Chapter 1

History and Evolution of the Rule of Capture

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Overview

The common-law rule regarding groundwater is the rule of capture or the English rule, which essentially 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 neighboring landowners even if in so doing they deprive their neighbors of the water's use.[1] The rule of capture is in contrast to "reasonable use" or the "American rule," which provides that the right of a landowner to withdraw groundwater is not absolute, but limited to the amount necessary for the reasonable use of his land, and that the rights of adjoining landowners are correlative and limited to reasonable use.[2]

Since its adoption in Texas 100 years ago, the rule of capture has been widely criticized.[3] Today, Texas stands alone as the only western state that continues to follow the rule of capture.[4]

Houston & Texas Central Railroad Co. v. East (1904)

The Texas Supreme Court adopted the rule of capture in the landmark decision *Houston & Texas Central Railroad Co. v. East*.[5] In *East*, a railroad company dug a well on its property in order to supply water for use in its locomotives and machine shops. The well, which produced 25,000 gallons of water daily, dried up the well of a neighboring landowner, who used his well for household use. The landowner sued the railroad for damages he sustained as a result of the dried well. The Texas Supreme Court first noted that English common law applied the rule of capture, which was first articulated in 1843 in *Acton v. Blundell*[6] as follows: "That the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor

[1] *See Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 76 (1999).
[2] *See Friendswood Development Co. v. Smith-Southwest Industries*, 576 S.W.2d 21, 25 (1978).
[3] *Id*. at 28-29 (1978).
[4] *Sipriano*, 1 S.W.3d. at 82, fn. 14.
[5] 98 Tex. 146, 81 S.W. 279 (1904).
[6] 152 Eng. Rep. 1223 (Ex. Ch. 1843), *quoted in East*, 81 S.W. at 280.

falls within the description of *damnum absque injuria*[1], which can not become the ground of an action."[2]

In *East*, the Court faced a choice between the rule of capture and its counterpart, the rule of reasonable use, which is also known as the American Rule. The Court chose the rule of capture based on two public policy considerations: (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 of agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility."[3]

Without deciding the issue, the Court left open the possibility of liability in the case of malice or wanton conduct.[4] More importantly, the Court acknowledged the power of the legislature to regulate groundwater: "*In the absence…of positive authorized legislation*, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth."[5]

Article 16, §59 (Conservation Amendment)

Following droughts in 1910 and 1917, Texas voters added the Conservation Amendment in 1917.[6] The Amendment declared that conservation of the state's natural resources, including water, are public rights and duties. It further authorized the Legislature to pass all appropriate laws:

> 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.

TEX. CONST., Art. XVI, § 59(a).

This constitutional amendment would become critical to water law issues confronting the courts from the time of its passage to the present and would form the basis for much of the judicial branch's reluctance to interfere with what it viewed as a legislative prerogative.

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[1] A loss or damage without injury.
[2] *East*, 81 S.W. at 280.
[3] *Id.* at 281.
[4] *Id*. at 282.
[5] *East*, 81 S.W. at 280 (quoting *Frazier v. Brown*, 12 Ohio St. 294).
[6] *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W2d 618, 626 (Tex. 1996).

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

Half a century after *East* — at a time when other jurisdictions were abandoning the English rule in favor of the "reasonable use" rule[1] — the Texas Supreme Court reaffirmed the rule of capture in *City of Corpus Christi v. City of Pleasanton*.[2]

The City of Pleasanton sued the Lower Nueces River Supply Company and the City of Corpus Christi to enjoin them from pumping water from wells and allowing them to flow more than 100 miles to Corpus Christi claiming that it constituted waste and for damages for materially affecting the water levels in plaintiff's wells. The Lower Nueces River Supply Company contracted with the City of Corpus Christi to supply water from four of its wells located 118 miles from Corpus Christi. The water was transported to Corpus Christi by allowing the wells to flow into the Nueces River. When fully operational, the wells discharged 10 million gallons of water per day into the river. Evidence showed that as much as 63 percent to 74 percent of the water discharged into the river escaped through evaporation, transpiration and seepage, and therefore never reached its destination. The lawsuit was based primarily upon statutes that made it unlawful to waste artesian water.[3] The trial court ruled in favor of the City of Pleasanton finding that the conduct of the defendants "was in violation of the statutes and the conversation [sic] laws of the State of Texas" and enjoining the defendants from discharging water into the river. [4] The Court of Appeals affirmed. But in a split decision the Texas Supreme Court reversed, holding that liability could only be established by proving that the water was to be put to an *unlawful* use as distinguished from a lawful use.[5] The Court reasoned that the Legislature knew that if transported by "river, creek, or other natural water course or drain" that some water would escape. Having implicitly approved the transportation of water by those means, the Court concluded that the Legislature could not have intended to make those same means of transportation illegal if some of it escaped. Thus, the Court focused narrowly on whether the defendants' use of the water was lawful. After examining precedents on the rule of capture, the Court reiterated the common law view that "an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off of the land and outside of the basin where produced, just as he could sell any other species of property."[6] Based on this narrow reading of the statutes and its broad application of the rule of capture, the Court held that the defendants use of the water was lawful despite the loss of up to 74 percent of the water during transport.

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[1] *See Friendswood*, 576 S.W.2d at 26.
[2] 154 Tex. 289, 276 S.W.2d 798 (1955).
[3] The statute provided "Waste is defined for the purposes of this Act, in relation to artesian wells to be the causing, suffering or permitting the waters of an artesian well to run into any river, creek or other natural water course or drain, superficial or underground channel, bayou, or into any sewer, street, road, highway, or upon the land of any other person than that of the owner of such well, or upon the public lands or to run or percolate through the strata above that in which the water is found, unless it be used for the purposes and in the manner in which it may be lawfully used on the premises of the owner of such well." Article 7602, Revised Civil Statutes (1925).
[4] *City of Corpus Christi*, 276 S.W.2d at 800.
[5] *Id*. at 802.
[6] *Id*.

The Court went on to note that the statutes in question passed just before the voters adopted the Conservation Amendment (Art. XVI, sec. 59) to the Texas Constitution, which declared the conservation of the state's natural resources — including water — to be a public right and duty. The Conservation Amendment further authorized the Legislature to pass all appropriate laws to carry out the purpose of the Amendment. The Court observed:

> No such duty was or could have been delegated to the courts. It belongs exclusively to the legislative branch of government. Undoubtedly the Legislature could prohibit the use of any means of transportation of percolating or artesian water which permitted the escape of excessive amounts, but it has not seen fit to do so.[1]

Finally, the majority observed that the Legislature was currently in session and would have the Court's opinion. If the Legislature wished to stop the conduct at issue, it had the ability to enact the appropriate legislation.[2]

In a noteworthy dissent, Justice Will Wilson acknowledged that what was "secret [and] occult" to the Court in 1904 was no longer the case.[3] Justice Wilson also cautioned that the Supreme Court would not forever use deference to the Legislature to justify maintaining the rule of capture in the face of changing circumstances.[4]

Beckendorff v. Harris-Galveston Coastal Subsidence Dist. (1977)

In 1975, the Legislature passed a bill creating the Harris-Galveston Coastal Subsidence District in order to address the problems posed by subsidence in the region. The District was given the power to regulate groundwater pumping to control subsidence.

In *Beckendorff*,[5] a number of rice farmers in Harris County using their wells for irrigation filed suit seeking to have the legislation creating the Harris-Galveston County Coastal Subsidence District held unconstitutional. The trial court upheld the constitutionality of the act, and the Court of Appeals affirmed.[6]

Although *Beckendorff* did not involve a direct application of the rule of capture, it was the first major opinion addressing the propriety of legislative action regulating groundwater pumping. Although an appeals court decision, the opinion would set the stage for the next modification of the rule of capture in the following year.

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[1] *Id*. at 803.
[2] *Id*.
[3] *Id*. at 805-806 (Wilson, J., dissenting).
[4] *Id*. at 805 (Wilson, J., dissenting).
[5] *Beckendorff v. Harris-Galveston Coastal Subsidence Dist*., 558 S.W.2d 75 (Tex. Civ. App. – Houston [14th Dist.], writ ref'd n.r.e.).
[6] The Texas Supreme Court refused the writ of error with the notation "no reversible error."

Friendswood Development Co. v. Smith Southwest Industries (1978)

Beckendorff set the stage for the last major modification to the rule of capture: an exception that recognized a negligence/nuisance cause of action for subsidence caused by excessive water pumping.

Friendswood Development Company pumped large amounts of groundwater from its property to sell primarily to industrial users in another of its developments.[1] These wells were drilled from 1964 through 1971 despite defendants' knowledge that previous engineering reports concluded that such groundwater pumping would cause land subsidence in the area. Landowners near the Johnson Space Center filed a class action suit in 1973 alleging that defendants' extensive withdrawal of groundwater caused their land to sink below mean sea level resulting in erosion and flooding of their land and damage to their residences and businesses. The evidence before the trial court showed that the land in the area had subsided 2.12 feet between 1964 and 1973.[2]

The Court observed that jurisdictions adhering to the English rule deny tort actions for subsidence.[3] But in departing from the common law rule, the Court noted that the Legislature had entered the field and that the recognition of a new tort action would encourage compliance with the legislative attempts to control subsidence through creation of subsidence control districts such as the one at issue in *Beckendorff*: "Providing policy and regulatory procedures in this field is a legislative function. It is well that the Legislature has assumed its proper role, because our courts are not equipped to regulate ground water uses and subsidence on a suit-by-suit basis."[4]

In departing from the common-law rule with respect to subsidence, the Court stated "We agree that some aspects of the English or common law rule as to underground waters are harsh and outmoded, and the rule has been severely criticized since its reaffirmation by this Court in 1955."[5] The Court then recognized a new cause of action if a landowner's withdrawal of groundwater is negligent, willfully wasteful, or for the purpose of malicious injury, and such conduct is a proximate cause of subsidence of the land of others.[6] The Court abandoned the English Rule as to subsidence reasoning that no other use of private real property enjoyed the same immunity from liability.[7] The Court further held that recognizing such a cause of action would better protect the rights of all landowners against subsidence if each has the duty not to damage the lands of others.[8]

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[1] *Friendswood*, 576 S.W.2d at 22.
[2] *Id*.
[3] *Id*. at 27.
[4] *Id*. at 29.
[5] *Id*. at 24-25.
[6] *Id*. at 30.
[7] *Id*. at 29.
[8] *Id*. at 30.

Finally, the cause of action applied only prospectively; the Court concluded that it would be unjust to apply this new tort action retroactively because the rule of capture had become an established rule of property law in Texas.[1]

Denis v. Kickapoo Land Co. (1989)

Under existing precedent, surface water users could only claim damages from excessive groundwater use upstream by presenting clear evidence that the springs arose from an underground stream and contributed directly to the diminution of a river. The burden of proof, however, is so high that it is nearly insurmountable.

In *Denis v. Kickapoo Land Co*.,[2] an upstream landowner drilled a suction well into Kickapoo Springs, which fed Kickapoo Creek, in order to irrigate crops. The well withdrew 700 to 800 gallons of water per minute and diminished the flow of the creek.[3] Downstream users sued claiming unlawful diversion of state surface waters. The trial court granted summary judgment for the defendant well owner, and the court of appeals affirmed.[4]

The Court distinguished between surface water, which belongs to the state, and percolating groundwater, which under the English rule is the absolute property of the landowner. The presumption in Texas is that water is percolating groundwater even if it feeds a spring.

The Court cited with approval the English rule regarding groundwater that feeds a spring:

> Under the English rule of the common law, percolating waters tributary to springs were treated the same as all other percolating waters as a part of the soil where found and belonged absolutely to the owner thereof, who could do what he pleased with them, even though in abstracting the water it dried up the springs, to which the water was tributary, on the land of another. And it is immaterial that the springs so supplied with water were the sources of a stream or surface water course upon which riparian rights had vested, provided that the water was intercepted while it was still percolating through the soil before it had reached the surface of the ground at the springs.[5]

The Court held that the summary judgment evidence was insufficient to sustain the plaintiffs' burden of proof and overcome the common-law presumption under the rule of capture. *Kickapoo Land Company* made clear that Texas courts would adhere strictly to the rule of capture, even when a clear opportunity to apply the "subterranean stream" exception presented itself.

[1] *Id*. at 26.
[2] 771 S.W.2d 235 (Tex. App. – Austin 1989, writ denied).
[3] *Id*. at 236.
[4] *Id*. at 235-236.
[5] *Id*. at 238-239 citing C. Kinney, *A Treatise on the Law of Irrigation and Water Rights*.

Barshop v. Medina County Underground Water Conservation Dist. (1996)

The Texas Supreme Court upheld the facial constitutionality of the Edwards Aquifer Act, which created the Edwards Aquifer Authority and greatly expanded the powers of underground water districts. The Court also affirmed the rule of capture.

The Court's discussion of the rule of capture provided the historical common-law framework within which the Legislature acted and within which the plaintiffs made their claims against the Act. The Court upheld the Act against a multitude of constitutional challenges. In rejecting the plaintiffs' contentions that the Act had no rational basis and was overbroad, the Court reiterated the Legislature's constitutional charge to regulate groundwater under the Conservation Act:

> Water regulation is essentially a legislative function. The [Conservation Amendment] recognizes that preserving and conserving natural resources are public rights and duties. The Edwards Aquifer Act furthers the goals of the [Conservation Amendment] by regulating the Edwards Aquifer, a vital natural resource which is the primary source of water in south central Texas. The specific provisions of the Act, such as the grandfathering of existing users, the caps on water withdrawals, and the regional powers of the Authority, are all rationally related to legitimate state purposes in managing and regulating this vital resource.[1]

Sipriano v. Great Spring Waters of America, Inc. (1999)

This case squarely presented the issue of whether Texas should continue to follow the rule of capture. The Texas Supreme Court refused to abolish the rule of capture and instead showed its historical deference to the Legislature. In *Sipriano*, Henderson County landowners sued the Ozarka Spring Water Co. when their wells were severely depleted by Ozarka's pumping of 90,000 gallons of water per day from nearby land.[2] Relying on the rule of capture, the district court granted summary judgment against the landowners, and the court of appeals affirmed.[3] The landowners then asked the Texas Supreme Court to overturn the rule of capture in favor of the rule of reasonable use. The Supreme Court refused the invitation.

> By constitutional amendment, Texas voters made groundwater regulation a duty of the Legislature. And by Senate Bill 1, the Legislature has chosen a process that permits the people most affected by groundwater regulation in particular areas to participate in democratic solutions to their groundwater issues. It would be improper for courts to intercede at this time by changing the common-law framework within which the Legislature has

[1] *Barshop* at 633.
[2] *Sipriano*, 1 S.W.3d at 76.
[3] *Id*.

> attempted to craft regulations to meet the state's groundwater-conservation needs. Given the Legislature's recent actions to improve Texas's groundwater management, we are reluctant to make so drastic a change as abandoning our rule of capture and moving into the arena of water-use regulation by judicial fiat. It is more prudent to wait and see if Senate Bill 1 will have its desired effect, and to save for another day the determination of whether further revising the common law is an appropriate prerequisite to preserve Texas's natural resources and protect property owners' interests.
>
> We do not shy away from change when it is appropriate. We continue to believe that 'the genius of the common law rests in its ability to change to recognize when a timeworn rule no longer serves the needs of society, and to modify the rule accordingly.' And Sipriano presents compelling reasons for groundwater use to be regulated. But unlike in *East*, any modification of the common law would have to be guided and constrained by constitutional and statutory considerations. Given the Legislature's recent efforts to regulate groundwater, we are not persuaded that it is appropriate today for this Court to insert itself into the regulatory mix by substituting the rule of reasonable use for the current rule of capture.[1]

The concurring opinion by Justice Nathan Hecht is particularly noteworthy. After observing that the people of Texas had given the Legislature the power and authority to regulate groundwater in 1917, Justice Hecht remarked, "Not much groundwater management is going on."[2] Justice Hecht noted that neither of the reasons given in *East* for the adoption of the rule of capture remained valid today.[3] Quoting Oliver Wendell Holmes, Jr., he further rejected the notion that we should adhere to the rule because it has been the law for a long time: "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."[4]

Although directly challenging the underpinnings of the rule of capture, Justice Hecht reluctantly agreed to defer to the Legislature for now:

> Nevertheless, I am persuaded for the time being that the extensive statutory changes in 1997, together with the increasing demands on the State's water supply, may result before long in a fair, effective, and comprehensive regulation of water use that will make the rule of capture obsolete. I agree with the Court that it would be inappropriate to disrupt the processes created and encouraged by the 1997 legislation before they have had a chance to work. I

[1] *Id*. at 80.
[2] *Id*. at 81 (Hecht, J., concurring).
[3] *Id*. at 82.
[4] *Id*.

> concur in the view that, for now — but I think only for now — *East* should not be overruled.[1]

Bragg v. Edwards Aquifer Authority (2002)

The latest chapter in the rule of capture in Texas is *Bragg v. Edwards Aquifer Authority*.[2] In *Barshop*, the Texas Supreme Court upheld the Edwards Aquifer Act in a facial challenge to its constitutionality. Six years later, the Court was faced with allegations that the Edwards Aquifer Authority in applying the Act had violated provisions of the Private Real Property Rights Preservation Act.[3] Thus, *Bragg* involved a challenge to the Act as applied.

At issue was the applicability of the Property Rights Act to the well-permitting process of the Edwards Aquifer Authority. Plaintiffs sued the Edwards Aquifer Authority claiming that the Authority violated the Property Rights Act by failing to prepare "takings impact assessments" (TIAs) before issuing is aquifer-wide well-permitting rules and applying those rules to the plaintiffs' applications for two well permits.[4]

The Supreme Court held that the Authority's adoption of well-permitting rules falls within the exception to the Property Rights Act for actions taken under a political subdivision's statutory authority to prevent waste or protect rights of owners of interest in groundwater.[5] The Court also concluded that the Authority's proposed actions on the plaintiffs' permit applications constitute "enforcement of a governmental action," to which the TIA requirement does not apply.[6]

Conclusion

Since its adoption in Texas 100 years ago, the rule of capture has been modified to prevent (1) willful waste, (2) malicious harm to a neighbor, and (3) subsidence. Further, the Texas Supreme Court has consistently acknowledged that this common-law rule can be modified by the Legislature. Any lingering doubt was resolved in 1917 by the adoption of the Conservation Amendment, which vests the Legislature with the power to regulate the state's natural resources, including groundwater.

In its decisions over the past half-century, the Texas Supreme Court has overwhelmingly reiterated the Legislature's power to regulate groundwater. If such regulation were to be adopted on a statewide basis, it could make the rule of capture obsolete. But so far, the Legislature has not accepted the Court's invitation to regulate groundwater more comprehensively. The Court has thus far shown substantial deference to the Legislature but the cautions of Justices Will Wilson and Nathan Hecht should be heeded: it is unlikely that the Supreme Court will forever use deference to the Legislature to justify maintaining the rule of capture in the face of changing circumstances.

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[1] *Id.* at 83.
[2] 71 S.W.3d 729 (Tex. 2002).
[3] *See* TEX. GOV'T CODE 2007.001-.045.
[4] *Bragg*, 71 S.W.3d at 730.
[5] *Id.*
[6] *Id.* at 731.

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