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Groundwater Ownership in Place: Fact or Fiction?

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GROUNDWATER OWNERSHIP IN PLACE: FACT OR FICTION?

I. INTRODUCTION

Just shy of the year 2009, and ten and a half decades after Texas first allied itself with the legal framework governing groundwater adopted by the British Exchequer Chamber Court in *Acton v. Blundell*,¹ water lawyers in Texas still disagree whether a Texas surface owner actually owns the water beneath the overlying tract, or if a surface owner is instead merely granted tortious immunity from the ire of neighboring landowners' if he or she pumps that water to the surface.

Is it any wonder Texas's own resident troubadour, Taoist sage,² and biodiesel purveyor predicted the current (and seemingly perpetual) state of debate surrounding Texas groundwater law in his 1974 release, "Phases and Stages," wherein he wrote:

Phases and stages
Circles and cycles
And scenes that
We've all seen before

Let me tell you some more³

This long-percolating⁴ debate reduces down to the basic question of whether Texas groundwater in place (in the soil) is owned by the overlying landowner. It has been

¹ *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 149, 81 S.W. 279, 280 (1904) (quoting *Acton*, 152 Eng. Rep. 1223, 1235 (1843)).

² See WILLIE NELSON & TURK PIPKIN, *THE TAO OF WILLIE: A GUIDE TO THE HAPPINESS IN YOUR HEART* (Gotham 2006).

³ WILLIE NELSON, *Phases and Stages, on PHASES AND STAGES* (Atlantic Records 1974).

⁴ My apologies, I couldn't resist.

stated that the "Texas Supreme Court has never addressed th[is] question."⁵ This paper aims to show that not only has the Texas Supreme Court addressed the question squarely and repeatedly over the past century, but so have the courts and legal authorities upon which Texas relied in doing so.

II. THE "LAW OF CAPTURE ... IS A PROPERTY RIGHT"⁶

Opponents of groundwater ownership in place are quick to encourage casting aside "the ancient percolating-water doctrine expressed in [*Houston & Tex. Cent. Ry. Co. v. East* and repeated in a century of groundwater case law," in favor of more modern and less primitive property rationales.⁷ This is a problematic approach for two reasons: (1) it misunderstands or ignores the original meaning of the right—as explicated by the Roman, British, and Texas jurists who conceived it; and (2) it ignores the subsequent property rights that have developed under the reasonable expectation of ownership in place.⁸

A. The Theory of Nonliability for Drainage is Derivative of the Theory of Absolute Ownership

The recent trend among some commentators and jurists to recast centuries of legal

⁵ Susana Elena Canseco, *Landowner's Rights in Texas Groundwater: How and Why Texas Courts Should Determine Landowners Do Not Own Groundwater in Place*, 60 BAYLOR L. REV. 491, 494 (Spring 2008).

⁶ *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935); see also *Corzelius v. Harrell*, 143 Tex. 509, 514, 186 S.W.2d 961, 964 (1945).

⁷ See Canseco, *supra* note 5, at 516.

⁸ See *Groesbeck v. Golden*, 7 S.W. 362, 365 (Tex. 1887).

treatises and opinions regarding the rule of capture and absolute ownership doctrines as merely “tort questions with property-laced terminology” is to willfully pretend generations of courts did not really mean what they expressly held.⁹ Moreover, this wholesale discounting of the jurisprudential record requires labeling every prior decision that links its nonliability holding to a property-ownership rationale as errant or sloppy dicta at best,¹⁰ or the meaningless recitation of “magic words about property rights in groundwater in place” at worst.¹¹

In reality, from its very first conception, the nonliability aspects of the rule of capture have always been tied to and derivative of ownership of the resource itself. In light of the spate of revisionist jurisprudence coming into favor of late, reviewing the genesis of the rule of capture and absolute ownership is necessary.

1. Preliminary Nomenclatural Confusion

Adding fuel to and perhaps prolonging this debate is the inherent confusion generated by the seemingly opposing terms, “rule of capture” and “absolute ownership.”¹² The

word “capture” implies acquiring ownership of something through the exertion of dominion over it,¹³ and “absolute ownership” connotes a “super-right [of ownership] subject to no limitations whatever.”¹⁴ Neither assumption is strictly accurate however.¹⁵

This terminological phenomenon is hardly new, however, because tort and property concepts—as they relate to groundwater—have been interrelated for almost 1,500 years.¹⁶ Indeed, even the very first formulation commonly attributed as the

These Years, 37 TEX. TECH L. REV. 1, 53 (Winter 2004).

¹³ See Drummond et al., *supra* note 12, at 54; THE NEW OXFORD AMERICAN DICTIONARY 257 (2001).

¹⁴ See Johnson, *supra* note 9, at 1288.

¹⁵ See, e.g., Drummond et al., *supra* note 12, at 54-57 (detailing how the law historically governing the seizing of wild game—*feroe naturoe*—was not an antecedent of or an influence upon the development of the rule of capture).

¹⁶ On December 30, 533, the *Digest of Justinian* (the “*Digest*”) was issued, which was expressly incorporated into the common law of England around the middle of the thirteenth century, and upon which Spanish mainland legal authorities based their treatises. See Drummond et al., *supra* note 12, at 31 n.196; Harbert Davenport & J. T. Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande*, 8 BAYLOR L. REV. 138, 173 (1956). The *Digest* incorporated both an earlier Roman law compendium called the *Theodosian Code* and the scattered legal writings of Roman jurists (akin to modern-day law professors, except that contemporary Roman judges often accorded precedential weight to these juristical expositions). Drummond et al., *supra* note 12, at 19-21. Exemplifying this conceptual adhesion is the *Digest’s* inclusion of both an imperial edict issued by the Roman Emperor Augustus in 397 A.D., expressly linking “water rights” and “long ownership,” as well as the writings of several jurists regarding the nonliability of a landowner for rightful, non-defective work performed on the landowner’s tract. See Drummond et al., *supra* note 12, at 22-29; CODE THEOD. 15.2.7; W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 39-41 (Peter Stein ed., 3d ed. 1963).

⁹ See Canseco, *supra* note 5, at 495 (“none of these cases carefully delineates the boundaries between tort and property rules; most cases address tort questions with property-laced terminology”); Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY’S L.J. 1281, 1288-93 (1986).

¹⁰ See Canseco, *supra* note 5, at 524 (“East and some of its progeny’s “absolute ownership” language probably evinces a belief that landowners own groundwater in place, but resolution of the question was never necessary to Texas groundwater cases’ holdings.”).

¹¹ *Id.* at 505.

¹² *Id.* at 495; Dylan O. Drummond, Lynn Ray Sherman, and Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All*

theoretical root of the rule of capture by the Roman jurist, Marcus Claudius Marcellus, combined property ownership and tortious immunity concepts.¹⁷

The concept of absolute ownership has long been described by the Latin maxim, *cujus est solum ejus est usque ad coelum et ad infernos*, which is translated to mean “[w]hoever owns the soil owns everything up to the sky and down to the depths.”¹⁸ Similarly, the right of capture is perhaps best summarized by another Latin phrase, *damnum absque injuria*, roughly translated as “damage without injury.”¹⁹

a. The Rule of Capture

The rule of capture, in its original context, is most accurately described by Marcellus, who wrote 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.²⁰

¹⁷ DIG. 39.3.1.12 (Ulpian, Ad Edictum 53) (as translated in 3 THE DIGEST OF JUSTINIAN 396 (Theodor Mommsen & Paul Krueger trans., Alan Watson ed., 1985)) (stating “no 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” (emphasis added)).

¹⁸ BLACK’S LAW DICTIONARY 1712 (8th ed. 2004).

¹⁹ See *id.* at 420, 801; see also *Acton v. Blundell*, 152 Eng. Rep. 1223, 1230 (1843). In 1999, the Texas Supreme Court defined *damnum absque injuria* as meaning, “an injury without a remedy,” but as is shown, *infra*, this translation is incorrect. See *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999). The basis of this maxim derives instead from the absence of a compensable injury despite the infliction of damages.

²⁰ DIG. 39.3.1.12 (Ulpian, Ad Edictum 53).

The British Exchequer Chamber Court in *Acton v. Blundell*,²¹ while expressly relying upon Marcellus’s writing, expanded upon his formulation somewhat, but muddied the waters as well.²² Therein, Chief Justice Tindall reframed the rule of capture as allowing:

[T]he person who owns the surface [to] 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 neighbor’s well, this inconvenience to this neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.²³

The *Acton* court’s usage of the Latin maxim, *damnum absque injuria*, to summarize the rule of capture was the first instance of its association with groundwater law.

While the Texas Supreme Court in *Houston & Texas Central Railway Co. v. East* expressly relied upon the *Acton* court’s formulation of the rule of capture, the Court did not actually coin the term.²⁴ In fact, nowhere in *East* is the word, “capture,” even mentioned.²⁵ The first Texas court to do so was the Texas Supreme Court in a decision handed down thirty years after *East*.²⁶ In *Brown v. Humble Oil & Refining Co.*, the Court not only minted the new term, “law of

²¹ 152 Eng. Rep. 1223, 1235 (1843).

²² My apologies again.

²³ *Acton*, 152 Eng. Rep. at 1235.

²⁴ *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 149, 81 S.W. 279, 280 (1904).

²⁵ See *id.*

²⁶ *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935).

capture,” it also unambiguously declared it “a property right.”²⁷

b. Absolute Ownership

The derivation of the term, “absolute ownership”—at least as it applies to groundwater law—is a little more diffuse than is the rule of capture, but its meaning has been clear from its very first usage.

In March 1836, the same month that some 190 militiamen were slaughtered in an old, crumbling Spanish mission just outside of San Antonio de Bexar,²⁸ the Massachusetts Supreme Court issued its opinion in *Greenleaf v. Francis*.²⁹ In affirming a jury verdict dismissing a trespass action for the diversion of well water, the *Greenleaf* court based its reasoning, in part, on the defendant landowner’s “*absolute dominion* of the soil, extending upwards and below the surface so far as [the landowner] pleases.”³⁰

Forty years later in *Pixley v. Clark*, the supreme court of New York (misleadingly dubbed the “Court of Appeals”) formulated the most succinct version of the concept of absolute ownership of groundwater, basing its holding on the judicial recognition that “the owner of the land is the *absolute owner* of the soil and of *percolating water*, which is a part of, and not different from, the soil.”³¹

The term debuted in Texas jurisprudence when Justice Williams quoted the “absolute

owner” passage from *Pixley* in *East*.³² In that sense, *East* can be rightfully cited as the first Texas court to adopt the absolute ownership doctrine.³³ Indeed, in 1978 the Texas Supreme Court agreed, describing that, in *East*, “this Court *adopted the absolute ownership doctrine of underground percolating waters*.”³⁴ Just five years after the Court issued *Friendswood*, the future Dean of the Baylor Law School wrote for a unanimous Court in *City of Sherman v. Public Utility Commission of Texas*, and again cited *East* as adopting the “absolute ownership theory regarding groundwater.”³⁵

2. Origins of Ownership in Place

Much is made by ownership-in-place opponents of the tort immunity secured by the rule of capture. However, the question is never asked, for what reason would such immunity be extended someone? What quality or attribute of the groundwater pumper entitles that pumper to such an extraordinary privilege?

From its very first utterance before the turn of the *first* millennium, this immunity from liability to neighboring landowners has been tied to *ownership* of the resource.³⁶

Sometime before 45 B.C., Marcellus drafted his now-famous *responsa*, included in the *Digest of Justinian* (the “*Digest*”) and upon

²⁷ *Id.*

²⁸ Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of Its Defenders*, 36 S.W. HIST. Q. 251, 265 (April 1933); Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of Its Defenders*, 37 S.W. HIST. Q. 237, 237-38 (April 1934).

²⁹ 35 Mass. (18 Pick.) 117 (1836).

³⁰ *Id.* at 122 (emphasis added).

³¹ *Pixley v. Clark*, 35 N.Y. 520, 527 (1866) (emphasis added).

³² *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904) (quoting *Pixley*, 35 N.Y. at 527).

³³ *But see contra* Canseco, *supra* note 5, at 504 (“*East* ... never intended to establish groundwater ownership in place.”).

³⁴ *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 25 (Tex. 1978) (emphasis added).

³⁵ *City of Sherman v. Pub. Util. Comm’n*, 643 S.W.2d 681, 686 (Tex. 1983).

³⁶ Drummond et al., *supra* note 12, at 22-29.

which the *Acton* court based its holding.³⁷ Marcellus wrote that “no 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.”³⁸

Clearly, what Marcellus theorized was not some unattached super-right of tortious immunity, nor was it even qualified by the manner in which the digging was done (negligence, etc.). Instead, Marcellus expressly tied the nonliability of someone who diverts the water supply of a neighbor to ownership of the land upon which one digs. More specifically, the reason why no action could lie against the digger was that he was digging in his own land and using what he found there for his own uses.

While “magic words” were certainly used in antiquity, it is unclear if the concept of “dicta” had yet been established, making it likely that Marcellus not only chose his words carefully but that he meant what he said as well.

The conceptual anchor of ownership in place is supported by other contemporary jurists included in the *Digest* as well. The man whose name was almost synonymous with Roman law during the Middle Ages and whose writings form the basis for between one-third to one-half of the *Digest* was Ulpian.³⁹ Building upon Marcellus’s

writing, Ulpian wrote that a landowner who dug a well in the landowner’s house that “cut off the sources of [a neighbor’s] well” was not liable because the landowner had not caused any *injury*.⁴⁰

Not only was this *responsa* notable in that it again linked nonliability for groundwater torts to ownership of the soil, it may also be the first and almost certainly the most influential foundation for the concept of *damnum absque injuria*. Although a neighboring landowner was certainly damaged by the digging landowner’s use of his own groundwater, the neighboring landowner was not compensably injured.

Another early first century jurist, Proculus,⁴¹ used groundwater as an example for his holding that “when somebody carries out work legally *on his own property ... no action is available* to [the neighboring landowner].”⁴² Again, the concept of immunity from liability to a neighboring landowner was derived from the ownership of the soil.

In fact, nowhere in the *Digest* does one find an example of such sweeping immunity from tort liability granted to anyone absent the keystone element of ownership in place.

³⁷ *Acton v. Blundell*, 152 Eng. Rep. 1223, 1235 (1843) (quoting DIG. 39.3.1.12 (Ulpian, Ad Edictum 53)).

³⁸ DIG. 39.3.1.12 (Ulpian, Ad Edictum 53) (as translated in 3 THE DIGEST OF JUSTINIAN 396 (Theodor Mommsen & Paul Krueger trans., Alan Watson ed., 1985)) (emphasis added).

³⁹ See BUCKLAND, *supra* note 16, at 32-33 (stating that Ulpian’s edicts—he served as the *Praefectus Praetorio* for a time just before his murder at the hands of his own guards and, therefore, possessed the ability to issue edicts—accounted for nearly one third of Justinian’s *Digest*); ALAN WATSON, THE LAW OF

THE ANCIENT ROMANS 93 (1970) (recounting that “about one half of the *Digest* comes from [Ulpian]”).

⁴⁰ DIG. 39.2.24.12 (Ulpian, Ad Edictum 81) (emphasis added).

⁴¹ Proculus’s writings were held in such high regard around 27 A.D., that one of the dominant schools of judicial thought in Rome was named after him. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI-KENT L. REV. 1539, 1539-40 (1995).

⁴² DIG. 39.2.26 (Ulpian, Ad Edictum 81) (emphasis added).

3. *Acton*'s confirmation of ownership in place

As endlessly fascinating as 1,500 year-old legal scholars and their “dicta” are to some (or one) lawyer(s) with an apparent abundance of free time on their hands, why should Texas water lawyers in 2008 A.D. give a whit what Roman jurists in 533 A.D. thought, wrote, or did?

When the British court in *Acton* handed down its landmark opinion in 1843, the legal treatises and textbooks sitting on the justices’ shelves, studied by the court and the lawyers in law school, and quoted to the court during *Acton*’s oral argument were all drawn from, based upon, or in fact were, the *Digest*.⁴³ Compare the seminal passage from *Acton*, where the court holds:

[T]he 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*,

⁴³ The *Digest* and its derivative works were relied upon by most of Europe through the nineteenth century. See, e.g., JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER (William Strahan trans., Luther S. Cushing ed. 1980) (1850); JOHN AYLIFFE, A NEW PANDECT OF ROMAN CIVIL LAW, AS ANCIENTLY ESTABLISHED IN THAT EMPIRE AND NOW RECEIVED AND PRACTICED IN MOST EUROPEAN NATIONS (Tho. Osborne, 1734); see also Drummond et al., *supra* note 12, at 31 n.196 (detailing how the *Digest* and its derivatives formed the basis for Spanish mainland law). The *Digest* was also distilled into a first-year casebook of sorts for law students, called the *Institutes of Justinian*. See BUCKLAND, *supra* note 16, at 28, 40-41; WATSON, *supra* note 39, at 17, 92-93; see also *Acton v. Blundell*, 152 Eng. Rep. 1223, 1228-30, 1234 (1843) (documenting the exchanges at oral argument referring repeatedly to the *Digest*, and Chief Justice Tindall’s comment that “the groundwork of the municipal law of most of the countries of Europe” is based upon Roman law—which was, for all practical purposes, codified in the *Digest*).

he intercepts or drains off the water collected from underground springs in his neighbour’s well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action,⁴⁴

with Ulpian’s writing that a person who “dig[s] a well in [their] house and by doing so ... cut[s] off the sources of [a neighbor’s] well” has “not ... caused [the neighbor] injury,” because “the matter is one in which [the person] was exercising [their] rights,”⁴⁵ and Proculus’s holding that “when somebody carries out work legally on his own property ... no action is available to [the neighboring landowner].”⁴⁶

It is plain that the very passage most learned ownership-in-place opponents would point to as the genesis of the rule of capture’s tortious immunity for drainage is both drawn directly from the *Digest* and incorporates the foundation of groundwater property rights established by Roman jurists.⁴⁷

In case there was any confusion regarding the nature of the right an overlying landowner had to the water beneath the surface tract, the *Acton* court went out of its way to describe what the interest was that was so substantial as to give a well-digger immunity from his neighbors’ displeasure. Just after quoting to Marcellus, the *Acton* court held:

⁴⁴ *Acton*, 152 Eng. Rep. at 1235 (emphasis added).

⁴⁵ DIG. 39.2.24.12 (Ulpian, Ad Edictum 81) (emphasis added).

⁴⁶ DIG. 39.2.26 (Ulpian, Ad Edictum 81) (emphasis added).

⁴⁷ *Acton*, 152 Eng. Rep. at 1235 (specifically referring to “Roman lawyers” other than Marcellus upon which the court based its decision).

[W]e think the present case, for the reasons above given [(referring to Marcellus’s passage from the *Digest*)], is not 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 his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour’s well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.⁴⁸

The order in which the court structured this holding is revealing. The *Acton* court did not begin the reasoning for its holding by stating that anyone who digs a well non-negligently is not liable to those damaged as a result of the groundwater withdrawal. Instead the court specifically ties the immunity precept taken from Ulpian and Proculus—*damnum absque injuria*—to ownership of the groundwater.⁴⁹ “[I]n the exercise of such [a] right”—held by the “person who owns the surface” and who is given “all that lies beneath his surface ... whether it is solid rock, or porous ground, ... or part soil, part water”—to “dig therein,” the surface owner cannot be liable

⁴⁸ *Id.* (emphasis added).

⁴⁹ *Id.*

to an adjoining landowner whose tract is drained.⁵⁰

A surface owner has immunity from drainage damages *because* he or she owns the groundwater in place.⁵¹ Tortious immunity for drainage is *derived* from ownership of the groundwater in place.⁵²

Ownership-in-place opponents would have Texas landowners believe that every word quoted above from *Acton*—other than “*damnum absque injuria*”—are extraneous “magic words” not “necessary” to the court’s holding. Such a construction is, of course, utter twaddle.

To be sure, tortious immunity from suit was not the only holding by the *Acton* court, but was instead only the derivative second half of the larger rule. Those who would call the rule of capture only a “rule of non-liability” or a “tort-law tagalong” to absolute ownership fundamentally misunderstand the nature of the foundational law upon which Texas has based one hundred years of property rights expectations.⁵³

4. Courts contemporaneous to *Acton* confirm ownership in place

Perhaps the *Acton* court overreached. Maybe they misinterpreted or bastardized the truly tort-based concepts the Roman jurists were really expounding upon. Perhaps then, contemporaneous courts in other countries that relied upon the same *Digest*-related materials as did *Acton* would be a fruitful source to examine.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See, e.g., Canseco, *supra* note 5, at 515, 517.

One such case was handed down by the Massachusetts Supreme Court in 1836, some nine years before *Acton*.⁵⁴ In *Greenleaf v. Francis*, the court relied upon both British and French treatises—each of which were themselves translations of and based upon the *Digest*.⁵⁵ In its discussion preceding its actual opinion, the *Greenleaf* court explained, “[a]ny person may dig a well on his own land, and if in so doing he accidentally and undesignedly drains another well, he is not answerable therefore.”⁵⁶ This passage is strikingly similar to that enunciated by *Acton*,⁵⁷ and no doubt is so because both courts were drawing from the same foundational texts. Lest there be any doubt as to the court’s actual holding and reasoning, Justice Putnam clarified that “[e]very one has the liberty of doing in his own ground whatsoever he pleases, even although it should occasion to his neighbor some other sort of inconvenience.”⁵⁸ The court continued and issued the first jurisprudential statement approximating the doctrine of absolute ownership, explaining that “nothing in the case at bar” involving well interference due to drainage by the defendants:

[L]imits or restrains the owners of these estates, severally, from having the *absolute dominion of the soil*, extending upwards and below

the surface so far as each pleases.”⁵⁹

Finally, the court concluded by holding that, because “the defendant dug his well in that part of his own ground ... [i]t was a lawful act, and although it may have been prejudicial to the plaintiff, it is *damnum absque injuria*.”⁶⁰

Again, a court construing the rights of adjoining landowners to the groundwater beneath their tracts expressly found that, because the landowner owned the groundwater in the soil, the tenet of *damnum absque injuria* applied. Here, no derisive label of unnecessary dicta can be affixed to the *Greenleaf* court’s opinion, because it is the court’s actual holding sentence which makes clear that, because the defendant owned the ground (i.e., the soil and the water) upon which he dug the offending well, it was a lawful act that rendered his adjoining neighbor damaged but legally uninjured.⁶¹

4. *East* confirms ownership in place

Up till now, this paper has focused on very old law in far away lands that has no direct precedential bearing⁶²—save for that pesky matter of the Texas Legislature’s adoption of the common law of England in 1840⁶³—

⁵⁴ Compare *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117 (1836), with *Acton*, 152 Eng. Rep. at 1223.

⁵⁵ *Greenleaf*, 35 Mass. (18 Pick.) at 122 (citing to AYLIFFE, *supra* note 43, at 307, and DOMAT, *supra* note 43, § 1047); see also Drummond et al., *supra* note 12, at 39.

⁵⁶ *Greenleaf*, 35 Mass. (18 Pick) at 121 (emphasis added).

⁵⁷ Compare *id.*, with *Acton*, 152 Eng. Rep. at 1235.

⁵⁸ *Greenleaf*, 35 Mass. (18 Pick), at 121 (quoting DOMAT, *supra* note 52, § 1047) (emphasis added).

⁵⁹ *Id.* at 122 (emphasis added).

⁶⁰ *Id.* at 123.

⁶¹ *Id.*

⁶² For a tedious exposition upon the precedential weight accorded Texas civil authority, please see—at your own boredom-inducing peril—Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89 (Winter 2008) [hereinafter *Citation Writ Large*].

⁶³ See 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) (recodified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002))

upon modern-day Texas courts. Which brings us to the Texas Supreme Court's groundbreaking⁶⁴ decision in *East*.⁶⁵

Let's begin with the precise language Justice Frank Williams⁶⁶ used in writing the majority's opinion in June 1904. At the outset of the opinion, the Court referred to the near unanimity with which U.S. and U.K. courts relied upon *Acton* as the precedential root of groundwater ownership law.⁶⁷ The Court next quoted to *Acton*'s recitation of a surface owner's property right to groundwater in place beneath the surface tract as the basis for the protections of *damnum absque injuria*.⁶⁸ A few pages later, the Court went out of its way to quote a passage from the supreme court of New York in its 1866 decision *Pixley v. Clark*.⁶⁹ For a decision that is purported by some to have not hinged upon the ownership of groundwater in place, the following language purposefully included in *East* is an odd choice indeed:

“An owner of soil may divert percolating water, consume or cut it off, with impugny. It is the *same*

(adopting and recognizing the common law of England).

⁶⁴ This is getting ridiculous, my apologies again.

⁶⁵ *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904).

⁶⁶ Justice Williams served as a justice on both the Austin and Galveston Courts of Civil Appeal before being elevated to the Texas Supreme Court by Governor Sayers in 1899. JUSTICES OF TEXAS 1836-1986: FRANK ALVAN WILLIAMS (1851-1945), available at

<http://tarlton.law.utexas.edu/justices/spct/williams.html> (last visited Nov. 23, 2008). Justice Williams served the Court for the next twelve years until he resigned and returned to private practice. *Id.*

⁶⁷ *East*, 98 Tex. at 149, 81 S.W. at 280 (citing *Acton v. Blundell*, 152 Eng. Rep. 1223 (1843)).

⁶⁸ *Id.*

⁶⁹ *Id.* at 150, 281.

*as land, and cannot be 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.*⁷⁰

For those of you scoring at home, the above-italicized portions of the quote from *East* are the “magic words” not “necessary” to the Court's holding. If this is indeed the case as tort enthusiasts would have Texas landowners believe, why would Justice Williams and the rest of the unanimous Court have included this “property-laced terminology?” If this language does not “explicitly address[] whether landowners own groundwater in place,” the author is at a loss to describe what language would suffice.⁷¹

It has been correctly stated that *East*'s effect was only to limit the liability of the petitioner, but what often times is conveniently left out of the discussion is upon what basis the *East* Court—and *Acton* for that matter—reasoned this immunity from liability should exist. The closing paragraphs of the opinion give some insight to this question, wherein the Court explained because the petitioner 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 the case.”⁷² Again, only because the overlying landowner had a property right to the groundwater beneath surface owner's

⁷⁰ *Id.* at 150, 281 (quoting *Pixley v. Clark*, 35 N.Y. 520, 527 (1866) (emphasis added)).

⁷¹ See Canseco, *supra* note 5, at 495-96.

⁷² *East*, 98 Tex. at 151, 81 S.W. at 281-82 (emphasis added).

land could the surface owner enjoy immunity from neighboring landowners due to drainage.

The argument is also frequently put forward that the rule of capture, even if it is a property right, does not vest until the moment of capture.⁷³ While the symmetry between this approach and the nomenclatural confusion surrounding ownership in place discussed, *supra*, are attractive at first blush, Texas cases do not support this superficial tack. Plainly, the *East* Court held a landowner “‘is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.’”⁷⁴ There is no other species of soil in Texas law of which a landowner cannot claim ownership until it is scooped up into the landowner’s hand. Accordingly, from the very first moment of Texas’s adoption of ownership in place, the Texas Supreme Court has refuted the vested-at-capture farce.

B. Groundwater Ownership in Place is Far From a Question of First Impression in Texas

The latest approach of those seeking to overturn Texas landowners’ rights to groundwater in place is to recast the past century of Texas common law expressly recognizing an overlying landowner’s property right to the groundwater below as not really involving the question of ownership in place per se. That is, the “[c]ases [m]ight [b]e [r]ead” by more modern and refined Courts to discover that, ‘lo and behold, “groundwater ownership in place was irrelevant to [previous] court[s]’ resolution of the case[s at bar].”⁷⁵ This

⁷³ See, e.g., Canseco, *supra* note 5, at 503, 525.

⁷⁴ *East*, 98 Tex. at 150, 81 S.W. at 281 (quoting *Pixley*, 35 N.Y. at 527).

⁷⁵ Canseco, *supra* note 5, at 503.

revisionist approach to ten decades of jurisprudence is—to borrow a phrase from a Jurist who recently co-authored a book with a Texan that rightfully condemns most of the writing conventions this author employs throughout this article⁷⁶—“sheer applesauce.”⁷⁷

It is a convenient theory of stare decisis indeed that labels every mention of a property right to groundwater in place “magic dicta” and every reference to vestment of ownership with the overlying tract—instead of capture—as immaterial to the holding.

As the preceding discussion up to this point tracing the development of the legal concept of ownership in place from its inception in Rome, through its modification and recognition in England, on to its express adoption in Texas should make clear, there is no “lack of precedent” on whether a Texas landowner owns the groundwater in place beneath the landowner’s tract.

1. *Texas Co. v. Daugherty*

Just eleven years after *East* was decided, the Texas Supreme court had its first opportunity to readdress the ownership interests of fugacious, in-ground substances—namely oil and gas.⁷⁸ While Texas oil and gas cases may not directly bear upon groundwater law,⁷⁹ they are

⁷⁶ HON. ANTONIN SCALIA AND BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (Thomson/West 2008).

⁷⁷ *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S. Ct. 1534, 1554 (2007) (Scalia, J., joined by Roberts, C.J., Thomas, and Souter, J.J., dissenting as to Part I).

⁷⁸ *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915).

⁷⁹ Canseco, *supra* note 5, at 504 (Texas oil & gas “cases’ holdings are ... only applicable to oil and gas law”).

highly persuasive because of the shared lineage both areas of law share.⁸⁰ Indeed, the first Texas case to coin the term, “law of capture,” was an oil and gas case citing to *East*.⁸¹

In *Texas Co. v. Daugherty*, the case directly turned on the plaintiff’s contention that the oil and gas at issue was “incapable of ownership as property until severed or extracted from the ground.”⁸² This was not a case that “would have turned out the same whether landowners owned [oil and gas] in place or whether their right vested on capture.”⁸³ In the most masterful explanations of the property interest that attaches to percolating substances in place before or since, the first Chief Justice Phillips to sit on the Texas Supreme Court left little room for subsequent jurisprudential mischief.⁸⁴

⁸⁰ 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 TEX. WESLEYAN L. REV. 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 TEX. L. REV. 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.”).

⁸¹ *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935) (citing *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904)).

⁸² *Daugherty*, 107 Tex. at 234, 176 S.W. at 719.

⁸³ See *Canseco*, *supra* note 5, 503.

⁸⁴ Chief Justice Nelson Phillips sat on the Court as an Associate Justice from 1912 to 1915 and as Chief from 1915 to 1921. JUSTICES OF TEXAS 1836-1986: NELSON PHILLIPS (1873-1939), available at <http://tarlton.law.utexas.edu/justices/spct/phillipsn.htm> (last visited Nov. 23, 2008). Chief Justice Thomas R. Phillips served as Chief Justice from 1988

One of the most troubling aspects of the concept of groundwater ownership in place to its opponents is that it denies a remedy to a drained landowner, despite the draineer’s ownership of the same water withdrawn by the drainer.⁸⁵ One commentator put the quandary this way, the “absolute ownership doctrine is used to make legal the act of taking and is refused when a remedy for the taking is asked.”⁸⁶

Then-Justice Phillips provided the answer to these concerns some ninety-four years ago in *Daugherty*. Therein he explained that:

Because of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession ..., have made a distinction between their conveyance while in place and that of other minerals, holding that it created no interest in the realty. But it is difficult to perceive a substantial ground for the distinction. A purchaser of them within the ground assumes the hazard of their absence through the possibility of their escape from beneath the particular tract of land, and, of course, if they are not discovered, the conveyance is of no effect, just as the purchaser of solid mineral within the ground incurs the risk of its absence, and therefore a futile venture. But let it be supposed that they have not escaped, and are in repose within

to 2004. COURT HISTORY - SINCE 1945: CHIEF JUSTICE, PLACE 1, available at <http://www.supreme.courts.state.tx.us/court/cj.asp> (last visited Nov. 23, 2008).

⁸⁵ *Canseco*, *supra* note 5, at 510.

⁸⁶ W.L. Summers, *Property in Oil and Gas*, 29 YALE L.J. 174, 179 (1919).

the strata beneath the particular tract and capable of possession by appropriation from it. There they *clearly constitute a part of the realty*. Is the possibility of their escape to render them while in place incapable of conveyance, or is their ownership while in that condition, with the exclusive right to take them from the land, anything less than ownership of an interest in the land?⁸⁷

He continued:

In place, they lie within the strata of the earth, and necessarily are a part of the realty. Being a *part of the realty while in place*, it would seem to logically follow that, whenever they are conveyed while in that condition or possessing that status, a conveyance of an interest in the realty results.

* * *

The opposing argument is founded entirely upon their peculiar property, and therefore the risk of their escape. *But how does that possibility alter the character of the property interest which they constitute while in place beneath the land? The argument ignores the equal possibility of their presence*, and that the parties have contracted upon the latter assumption; that, if they are in place beneath the tract, they are essentially a part of the realty, and their grant, therefore, while in that condition, if effectual at all, *is a grant of an interest in the realty*. In other words, the

⁸⁷ *Daugherty*, 107 Tex. at 235, 176 S.W. at 719-20 (emphasis added).

question, it seems to us, reduces itself to this: If the oil and gas, the subject of the conveyance, are in fact not beneath or within the land, and are therefore not capable of being reduced to possession, the conveyance is of no effect. But, if they have not departed and are beneath it, *they are there as a part of the realty; and their conveyance while in place*, if the instrument be given any effect, is consequently the conveyance of an interest in the realty.⁸⁸

Justice Phillips concluded:

The possibility of the escape of the oil and gas from beneath the land before being finally brought within actual control may be recognized, ... [b]ut nevertheless, *while they are in the ground, they constitute a property interest*. If so, what is the nature of it in the hands of the original owner? It embraces necessarily the privilege or right to take them from the ground. But is that its extent or sole character? While they lie within the ground as a part of the realty, is the ownership of the realty to be denominated, as to them, a mere license to appropriate, as distinguished from an absolute property right in the corpus of the land? *With the land itself capable of absolute ownership, everything within it ... is likewise capable of ownership, so long as it constitutes a part of it*. If these minerals are a part of the realty *while in place*, as undoubtedly they are, upon what principle can the ownership of the property interest, which they

⁸⁸ *Id.* at 235-36, 719-20 (emphasis added).

constitute *while they are beneath or within the land, be other than the ownership of an interest in the realty?*⁸⁹

Daugherty is instructive in that it makes clear the fallacy in attempting to attach the property right in groundwater not to its residence in place, but to some pseudo-license to appropriate or capture the water—that it only vests upon capture. To do so ignores the fact that, while the groundwater is beneath an overlying landowner’s tract, it is owned just as any other species of realty.

2. *Stephens v. Mid-Kan. Oil & Gas Co.*

The Court’s opinion in *Stephens v. Mid-Kansas Oil & Gas Co.* follows on *Daugherty*’s heels in directly rebutting the theory that ownership of fugacious substances can only vest upon capture.⁹⁰ However, unlike *Daugherty*, the *Stephens* opinion directly relied upon groundwater law in arriving at its opinion.⁹¹ Therefore, any claim that its holding is “only applicable to oil and gas law” is undercut.

Specifically, the Court held that it did:

[N]ot regard it as an open question in this state that gas and oil in place are ... realty, subject to ownership, severance, and sale, while embedded in the sands or rocks beneath the earth’s surface, in like manner and to the same extent as is coal or any other solid mineral.⁹²

The Court even went as far as to expressly overrule a Commission of Appeals’ opinion

which held that “oil, like water, is not the subject of property until reduced to actual possession,” explaining “[t]his portion of the opinion is not authoritative, because the Supreme Court adopted only the judgment recommended by the Commission.”⁹³ The Court explained that the “objection lacks substantial foundation that gas or oil in a certain tract of land cannot be owned in place.”⁹⁴

Recent commentators have asked, if the draineer is denied a remedy by the rule of capture, “in what sense does he own it?”⁹⁵ Others have gone farther and asserted a “property right cannot exist if the law refuses it a remedy.”⁹⁶ Justice Greenwood answered this query in *Stephens* by citing to *East* as the Court’s authority that the remedy afforded a landowner who finds the groundwater beneath his land being drained is to sink his own pump so that he may withdraw the groundwater as long as it is beneath his land.⁹⁷

3. *Texas Co. v. Burkett*

Twenty-three years after its decision in *East*, the Court accepted writ of error in a case where it was called upon specifically to address whether an overlying landowner possessed a property right in the groundwater beneath his land.⁹⁸ In *Texas Co. v. Burkett*, the Court again held

⁹³ *Id.* at 167, 291 (emphasis added); see also *Citation Writ Large*, *supra* note 62, at 97-98 (examining the weight of judgment-adopted opinions of the Texas Commission of Appeals).

⁹⁴ *Id.* at 167, 292.

⁹⁵ Canseco, *supra* note 5, at 510.

⁹⁶ *Id.* at 516 (citing A.W. Walker, Jr., *Theories of Ownership and Control of Oil and Gas Compared with Those of Ground Water*, Water Law Conference 121, 121 (1956)).

⁹⁷ *Stephens*, 113 Tex. at 167, 254 S.W. at 292.

⁹⁸ *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273 (1927).

⁸⁹ *Id.* at 236, 720 (emphasis added).

⁹⁰ 113 Tex. 160, 254 S.W. 290 (1923).

⁹¹ *Id.* at 167, 291-92.

⁹² *Id.* at 167, 292.

percolating waters beneath the respondent's land were his "exclusive property," giving him "all the rights incident to them one might have as to any other species of property."⁹⁹

Some fifty years after *Burkett* was handed down, the Court discussed the *Burkett* opinion in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, in which the Court framed *Burkett* as holding "a landowner has the absolute right to sell percolating ground water for industrial purposes off the land."¹⁰⁰

4. *Brown v. Humble Oil & Ref. Co.*

As has been mentioned previously, the *Humble Oil* Court was the first to coin the term, "law of capture."¹⁰¹ In doing so, the Court cited to its decision in *East*, and unambiguously labeled the "law of capture" a "property right."¹⁰²

5. *Corzelius v. Harrell*

Ten years after it issued *Humble Oil*, the Court reiterated once again—lest future generations lose their jurisprudential way—that "this State recognizes the ownership of oil and gas in place, and ... such rule should be considered in connection with *the law of capture, which is recognized as a property right.*"¹⁰³

The author readily admits that, while this oil and gas case does not directly inform a

subsequent court's ruminations regarding the property rights attendant to groundwater owned in place, no less than former Chief Justice Greenhill has agreed that the doctrine of ownership in place—as applied in the oil and gas context—was undoubtedly influenced by *East*.¹⁰⁴

6. *City of Corpus Christi v. City of Pleasanton*

In 1955, the Court was called upon to decide whether it was "waste to transport water produced from artesian wells by flowing it down a natural stream bed and through lakes with consequent loss of water by evaporation, transpiration, and seepage."¹⁰⁵ In *City of Corpus Christi v. City of Pleasanton*, the Court discussed *Acton* and quoted its *damnum absque injuria* passage.¹⁰⁶ In doing so, the Court also held that:

Under th[e] rule [adopted by *Acton*] percolating waters *are regarded as the property of the owner of the surface* who may, "in the absence of malice, intercept, impede, and appropriate such water *while they are upon his premises*, and make whatever use of them he pleases, regardless of the fact that his use cuts off the flow of such waters to adjoining land, and deprives the adjoining owner of their use."¹⁰⁷

⁹⁹ *Id.* at 29, 278.

¹⁰⁰ *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 25-26 (Tex. 1978).

¹⁰¹ *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935 (1935).

¹⁰² *Id.*

¹⁰³ *Corzelius v. Harrell*, 143 Tex. 509, 514, 186 S.W.2d 961, 964 (1945) (emphasis added).

¹⁰⁴ See Greenhill & Gee, *supra* note 30, at 621 ("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.").

¹⁰⁵ *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 290, 276 S.W.2d 798, 799 (1955).

¹⁰⁶ *Id.* at 292, 800.

¹⁰⁷ *Id.* (quoting 55 A.L.R. 1390) (emphasis added).

The Court also made mention of the *East* Court's "considered and deliberate" choice in "unequivocally" adopting *Acton's* formulation of groundwater ownership, particularly since the Dallas Court of Civil Appeals which *East* reversed had framed *Acton* as "shock[ing to its] sense of justice."¹⁰⁸

7. *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*

The Court's 1978 opinion in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*,¹⁰⁹ which is commonly acknowledged as having adopted a negligent subsidence exception to the rule of capture,¹¹⁰ may have instead merely formally recognized an aspect of the rule adopted in *Acton*, which itself had already been jurisprudentially adopted in *East*.

The landmark holding of *Friendswood* was the recognition of an exception to the tort immunity aspect of the rule of capture in cases of negligently-caused subsidence due to groundwater withdrawal.¹¹¹ The Court labored over its purported modification of the *Acton* doctrine, but it was apparently unaware that subsidence had always been an exception to rule of capture since antiquity. In the *Digest*, Ulpian qualified his discussions of the right of a landowner to freely and with immunity dig a well on the landowner's tract, so long as the landowner did not "dig so deeply ... that one of [an

adjoining landowner's] walls [could] not stand upright."¹¹²

Of more importance to this discussion was the *Friendswood* Court's description of the rule adopted in *East*, holding "this Court adopted the absolute ownership doctrine of underground percolating waters."¹¹³ The Court further ruled that "ownership of underground water comes with ownership of the surface; it is part of the soil."¹¹⁴

Perhaps as forcefully as it did in *Stephens*, the *Friendswood* Court also directly refuted the vested-at-capture argument. Because ownership of underlying groundwater vests with ownership of the surface, it can't then re-vest when it is later captured or withdrawn. Groundwater is part of the soil, and is therefore owned in place. Of course, this seminal holding in *Friendswood*—a case which is generally treated kindly by ownership-in-place opponents—either magically escapes mention or is tarred as superfluous dicta.

8. *Sipriano v. Great Spring Waters of America, Inc.*

The Court's 1999 decision in *Sipriano v. Great Spring Waters of America, Inc.*,¹¹⁵ has been repeatedly relied upon by some commentators as evidence that the Court is moving away from the purportedly overbroad language used by the Court in *East* and subsequent opinions.

Central to this line of argument is the Court's repeated use of tort language in the opinion, as opposed to its almost unbroken line of property terminology used in

¹⁰⁸ *Id.* at 293, 801 (quoting *East v. Houston & Tex. Cent. Ry. Co.*, 77 S.W. 646, 648 (Tex. Civ. App.—Dallas 1903) *rev'd* by 98 Tex. 146, 81 S.W.279.

¹⁰⁹ 576 S.W.2d 21 (Tex. 1978).

¹¹⁰ *See, e.g.*, Drummond et al., *supra* note 12, 48-50.

¹¹¹ *Friendswood*, 576 S.W.2d at 30.

¹¹² DIG. 39.2.24.12 (Ulpian, Ad Edictum 81).

¹¹³ *Friendswood, Inc.*, 576 S.W.2d at 25 (emphasis added).

¹¹⁴ *Id.* at 30 (emphasis added)

¹¹⁵ 1 S.W.3d 75 (Tex. 1999).

groundwater law opinions since *East*.¹¹⁶ In describing its holding in *East*, the *Sipriano* Court stated it “refused to recognize tort liability against a railroad company whose pumping of groundwater under its own property allegedly dried the neighboring plaintiff’s well.”¹¹⁷ There is nothing earth-shattering or revelatory about this passage. It is absolutely accurate: *East* did refuse to impose tort liability upon the railroad under the precepts of the *Acton* rule it adopted. As has been shown throughout this article, from the time of its inception in the *Digest*, through to its recognition in *Acton*, and up to its adoption in *East*, the rule of capture has always been an immunity rule derived from the tortfeasor’s ownership of groundwater. *East* did not impose tort liability against the railroad *because* the railroad owned the groundwater in place.

Similarly, *Sipriano* discusses the “common-law tort framework established by the rule of capture.”¹¹⁸ There is nothing in this statement that runs headlong into the concept of ownership of groundwater in place. There was indeed a common-law tort framework established not by the rule of capture as adopted in *East*, but by the rule as it was first recognized in *Acton*. Therein, the *Acton* court recounts the exchanges at oral argument, during which one of the justices on the panel interrupted *Acton*’s counsel and said:

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*.¹¹⁹

What the Court left unsaid in *Sipriano* that it said so often previously was that the tort framework established by the rule of capture is a natural derivation of the property ownership framework established by the same rule.

Undercutting as well the theory of ownership-in-place opponents that *Sipriano* somehow overruled all previous property pronouncement made by the Court regarding ownership in place, is the ultimate decision in the opinion. The plaintiffs pled the case as a tort action, but their claims were dismissed on summary judgment because “Texas does not recognize [these] claims because Texas follows the rule of capture.”¹²⁰ Not surprisingly, the Court affirmed the summary judgment dismissal, stating that “the sweeping change to Texas’s groundwater law *Sipriano* urges this Court to make is not appropriate at this time.”¹²¹

As has been discussed, *supra*, the one troubling aspect of the Court’s opinion in *Sipriano* is that it mistranslated *Acton*’s mention of *damnum absque injuria* as meaning, “an injury without a remedy.”¹²² However, as both Ulpian and Proculus explained in the *Digest*, the fundamental concept embodied by *damnum absque injuria* is that a neighboring landowner may be *damaged* by an overlying landowner’s withdrawal of groundwater, but such

¹¹⁶ See *id.* at 77-78.

¹¹⁷ *Id.* at 77.

¹¹⁸ *Id.* at 78.

¹¹⁹ *Acton v. Blundell*, 152 Eng. Rep. 1223, 1228 (1843).

¹²⁰ *Sipriano*, 1 S.W.3d at 76.

¹²¹ *Id.* at 75.

¹²² *Id.* at 76 (quoting *Acton*, 152 Eng. Rep. at 1235).

damage cannot form the basis of a compensable *injury*.¹²³

C. Hope Springs Eternal¹²⁴ with the Progression of Recent Cases

Since *Sipriano*, things have been relatively quiet regarding the groundwater law debate in Texas. However, there are a few cases making their way up the appellate chain that may address any remaining confusion in the bar regarding ownership of groundwater in place.

In August of this year, the Court handed down its opinion in *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District No. 1*, but the decision did not turn on substantive questions of ownership in place.¹²⁵

The formation of the Edwards Aquifer Authority (EAA) in 1993 spawned several lawsuits, three of which have been only a passing footnote in the Texas groundwater law saga, and one of which may yet hold some promise.

The first of these opinions was the Court's 1996 decision in *Barshop v. Medina County Underground Water Conservation District*, which resolved a facial constitutional challenge to the Act establishing the EAA.¹²⁶ Although the plaintiffs in *Barshop* asked the right question—whether EAA Act constituted an unconstitutional deprivation of the affected landowner's vested property rights in the groundwater beneath their land—the mechanism by which they

brought the challenge (a facial constitutional challenge) was the wrong one.

While the Court dutifully noted the parties “fundamentally disagree[d] on the nature of the property rights affected” by the EAA 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,” the Court found it unnecessary “to definitively resolve the clash between property rights in [ground]water and regulation of [ground]water” because the plaintiffs “ha[d] not established that the Act is unconstitutional on its face.”¹²⁷

In its 2002 opinion in *Bragg v. Edwards Aquifer Authority (“Bragg I”)*,¹²⁸ the Court handed down a follow-up opinion to its earlier decision in *Barshop*, wherein it examined allegations of property takings involving the EAA. In *Bragg I*, the Court was compelled to determine whether “certain actions of the ... [EAA] Act violate[d] provisions of the Private Real Property Rights Preservation Act¹²⁹ [(the “PRPRP Act”)].”¹³⁰ The Court found the EAA Act did not violate the PRPRP Act because the EAA's “adoption of well-permitting rules was done pursuant to its statutory authority to prevent waste or protect the rights of owners or interest in groundwater.”¹³¹

¹²³ See DIG. 39.2.26, 39.2.24.12 (Ulpian, Ad Edictum 81).

¹²⁴ I've really got to stop.

¹²⁵ 263 S.W.3d 910 (Tex. 2008).

¹²⁶ 925 S.W.2d 618 (Tex. 1996) [hereinafter *Bragg I*].

¹²⁷ *Id.* at 625-26.

¹²⁸ 71 S.W.3d 729 (Tex. 2002).

¹²⁹ See TEX. GOV'T CODE ANN. §§ 2007.001-.045 (Vernon 2008).

¹³⁰ *Bragg I*, 71 S.W.3d at 730.

¹³¹ *Id.* at 735.

1. *Bragg v. Edwards Aquifer Auth. (Bragg II)*

Two years after the Court issued *Bragg I*, the EAA formally denied the Braggs' well application.¹³² Two years after that, the Braggs brought suit again in *Bragg v. Edwards Aquifer Authority* ("*Bragg II*"), this time alleging takings claims under Article I, Section 17 of the Texas Constitution and Equal Protection and Due Process claims under 42 U.S.C. § 1983.¹³³ In January of this year, the district court (which is presided over by a former Texas Supreme Court Justice)¹³⁴ dismissed the Braggs' Motion for Partial Summary Judgment on its state constitutional claims,¹³⁵ and the court subsequently reaffirmed this denial in May.¹³⁶ However, in March, the court granted the EAA summary judgment on its federal claims, and remanded the state constitutional claims back to the state district court in Medina County.¹³⁷ As this case climbs up the appellate ladder, it could prove to be an appropriate factual setting for the Texas Supreme Court to further opine on ownership of groundwater in place.

¹³² See *Bragg v. Edwards Aquifer Auth.*, No. SA-06-CV-1129-XR, 2008 WL 819930, at *1 (W.D. Tex. Mar. 25, 2008) (recounting the procedural history of the case) [hereinafter *Bragg II*]; see also Canseco, *supra* note 5, at 506.

¹³³ See *Bragg II*, 2008 WL 819930, at *2.

¹³⁴ COURT HISTORY - SINCE 1945: JUSTICES, PLACE 5, available at <http://www.supreme.courts.state.tx.us/court/j5.asp> (last visited Nov. 23, 2008) (noting Judge Xavier Rodriguez's service to the Texas Supreme Court from 2001 to 2002).

¹³⁵ *Bragg II*, 2008 WL 596862, at *1.

¹³⁶ *Bragg II*, 2008 WL 2033715, at *1.

¹³⁷ *Bragg II*, 2008 WL 819930, at *1, *10 (remanding to the 38th Judicial District Court in Medina County, Texas).

2. *Edwards Aquifer Auth. V. Day*

In a case similar to *Bragg II*, an aggrieved water-well applicants residing within the EAA's boundaries sued the EAA alleging, among other claims, an unconstitutional taking of their groundwater under Article I, Section 17 of the Texas Constitution.¹³⁸ The trial court granted the EAA's motion for summary judgment which asserted the applicants did not have a constitutionally-protected vested interest in their groundwater.¹³⁹

In *Edwards Aquifer Authority v. Day*, the San Antonio Court of Appeals reversed the trial court's grant of summary judgment in favor of the EAA. The unanimous panel explained its holding by citing to *East* for the underwhelming proposition that overlying "landowners have some ownership rights in the groundwater beneath their property."¹⁴⁰ However, having found the Days possessed some ownership rights in their underlying groundwater, the court held those rights were not only vested in place, but were entitled to constitutional protection as well.¹⁴¹

While this holding is encouraging for ownership-in-place advocates, it's outlook as a vehicle for further elaboration on the doctrine of ownership in place is dubious. First, it will likely be held by the Texas Supreme Court pending the outcome in

¹³⁸ See *Edwards Aquifer Auth. v. Day*, No. 04-07-00103-CV, 2008 WL 4056321, *9 (Tex. App.—San Antonio Aug. 29, 2008, pet. filed).

¹³⁹ *Id.* at *9.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (citing to *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) and *Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 903 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)).

Bragg II, as both involve identical state constitutional takings claims implicating the EAA.¹⁴² The EAA currently has until January 2, 2009 to file its petition for review.¹⁴³ Second, because this alleged taking has been effected within the confines of the EAA, the ownership-in-place question is not as purely presented as it is in another pending case, examined, *infra*.

3. *City of Del Rio v. Clayton Sam Colt Hamilton Trust*

If there was ever a case with a style befitting an important Texas groundwater law opinion, *City of Del Rio v. Clayton Sam Colt Hamilton Trust* has got to be it.¹⁴⁴ *Del Rio* is unique in that, it is the first case since *Sipriano* to present facts that do not involve a legislatively-established regulatory agency (i.e., the EAA, or a groundwater conservation district). Accordingly, the facts of *Del Rio* present a much cleaner legal slate to the Justices at the Texas Supreme Court, should they decide to grant review. The City has filed their petition, and the Trust has waived its response, so the long wait on the internal machinations of the Court has now begun.

The case itself involves a suit by the Trust against the City for withdrawing groundwater from land the Trust conveyed to the City, but in which the Trust expressly reserved “all water rights associated with said tract.”¹⁴⁵ The trial court found:

(1) [T]he water rights reservation was valid and enforceable; (2) the City's argument that groundwater, until captured, cannot be the subject of ownership was an incorrect statement of the law; and (3) ownership to the groundwater rights beneath the fifteen-acre tract belonged to the Trust.¹⁴⁶

The City appealed, asserting that—pursuant to the rule of capture—“the corpus of groundwater cannot be ‘owned’ until it is reduced to possession.”¹⁴⁷ The City also followed Professor Johnson’s argument that the doctrine of absolute ownership “does not refer to the actual corpus of water beneath the land but only to a right of the surface estate owner to acquire possession of the water.”¹⁴⁸

The San Antonio Court of Appeals disagreed with the City, finding that, “under the absolute ownership theory, the Trust was entitled to sever the groundwater from the surface estate by reservation when it conveyed the surface estate to the City.”¹⁴⁹ As justification for its holding, the appellate court found the magic dicta from *East, City of Sherman, Friendswood, and Burkett* regarding the absolute ownership of groundwater in place in the soil to be particularly persuasive.¹⁵⁰ However, the court also cited to a 1998 Texarkana Court

¹⁴² Compare *Bragg II*, 2008 WL 2033715, at *2, 10, with *Day*, 2008 WL 4056321, at *9.

¹⁴³ See CASE INFORMATION: CASE NUMBER: 08-0964, available at <http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=29927> (last visited Nov. 23, 2008).

¹⁴⁴ No. 04-06-00782-CV, 2008 WL 508682 (Tex. App.—San Antonio Feb. 27, 2008, pet. filed).

¹⁴⁵ *Id.* at *1-2.

¹⁴⁶ *Id.* at *2.

¹⁴⁷ *Id.* at *3.

¹⁴⁸ *Id.*; see also Johnson, *supra* note 9, at 1288-89.

¹⁴⁹ *Id.* at *4.

¹⁵⁰ *Id.* (citing *City of Sherman v. Pub. Util. Comm’n*, 643 S.W.2d 681, 686 (Tex. 1983); *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 25-27 (Tex. 1978); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972); *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 278 (1927); *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 281 (1904)).

of Appeals decision that incorrectly stated “[t]he rule of capture is a doctrine of nonliability for drainage.”¹⁵¹ The fallacy in the intermediate appellate court’s holding is apparent though, because the case upon which it relies is the Texas Supreme Court’s 1910 opinion in *Bender v. Brooks*¹⁵²—the reasoning in which was expressly overturned by the Court five years later in *Daugherty*¹⁵³ and again in the Court’s 1923 opinion in *Stephens*.¹⁵⁴ The San Antonio Court also cited to Professors Smith and Lang’s treatise on oil and gas law for the proposition that the rule of capture, as it developed, was “not a rule of property.”¹⁵⁵ Of course as has been shown, *supra*, this excerpt from the treatise cannot be correct. Indeed, the Texas Supreme Court has even directly held to the contrary at least twice, stating the “law of capture ... is ... a property right.”¹⁵⁶

More fascinating to groundwater lawyers though is one of the issues presented in the City’s petition for review. The City raises the question of whether groundwater owned in place is subject to *ad valorem* taxation pursuant to Article I, Section 8 of the Texas Constitution.¹⁵⁷ The City also devotes a paragraph in its petition to briefly discussing

the Court’s holding in *Sun Oil Co. v. Whitaker*,¹⁵⁸ which has long perplexed the author as well. In *Sun Oil*, the Court relied upon the implied grant accorded the dominant mineral estate of reasonable use of the surface estate including groundwater.¹⁵⁹ Sadly, the facts of *Del Rio*, in which only the surface estate absent “all water rights” appears to have been conveyed to the City, will likely not support this examination.

D. A Century of Property Rights Have Grown Up Under *East*

Putting aside for the moment the long jurisprudential history documenting an overlying landowner’s vested right to the groundwater beneath the landowner’s property, Texas landowners have now experienced over a century of property and contractual rights that have grown up and become fixed under the absolute ownership doctrine adopted in *East*.

This is problematic for ownership-in-place opponents for several reasons.

The Court has repeatedly evinced a reluctance to stray from precedent, especially where property rights are at stake.¹⁶⁰ Forty-seven years after the Republic of Texas’s adoption and recognition of the common law of England the Court wrote that:

[W]here a decision has been made, adhered to and followed for a series

¹⁵¹ *Id.* (quoting *Riley v. Riley*, 972 S.W.2d 149, 155 (Tex. App.—Texarkana 1998, no pet.)).

¹⁵² 103 Tex. 329, 335, 127 S.W. 168, 170 (1910).

¹⁵³ *Texas Co. v. Daugherty*, 107 Tex. 226, 235-36, 176 S.W. 717, 719-20 (1915).

¹⁵⁴ *Stephens v. Mid-Kan. Oil & Gas Co.*, 113 Tex. 160, 167, 254 S.W. 290, 291-92 (1923).

¹⁵⁵ *Del Rio*, 2008 WL 508682 at *4 (quoting ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL & GAS § 1.1(A) (2d ed. 2007)).

¹⁵⁶ *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935); *see also* *Corzelius v. Harrell*, 143 Tex. 509, 514, 186 S.W.2d 961, 964 (1945).

¹⁵⁷ *See* City of Del Rio’s Petition for Review, No. 08-0755, at 11-12 (filed October 30, 2008) (on file with the author).

¹⁵⁸ 483 S.W.2d 808 (Tex. 1972); *see* City of Del Rio’s Petition for Review, No. 08-0755, at 10 (filed October 30, 2008) (on file with the author).

¹⁵⁹ *Sun Oil*, 483 S.W.2d at 810-11 (citing *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967)).

¹⁶⁰ *See, e.g.*, *John G. & Marie Stella Kennedy Mem’l Found. v. Dewhurst*, 90 S.W.3d 268, 281 (Tex. 2002); *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 29 (Tex. 1978).

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.¹⁶¹

The Court reaffirmed this view in 1954 when it held that:

We are not unmindful of the doctrine of stare decisis, based on public policy and sound legal administration, requiring that courts respect and adhere to prior judicial decisions. The law should be settled, so far as possible, especially where contract rights and rules of property have been fixed.¹⁶²

In *Friendswood*, the Court noted that even critics of the rule of capture “recognize that it has become an established rule of property law in the State, under which many citizens own land and water rights.”¹⁶³ Most recently in 2002, the Court reasoned that “stare decisis is never stronger than in protecting land titles, as to which there is great virtue in certainty.”¹⁶⁴

In examining nineteenth century rule of capture laws and their potential effects on takings claims, BYU Professor James Rasband opined:

If one of the core functions of takings doctrine is to protect

property owners’ reliance interests, it is imperative to accurately identify those interests. In the terminology of *Lucas v. South Carolina Coastal Council*, the key question is whether the restricted or eliminated property right originally “inhere[d] in the title.” Thus ... many natural resource users have indisputably good title to those resources because ... their title depended only upon capture. Under both *Lucas* and *Penn Central Transportation Co. v. New York City*, reallocation of a resource obtained under a rule of capture is more likely to be a taking than reallocation of a resource that is not being used in conformity with the terms of the grant. While it may be appealing to reallocate resources away from an owner who took the resource under a “primitive” capture rule that has now fallen out of favor, *it is less just* because of its refusal to recognize reasonable reliance interests.¹⁶⁵

Accordingly, “reallocating” a resource away from those whose property and contract rights have grown up under the *East* decision is both manifestly unjust and likely unconstitutional.

III. CONCLUSION

As the Texas Supreme Court examines these new groundwater law decisions heading its way (or already on its doorstep), it should carefully review the reams of Texas caselaw

¹⁶¹ *Groesbeck v. Golden*, 7 S.W. 362, 365 (Tex. 1887).

¹⁶² *McLendon v. City of Houston*, 153 Tex. 318, 322-23, 267 S.W.2d 805, 807 (1954).

¹⁶³ *Friendswood*, 576 S.W.2d at 29.

¹⁶⁴ *Dewhurst*, 90 S.W.3d at 281.

¹⁶⁵ James R. Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477*, 35 ENVTL L. 1005, 1009-10 (2005).

unequivocally establishing a Texas surface owner's property right to the groundwater in place beneath the surface-owner's tract. All the familiar arguments put forward by ownership-in-place opponents are not novel and have been thoroughly debunked not only by the Texas Supreme Court, but by *Acton* and the Roman jurists upon which *Acton* relied as well. No matter how earnest a revisionist reading of how cases "might be read" to exclude any unnecessary property-laced terminology as dicta, this approach is not stare decisis: it is fiction. Ownership of Texas groundwater in place is—and has always been—fact.