

The *Friendswood* opinion would prove to be one of Justice Daniel’s last, as he retired just a month after it issued. Compare *Friendswood*, 576 S.W.2d at 21, with SCOTX NARRATIVE HISTORY at 250.

<sup>224</sup> *City of Sherman v. Pub. Util. Comm’n*, 643 S.W.2d 681, 682–83 (Tex. 1983).

<sup>225</sup> *Id.* at 681.

<sup>226</sup> *Id.* at 686; see *Day*, 369 S.W.3d at 827. The author of the unanimous opinion was Justice Charles W. Barrow, who served with great distinction as both a Justice and Chief Justice of the San Antonio Court of Appeals for 15 years prior to his appointment to the Court in 1977. SCOTX NARRATIVE HISTORY at 207, 209, 247. Justice Barrow left the Court in 1984 in order to become the new dean of Baylor Law School. *Id.* at 214, 247.

“corollary to absolute ownership of groundwater is the right of the landowner to capture such water.”<sup>227</sup>

### The Edwards Aquifer Authority Act (1993)

The tale of the formation of the Edwards Aquifer Authority (EAA) and the role the federal bench played in the saga is important to the examination of the development of Texas groundwater law.<sup>228</sup>

In 1991, the Sierra Club sued the U.S. Secretary of the Interior in the Midland U.S. District Court “alleging that the Secretary . . . had allowed takings of endangered species by not ensuring water levels in the Edwards Aquifer adequate to sustain the flow of Comal and San Marcos Springs.”<sup>229</sup> The trial began in November 1992 in Midland, Texas and was presided over by the late Judge Lucius D. Bunton III,<sup>230</sup> who ruled in favor of the Sierra Club on February 1, 1993,<sup>231</sup> exactly 20 days after the 73rd Legislature convened in Austin.<sup>232</sup>

As part of his ruling, Judge Bunton threatened the State with the “blunt axes” of federal intervention<sup>233</sup> if the Texas Legislature did not adopt a management plan that limited withdrawals from the Edwards Aquifer by the end of the Legislative Session.<sup>234</sup> If the Legislature failed to act in time, Judge Bunton would allow the Sierra Club to return to his court and seek additional remedies—namely subjecting the Edwards Aquifer to federal regulation by the U.S. Fish and Wildlife Service.<sup>235</sup> Not surprisingly, the Legislature passed the EAA Act just 1 day before Judge Bunton’s deadline expired.<sup>236</sup>

The Act imposed an aquifer-wide cap on annual total groundwater production from non-exempt wells in the Edwards Aquifer of 450,000 acre-feet<sup>237</sup> of water per year through calendar year 2007, dropping to 400,000 acre-feet per year thereafter<sup>238</sup> until the cap is increased upon a determination that “additional water supplies are safely available from the aquifer.”<sup>239</sup> To implement the objectives of the legislation, the EAA was authorized to adopt regulations and issue permits limiting the amount of groundwater a landowner could produce.<sup>240</sup>

The Act was originally set to take effect on September 1, 1993 but was delayed after the U.S. Department of Justice refused administrative preclearance for the EAA under section 5 of the Voting Rights Act of 1965, and the EAA was subsequently enjoined from operating while a facial constitutional challenge unfolded.<sup>241</sup> The EAA would not begin operations until 3 years later in 1996 when the constitutional challenge was resolved and the injunction dissolved by the Court.<sup>242</sup>

Due to its unique lineage and regulatory powers, the EAA would go on to play a significant and recurring role in the coming decades as the Court examined Texas groundwater law.<sup>243</sup>

### *Barshop v. Medina Cnty. Underground Water Conservation Dist.* (1996)

The dispute that helped delay the EAA’s operation also appeared to be a vehicle in which the Court would finally resolve the tension between property rights in and regulation of groundwater. But the Court’s decision in *Barshop v. Medina County Underground Water Conservation District* would not prove so sweeping.<sup>244</sup>

In 1995, a group of plaintiffs, led by the Medina County Underground Water Conservation District (collectively, MCUWCD), brought a facial constitutional challenge to the

<sup>227</sup> *Sherman*, 643 S.W.2d at 686.

<sup>228</sup> Todd H. Votteler, *Raiders of the Lost Aquifer? Or, the Beginning of the End to Fifty Years of Conflict Over the Texas Edwards Aquifer*, 15 TULANE ENVIRONMENTAL LAW JOURNAL 257, 273 (2002) [hereinafter *Raiders of the Lost Aquifer*].

<sup>229</sup> Todd H. Votteler, *The Little Fish that Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide Over the Texas Edwards Aquifer*, 28 ENVIRONMENTAL LAW 845, 856 (1998) [hereinafter *Fish that Roared*].

<sup>230</sup> *Raiders of the Lost Aquifer*, 15 TULANE ENVIRONMENTAL LAW JOURNAL at 274.

<sup>231</sup> *See Id.*; *Fish that Roared*, 28 ENVIRONMENTAL LAW at 856.

<sup>232</sup> *See* 1993 Texas General Laws vol. I, at iii.

<sup>233</sup> *Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353 (W.D. Tex. May 26, 1993) (not designated for publication) (citation omitted); *see Fish that Roared*, 28 ENVIRONMENTAL LAW at 856.

<sup>234</sup> *Fish that Roared*, 28 ENVIRONMENTAL LAW at 856.

<sup>235</sup> *Raiders of the Lost Aquifer*, 15 TULANE ENVIRONMENTAL LAW JOURNAL at 275; *Fish that Roared*, 28 ENVIRONMENTAL LAW at 860.

<sup>236</sup> *See* Act of May 30, 1993, 73rd Leg., R.S., ch. 626 § 1, 1993 Texas General Laws 2350, 2360 [hereinafter Act]; *Raiders of the Lost Aquifer*, 15 TULANE ENVIRONMENTAL LAW JOURNAL at 276; *Fish that Roared*, 28 ENVIRONMENTAL LAW at 860.

<sup>237</sup> An acre-foot is the amount of water necessary to cover an acre of land to a depth of one foot and equates to approximately 325,850 gallons in volume. *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 624 n.1 (Tex. 1996).

<sup>238</sup> *Barshop*, 925 S.W.2d at 624 (citing Act, at § 1.14(b)–(c)).

<sup>239</sup> *Barshop*, 925 S.W.2d at 624 (citing Act, at § 1.14(d)).

<sup>240</sup> Act, at §§ 1.03, .16–.20; *Barshop*, 925 S.W.2d at 624–25.

<sup>241</sup> *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 396 (Tex. 2009).

<sup>242</sup> *Chem. Lime*, 291 S.W.3d at 396, 402; *see also Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 820 (Tex. 2012).

<sup>243</sup> *See, e.g., Day*, 369 S.W.3d at 814; *Chem. Lime*, 291 S.W.3d at 392; *Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729 (Tex. 2002); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996).

<sup>244</sup> 925 S.W.2d 618 (Tex. 1996)

Act.<sup>245</sup> MCUWCD brought the suit against the individual directors, including San Antonio businessman Phil Barshop, and the State of Texas was joined as a necessary party.<sup>246</sup>

MCUWCD did not challenge the constitutionality of the Act as it was applied to any particular landowner or their right to produce the groundwater from beneath their land.<sup>247</sup> Instead, because MCUWCD brought a facial challenge to the Act, the Court reviewed it to determine whether the statute, “by its terms, always operates unconstitutionally.”<sup>248</sup> The district court subsequently ruled that the Act was unconstitutional, and the State perfected a direct appeal to the Court.<sup>249</sup>

The introduction to the Court’s opinion recounted the long legal history of the rule of capture:

This case concerns [ground]water rights in Texas. The clash between the property rights of landowners in the water beneath their land and the right of the State to regulate [that] water for the benefit of all is more than a century old. This case presents another chapter in this ongoing battle.<sup>250</sup>

But the *Barshop* “chapter” of the story of the rule of capture in Texas proved to be anticlimactic.<sup>251</sup>

MCUWCD’s central claim was that the Act constituted an unconstitutional deprivation of an affected landowner’s vested property rights in the groundwater beneath their land.<sup>252</sup> MCUWCD’s claims were founded on the Court’s adoption of the rule of capture in *East* and its subsequent reaffirmation of the doctrine in *East*’s progeny, each of which steadfastly rejected the “correlative rights” or “reasonable use” theories of groundwater ownership followed in other jurisdictions.<sup>253</sup> The State defended the constitutionality of the Act on the theory that “until the water is actually reduced to possession, the right is not vested and no taking occurs.”<sup>254</sup> Under the State’s defense, there could be no constitutional taking under the Act

for landowners “who ha[d] not previously captured [ground] water.”<sup>255</sup>

The Court noted that the parties “fundamentally disagree[d] on the nature of the property rights affected” by the Act, and that it had not had occasion to previously address “the point at which [ground]water regulation [by the state] unconstitutionally invades the property rights of landowners.”<sup>256</sup> Ultimately however, the Court sidestepped the issue and did not consider whether the Act, when applied to a particular landowner, would operate unconstitutionally to “take” their rights in the groundwater in place or their right to produce such groundwater.<sup>257</sup> Instead, the Court addressed MCUWCD’s facial challenge to the constitutionality of the Act and held that MCUWCD had not established that the Act is unconstitutional on its face.<sup>258</sup> Because MCUWCD’s constitutional challenge was facial, the Court explained that any takings violations were “hypothetical.”<sup>259</sup> Nevertheless, the Court opined that, “[a]s long as compensation is provided, the [Act] does not violate [the Takings Clause in] article I, section 17” of the Texas Constitution.<sup>260</sup>

Having resolved the issue based on the narrow constitutional question presented, the Court found it unnecessary “to definitively resolve the clash between property rights in [ground] water and regulation of [ground]water.”<sup>261</sup>

It would not be until some 16 years later that the Court would do so.<sup>262</sup>

### Senate Bill 1 (1997)

When it was passed, Senate Bill 1<sup>263</sup> was called “revolutionary”<sup>264</sup> and the “most exhaustive rewrite of Texas water law in the [preceding] thirty years.”<sup>265</sup>

The signature change wrought by Senate Bill 1 was to finally

<sup>245</sup> *Id.* at 623. Other plaintiffs included the Uvalde County Underground Water Conservation District, the Texas and Southwestern Cattle Raisers Ass’n, Russell Brothers Cattle Co., and Bruce Gilleland. *Id.*

<sup>246</sup> *See id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 626.

<sup>252</sup> *Id.* at 625.

<sup>253</sup> *See id.* at 626 (citing *Friendswood Dev. Co. v. Smith-S.W. Indus., Inc.*, 576 S.W.2d 21, 30 (Tex. 1978); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 292–93, 276 S.W.2d 798, 801 (1955)).

<sup>254</sup> *Id.* at 625.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 625–26.

<sup>257</sup> *Id.* at 623, 625–27.

<sup>258</sup> *Id.* at 626.

<sup>259</sup> *Id.* at 631.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 626.

<sup>262</sup> *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 817–18 (Tex. 2012).

<sup>263</sup> Act of June 2, 1997, 75th Leg., R.S., ch. 1010, 1997 Texas General Laws 3610.

<sup>264</sup> Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas’s Most Precious Resource*, 35 TEXAS TECH LAW REVIEW 101, 107 (2004).

<sup>265</sup> Martin Hubert & Hon. Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas’s Future Water Needs*, 30 TEXAS TECH LAW REVIEW 53, 54 (1999).

and unequivocally codify that, pursuant to the Conservation Amendment's mandate to conserve and develop the state's natural resources, groundwater conservation districts were the state's "preferred method" of managing its groundwater resources.<sup>266</sup>

By Senate Bill 1's passage, the Legislature gave more "authority to locally controlled groundwater conservation districts for establishing requirements for groundwater withdrawal permits and for regulating water transferred outside the district."<sup>267</sup> The process put in place by Senate Bill 1 "permits the people most affected by groundwater regulation in particular areas to participate in democratic solutions to their groundwater issues."<sup>268</sup>

Senate Bill 1 also revised the "critical-area" designation process requiring the Texas Commission on Environmental Quality (TCEQ) (formerly the Texas Natural Resource Conservation Commission) and the Texas Water Development Board to identify areas anticipated to experience critical groundwater problems and streamline the process by which TCEQ or the Legislature can create a district in these areas.<sup>269</sup> In addition, Senate Bill 1 included various provisions calling for more comprehensive and coordinated water planning.<sup>270</sup>

### *Sipriano v. Great Spring Waters of Am., Inc. (1999)*

When the Court handed down *Sipriano v. Great Spring Waters of America, Inc.* in 1999, it seemed to herald the demise of the ownership in place and perhaps even the rule of capture.<sup>271</sup> Because of its import to the jurisprudential saga of groundwater law in Texas, the background to the case is examined in more depth below.

### *Factual background*

Ironically, 1 year after the Texas Supreme Court's decision in *East*, Great Spring Waters of America—otherwise known as



**Figure 8.** Henderson-County landowner Dale Groom stands next to a sign unambiguously noting his displeasure with Ozarka. *Biggest Pump Wins* (photograph by Mark Graham).



**Figure 9.** Bart Sipriano examines a pond on his 44-acre tract of land. *Biggest Pump Wins* (photograph by Mark Graham).

Ozarka—began operation in Arkansas in 1905.<sup>272</sup> Indeed, the factual setting in *Sipriano* was the first since *East* to be "virtually identical" to that presented nearly a century before.<sup>273</sup>

In the late 1980s, a representative from Ozarka began inquiring about leasing property in East Texas, particularly near the springhead of Roher Springs in Henderson County.<sup>274</sup> Roher Springs flows into Mill Creek and is itself fed by the Carrizo Aquifer.<sup>275</sup>

When none of the local landowners would agree to lease their property, Ozarka leased the property of a resident of Dallas's Highland Park neighborhood. The resident was also an absentee landowner in Henderson County.<sup>276</sup> Although Ozarka had originally planned to begin operation in the fall of 1995, it postponed doing so for 6 months due to local outrage from Henderson County residents<sup>277</sup> (Figure 8). Ozarka eventually began operating its pumping substation in March 1996.<sup>278</sup>

Bart Sipriano owned a 44-acre tract across the road from the parcel leased by Ozarka<sup>279</sup> (Figure 9). Since 1976, Sipriano had relied upon a 24-foot-deep, 100-year-old well, which

<sup>272</sup> Dylan O. Drummond, *Texas Groundwater Rights and Immunities: From East to Sipriano and Beyond*, in 115th TEXAS STATE HISTORICAL ASSOCIATION ANNUAL MEETING(2011) (Joint Session with the Texas Supreme Court Historical Society, presented alongside Hon. Nathan L. Hecht and Prof. Megan Benson) [hereinafter *East to Sipriano*].

<sup>273</sup> *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 827 (Tex. 2012).

<sup>274</sup> Carol Countryman, *Bottleneck*, TEXAS MONTHLY, August 1995, at 56, 57–58 [hereinafter *Bottleneck*].

<sup>275</sup> *Id.* at 57; Stuart Eskenazi, *The Biggest Pump Wins*, DALLAS OBSERVER, Nov. 19, 1998, available at <http://www.dallasobserver.com/1998-11-19/news/the-biggest-pump-wins/> (last visited Mar. 1, 2013) [hereinafter *Biggest Pump Wins*].

<sup>276</sup> *Bottleneck*, at 57.

<sup>277</sup> *Biggest Pump Wins*.

<sup>278</sup> *Fain v. Great Spring Waters of Am., Inc.*, 973 S.W.2d 327, 328 (Tex. App.—Tyler 1998), *aff'd sub nom.* 1 S.W.3d 75.

<sup>279</sup> *Biggest Pump Wins*.

<sup>266</sup> TEXAS WATER CODE § 36.0015.

<sup>267</sup> *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 79–80 (Tex. 1999) (citing TEXAS WATER CODE §§ 36.113, 36.122).

<sup>268</sup> *Id.* at 80.

<sup>269</sup> *Id.* (citing TEXAS WATER CODE §§ 35.008, 35.018).

<sup>270</sup> *Id.* (citing TEXAS WATER CODE §§ 11.134, 11.151, 16.053, 36.1071–.1073).

<sup>271</sup> The unflinching concurrence by then-Justice Nathan L. Hecht, joined by Justice Harriet O'Neill, methodically listed the Justices' concerns with the rule of capture. *Sipriano*, 1 S.W.3d at 81–83 (Hecht, J., concurring, joined by O'Neill, J.); see also *Fact or Fiction* at 1–2, in UTCLE, TEXAS WATER LAW INSTITUTE (citing Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY'S LAW JOURNAL 1281, 1288–93 (1986)).



**Figure 10.** Harold Fain checks his 37-foot well near the Ozarka tract. *Biggest Pump Wins* (photograph by Mark Graham).



**Figure 11.** Ozarka's pumping station in Henderson County, Texas. *Biggest Pump Wins* (photograph by Mark Graham).

he recollected had always had at least 7 or 8 feet of water in it.<sup>280</sup> Four days after Ozarka's facility began operations, Sipriano's well went nearly—if not completely—dry.<sup>281</sup> Similarly, Harold Fain—who was a retired Southwestern Bell employee and onetime black-eyed pea farmer<sup>282</sup>—and his wife, Doris, also lived on land nearby the Ozarka tract<sup>283</sup> (Figure 10). The Fains' 37-foot-deep well dropped 5 feet just days after Ozarka began pumping.<sup>284</sup>

Ozarka's operation itself utilized 2 pumps drilled around 80 feet deep, which together pumped some 90,000<sup>285</sup> to 110,000<sup>286</sup> gallons per day.<sup>287</sup> Once brought to the surface, Ozarka stored the water in twin tanks, each holding some 20,000 gallons of water<sup>288</sup> (Figure 11). Ozarka estimated it invested around \$500,000 in constructing and developing the Henderson County facility.<sup>289</sup>

### Trial Court proceedings

Soon after Ozarka began operation in March 1996,<sup>290</sup> the Fains, along with Sipriano, sought injunctive relief against

Ozarka, as well as actual and punitive damages for Ozarka's alleged nuisance, negligence, gross negligence, and malice.<sup>291</sup> Although Ozarka disputed whether its pumping operation, in fact, affected Sipriano or the Fains' wells,<sup>292</sup> Ozarka moved to summarily dismiss the landowners' claims purely on legal grounds under the rule of capture and absolute ownership as failing to state a claim.<sup>293</sup> In their response, the landowners asserted their claims did indeed fall within the recognized exceptions to the rule of capture (negligent subsidence, waste, or malice),<sup>294</sup> but they failed to identify which exception specifically applied or introduce any sufficient evidence supporting any exception.<sup>295</sup>

Instead, they generally cited to *Friendswood*, which recognized the negligent subsidence exception to the rule of capture, as support for their contention that it was time to overrule absolute ownership and the rule of capture.<sup>296</sup> Accordingly, the trial court granted summary judgment in Ozarka's favor 2 days before Christmas 1996, and the landowners timely appealed.<sup>297</sup>

### Review by the Tyler Court of Appeals

Before the Tyler Court of Appeals, Sipriano and the Fains put forward 2 points of error: (1) that the prayer in their live pleadings asserting Ozarka acted maliciously, when liberally construed, showed a genuine issue of material fact as a matter of law sufficient to defeat Ozarka's summary judgment;<sup>298</sup> and (2) the "absolute ownership rule should be overruled as antiquated

<sup>291</sup> *Sipriano*, 1 S.W.3d at 76; TAMES, TWELFTH COURT OF APPEALS, CASE # 12-97-00044-CV, CASE EVENTS, <http://www.search.txcourts.gov/Case.aspx?cn=12-97-00044-CV> (last visited Mar. 2, 2013) (noting the trial court returned judgment in December 1996) [hereinafter *Fain* CASE EVENTS].

<sup>292</sup> *Compare Biggest Pump Wins* (relating that a Texas Water Development Board geologist asserted test wells that were located 600 to 700 feet away from Ozarka's boreholes and some 2,000 feet closer than Sipriano's well "showed no appreciable signs of change while pumping was going on."), with *Bottleneck*, at 58 (reporting that, in order to alleviate local concerns, Ozarka ceased pumping during August 1996, which was the driest month of the year) and *Biggest Pump Wins* (Sipriano alleged the only time water returned to his well was during this 1-month pumping hiatus).

<sup>293</sup> *Compare Fain*, 973 S.W.2d at 328, with *Sipriano*, 1 S.W.3d at 76.

<sup>294</sup> *Sipriano*, 1 S.W.3d at 76, 78.

<sup>295</sup> *Fain*, 973 S.W.2d at 329.

<sup>296</sup> *Id.*; *Sipriano*, 1 S.W.3d at 76. It is interesting that—in adjudging the same case on the same facts—the intermediate appellate court opinion in *Fain* does not mention the rule of capture once, instead referring only to absolute ownership, but the Texas Supreme Court's opinion in *Sipriano* only discusses the rule of capture, but never mentions absolute ownership. *Compare Fain*, 973 S.W.2d at 328–30, with *Sipriano*, 1 S.W.3d at 76–80.

<sup>297</sup> *See Fain*, 973 S.W.2d at 328–29; *Fain* CASE EVENTS (noting the trial court returned judgment on December 23, 1996).

<sup>298</sup> *Fain*, 973 S.W.2d at 329.

<sup>280</sup> *Id.*

<sup>281</sup> *See Fain*, 973 S.W.2d at 328; *Biggest Pump Wins*.

<sup>282</sup> *Biggest Pump Wins*. Nearby Athens, Texas is the self-proclaimed "Black-Eyed Pea Capitol of the World." CITY OF ATHENS, WELCOME TO THE CITY OF ATHENS, <http://athenstexas.us/> (last visited Mar. 2, 2013).

<sup>283</sup> *Biggest Pump Wins*.

<sup>284</sup> *See Fain*, 973 S.W.2d at 328; *Biggest Pump Wins*.

<sup>285</sup> *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 75–76 (Tex. 1999).

<sup>286</sup> *Biggest Pump Wins*.

<sup>287</sup> *Sipriano*, 1 S.W.3d at 76.

<sup>288</sup> *Bottleneck*, at 57 (stating that each tank could hold approximately 20,000 gallons of water); *Biggest Pump Wins* (stating that, "together, [the 2 tanks] can hold as much as 50,000 gallons of water").

<sup>289</sup> *Bottleneck*, at 58.

<sup>290</sup> *See Bottleneck*, at 58 (as of July 5, 1996, when Ozarka held a town meeting to discuss its pumping facility, no lawsuit had apparently yet been filed).

and violative of public policy.”<sup>299</sup> In January 1998,<sup>300</sup> the appellate court affirmed the trial court’s summary judgment on both grounds, finding first that the landowners’ response had been too nebulously pled to show that a genuine issue of material fact existed sufficient to prevent the issuance of the trial court’s summary judgment.<sup>301</sup> Second, the Tyler Court also rejected the landowners’ oblique assault on the doctrine of absolute ownership, proposing that, “for so well-settled law as the absolute ownership rule, we conclude that it would be more appropriate for the [L]egislature or the Texas Supreme Court to fashion a new rule if it should be more attuned to the demands of modern society.”<sup>302</sup>

### *The Texas Supreme Court’s opinion*

#### **The majority opinion**

Between the issuance of the Tyler Court of Appeals’ judgment and their petition to the Texas Supreme Court, the Fains and Sipriano waived their claim that they sufficiently pled an exception to the rule of capture and instead relied solely upon their policy argument that the rule of capture should be abandoned entirely.<sup>303</sup>

*Sipriano’s* actual holding was unremarkable in that it reaffirmed the state’s century-long adherence to the rule of capture.<sup>304</sup> Writing for the majority, Justice Craig Trively Enoch<sup>305</sup> again explained the application of the rule of capture in Texas:

The rule of capture answers the question of what remedies, if any, a neighbor has against a landowner based on the landowner’s use of the water under the landowner’s land. Essentially, the rule provides 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 so doing they deprive their neighbors of the water’s use.<sup>306</sup>

The Court also reiterated that the rule of capture<sup>307</sup> was “not unfettered,” because, while it may preclude a plaintiff’s suit, it cannot escape legislative regulation pursuant to the Conservation Amendment.<sup>308</sup>

As the Court confirmed nearly 15 years later, no issue regarding the ownership of groundwater in place was presented in *Sipriano*.<sup>309</sup>

#### **Justice Hecht’s concurrence**

Perhaps almost more intriguing than the governing holdings of the majority opinion was the strident concurrence by then-Justice Nathan L. Hecht (contemporaneously referred to as “Justice” in the remainder of this article),<sup>310</sup> joined by Justice Harriet O’Neil,<sup>311</sup> which “had the dulcet tones of a dissent” and unequivocally announced the Justices’ dissatisfaction with the rule of capture.<sup>312</sup>

<sup>306</sup> *Sipriano*, 1 S.W.3d at 76; see *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 827–28 (Tex. 2012).

<sup>307</sup> One other aspect of *Sipriano* worth noting is that it translated the axiom long used to described the rule as capture, *damnum absque injuria*, to mean “an injury without a remedy.” *Id.* However, *damnum absque injuria* actually translates to mean “damage without injury.” See, e.g., *Acton v. Blundell*, 152 Eng. Rep. 1223, 1230 (1843); *Fact or Fiction* at 16–17, in UTCLE, TEXAS WATER LAW INSTITUTE. The distinction, although admittedly obscure, is material because the rule of capture does not even recognize that an injury can be inflicted on a neighboring landowner resulting from withdrawal of groundwater absent malice, waste, or negligent subsidence. *Fact or Fiction* at 16–17, in UTCLE, TEXAS WATER LAW INSTITUTE. Instead, while a “neighboring landowner may be *damaged* by an overlying landowner’s withdrawal of groundwater, . . . such resulting damage cannot form the basis of a compensable *injury*.” *Id.*

<sup>308</sup> *Sipriano*, 1 S.W.3d at 79 (recalling that the *East* Court also anticipated legislative involvement in groundwater regulation, clarifying the rule of capture’s operation “[i]n the absence . . . of positive authorized legislation” (quoting *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 149, 81 S.W. 279, 280 (1904)); see *Day*, 369 S.W.3d at 828, 828 n.70).

<sup>309</sup> See *Day*, 369 S.W.3d at 828.

<sup>310</sup> Chief Justice Hecht was appointed Chief Justice on October 1, 2013, after first being elected to the Court in 1988. See SCOTX NARRATIVE HISTORY at 250. As of January 2014, Chief Justice Hecht now holds the record as the longest-serving Justice in the Court’s history. On November 4, 2014, he was re-elected to the Court for a record sixth time, making him also the most-elected Justice on Court history (1988, 1994, 2000, 2006, 2012, 2014). See *id.* at 250.

It was the author’s great honor to clerk for then-Justice Hecht during the Court’s 2003–04 term. See *Still So Misunderstood*, 37 TEXAS TECH LAW REVIEW at 1 n\*.

<sup>311</sup> Justice O’Neill served the Court for over a decade from 1999 to 2010. SCOTX NARRATIVE HISTORY at 246.

<sup>312</sup> *Sipriano*, 1 S.W.3d at 81–83 (Hecht, J., concurring, joined by O’Neill, J.).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 330 (noting the appellate court issued its opinion on Jan. 29, 1998).

<sup>301</sup> *Id.* at 329.

<sup>302</sup> *Id.* at 329–30.

<sup>303</sup> *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999).

<sup>304</sup> See *id.* at 80–81.

<sup>305</sup> Justice Enoch sat on the Court for a decade from 1993 to 2003. SCOTX NARRATIVE HISTORY at 252.

At the beginning of the author’s legal career, it was his privilege to practice with Justice Enoch at Winstead PC in Austin, Texas. See *Still So Misunderstood*, 37 TEXAS TECH LAW REVIEW at 1 n\*.

The concurrence was an unvarnished and comprehensive frontal assault on both the practical effects and theoretical foundation of the rule of capture.<sup>313</sup> Justice Hecht began by dryly observing that, despite 50 years having elapsed since the GCDA was passed in 1949, “[n]ot much groundwater management is going on.”<sup>314</sup>

Making abundantly clear what he viewed as the cause of the stagnation in groundwater law, Justice Hecht surmised, “[w]hat really hampers groundwater management is the established alternative, the common law rule of capture.”<sup>315</sup> As support for his contention, Justice Hecht reasoned that neither of the original 2 justifications that the *East* Court relied upon in adopting the rule of capture were still valid.<sup>316</sup>

- (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible[; and]
- (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.<sup>317</sup>

Justice Hecht continued, explaining “it is not regulation that threatens progress, but the lack of it.”<sup>318</sup> Unimpressed with the similar arguments of the 19 some-odd amici curiae in favor of retaining the rule of capture that has been settled law in Texas for “a long time,” Justice Hecht offered Justice Holmes’s observation that:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.  
It is still more revolting if the grounds upon which it

was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>319</sup>

Finally, returning to the Legislative Branch’s constitutionally delegated power to manage water resources, Justice Hecht went as far as to suggest that, “even if the Court abandoned the rule of capture as part of the common law, the Legislature could adopt the rule by statute. . . .”<sup>320</sup> Only because Justice Hecht assumed the 75th Legislature’s comprehensive rewrite of the Water Code just 2 years before would “make the rule of capture obsolete,” he cautioned that, “for now—but I think only for now—*East* should not be overruled.”<sup>321</sup>

Of note, in *Day*, Justice Hecht framed his concurrence in *Sipriano* as expressing the “concern that with no common law liability for a landowner’s unlimited pumping, legislators had inadequately provided for the protection of groundwater supplies.”<sup>322</sup>

### ***Guitar Holding Co. v. Hudspeth Cnty. Underground Water Conservation Dist. (2008)***

In *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District*, the Court examined and rejected the contention that a groundwater conservation district’s discretion in preserving “historic or existing use” was limited to the amount of water permitted.<sup>323</sup>

*Guitar Holding Co.* was one of the largest landowners in Hudspeth County but had irrigated only a small portion of its land during an historical period specified by the Hudspeth County Underground Water Conservation District (HCUWCD).<sup>324</sup> When the HCUWCD’s rules requiring a groundwater

<sup>319</sup> *Id.* (quoting *Path of the Law*, 10 HARVARD LAW REVIEW at 469). While no one would credibly quibble with Justice Holmes on this point, Justice Hecht perhaps too broadly framed the amici’s concern. Indeed, one of the oldest tenets in Texas jurisprudence is that, “where a decision has been made, adhered to and followed for a series of years, it will not be disturbed, except on the most cogent reasons, and it must be shown in such case that the former decisions are clearly erroneous; and, where property rights are shown to have grown up under the decision, the rule will rarely be changed for any reason.” *Groesbeck v. Golden*, 7 S.W. 362, 365 (Tex. 1887); see also, e.g., *McLendon v. City of Houston*, 153 Tex. 318, 322–23, 267 S.W.2d 805, 807 (1954) (“The law should be settled, so far as possible, especially where contract rights and rules of property have been fixed.”). Here, the concern of many observers was that, regardless of the original reasoning or wisdom of the *East* Court in adopting the rule of capture and giving heed to ownership in place, over a century of property rights had by then “grown up” and become “fixed” under the decision.

<sup>320</sup> *Sipriano*, 1 S.W.3d at 82 (Hecht, J., concurring, joined by O’Neill, J.).

<sup>321</sup> *Id.* (referring to Senate Bill 1’s passage during the 75th Legislative Session 2 years before in 1997).

<sup>322</sup> *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 828 (Tex. 2012).

<sup>323</sup> 263 S.W.3d 910, 916 (Tex. 2008).

<sup>324</sup> *Id.* at 914–15.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 81 (noting the creation of only some 42 groundwater conservation districts in that time).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 82. While Justice Williams did acknowledge the 2 policy arguments originally postulated by the Ohio Supreme Court in *Frazier v. Brown*, 12 Ohio St. 294, 311 (1861), they were arguably not the only 2 justifications for the Court’s decision in *East*. See *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 149–50, 81 S.W. 279, 280–81 (1904) (quoting Marcellus’s *responsum* from *Acton* and repeatedly citing to *Acton* as justification for the adoption of the rule of capture and absolute ownership).

<sup>317</sup> *Sipriano*, 1 S.W.3d at 82 (Hecht, J., concurring, joined by O’Neill, J.) (quoting *East*, 98 Tex. at 149, 81 S.W. at 281 (quoting *Frazier*, 12 Ohio St. at 311)).

<sup>318</sup> *Id.*

permit amount to be based on the applicant's use of water for irrigation during this historical period took effect, Guitar Holding's permits were limited in amount compared to others who had irrigated more extensively.<sup>325</sup>

Because a market for transporting water for consumption outside the HCUWCD had developed and landowners were interested in turning from irrigation to selling water in the new market, Guitar Holding complained that the rules preserved only historical amounts, not historical use.<sup>326</sup> But the Court disagreed, explaining that "use" under Chapter 36 of the Water Code included purpose as well as amount:

[T]he amount of groundwater withdrawn and its purpose are both relevant when identifying an existing or historic use to be preserved. Indeed, in the context of regulating the production of groundwater while preserving an existing use, it is difficult to reconcile how the 2 might be separated. . . . [B]oth the amount of water to be used and its purpose are normal terms of a groundwater production permit and are likewise a part of any permit intended to "preserve historic or existing use." A district's discretion to preserve historic or existing use is accordingly tied both to the amount and purpose of the prior use.<sup>327</sup>

### *Coastal Oil & Gas Corp. v. Garza Energy Trust* (2008)

Another oil and gas case to presage the progression of Texas groundwater law was the Court's 2008 opinion in *Coastal Oil & Gas Corp. v. Garza Energy Trust*.<sup>328</sup>

This case was of critical importance to the thriving shale oil and gas industry in Texas because at stake was whether damages caused by "fracing"<sup>329</sup> were precluded by the rule of capture.<sup>330</sup>

Writing for the majority, Justice Hecht held they were.<sup>331</sup> Of import to Texas groundwater law was that the Court appeared to formally announce the demise of the concept of absolute ownership—at least in oil and gas cases.<sup>332</sup> Relying upon precedent from the U.S. Supreme Court, Justice Hecht held that the Latin axiom that long has undergirded the concept of absolute ownership, *cujus est solum ejus est usque ad coelum et ad infer-*

*nos*,<sup>333</sup> (meaning "[w]hoever owns the soil owns everything up to the sky and down to the depths")<sup>334</sup> "has no place in the modern world."<sup>335</sup> The Court continued, explaining that the "minerals owner is entitled, not to the molecules actually residing below the surface, but to 'a fair chance to recover the oil and gas in or under his land, or their equivalents in kind.'"<sup>336</sup> In *Day*, a unanimous Court expressly applied this concept to groundwater as well.<sup>337</sup>

The *Coastal Oil* Court then concluded that "the rule of capture determines title to gas that drains from property owned by one person onto property owned by another. It says nothing about the ownership of gas that has remained in place."<sup>338</sup>

### Senate Bill 332 (2011)

For the first time since Senate Bill 1 was passed 14 years earlier—and arguably since the GCDA was enacted more than 60 years before—the Texas Legislature made substantive changes to the groundwater ownership provision in the Water Code.<sup>339</sup>

Having seen the juristic writing on the wall after *Sipriano*

<sup>333</sup> This maxim first appeared in Texas common law in the case of *Williams v. Jenkins*, 25 Tex. 279, 286 (1860). The opinion's author, Justice Oran Milo Roberts, served as an Associate Justice of the Court from his initial election in 1857 until he resigned in 1862 to fight in the Civil War. SCOTX NARRATIVE HISTORY at 237. He returned to bench, this time as Chief Justice after his election to the post in 1864, until he was removed from office with the advent of Reconstruction. *Id.* at 236. He was elected as one of Texas's 2 U.S. Senators in 1866 but was never seated due to Reconstruction. *Id.* at 77, 88.

He was subsequently appointed to his former seat as Chief Justice in 1874 and would serve as Chief of the "Redeemer Court"—so called because it followed the much-maligned "Military Court" that sat from 1867 to 1870, and which operated with no Texas Constitutional basis causing its decisions to lack precedential weight under the rule of stare decisis. See Jim Paulsen & James Hambleton, *Confederates and Carpetbaggers: The Precedential Value of Decisions from the Civil War and Reconstruction Era*, 51 TEXAS BUSINESS JOURNAL 916, 917–20 (October 1988).

After he learned of his Democratic nomination for governor in July 1878, Chief Roberts resigned from the Court to successfully run for governor. *Id.* at 95, 239.

<sup>334</sup> BLACK'S LAW DICTIONARY 1712 (8th ed. 2004).

<sup>335</sup> *Coastal Oil*, 286 S.W.3d at 11, 11 n.30 (quoting *United States v. Causby*, 328 U.S. 256, 260–61 (1946)).

<sup>336</sup> *Id.* at 15; see *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 830 (Tex. 2012).

<sup>337</sup> *Day*, 369 S.W.3d at 830 ("[b]ecause a landowner is not entitled to any specific molecules of groundwater or even to any specific amount . . .").

<sup>338</sup> *Coastal Oil*, 286 S.W.3d at 14.

<sup>339</sup> Act of May 29, 2011, 82nd Leg., R.S., ch. 1207, 2011 Texas General Laws 3224 (codified at TEXAS WATER CODE §§ 36.002, 36.101)..

<sup>325</sup> *Day*, 369 S.W.3d at 841.

<sup>326</sup> *Guitar Holding*, 263 S.W.3d at 916; *Day*, 369 S.W.3d at 841.

<sup>327</sup> *Guitar Holding*, 263 S.W.3d at 916; see also *Day*, 369 S.W.3d at 841.

<sup>328</sup> 268 S.W.3d 1 (Tex. 2008).

<sup>329</sup> "Fracing" is shorthand for hydraulic fracturing, whereby fractures are propagated in a rock layer by the injection of a pressurized fluid. See East to Sipriano, at 28–29.

<sup>330</sup> *Coastal Oil*, 286 S.W.3d at 17.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 11.

and *Coastal Oil*,<sup>340</sup> Senator Troy Fraser introduced Senate Bill 332 during the opening days of the 82nd Session in January 2011.<sup>341</sup>

Prior to the 82nd Session and virtually since 1945,<sup>342</sup> section 36.002 governing the “Ownership of Groundwater” contained the noncommittal bromide that:

The ownership and rights of the owner of the land and their lessees and assigns in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district. . . .<sup>343</sup>

This construction, of course, substantively meant next to nothing because precisely what were the “ownership and rights of the owner of the land” was not defined and a matter of intense dispute. Specifically, the crux of the disagreement centered around whether a property right in groundwater vests only upon capture—that is, when it is “actually reduced to possession”<sup>344</sup>—or vests while in place beneath a surface owner’s real property.<sup>345</sup>

So into this fray, Senate Bill 332 was introduced to provide more certainty for Texas landowners regarding exactly what property interest they possess in the groundwater beneath their land.<sup>346</sup> To this end, the introduced version of Senate Bill 332 proclaimed that a Texas “landowner . . . has a vested ownership interest in and right to produce groundwater below the surface of the landowner’s real property.”<sup>347</sup>

<sup>340</sup> SENATE RESEARCH CENTER, BILL ANALYSIS, S.B. 332, 82nd Leg., R.S. (1022) (introduced version), available at <http://www.capitol.state.tx.us/tlodocs/82R/analysis/pdf/SB00332I.pdf#navpanes=0> (last visited Mar. 3, 2013) (“Recently, landowners’ interest in groundwater below the surface has come into question in the courts.”) [hereinafter S.B. 332 Introduced Version BILL ANALYSIS].

<sup>341</sup> TEXAS LEGISLATURE ONLINE, ACTIONS, SB 332, 82(R), <http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=82R&Bill=SB332> (last visited Mar. 3, 2013).

<sup>342</sup> GCDA at § 1, 1949 Texas General Laws at 562.

<sup>343</sup> TEXAS WATER CODE § 36.002, amended by Act of May 29, 2011, 82nd Leg., R.S., ch. 1207, 2011 Texas General Laws 3224.

<sup>344</sup> See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 837 (Tex. 2012).

<sup>345</sup> S.B. Introduced Version BILL ANALYSIS (“The argument being made by some GCDs is that the landowner does not have an interest in the water below the surface until they capture it.”); *Fact or Fiction* at 10, in UTCLE, TEXAS WATER LAW INSTITUTE.

<sup>346</sup> Introduced Version BILL ANALYSIS (“This bill clearly defines that a property owner has a vested ownership interest in, and the right to produce, the groundwater below the surface of their property.”).

<sup>347</sup> TEXAS LEGISLATURE ONLINE, TEXT, SB 332, 82(R) (introduced version), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00332I.pdf#navpanes=0> (last visited Mar. 3, 2013).

By the end of the 82nd Session, the ownership pronouncement in subsection (a) was modified to provide: “The Legislature recognizes that a landowner owns the groundwater beneath the surface of the landowner’s land as real property.”<sup>348</sup>

In its final form, Senate Bill 332’s ownership provisions were somewhat moderated by balancing language added to allay fears that Senate Bill 332 would greatly restrict the ability of groundwater conservation districts to fulfill their statutory duties to regulate groundwater production. Making clear the nature of ownership interest identified in subsection (a) of section 36.002 is not absolute, subsections (d) and (e) were added:

(d) This section does not:

(1) prohibit a district from limiting or prohibiting the drilling of a well by a landowner for failure or inability to comply with minimum well spacing or tract size requirements adopted by the district;

(2) affect the ability of a district to regulate groundwater production as authorized under Section 36.113, 36.116, or 36.122 or otherwise under this chapter or a special law governing a district; or

(3) require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner.<sup>349</sup>

(e) This section does not affect the ability to regulate groundwater in any manner authorized [for the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, and the Fort Bend Subsidence District].<sup>350</sup>

This balancing of interests was exemplified in the changes made to section 36.101.<sup>351</sup> The original version of the section that existed prior to 2011, which governs the rulemaking power of groundwater conservation districts, did not expressly require the consideration of overlying landowners’ ownership interests in the groundwater beneath their land (whatever those were under former section 36.002’s nebulous “recognition” of same). The revised version of section 36.101 now requires a groundwater district to consider not only the “groundwater ownership and rights described by Section 36.002,” but also “consider the public interest in conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and

<sup>348</sup> TEXAS WATER CODE § 36.002(a).

<sup>349</sup> *Id.* § 36.002(d).

<sup>350</sup> *Id.* § 36.002(e).

<sup>351</sup> TEXAS LEGISLATURE ONLINE, TEXT, SB 332, 82(R) (enrolled version), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00332F.pdf#navpanes=0> (last visited Mar. 3, 2013) [hereinafter S.B. 332 Enrolled Version Comparison].

in controlling subsidence caused by withdrawal of groundwater from those groundwater reservoirs or their subdivisions, consistent with the objectives of Section 59, Article XVI, Texas Constitution” and “consider the goals developed as part of the district’s management plan under Section 36.101.”<sup>352</sup>

Overall, the changes to Texas groundwater ownership wrought by Senate Bill 332 are substantial. Previously, the Water Code recognized that Texas landowners owned some vague interest in groundwater but provided no guidance as to what that interest actually was.<sup>353</sup> Now, expressly and unequivocally, the Water Code “recognizes that a landowner owns the groundwater beneath the surface of the landowner’s land as real property.”<sup>354</sup>

### *Edwards Aquifer Auth. v. Day (2012)*

#### *The climate leading up to Day*

The anticipation and anxiety leading up the Court’s issuance of *Day* was at a fever pitch.

During the intervening 13 years since *Sipriano* was decided, issues surrounding Texas groundwater production and supply had only grown more acute. Frustration set in amongst the groundwater law bar because, after *Sipriano*, several cases seemed poised to carry the mantle of the “next big groundwater case,” but all either failed to reach review by the Court or were decided on other grounds.<sup>355</sup>

When *Day* finally reached the Court, some 24 amici filed briefs in the case both before and after review was granted<sup>356</sup>—at the time the most of any case then pending before the Court.<sup>357</sup> In addition, the one Justice from *Sipriano* who had most vociferously seemed to oppose the policy underpinnings and operation of the rule of capture—Justice Hecht—was the only Justice from that decision still serving on the Court.<sup>358</sup> Justice Hecht was also the author of 2008’s *Coastal Oil*, in

which the conceptual foundation of absolute ownership was dismissed as outdated and irrelevant.<sup>359</sup> Into this mix and after the Court requested merits briefing in *Day* in January 2010,<sup>360</sup> the Legislature’s substantial rewrite of Water Code section 36.002 in Senate Bill 332 to explicitly recognize the ownership of groundwater in place greatly altered the statutory landscape the Court would be called upon to construe and seemed to provide the very guidance the Court had long sought from its sister branch of government.

#### *Factual and procedural background*

In 1994, Robert Burrell Day<sup>361</sup> and Joel McDaniel purchased some 380 acres overlying the Edwards Aquifer<sup>362</sup> on which to raise oats and peanuts and graze cattle<sup>363</sup> (Figure 12). The casing of a well originally drilled on the property in 1956 that had been used for irrigation until the early 1970s eventually collapsed, and its pump was subsequently removed sometime prior to 1983.<sup>364</sup> Even after the removal of its pump, the well continued to flow under artesian pressure, with most of the water flowing along a ditch several hundred yards into a 50-acre lake on the property.<sup>365</sup> To continue to use the existing well or drill a replacement well as Burrell and Day planned, they were required to obtain a permit from the EAA, which was created

<sup>359</sup> *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 286 S.W.3d 1, 11 n.30 (Tex. 2008) (quoting *United States v. Causby*, 328 U.S. 256, 260–61 (1946)).

<sup>360</sup> *Day* EVENTS.

<sup>361</sup> Day was reared on his family’s ranch in Zavala County, Texas, which was “the only piece of land in Zavala County that never had a deed of trust” because his grandfather never borrowed money to buy it. Colleen Schreiber, *Stockman Burrell Day Got Start At San Antonio Union Stockyards*, LIVESTOCK WEEKLY, Sept. 4, 2003 (internet ed.), <http://www.livestockweekly.com/papers/03/09/04/whlburrell.asp> (last visited Mar. 3, 2013). His grandfather, Harry Holdsworth, was an orphan who came to Texas from England when he just 17 years old. *Id.*

Day’s suit against the EAA was not his first brush with the judicial system. When he was 25, he ran for county judge of Zavala County, Texas but fell 25 votes shy. *Id.* Day would not live to see the result in his namesake case, passing away at the age of 72 on April 23, 2009 in San Antonio. HARLEY FUNERAL HOME, OBITUARY FOR ROBERT BURRELL DAY, 4/13/1937–74/23/2009, available at <http://www.hurleyfuneralhome.com/services.asp?page=ode-tail&id=572&locid=> (last visited Mar. 3, 2013) [hereinafter DAY OBITUARY].

<sup>362</sup> The Edwards Aquifer is “an underground layer of porous, water-bearing rock, 300–700 feet thick, and 5 to 40 miles wide at the surface, that stretches in an arced curve from Brackettville, 120 miles west of San Antonio, to Austin.” *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 394 (Tex. 2009).

<sup>363</sup> *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 818 (Tex. 2012).

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>352</sup> TEXAS WATER CODE § 36.101(a)(3)–(5).

<sup>353</sup> TEXAS WATER CODE § 36.002, amended by Act of May 29, 2011, 82nd Leg., R.S., ch. 1207, 2011 Texas General Laws 3224.

<sup>354</sup> TEXAS WATER CODE § 36.002(a).

<sup>355</sup> See, e.g., *Guitar Holding Co. v. Hudspeth Cnty. Underground Water Conservation Dist.*, 263 S.W.3d 910 (Tex. 2008); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied).

<sup>356</sup> TAMES, SUPREME COURT OF TEXAS, CASE # 08-0964, CASE EVENTS, <http://www.search.txcourts.gov/Case.aspx?cn=08-0964> (last visited Mar. 3, 2013) [hereinafter *Day* EVENTS].

<sup>357</sup> See TAMES, SUPREME COURT OF TEXAS, CASE # 08-0964, Parties, <http://www.search.txcourts.gov/Case.aspx?cn=08-0964> (last visited Mar. 3, 2013).

<sup>358</sup> East to *Sipriano*, at 25, 25 n.124.



**Figure 12.** Lifelong stockman R. Burrell Day. HARLEY FUNERAL HOME, OBITUARY FOR ROBERT BURRELL DAY, 4/13/1937-4/23/2009, available at <http://www.hurleyfuneralhome.com/services.asp?page=odetail&cid=572&locid=> (last visited March 3, 2013).

the year before they bought the property.<sup>366</sup>

Day and McDaniel sought a permit from the EAA to allow them to pump some 700 acre-feet of groundwater annually from the Edwards Aquifer to irrigate crops on their land.<sup>367</sup> After the EAA's general manager wrote Day and McDaniel stating that the EAA's staff had "preliminarily found" that their application "provide[d] sufficient convincing evidence to substantiate" the amount of irrigation they sought to provide, Day and McDaniel drilled a replacement well at a cost of \$95,000.<sup>368</sup> Soon thereafter, the EAA notified Day and McDaniel that it was denying their application because the documented withdrawals from their well during the historical period were not put to a beneficial use.<sup>369</sup>

Day and McDaniel exhausted their administrative remedies against the EAA at the State Office of Administrative Hearings, after which the EAA agreed with the Administrative Law Judge's findings that the maximum beneficial use of groundwater shown by Day and McDaniel amounted to some 14 acre-feet annually.<sup>370</sup> Day and McDaniel appealed the EAA's decision to the district court, suing the EAA for taking their property without compensation under the Texas Constitution's Takings

Clause contained in article I, section 17(a).<sup>371</sup> The district court subsequently granted summary judgment for the EAA on Day and McDaniel's takings claims.<sup>372</sup>

On appeal before the San Antonio Court of Appeals, the court relied upon its decision earlier that year in *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, in which it held that "landowners have some ownership rights in the groundwater beneath their property."<sup>373</sup> Because they had "some ownership rights" in the groundwater, the court reasoned "they have a vested right therein."<sup>374</sup> The court concluded Day and McDaniel's "vested right in the groundwater beneath their property [wa]s entitled to constitutional protection."<sup>375</sup>

### *The Texas Supreme Court's opinion*

In February 2012, the Court finally issued its long-awaited opinion in *Day*.<sup>376</sup> As suspected (and a little feared by ownership-in-place proponents), Justice Hecht was the opinion's author.<sup>377</sup> Surprising perhaps to most was that the opinion was unanimous.<sup>378</sup>

### Common law analysis

At the outset, the Court laid out the question before it: "whether land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by article I, section 17(a) of the Texas Constitution."<sup>379</sup> After more than a century of debate and

<sup>371</sup> *Id.*; Article I, section 17(a) of the Texas Constitution is the state's Takings Clause, providing that "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . ." TEXAS CONSTITUTION art. I, § 17(a).

<sup>372</sup> *Day*, 369 S.W.3d at 821.

<sup>373</sup> *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008), *aff'd* 369 S.W.3d 814, 818 (Tex. 2012) (citing *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied)).

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Day*, 369 S.W.3d at 814.

<sup>377</sup> *See id.* at 817.

<sup>378</sup> *See id.* The previous 3 major ownership-related groundwater law opinions issued by the Court all included separate writings. *See Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 81 (Tex. 1999) (Hecht, J., concurring, joined by O'Neill, J.); *Friendswood Dev. Co. v. Smith-S.W. Indus., Inc.*, 576 S.W.2d 21, 31 (Tex. 1978) (Pope, J., dissenting, joined by Johnson, J.); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 297, 299, 276 S.W.2d 798, 804, 805 (1955) (Griffin, J., dissenting; Wilson, J., dissenting, joined by Culver, J.).

<sup>379</sup> *Day*, 369 S.W.3d at 817.

<sup>366</sup> Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Texas General Laws 2350; *see Day*, 369 S.W.3d at 818.

<sup>367</sup> *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 748 (Tex. App.—San Antonio 2008), *aff'd* 369 S.W.3d 814, 818 (Tex. 2012).

<sup>368</sup> *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 820 (Tex. 2012).

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 821.

discord on this issue amongst the bar since *East* was decided, the Court held that it did.<sup>380</sup>

The Court was careful as well to clarify the distinction between the rule of capture and ownership in place. It reflected that, “while the rule of capture does not entail ownership of groundwater in place, neither does it preclude such ownership.”<sup>381</sup> Therefore, the Court disagreed with the EAA that the rule of capture, “because it prohibits an action for drainage, is antithetical to such ownership.”<sup>382</sup> To the contrary, it relied on its 2008 decision in *Coastal Oil*, in which it explained that the “rule of capture determines title to [natural] gas that drains from property owned by one person onto property owned by another,” but “says nothing about the ownership of gas that has remained in place.”<sup>383</sup> And for the first time, it confirmed that the same is true of groundwater.<sup>384</sup> Put another way, the Court explained that a “landowner is not entitled to any specific molecules of groundwater or even to any specific amount. . . .”<sup>385</sup>

In a detailed review of its long line of groundwater law decisions over the preceding 100 years, the Court reiterated that it had never addressed whether groundwater can be owned in place.<sup>386</sup>

It is not often that a Court distinguishes aspects of a decision it handed down more than a century before, but it did so in *Day* regarding its opinion in *East*.<sup>387</sup> The Court clarified that the “effect of our decision denying *East* a cause of action was to give the Railroad ownership of the water pumped from its well *at the surface*.”<sup>388</sup> “No issue of ownership of groundwater *in place*,” the Court continued, “was presented in *East*.”<sup>389</sup> The Court elaborated that the Railroad escaped liability not because *East* owned in place the groundwater below his property, but “irrespective of whether he did.”<sup>390</sup> The Court also sought to distinguish language it quoted in *East* from the New York Court of Appeals:

“An owner of soil may divert percolating water, consume or cut it off, with impugny. It is the same distinguished in law from land. So the owner of land is

the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth’s surface.”<sup>391</sup>

Despite this passage perhaps sounding awfully close to recognizing ownership in place of groundwater,<sup>392</sup> the Court clarified that it “could have meant only that a landowner is the absolute owner of groundwater flowing at the surface from its well.”<sup>393</sup>

Tacking its analysis toward finding that groundwater is indeed owned in place, the Court turned to its robust line of oil and gas decisions. It began by relying on Chief Justice Nelson Phillips’s seminal explanation in 1915 of how the fugitive nature of fugacious substances, in and of itself, cannot operate to defeat their ownership in place.<sup>394</sup> The Court focused on its holding in *Daugherty* that a landowner’s “right to oil and gas beneath his land is an exclusive and private property right . . . inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property.”<sup>395</sup>

Concluding that no basis exists to treat groundwater differently from oil and gas, the Court observed that “*Daugherty* refutes the EAA’s argument that the rule of capture precludes ownership in place.”<sup>396</sup>

The decisive holding of *Day* was its recitation of the “law regarding ownership in place of oil and gas,” which, for the first time, the Court confirmed “correctly states the common law regarding the ownership of groundwater in place”:

In our state the landowner is regarded as having absolute title in severalty to the [groundwater] in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The [groundwater] beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the [groundwater] under his land and is accorded the usual remedies

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at 828.

<sup>382</sup> *Id.* at 823.

<sup>383</sup> *Id.* at 829 (quoting *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 286 S.W.3d 1, 14 (Tex. 2008)).

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at 830.

<sup>386</sup> *Id.* at 823, 826.

<sup>387</sup> *Id.* at 826.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904) (quoting *Pixley v. Clark*, 35 N.Y. 520, 527 (1866)).

<sup>392</sup> *Fact or Fiction* at 9, in UTCLE, TEXAS WATER LAW INSTITUTE (the author regrettably providing a prime example of being jurisprudentially pwned by a unanimous court). “Pwned” is a modern term that connotes being dominated). Urban Dictionary, Pwned, <http://www.urbandictionary.com/define.php?term=pwned> (last visited Mar. 3, 2013).

<sup>393</sup> *Day*, 369 S.W.3d at 826.

<sup>394</sup> *Id.* at 829 (quoting *Tex. Co. v. Daugherty*, 107 Tex. 226, 231–36, 239–41, 176 S.W. 717, 718–20, 722 (1915)).

<sup>395</sup> *Id.* (quoting *Daugherty*, 107 Tex. at 237, 176 S.W. at 720).

<sup>396</sup> *Id.*

against trespassers who appropriate the [groundwater] or destroy [its] market value.<sup>397</sup>

### Statutory analysis

The Court next acknowledged the Legislature's recognition the year before that a landowner owns as real property the groundwater beneath the surface of her land.<sup>398</sup> However, it noted that subsection (c)—which was largely carried over from the previous version of section 36.002<sup>399</sup> and provides that “[n]othing in this code shall be construed as granting the authority to deprive or divest a landowner . . . of the groundwater ownership and rights described this section”<sup>400</sup>—was in apparent conflict with subsection (e)—which allows that this “section does not affect the ability to regulate groundwater in any manner authorized for” 3 enumerated groundwater districts, including the EAA.<sup>401</sup> The Court resolved the tension between the 2 provisions by concluding that the terms, “deprive” and “divest” in subsection (c) do not encompass a “taking of property rights for which adequate compensation is constitutionally guaranteed.”<sup>402</sup>

### Constitutional analysis

For the first time in nearly 110 years, the Court recognized that “landowners do have a constitutionally compensable interest in groundwater,”<sup>403</sup> and concluded that the district court's grant of summary judgment in favor of the EAA was not constitutionally supported.<sup>404</sup>

Beginning its analysis regarding whether the EAA effected a taking of Day and McDaniel's vested property right to the groundwater beneath their land, the Court relied on its earlier decision in *Sheffield Development Co. v. City of Glenn Heights* in deferring to the U.S. Supreme Court's long line of takings jurisprudence.<sup>405</sup> While the Court clarified that a *Loretto* physi-

cal invasion of property was not at issue in *Day*, the Court posed the “interesting question” of whether regulations depriving an overlying “landowner of all access to groundwater—confiscating it, in effect—would fall into” the *Loretto* takings category.<sup>406</sup> The Court concluded that the summary-judgment record before it was inconclusive as to whether a *Lucas* category of deprivation of all economically beneficial use of property was implicated by the EAA's actions.<sup>407</sup> While allowing that the EAA's regulations had made it “much more expensive, if not impossible, to raise crops and graze cattle” on Day and McDaniel's land that effected the landowners a “significant, negative impact,” the Court expressed doubt that the EAA's actions had denied the landowners “all economically beneficial use” of the property.<sup>408</sup> The Court again noted the limitations in the record before it regarding whether the *Penn Central* factor considering a regulations interference with investment-backed expectations could be thoroughly analyzed.<sup>409</sup> Nonetheless, the Court observed that, while Day and McDaniel “should certainly have understood that the Edwards Aquifer could not supply [their] unlimited demands for water, we cannot say that [they] should necessarily have expected that [their] access to groundwater would be severely restricted.”<sup>410</sup>

The Court focused the remainder of its analysis on the third *Penn Central* factor that examines the nature of the regulation itself.<sup>411</sup>

While the Court found no reason to treat differently the ownership in place of groundwater as compared to oil and gas, it did distinguish the difference between the 2 when it comes to the purpose of regulation of each.<sup>412</sup> Specifically, the Court reasoned that, because oil and gas cannot be replenished, “land[-]surface area is an important metric in determining an owner's fair share.”<sup>413</sup> However, because the amount of groundwater beneath the surface is “constantly changing” due

<sup>397</sup> *Id.* at 831–32 (quoting *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 580, 210 S.W.2d 558, 561 (1948) (internal citations omitted)).

<sup>398</sup> *Id.* at 842 (citing TEXAS WATER CODE § 36.002(a)).

<sup>399</sup> S.B. 332 Enrolled Version Comparison.

<sup>400</sup> *Day*, 369 S.W.3d at 842–43 (quoting and citing TEXAS WATER CODE § 36.002(c)).

<sup>401</sup> *Id.* (quoting and citing TEXAS WATER CODE § 36.002(e)).

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* at 838.

<sup>404</sup> *Id.* at 843.

<sup>405</sup> 140 S.W.3d 660, 669–70 (Tex. 2004) (perhaps better (or also) known as the “Sophistic Miltonian Serbonian Bog” opinion, see 140 S.W.3d at 671). Therein, the Court reiterated that its takings analysis would follow the framework laid out by 3 landmark decisions of the U.S. Supreme Court. *Id.* at 838–39. Specifically, 2 categories of regulatory action exist that will generally be deemed *per se* takings: (1) where government requires an owner to suffer a permanent physical invasion of the owner's property (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)); and (2)

regulations that completely deprive an owner of “all economically beneficial use” of the owner's property (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)). *Id.* Absent regulatory action falling within these 2 categories, the Court recounted the 3 prongs of analysis first set forth in the U.S. Supreme Court's decision in *Penn Central Transportation Co. v. New York City*: (1) the economic impact on the claimant; (2) the interference of the regulation with investment-backed expectations; and (3) the nature of the regulation itself. *Id.* at 839–40 (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

<sup>406</sup> *Id.* at 839

<sup>407</sup> *Id.* at 839–40.

<sup>408</sup> *Id.* at 840.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 840–43.

<sup>412</sup> Compare *id.* at 829, with *id.* at 840–41.

<sup>413</sup> *Id.* at 840.

to recharge via rainfall, drainage, surface water underflow or depletion due to drought, “regulation that affords an owner a fair share of subsurface water must take into account factors other than surface area.”<sup>414</sup>

Not unlike Justice Maule nearly 170 years before, the Court distinguished the EAA’s reliance on a riparian rights surface water case as support for its argument that basing the issuance of permits based on historical use was sound because it recognizes a landowner’s investment in developing groundwater resources.<sup>415</sup> The key difference between the 2 regimes, the Court explained, was that the riparian rights governing surface water are usufructuary—giving their owner only a right of use—while groundwater is owned in place completely.<sup>416</sup> Therefore, “nonuse of groundwater conserves the resource,” but nonuse of appropriated surface water is “equivalent to waste.”<sup>417</sup>

Neither was the Court impressed with the EAA’s warning that allowing groundwater takings claims to proceed would be “nothing short of disastrous,”<sup>418</sup> noting that only 3 takings claims had been filed in the more than 15 years that the EAA had existed.<sup>419</sup> The Court continued, qualifying that, while “Chapter 36 allows districts to consider historical use in permitting groundwater production,” it “does not limit consideration to such use.”<sup>420</sup> A landowner, the Court held, “cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited.”<sup>421</sup> The resulting “requirement of compensation” for such a taking “may make the regulatory scheme more expensive, but it does not affect the regulations themselves or their goals for groundwater production.”<sup>422</sup> The Court concluded that the “Takings Clause ensures that the problems of a limited public resource—the water supply—are shared by the public, not foisted onto a few. We cannot know, of course, the extent to which the EAA’s fears will yet materialize, but the burden of the Takings Clause on government is no reason to excuse its applicability.”<sup>423</sup>

The Court ultimately affirmed the judgment of the San Antonio Court of Appeals, which itself had reversed the summary dismissal of Day and McDaniel’s claims on constitutional grounds and remanded the cause back to the trial court.<sup>424</sup> On remand, the EAA settled the dispute with Day and McDaniel, which prevented any substantive ruling on whether the EAA’s actions effected any taking at all.

## THE DAY AFTER TOMORROW

### What is the state of Texas groundwater law after *Day* and S.B. 332?

It now seems clear that Texas landowners “own[] the groundwater below the surface of the[ir] . . . land as real property,”<sup>425</sup> and that such groundwater is owned in place.<sup>426</sup>

Ownership in place, however, appears to have been distinguished from the traditional concept of absolute ownership. In one fell swoop, the Court recast its holding from *East* that “the owner of land is the absolute owner of the soil and of percolating water”<sup>427</sup>—of which the Court later said “adopted the absolute ownership doctrine of underground percolating waters”<sup>428</sup>—as meaning “only that a landowner is the absolute owner of groundwater flowing at the surface from its well.”<sup>429</sup> This holding from *Day*, in conjunction with *Coastal Oil’s* 2008 pronouncement that the concept underlying absolute ownership—that land ownership extends from the earth’s center up to the sky above<sup>430</sup>—“has no place in the modern world,”<sup>431</sup> likely indicates merely that groundwater is owned in place beneath an overlying landowner’s tract where it naturally occurs.<sup>432</sup>

The jurisprudential contours of the rule of capture as it relates to groundwater ownership have also now been identified more

<sup>414</sup> *Id.* at 841.

<sup>415</sup> Compare *id.*, with *Acton v. Blundell*, 152 Eng. Rep. 1223, 1226, 1228 (1843).

<sup>416</sup> *Day*, 369 S.W.3d at 842.

<sup>417</sup> *Id.* (quoting *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 445 (Tex. 1982)).

<sup>418</sup> *Id.* at 843.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at 843–44.

<sup>424</sup> *Id.* at 817–18.

<sup>425</sup> TEXAS WATER CODE § 36.002(a).

<sup>426</sup> *Day*, 369 S.W.3d at 831–32.

<sup>427</sup> *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904) (quoting *Pixley v. Clark*, 35 N.Y. 520, 527 (1866)).

<sup>428</sup> *Friendswood Dev. Co. v. Smith-S.W. Indus., Inc.*, 576 S.W.2d 21, 25 (Tex. 1978).

<sup>429</sup> *Day*, 369 S.W.3d at 826.

<sup>430</sup> BLACK’S LAW DICTIONARY 1712 (8th ed. 2004).

<sup>431</sup> *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 286 S.W.3d 1, 11, 11 n.30 (quoting *United States v. Causby*, 328 U.S. 256, 260–61 (1946)).

<sup>432</sup> Because, outside of Jules Verne, water is not generally thought to occur at the center of the Earth. See JULES VERNE, JOURNEY TO THE CENTER OF THE EARTH (Jenny Bak ed., Dover Publ’ns 2005) (1864).

clearly.<sup>433</sup> The *Day* Court confirmed that the “rule of capture determines title to [groundwater] that drains from property owned by one person onto property owned by another,” but “says nothing about the ownership of [groundwater] that has remained in place.”<sup>434</sup> The Court also added that the rule of capture, as announced in *East*, confers “ownership of . . . [ground]water . . . at the surface.”<sup>435</sup>

Finally, the Court observed that, while groundwater resources are undoubtedly subject to regulation under the Texas Constitution’s Conservation Amendment, such regulation is balanced against the Texas Constitution’s Takings Clause, regardless of whether required compensation makes a given regulatory scheme more costly.<sup>436</sup>

### What are the next seminal groundwater cases following behind *Day*?

As of the date of this publication, *Day* was handed down close to 3 years ago.<sup>437</sup> Since that time, only a handful of cases have cited to *Day*—still fewer of which did so in the majority opinion on the merits.<sup>438</sup> However, all the cases that have are now pending before the Texas Supreme Court.

#### *FPL Farming (2012)* and *Coyote Lake Ranch (2014)*

Just 7 months after the Texas Supreme Court issued its decision in *Day*, the Beaumont Court of Appeals relied upon the High Court’s holding that overlying landowners own the groundwater beneath their tract in allowing a common law trespass claim to stand regarding briny water affected by the subsurface migration of the appellee’s waste plume.<sup>439</sup> The Court granted for review in *FPL Farming Ltd. v. Environmental Processing Systems, L.C.*, on November 22, 2013, and the case was submitted to the Court after oral argument was heard on January 7, 2014.

The Court’s grant of review in *FPL Farming* and its grant of

oral argument strongly indicate that it has taken a keen interest in the subsurface trespass questions posed by the case.

During the summer of 2014 in its decision in *City of Lubbock v. Coyote Lake Ranch, LLC*, the Amarillo Court of Appeals examined whether the Texas Supreme Court’s decision in *Day* should be extended to apply the accommodation doctrine<sup>440</sup> to severed interests in groundwater.<sup>441</sup> The Amarillo court declined to read *Day* to support such an extension of the accommodation doctrine, deferring instead to the High Court or the Legislature to enact such a far-reaching modification to the law.<sup>442</sup>

The Texas Supreme Court will have the chance to do just that as *Coyote Lake Ranch, LLC* filed its petition for review on September 24, 2014.

#### *Bragg II (2013)*

The final case pending before the High Court is one that stems from an old dispute that has followed a tortured jurisprudential path.

#### *Bragg I (2002)*

In 1996, Glenn and JoLynn Bragg applied to the EAA for an initial regular permit to withdraw water from the Edwards Aquifer to irrigate 2 pecan orchards—the “Home Place Orchard” and the “D’Hanis Orchard.”<sup>443</sup> After the Braggs applied for permits allowing the withdrawal of 228.85 acre-feet annually to irrigate the Home Place Orchard and 193.12 acre-feet annually to irrigate the D’Hanis Orchard, the EAA—after examining the documented historical use in both orchards—granted the Braggs a permit to withdraw only 120.2 acre-feet annually in the Home Place Orchard but denied their permit entirely as to the D’Hanis Orchard.<sup>444</sup>

The Braggs first challenged the EAA’s actions asserting that the EAA had to first prepare a “takings impact assessment” (TIA) under the Private Real Property Rights Preservation Act (PRPRPA) before either adopting aquifer-wide permitting rules

<sup>433</sup> The rule of capture, as it applies to oil and gas, was first described as a property right in *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935).

<sup>434</sup> *Id.* at 829 (quoting *Coastal Oil*, 286 S.W.3d at 14 and expressly applying the natural gas holding from *Coastal Oil* to groundwater).

<sup>435</sup> *Id.* at 826.

<sup>436</sup> *Id.* at 843.

<sup>437</sup> *Id.* at 814 (noting the opinion was issued on February 24, 2012).

<sup>438</sup> See *City of Lubbock v. Coyote Lake Ranch, LLC*, No. 07-14-00006-CV, 2014 WL 2810419, at \*5–6 (Tex. App.—Amarillo July 10, 2014, pet. filed); *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 126 (Tex. App.—San Antonio 2013, pet. filed) [hereinafter *Bragg II*]; *FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 383 S.W.3d 274, 280–81 (Tex. App.—Beaumont 2012, pet. granted).

<sup>439</sup> *FPL Farming*, 383 S.W.3d at 280–81 (citing *Day*, 369 S.W.3d at 832).

<sup>440</sup> The “accommodation doctrine” has been described as a relationship between the surface owner and the mineral owner:

[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under established practices in the industry there are alternatives available to the lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.

*Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971).

<sup>441</sup> *Coyote Lake Ranch*, 2014 WL 2810419, at \*5–6.

<sup>442</sup> *Id.* at \*7.

<sup>443</sup> *Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729, 730–32 (Tex. 2002) [hereinafter *Bragg I*].

<sup>444</sup> *Bragg II*, 421 S.W.3d 118, 126 (Tex. App.—San Antonio 2013, pet. filed).

or acting upon individual permit applications.<sup>445</sup> More than a decade ago in its 2002 decision in *Bragg v. Edwards Aquifer Authority*, the Texas Supreme Court resolved this aspect of the dispute, holding that the EAA's adoption of well-permitting rules was excepted from the PRPRPA's requirement to prepare a TIA because the EAA's rules were promulgated pursuant to its statutory authority to prevent waste or protect the rights of owners of interest in groundwater.<sup>446</sup> The Court disposed of the second question by relying on the plain language of the PRPRPA itself, which did not require TIAs for enforcement of a governmental action through the use of permitting.<sup>447</sup>

### *Bragg II* reaches the Texas Supreme Court

The Braggs then brought civil rights and takings claims against the EAA in 2006, which were removed to federal court.<sup>448</sup> The federal district court dismissed the Braggs' civil rights claims and remanded the takings claims back to state court.<sup>449</sup> After the EAA and the Braggs both filed competing summary judgment motions, the trial court granted partial summary judgment in favor of the Braggs, finding that the EAA's partial grant of the permit for the Home Place Orchard and denial of a permit for the D'Hanis Orchard constituted a regulatory taking for which the Braggs were entitled to \$597,575.00 and \$134,918.40, respectively.<sup>450</sup>

On appeal before the San Antonio Court of Appeals, the EAA challenged the judgment on several grounds. First, it asserted that, because the trial court issued a conclusion of law holding that the EAA "acted solely as mandated by the Act and without discretion" in adjudicating the Braggs' permits, any takings liability rests with the State and not the EAA.<sup>451</sup> Next, the EAA disputed the trial court's finding that the EAA's actions on the Braggs' permits constituted an impermissible taking.<sup>452</sup> Last, the EAA challenged the method by which the trial court calculated the compensation due to the Braggs as a result of the EAA's regulatory taking.<sup>453</sup>

In its 2013 decision in *Edwards Aquifer Authority v. Bragg (Bragg II)*, the San Antonio Court noted the issue was one of first impression, but considering that the Act expressly provides

for the payment of "just compensation . . . if implementation of [the Act] causes a taking of private property," the Water Code specifically allows for suits against water districts, and the Texas Supreme Court's caution that the "burden of the Takings Clause on government is no reason to excuse its applicability," the court concluded the EAA was the proper party to the Braggs' takings lawsuit.<sup>454</sup>

The court next examined the EAA's regulatory actions in light of the *Penn Central* 3-factor test as *Day* directs.<sup>455</sup> Because the evidence established that the Braggs invested more than \$2 million in their orchard operations, reduced the number of trees by 30% to 50%, and were rendered unable to raise a commercially viable crop in their orchards with their own permitted water, the court found that *Penn Central's* first factor regarding the degree of economic impact on the Braggs was severe, significant, and substantial enough to weigh "heavily in favor of a finding of a compensable taking of both orchards."<sup>456</sup> The court also found that *Penn Central's* second factor concerning the Braggs' investment-backed expectations militated "heavily in favor" of finding the EAA's actions constituted a compensable taking.<sup>457</sup> Specifically, the court reasoned that, considering "Mr. Bragg's extensive understanding of pecan crops, the Braggs' understanding that they owned the water under their land, and that no regulatory entity existed that governed the use of their water when they purchased the property as an existing pecan orchard," the Braggs' investment-backed expectations for their orchard operations were reasonable.<sup>458</sup> Finally, the court found that the third *Penn Central* factor regarding the nature of the regulation weighed "heavily against" a compensable-taking finding because of the unique importance of the Act's stated purpose of "protect[ing] terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state."<sup>459</sup> On balance, the court held that the record supported the conclusion that the EAA's permitting system imposed under the Act effected a regulatory taking of both the Home Place Orchard and D'Hanis Orchard.<sup>460</sup>

Turning to the final issue regarding the proper method for calculating compensation due the Braggs for the EAA's regulatory taking, the court disagreed with the trial court's approach

<sup>445</sup> *Bragg I*, 71 S.W.3d at 734, 737.

<sup>446</sup> *Id.* at 735–36.

<sup>447</sup> *Id.* at 737.

<sup>448</sup> *Bragg II*, 421 S.W.3d at 126; see generally *Bragg v. Edwards Aquifer Auth.*, No. SA-06-CV—1129-XR, 2008 WL 819930 (W.D. Tex. Mar. 25, 2008) [hereinafter *Bragg 1.5*].

<sup>449</sup> *Bragg II*, 421 S.W.3d at 126; see generally *Bragg 1.5*, 2008 WL 819930.

<sup>450</sup> *Bragg II*, 421 S.W.3d at 126.

<sup>451</sup> *Id.* at 126–27.

<sup>452</sup> *Id.* at 137.

<sup>453</sup> *Id.* at 146–47.

<sup>454</sup> *Id.* at 127, 130–31 (citing TEXAS WATER CODE § 36.251, § 1.07 of the Act, and *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 843–44 (Tex. 2012)).

<sup>455</sup> *Id.* at 138–146.

<sup>456</sup> *Id.* at 139–41.

<sup>457</sup> *Id.* at 142–44.

<sup>458</sup> *Id.* at 144.

<sup>459</sup> *Id.* at 143–45 (citing § 1.01 of the Act).

<sup>460</sup> *Id.* at 146.

to valuing the compensation owed for both orchards.<sup>461</sup> The court reasoned that, because the water beneath the Braggs' land is not the source of their business, but instead merely used to benefit the business in which they are engaged, just compensation should be "determined by reference to the highest and best use of the properties," which the evidence showed was as commercial pecan orchards.<sup>462</sup> Therefore, the court concluded, the Braggs are entitled to "compensation for the amount by which their property was impaired by [the EAA's] taking."<sup>463</sup> Pursuant to this holding the court remanded the case back to the trial court to determine:

[T]he compensation owed on[: (1)] the Home Place Orchard as the difference between the value of the land as a commercial-grade pecan orchard with unlimited access to Edwards Aquifer water immediately before implementation of the Act in 2005 and the value of the land as a commercial-grade pecan orchard with access to Edwards Aquifer water limited to 120.2 acre-feet of water immediately after implementation of the Act in 2005 ...[; and (2)] the D'Hanis Orchard as the difference between the value of the land as a commercial-grade pecan orchard with unlimited access to Edwards Aquifer water immediately before implementation of the Act in 2004 and the value of the land as a commercial-grade pecan orchard with no access to Edwards Aquifer water immediately after implementation of the Act in 2004.<sup>464</sup>

Both the EAA and the Braggs have filed petitions for review before the Texas Supreme Court in the case, and the Court ordered merits briefing in the matter in October 2014.

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<sup>461</sup> *Id.* at 152–53.

<sup>462</sup> *Id.* at 151.

<sup>463</sup> *Id.* at 152.

<sup>464</sup> *Id.* at 152–53.

## CONCLUSION

As contentious and enduring as the groundwater ownership and use debates have been here in Texas for the past 110 years since *East*, the roots of the controversy have proved to be as ancient as civilization's need for water itself. It is perhaps little wonder that the first serious and systematic codification of Western law contained the juristical precepts opining on the legal use and ownership of groundwater.

Although every decision by the Court over the last century and each act enrolled by the Legislature over the past 70 years have proven to be crucial junctures redirecting the juridic progression of groundwater law in Texas, no doubt *East* and *Day* bookend the heart of the debate—whether an overlying landowner owns the groundwater in place beneath. The next generation of disputes will bring into focus the regulatory mechanics and logistics broadly outlined in *Day*.

Of these coming cases, only *Bragg II* seems to present squarely so many of the questions left unanswered by *Day*—namely the application of *Day's* non-*per se* takings framework under *Penn Central* and the appropriate calculation by which just compensation for taken groundwater interests should be determined. Because of this, it has the potential to be the next seminal groundwater case in *East* and *Day's* jurisprudential line of succession.