Chapter 8

Transcript of Record and Opinion of Texas Supreme Court and Other Documents

Robert E. Mace, Robert F. Flores, Cynthia Ridgeway, and Edward S. Angle
Texas Water Development Board

The purpose of this paper is to present the original documents of the East case, the case that established the Rule of Capture in Texas. We have included copies of the documents as attachments to this paper. These attachments are from original documents on file at the Texas State Archives. Personnel at the Texas State Archives photocopied the documents, and we then scanned the documents and resized them to fit within the margins of this report. We made some minor adjustments to some documents to facilitate their presentation on the page. These modifications included removing the title "Supreme Court, Austin." from the Texas Supreme Court decision to maximize the size of the document on the page. We digitally removed some bleed-through text from a few pages. We did not change any content.

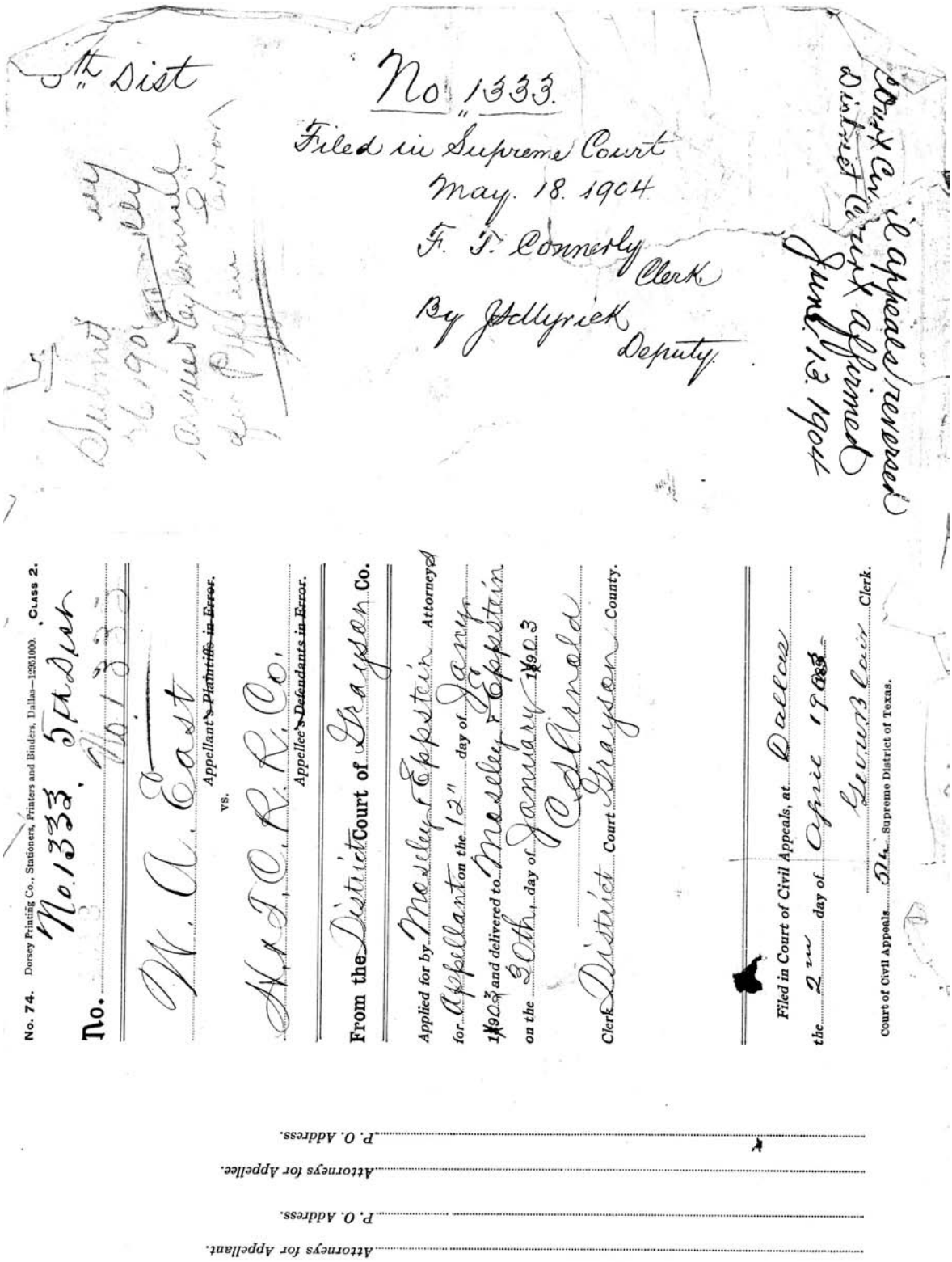
The documents on file at the Texas State Archives do not include any documents from the original filing of the case in District Court of Grayson County. However, the pertinent documents of that case are included in an appeal to the Court of Civil Appeals at Dallas.

Documents in this paper include:

c. Appellee's Motion for Rehearing (p.130).
d. Appellee's Application for Writ of Error (p. 135).
e. Court's Order granting Appellee's Application, denying Appellee's Motion and Certification of Clerk Authenticating Transcript of Record (p.147).
f. Appellee's Appeal bond, (covering all court costs) (p. 149).
g. Appellee's Appeal bond, (covering only Texas Supreme Court costs) (p. 152).
h. Certificate of Bill of Costs (p. 155).

III. Texas Supreme Court, Austin, Texas (p. 157).
a. Citation (service) ordering Defendant of Errors (plaintiff) to appear before the Texas Supreme Court, exercised by Grayson County Sheriff (p. 157).
b. Supreme Court's Opinion and Judgment Reversing Appeal and Affirming Trial Courts Opinion (p. 160).
c. Defendant of Error's Motion for Rehearing before the Supreme Court (p. 167).
d. Precept Ordering Grayson County Sheriff to deliver a copy of the motion for Rehearing to Plaintiff of Error (defendant) (p. 170).
e. Defendant of Error's Motion asking that their Motion for Rehearing be dismissed (p. 172).

I. Grayson Count District Court, Sherman Texas



No. 1333.

Filed in Supreme Court
May. 18. 1904
F. J. Connerly Clerk
By J. Gillyriek Deputy.

Court of Civil Appeals 5th Supreme District of Texas.

No. 74. Dorsey Printing Co., Stationers, Printers and Binders, Dallas—12561000. CLASS 2.

No. 1333. 5th Dist

M. A. East
Appellant's ~~Plaintiffs in Error.~~

vs.

M. K. & T. R. R. Co.
Appellee's ~~Defendants in Error.~~

From the District Court of Grayson Co.

Applied for by Moseley & Epperson Attorneys for Appellant on the 12" day of January 1903 and delivered to Moseley & Epperson on the 30th day of January 1903

J. D. Arnold
Clerk District Court Grayson County.

Filed in Court of Civil Appeals, at Dallas
the 2nd day of April 1903

Lewis Cain Clerk.

Attorneys for Appellant.

P. O. Address.

Attorneys for Appellee.

P. O. Address.

----: I N D E X :----

THE STATE OF TEXAS,
COUNTY OF GRAYSON.

At a term of the District Court, begun and holden at Sherman, within and for the County of Grayson, and ending on the 27th day of December, A.D. 1902, the following case came on for trial, to-wit:

-:Caption:-

W . A . E A S T
Nº 13880 -v-
H.& T.C. R.R.COMPANY.

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The State of Texas, ## In the District Court,
##
County of Grayson. ## Grayson County, Texas.

W . A . E A S T
Nº 13880 -vs-
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

Plaintiff's First Amended Original Petition. Filed Dec.16.1902.

Comes now W.A. East and files this his first amended petition, and for such amendment says:-

That at all times hereinafter mentioned the plaintiff was a resident of Grayson County, Texas, and defendant was a railroad company, duly and legally incorporated under the laws of the State of Texas as a common carrier of freight and passengers for hire, with a local office and local agent at Denison, in Grayson County, Texas, and that the name of such agent is C.C. Calvert.

Plaintiff shows that, heretofore, to-wit: on or about the first day of August, 1901, and for many years prior thereto, he

1.

was the owner in fee simple of the following described property, to-wit:

> Two lots and one-half on the corner of Lamar Avenue and Morgan Street, Lots 1 and 2 and one-half of 3, Block two, Cook's second addition to Denison, Grayson County, Texas.

That the defendant, at all times mentioned in this petition, and for many years prior thereto, was the owner of and was operating a certain line of railway which ran into the City of Denison from a southeasterly direction, crossing Owing Street and Lamar Avenue in a northwesterly direction, and extending beyond that point in each direction for many miles.

Plaintiff's First Amended Original Petition.

Plaintiff shows that for a long period of time prior and including, to-wit: the month of August, 1901, he had upon the proper hereinbefore described a certain well about 33 feet deep, which was supplied with water by a subteranean stream which ran from near the intersection of Lamar Avenue and Owing Street in the city of Denison, Grayson County, Texas, to the said well: or, if he is mistaken in this, then this plaintiff says that the said well was fed by percolations of water through his land. He shows that his said well was filled, and has been for mny years prior to the month of August, 1901, with pure water, and that the said well supplied large quantities of water to this plaintiff, sufficient for all the ordinary household purposes and the natural requirements of such prop-

erty. That the aforesaid stream or percolations supplied said well with, practically, an inexhaustible supply of well water, which water he alleges was pure, soft water of a kind that it was almost impossible to secure in the markets.

Plaintiff further shows that said well and supply of water was of a permanent character, and but for the facts hereinafter set out, would have remained inexhaustible.

He shows further that on or about sometime in the month of July, 1901, defendant company sent its agents and employees down to near a point of the intersection of Owing Street with Lamar Avenue, and that they examined the wells in the surrounding neighborhood, and traced the course of the subteranean waters until they learned that by sinking a well at or near said point they could extract from the surrounding country all of the water that naturally and usually percolated into and through said land, and, particularly, that which supplied the well of the plaintiff, by digging a large well at or near said point and supplying it with powerful pumping engines and apparatus. That they did, sometime in the month of August, sink a large well at said point, about twenty feet in diameter and about 80 feet deep. That said well was so dug that it, in connection with the powerful pumps and engines with which it was supplied to extract water from land, drew all the water from under plaintiff's land, as well as that of all of the other surrounding land owners for a very large teritory.

Plaintiff's First Amended Original Petition.

Plaintiff further alleges that the water so taken from said well was not taken for the purposes of developing or using this land as land for any useful, profitable or pleasurable purpose, but that the said well and land is used for no other purpose whatsoever except for the purpose of extracting immense quantities of water from under defendant's land and the land of this plaintiff and other parties. That said water was used for the purpose of furnishing the entire Houston & Texas Central Railroad Company tributary to Denison with water, and that many millions of gallons of water have been extracted from the said well; and that the defendant has continued and is now extracting and pumping from said well about eighty-five thousand (85000) gallons per day. That at the time it sunk said well, it did so for the purpose of obtaining more water from said land than its natural and reasonable supply of water, and did so knowing that it was extracting and appropriating it to its own use all of the water under this plaintiff's land, and that in this way it dried or caused to be dried up the subteranean streams and percolations of water which supplied plaintiff's well and thereby cut off the supply of water to this plaintiff's well, and that it proposes to continue to do so for all time to come.

Plaintiff's First Amended Original Petition.

Plaintiff shows that by reason of said action on the part of defendant, his well has been absolutely destroyed as a well, and is now of no value whatever. That his natural and necessary water supply has been cut off so as to make it impossible

for him to secure any water whatever from said well, and that by reason of the promises he has been damaged in the sum of eleven hundred dollars. He alleges that the reasonable value of his said well was, to-wit: the sum of eleven hunired (1100) dollars. That he has been compelled to purchase water and that the rental value of his property, by reason of these facts, has been reduced, to-wit: the sum of thirty (30) dollars per year.

He shows further that the defendant mastaken from its said well an unreasonable and unnatural supply of water out of all proportion to any reasonable or legitimate use of the said land as land. That it uses said water in supplying a vast number of engines with wter and for all other purposes necessary and usual in conducting a large system of railroad extending over several hundred miles. That it constructed said well for the purpose and with the intention of committing a trespass upon the land of this plaintiff and of extracting from said well its natural and customary water supply of underground water. That it equipped its well with engines of such great power as to extract from plaintiff's land its supply of water. That the quantity of water taken by it was unreasonable and greatly in excess of any purpose for which the land of defendant could be used as land, and that in fact said land is being used for no other purpose whatever except for the purpose of extracting the wter of this plaintiff and other

Plaintiff's First Amended Original Petition.

5.

adjoining land owners from their land.

Premises considered, plaintiff shows that he has been damaged in the sum of eleven hundred (1100) dollars, for which he prays judgment, as well as for all costs of suit and for such other and further relief, general or special, as he may in this behalf deserve.

Plaintiff's First Amended Original Petition. Filed Dec.15. 1902.

MOSELEY & EPPSTEIN,
Attorneys for Plaintiff.

Filed December 16th, 1902. ---------- C.S. ARNOLD, Cl'k. D.C.

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Plaintiff's

W . A . E a s t ## In the District Court,
Nº 13880 -vs- ##
H.& T.C.R.R.Company. ## Grayson County, Texas.

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Now comes the defendant and says:

FIRST. Defendant demurs generally to plaintiff's petition because the facts therein alleged show no cause of action.

HEAD & DILLARD,
Attorneys for Defendant.

Defendant's Original Answer. Filed Apl. 5. 1902.

SECOND. Defendant demurs specially to plaintiff's petition because; first, it is too general, vague and indefinite, both in stating the acts of negligence charged against the defendant and the injuries received by plaintiff.

HEAD & DILLARD,
Attorneys for Defendant.

THIRD. Defendant, for general answer to plaintiff's petition, denies every allegation therein contained and demands

6.

strict proof thereof.

HEAD & DILLARD,
Attorneys for Defendant.

Defendant's Original Answer. Filed Apl.5. 1902.

Wherefore defendant prays to be discharged with its cost.

HEAD & DILLARD,
Attorneys for Defendant.

Filed April 5th, 1902. ---------- C.S. ARNOLD, Cl'k. D.C.

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The State of Texas, ## In the District Court,
##
County of Grayson. ## Grayson County, Texas.

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W. A. EAST, ET AL,
-vs-
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

Nos. 13880 to 13888, inclusive.

I.

Findings of Fact and Conclusions of Law. Filed Dec.26.1902.

In each of these cases I find as follows:

1ST. The defendant, the Houston & Texas Central Railroad Company, was the owner in fee simple of six (6) lots in the city of Denison, Grayson County, Texas, at the time mentioned in plaintiff's petition, and dug thereon a well twenty (20) feet in diameter and sixty-six (66) feet deep. It put therein a steam pump of sufficient strength to supply a three inch pipe, and with the exception of three or four days since Aug-

7.

ust, 1901, has daily taken from said well by means of said pump about twenty-five (25,000) thousand gallons of water. This water was taken from said well and used by it in its locomotives and machine shops operated by it in the city of Denison, in which said land is situated. Said well is supplied entirely by water percolating through its soil and that of adjacent lands, and not by any under-ground or other stream of any kind. Before digging said well, defendant made an examination of all of the surroundings, including the wells of the plaintiff, and made test holes with a view of obtaining the desired supply of fifty (50,000) gallons of water per day. Plaintiff was present when such examinations were being made, and consented for their wells to be examined by the defendant, and had no further conversation or communication with defendant upon the subject. From the examination made by it, defendant became satisfied that it could procure the desired supply of water upon its land as aforesaid, and dug said well for the purpose of obtaining the same for the uses hereinbefore set out. The wells were dug without any intention on the part of defendant of injuring the property of either of the plaintiffs, and did not know that such would be the effect. The water percolated into defendant's well at different depths, some of it coming in at the bottom thereof. The wells of plaintiffs are each about five feet in diameter and about thirty-three feet in depth, and are situated in different di-

Findings of Fact and Conclusions of Law.

rections and distances from defendant's well; are on lands owned by plaintiff in fee simple and which was used as a homestead by each of the plaintiffs; were dug prior to defendant's well, and had always been used by plaintiffs, up to the time defendant's well was dug, for household purposes, and, prior to that time, had always furnished an adequate supply of good water for such uses; and these wells have been dried up by the digging and use to which defendant has put its well. That the damage that each of plaintiffs and their land has sustained by the drying up of their wells is the sum of two hundred and six dollars and twenty-five cents, including both past and prospective injury to themselves, and their lots described in their petition.

Findings of Fact and Conclusions of Law.

2ND. I further find that the use to which defendant puts its well was not a reasonable use of their property as land, but was an artificial use of their property, and, if the doctrine of reasonable use as applicable to defined streams applies to such cases, this was unreasonable.

II.

I conclude that under the foregoing facts no cause of action is shown in behalf of plaintiffs in any sum whatsoever, because I do not believe that any correlative rights exist between the parties as to underground, percolating waters, which do not run in any defined channel.

9.

I therefore find in favor of defendant.

RICE MAXEY,
Judge 15th Judicial District.

Findings of Fact and Conclusions of Law. Filed Dec.28.1902.

Filed December 28th, 1902. ---------- C.S. ARNOLD, Cl'k. D.C.

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W . A . E a s t ## #
Nº 13880 -vs- ##
H.& T.C.R.R.Company.

December 22nd, 1902.

This day this cause was called for trial and came the parties by their attorneys and announced ready for trial; and, no jury being demanded, all matters, both of law and of fact, were submitted to the Court, and after hearing the pleadings and the evidence the Court finds in favor of defendant.

-:Judgment:- It is therefore ordered, adjudged and decreed by the Court that the plaintiff, W.A. East, take nothing by this suit, and that the defendant, the Houston & Texas Central Railroad Company, a corporation, go hence without day and recovrr of said plaintiff all costs of this suit, for which let execution issue.

To which judgment, and to the findings of fact and conclusions of law made by the Court herein, plaintiff excepts, and in open Court gives notice of appeal to the Court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas.

10. ----o---- -----o----- ----o----

The State of Texas, ## In the District Court,
##
County of Grayson. ## Grayson County, Texas.

W . A . E A S T
Nº 13880 -v-
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

Plaintiff's Motion for New Trial. Filed. Dec.23. 1902.

Now comes the plaintiff in the above entitled and numbered cause and files this his motion for a new trial, and for cause shows:

1ST. That the Court erred in its findings of fact conclusion from the facts that defendant was not liable, because said finding was contrary to the law and contrary to the evidence.

MOSELEY & EPPSTEIN,
Attorneys for Plaintiff

Filed December 23rd, 1902. ---------- C.S. ARNOLD, Cl'k. D.C.

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Order on Motion for New Trial.

W . A . E a s t ##
Nº 13880 -v- ##
H.& T.C.R.R.Company. ## December 23rd, 1902.

Now on this day came on to be heard the motion of plaintiff for a new trial of this cause, and said motion being heard and considered by the Court is overruled, to which ruling of the Court plaintiff excepts and in open Court gives notice of appeal to the Court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas: and ten days after adjournment of the present term of this Court is allowed plaintiff within which to prepare and file a statement of facts herein.

11.

The State of Texas, ## In the District Court,
##
County of Grayson. ## Grayson County, Texas.

W . A . E A S T
Nº 13860 -vs-
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

KNOW ALL MEN BY THESE PRESENTS, That we, W.A. East, as principal, and M.L. Eppstein and L.B. Eppstein, as sureties, acknowledge ourselves indebted to and bound to pay to the Houston & Texas Central Railroad Company thesum of one hundred and fifty dollars, conditioned, however, as follows: that,

ppeal Bond. Filed an. 12.1903.

WHEREAS, in the above entitled and numbered cause, heretofore, on the 22nd day of December, 1902, judgment was rendered in favor of the defendant, and motion for a new trial overruled on, to-wit: the 23rd day of December, 1902; from which said judgment plaintiff has appealed to the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas; and,

WHEREAS, the probable amount of the costs of the suit in the Court of Civil Appeals, the Supreme Court and the Court below has been fixed by the Clerk at seventy-five ($75) dollars:

NOW, THEREFORE, this bond shall be void on condition that W.A. East, appellant, shall prosecute his appeal with effect, and shall pay all costs that have accrued in the Court below, and which may accrue in the Court of Civil Appeals and in the Supreme Court.

W.A. EAST.
M.L. EPPSTEIN.
L.B. EPPSTEIN.

Approved and filed January 12th, 1903.--C.S. ARNOLD, Cl'k. D.C.

12.

The State of Texas, ## In the District Court,
##
County of Grayson. ## Grayson County, Texas.

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W . A . E A S T
Nº 13880 -vs-
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

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Now comes the plaintiff in the above entitled and numbered cause and makes the following assignment of errors committed by the Court upon the trial of said cause:

Plaintiff's Assignment of Errors. Filed Jan.12.1903.

----:1ST:----

The Court erred in its conclusion of law that under the facts the defendant was not liable.

----:2ND:----

The Court erred in overruling defendant's motion for a new trial.

----:3RD:----

The Court erred in failing to render judgment for plaintiff upon said facts.

MOSELEY & EPPSTEIN,

Attorneys for Plaintiff.

Filed January 12th, 1903. ---------- C.S. ARNOLD, Cl'k. D.C.

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Bill of Costs.

BILL OF COSTS.

Clerk's:-		Sheriff's:-	
Docketing.....	.20	Serving Cits.....	.75
Ent. Apprs.....	.30	Mileage.....	.10
Filing Papers.....	1.20	Jury Fee.....	.50
Issuing Cits.....	1.25	SHERIFF'S COST.....	$1.35
Ent. Orders.....	1.50		
Ent. Comts.....	.20		
Ent. Mots.....	.15		
Issuing Subps.....	.25		
Taking Bond.....	1.50		
Assessing Damages....	.50		
Judgment.....	1.00	RECAPITULATION.	
Taxing Costs.....	.25		
Transcript.....	7.00		
Certificate.....	.75	Clerk's Cost.....	16.55
Recording Rets.....	.50	Sheriff's Cost.....	1.35
TOTAL CLERK'S COST..	$16.55	TOTAL COSTS.....	$17.90

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Certificate of Clerk.

The State of Texas,
County of Grayson.

I, C.S. ARNOLD, Clerk of the District Court of Grayson County, Texas, do hereby certify that the above and foregoing thirteen and one-half (13½) pages of typewritten matter is a true and correct copy and constitutes a complete transcript of all the proceedings had on the trial of cause Nº 13880, W.A.EAST vs. HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, as same now appear on file and of record in my office.

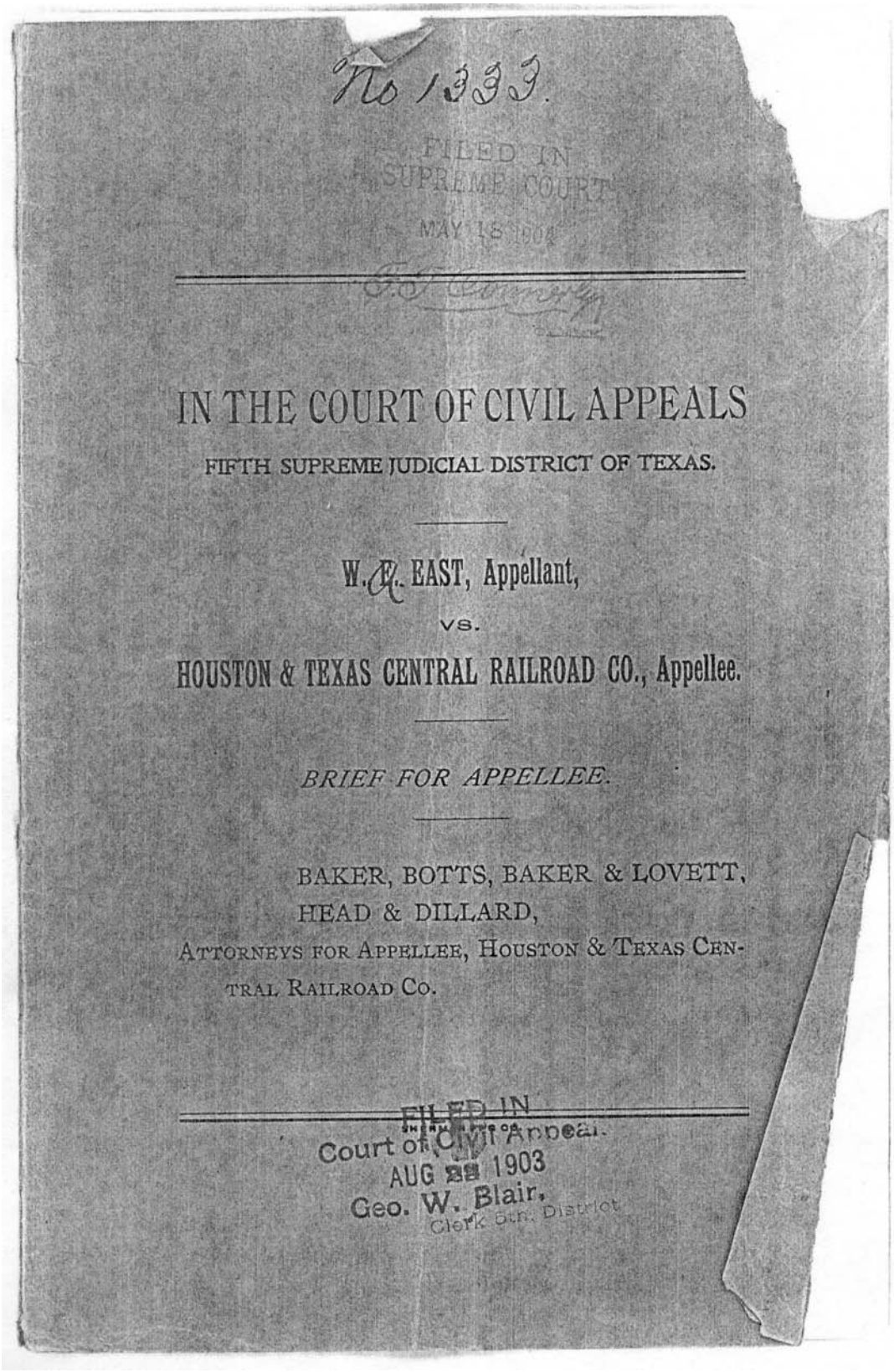
Given under my hand and seal of said Court at office in the City of Sherman, this January 30th, 1903.

C S Arnold

Clerk of the District Court
of Grayson County,
Texas.

14.

II. Court of Civil Appeals – 5th Supreme Judicial District, Dallas Texas



No 1393.

FILED IN
SUPREME COURT
MAY 18 1904

IN THE COURT OF CIVIL APPEALS

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

W. E. EAST, Appellant,

vs.

HOUSTON & TEXAS CENTRAL RAILROAD CO., Appellee.

BRIEF FOR APPELLEE.

BAKER, BOTTS, BAKER & LOVETT,
HEAD & DILLARD,
ATTORNEYS FOR APPELLEE, HOUSTON & TEXAS CENTRAL RAILROAD CO.

FILED IN
Court of Civil Appeals
AUG 28 1903
Geo. W. Blair,
Clerk 5th. District

IN THE COURT OF CIVIL APPEALS

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

W. E. EAST, Appellant,

VS.

HOUSTON & TEXAS CENTRAL RAILROAD CO., Appellee.

BRIEF FOR APPELLEE.

FIRST COUNTER PROPOSITION, FIRST ASSIGNMENT OF ERROR.

An assignment in this language: "The court erred in its conclusion of law, that under the facts the defendant was not liable," is too general, and appellee objects to its consideration by this court.

AUTHORITIES.

Mynders v. Ralston, 68 Tex. 499;

Falls L. & C. Co. v. Chisholm, 71 Texas 528, where this language is used: "The remaining assignments of error are as follows:

'4: The court erred in holding that plaintiff could keep his deed in his pocket for near twenty years and then recover.

'5: The court erred in rendering judgment in favor of plaintiff.

'6. The court erred in finding that plaintiff's claim was a stale demand.

'7. The court erred in overruling the defendant's motion for a new trial.

'These assignments do not distinctly specify any grounds of error as required by Art. 1033 of the revised statutes and by rules 24, 25 and 26 for the government of this court. It is useless to encumber the record with such matter and the practice of doing so should be abandoned.''

Am. Legion of Honor v. Rowell, 78 Tex. 677, where it is said: ''There is, however, another brief for appellant on file which contains an assignment of error which was filed in time. So much of it as is copied in the brief reads as follows:

'The court erred in rendering judgment for plaintiff upon the evidence adduced upon the trial, because the judgment is contrary to law and not supported by the evidence.'

Such an assignment is too general to admit of consideration, as has been repeatedly decided by this court.''

SECOND COUNTER PROPOSITION, FIRST ASSIGNMENT OF ERROR,

If said assignment is considered.

The court having found that defendant's well was upon land owned by it in fee-simple. and was dug to

supply water for the use of its locomotives and machine shops operated by it in the city of Denison, in which said land is situated, and without any intention of injuring the property of the plaintiff or knowledge that it would have such effect, and that the water in said well was supplied by *percolation* through the soil and did not come from any defined stream, no other judgment than the one rendered should have been rendered by the court below. The law is that the owner of land can use all the water he can obtain thereon by digging wells which are supplied by water percolating through the soil, provided said wells are not dug for the purpose of maliciously injuring adjoining proprietors, and this though such adjoining proprietors may be entirely deprived of water which otherwise would have percolated into their own land.

STATEMENT.

For the court's findings in full see statement to appellant's first assignment on page 2 of his brief.

AUTHORITIES.

Gould on Waters, 3d ed. §280;
Miller v. Blackrock Springs Im. Co., 40 S. E. 27;
27 A. & E. Ency. Law, 1st ed., 424, 425;
Hougan v. Ry. Co., 35 Iowa, 558;
Acton v. Blundell, 12 M. & W. 324;
Burrows v. Saterlee, 67 Iowa;
Hanson v. McCue, 42 Cal. 303;
Hale v. McLee, 53 Cal. 578;

Sadler v. Lee, 66 Ga;

Lybe's Appeal, 106 Pa. St. 626-634;

Collins v. Gas Co., 131 Pa. St. 156;

Metcalf v. Nelson, 59 Am. St. 756 and note.

Southern Pacific v. Defour, 19 L. R. A. 92 and full note.

ARGUMENT.

The question presented by the court's findings of facts and law is the extent to which the owner of land can appropriate to his own use the water which percolates through his soil and accumulates in a well dug by him thereon. Can the owner of the land use such water for the purpose of supplying machinery owned by him, or is he restricted to household and domestic purposes? The rule on this subject seems so well settled that we have only attempted to cite a few of the very many cases bearing thereon.

Mr. Gould in his Work on Waters (3 ed.) published in 1900, §280, says: "Water percolating through the ground beneath the surface, either without a definite channel, or in courses which are unknown and unascertainable, belongs to the realty in which it is found. The rule that a man may freely and absolutely use his property, so long as he does not directly invade that of his neighbor's, or consequentially injure his clearly defined rights, is applicable to the interruption of subsurface supplies of water or of a stream, and the damage resulting therefrom is not the subject of legal re-

dress. The land-owner may, therefore, make a ditch to drain his land, or dig a well thereon, or open and work a quarry upon it, or otherwise change its natural condition, although by so doing he interrupts the underground sources of a spring or well on his neighbor's land. The only remedy for the latter is to sink his own well deeper. He may take the water which would otherwise pass off by natural percolation into the adjoining land, or draw off the water which may come by natural percolation from that land, and no adverse right to prevent the exercise of this privilege can be acquired by prescription."

A large number of cases are cited in the note which follows to sustain the text. In fact fewer cases can be found on the other side of this question than upon almost any other legal proposition announced in the law books.

The case of Miller v. Blackrock Springs Improvement Company, cited above, is such a full discussion of this question and such a complete and convincing review of the authorities bearing thereon, that we can do but little more than ask its careful consideration at the hands of the court.

We also invite the especial attention of the court to the case of Hougan v. Railway, 35 Iowa 558, on account of the very great similarity of the facts therein involved to those here in question. In that case it is distinctly held that where a railroad company holds a

deed conveying "for all purposes connected with the construction, use and operation of the said railway," the right-of-way over certain lands, this includes the right to dig a well on the right-of-way in order to procure water for the railroad company's own use in connection with the operation of its railroad. The case at bar is much stronger than the one decided by that court, in that the appellee is owner in *fee-simple* of the land upon which it dug the well in question.

We are aware that cases can be found in which a person holding an easement acquired under the terms of a statute has been held not entitled to use percolating waters to the same extent as the owner of the fee would have the right to use them. Such a case is United States v. Alexander, 148 U. S. 186, but in that case the general rule is recognized in the following language:

"Finally, an argument in favor of the government is based upon the finding of the court below, that it does not appear that the well was supplied 'by a distinct vein of water running into it;' and the leading case of Acton v. Blundell, 12 M. & W. 324, and cognate cases are cited.

The doctrine of those cases substantially is, that the owner of land 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 un-

derground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

We recognize this as sound doctrine in the ordinary case of a question between adjoining owners of land. But in a case like the present, where the injury complained of is inflicted by the construction of a public work under authority of a statute, over land upon which the public authority had acquired a right-of-way only, and where the statute itself provides a remedy for such injury, the law has been held to be otherwise in cases whose reasoning demands our assent."

Then follows a review of a number of cases sometimes relied upon in the vain attempt to tear down the long established rule upon this subject.

It will be noted that the cases cited by appellant to sustain his contention themselves concede that they are opposed to the great weight of authority on this subject, and appellant's counsel, in his brief, in effect, makes a like concession.

The case of Bassett v. Salisbury principally relied upon by appellant seems to us to have but little application. The question involved was the right of the defendant to maintain a dam on his land so as to obstruct the natural drainage from the plaintiff's land above the dam to his injury, which seems to us a very different question from the right of the owner of land to appro-

priate to his own use the water he finds therein. The overwhelming weight of authority holds that he has as much right to appropriate this water as he has the sand, gravel or soil itself. It is true, language is used by the judge delivering the opinion in that case which could be applied to some extent to the facts herein involved, but the total failure to cite authority to sustain such expressions is at least significant, as is the following quotation from the opinion:

"We are aware that since the case of Acton v. Blundell, 12 M. & W. 324, the weight of authority elsewhere is against the view of the law which we have adopted. A number of cases have been cited by the defendant's counsel and more may now be found in which the reasoning conflicts with the conclusion at which we have arrived, but with the highest respect for the tribunals that have pronounced these decisions, we are compelled to differ from the views they have expressed."

The New Hampshire case of Swett v. Cutts, also greatly relied upon by appellant, will also be found to have but little application. We merely copy the syllabus: "A land-owner may in the reasonable use of his own land lawfully prevent the flow of surface water on to his premises from the adjacent higher land of another, although such adjacent land is thereby injured, and the fact that such water has been wont to flow upon the inferior land for over twenty years, will not amount to a prescription."

It will be noted that this case, like the previous one referred to, did not involve the question as to what use the owner of the land could make of the water found percolating through his soil, but only involved the extent to which he could prevent the water from his neighbor's land coming upon his premises, and his right to do this was sustained.

The case of Forbell v. City of New York, 164 N. Y. 522, relied upon by defendant is more in point in his favor, but that case is likewise unsupported by authority and only involves the right of one proprietor to intentionally draw from his neighbor's land water for the purpose of *selling it to others*. While we do not concede that this case can be sustained by authority even as applied to the facts upon which it was rendered, yet it does not go far enough to sustain the plaintiff's position in the case at bar.

To decide in appellant's favor it will be necessary to establish the law to be: That the owner of land cannot obtain water from his well thereon to run his gin or traction engine, if it interfers with the supply of the adjoining proprietor. If the owner of land can use the water thereon to supply one engine he can use it to supply two or more; and in like manner, if he can use it to operate one gin or mill, he can use it to operate two or more. The question is: Does percolating water belong to the owner of the land, or does it belong to the adjoining proprietor from whose land the water comes? If the

owner of land desires to retain the water which falls thereon for his own use he must adopt the necessary means to prevent its escape. He cannot permit it to percolate through his neighbor's soil and then claim damages of such neighbor for using it after it has left his land. The authorities and reasoning to this effect are so convincing that we cannot understand how the question can again be presented for consideration.

FIRST COUNTER PROPOSITION, SECOND ASSIGNMENT OF ERROR.

An assignment of error in this language, "The court erred in overruling plaintiff's motion for a new trial" is too general, and appellee objects to its consideration for that reason.

AUTHORITIES.

Falls L. & C. Co. v. Chisholm, 71 Tex. 528, cited above.

Cooper v. Lee, 21 S. W. 998.

McCowan v. Terrell, 29 S. W, 484.

ARGUMENT.

It will be noted that one of the assignments in Falls L. & C. Co. v. Chisholm, referred to above, is in almost the exact language of appellant's assignment here objected to. In the other cases cited there was more than one ground in the motion for new trial, and they might be distinguished on that ground. In this case there is but one ground set up in plaintiff's motion for a new trial, which is as follows: "That the court

erred in its finding of fact, and conclusion from the facts, that defendant was not liable, because said finding was contrary to the law and contrary to the evidence ''

A citation of authority is not necessary to show that this in like manner is too general to admit of consideration, could it be substituted for the assignment itself, as appellant attempts to have it done. See authorities cited to first counter proposition, first assignment. Also see the great number of cases cited in the 1st volume of Batts' Buckler's Civil Digest, page 180, to sustain the statement that an assigment that "The court erred in overruling motion for a new trial" is too general. Also that an assignment that "The judgment is contrary to the law and evidence" is too general.

FIRST COUNTER PROPOSITION, THIRD ASSIGNMENT OF ERROR.

An assignment in this language, "That the court erred in failing to render judgment for plaintiff upon said facts," is too general, and appellee objects to its consideration for that reason.

AUTHORITIES.

Same as to first counter propositions, first and second assignments.

All of which is respectfully submitted with the request that the judgment of the court below in all things be affirmed.

BAKER, BOTTS, BAKER & LOVETT,
HEAD & DILLARD,

ATTORNEYS FOR APPELLEE, HOUSTON & TEXAS CENTRAL RAILROAD CO.

With app No 4050

No. 4018.

W. A. East,

Appellant,

vs.

Houston & Texas Central R. R. Co

Appellee.

FILED IN
SUPREME COURT
JAN16 1904
F. J. Conway
Clerk.

OPINION.

FILED IN
Court of Civil Appeals.
NOV 28 1903
Geo. W. Blair,
Clerk 5th. District,

By BOOKHOUT, Associate Justice.

12-29-1903

12-1

W. A. East, Appellant, |
No. 4018. vs. | Appeal from Grayson County.
Houston & Texas Central Railroad Co. |
Appellee. |

##########

This is a suit by W. A. East against the Houston and Texas Central Railroad Company for damages growing out of the alleged destruction by defendant of plaintiff's well. The case was tried before the Court without a jury and resulted in a judgment for defendant and plaintiff appealed. The trial court filed conclusions of fact which in the absence of a statement of facts are to be taken as the facts of the case. Said conclusions are as follows:

"1st. The defendant, the Houston and Texas Central Railroad Company, was the owner in fee simple of six (6) lots in the City of Denison, Grayson County, Texas, at the time mentioned in plaintiff's petition, and dug thereon a well twenty (20) feet in diameter and sixty-six (66) feet deep. It put therein a steam pump of sufficient strength to supply a three inch pipe, and with the exception of three or four days since August, 1901, has daily taken from said well by means of said pump about twenty-five thousand (25,000) gallons of water. This water was taken from said well and used by it in its locomotives and machine shops operated by it in the City of Denison, in which said land is situated. Said well is supplied entirely by water percolating through its soil and that of adjacent lands and not by any underground or other stream of any kind. Before digging said well, defendant made an examination of its surroundings, including the well of the plaintiff, and made test holes with a view of obtaining the desired supply of fifty thousand (50,000) gallons of water per day. Plaintiff was present when such examinations were being made and consented for his well to be examined by defendant, and had no further conversation or communication with the defendant upon the subject. From the examination made by it, defendant became satisfied that it could procure the desired supply of water upon the land as aforesaid, and dug said well for thepurpose of obtaining the same for the uses hereinbefore set out. The wells were dug without any intention on the part of defendant of injuring the property of either of the plaintiffs and did not know that such would be the ef-

effect. The water percolated into defendant's well at different depths, some of it coming into the bottom thereof. The well of plaintiff is about five feet in diameter and about thirty-three feet in depth; is on land owned by plaintiff in fee simple and is used as a homestead by plaintiff, was dug prior to defendant's well and had always been used by plaintiff, up to the time defendant's well was dug, for household purposes, and prior to that time, had always supplied an adequate supply of water for such uses; that this well has been dried up by the digging and use to which defendant has put its well. That the damage that plaintiff and his land has sustained, by the drying up of his well, is the sum of two hundred and six dollars and twenty-five cents (206.25) including both past and possessive injury to himself and the lots described in his petition.

2nd. I further find that the use to which defendant puts its well was not a reasonable use of their property as land, but was an artificial use of their property, and if the doctrine of reasonable use, as applicable to defined streams to such cases, this was unreasonable."

In Bassett v. Salisbury Mfg. Co. 43 N. H. 569; 82 Am. Dec. 179, it is held in effect that the right of a land owner to draw from his land all water found percolating underground, was not absolute, but qualified and limited to the amount necessary for the reasonable use of the land, as land. That the rights of adjoining landowners are correlative and from the necessity of the case the rights of each is only to a reasonable use. The Court goes into an exhaustive discussion of the question and in the very able opinion delivered, arrives at the conclusion above stated. The rule as announced therein was approved in the later case of Swett v. Cutts, 50 N. H. 439; 9 Am. Rep. 276.

In a late case decided by the Court of Appeals of New York in which the plaintiff was a lessee of certain farming lands situated near Spring Creek, within the County of Kings. He used a portion of the lands in question for the purpose of growing celery and water cresses. The City of Brooklyn constructed a pumping station in the borough of Queens City of New York on the conduit line near the Kings County boundary line and early in 1885, and in 1894 sunk additional wells and made an additional pumping station. The effect of pumping at these stations was to lower the underground water table on this land, and thus made it unfit for the cultivation of celery or water cresses,

and the crops failed for many years prior to the commencement of the action, in 1898." The Court in treating of the right of the land owner to the use of underground percolating water, in that case, uses the following language:

"In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however unreasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired." Forbell v. New York, 164 N. Y. 522; 51 L. R. A. 696.

The Court treated the act of the city in extracting the percolating waters from the land of plaintiff in the manner and by use of the appliances adopted by it, as a trespass. It further held that a trespass may be produced by the employment of such material, agencies or instruments as become effective by the co-operation of the forces of nature. See also Smith vs. Brooklyn, 160 N. Y. 357; 45 L. R. A. 664; 27 Am. & Eng. Enc. Law, p. 429, ist. ed.

In the case at bar the trial court found that the defendant was not making a reasonable use of its property as land, but that the use was an artificial one. Before defendant dug its well it made an examination of its surroundings, examined plaintiff's well, dug test holes and calculated that it could, from the waters percolating

underground its land and the surrounding land, including plaintiff's cause to be extracted therefrom as much as 50,000 gallons per day. To accomplish this purpose it dug its well twenty feet in diameter and sixty-six feet deep and fitted the same with a steam pump and other suitable appliances for forcing that amount of water therefrom. It has, since August 1901, with the exception of three or four days, forced 25,000 gallons of water daily from said well, which it has used in operating its locomotives and machine shops in the City of Denison. The plaintiff's well was thirty three feet deep andfive feet in diameter and was on his own land, occupied by him as his resident homestead. It was dug prior to that of defendant and had always been used by plaintiff for supplying water for his household purposes, for which purpose it furnished an adequate supply, until the defendant dug and installed its well and began pumping therefrom, since which time and as a result thereof, the plaintiff's well has dried up. The trial Court found that the plaintiff and his land have sustained damage by these acts of defendant in the sum of $206.25. We are of the opinion that under the facts the plaintiff was entitled to recover this sum.

It is true that in the case of Acton v. Blundell, 12 Mees. & Wels. 324, the doctrine was laid down in England that "If a man digs a well on his own field and thereby drains his neighbors he may do so unless he does it maliciously." It is further true that this rule has been adopted in some of the American States, Gould on Waters, 4th. ed., Sec. 280; Miller v. Blackrock Springs Imp. Co., 40 S. E. 27. It is by reason of the rule laid down in Acton v. Blundell that the appellee claims immunity from liability in this case. To apply that rule under the facts here shown would shock our sense of justice.

So far as we can ascertain the question has not been passed upon by any of the appellate courts of this State. Believing as we do, that the rule adopted by the Court of Appeals of New Hampshire and followed by the Court of Appeals of New York, is just, and sustained by reason we [illegible] hold in accordance therewith

We conclude that the judgment of the Trial Court should be reversed and here rendered for appellant for $206.25, the amount of the damage sustained by plaintiff, and his land as shown by the facts.

Reversed and rendered.

Bookhout

Associate Justice.

Delivered Nov. 28, 1903.

With app. No 4050
3464
No 4018

W. A. East

vs.

H. & T. C. R. R. Co.

Motion for Rehearing.

FILED IN
SUPREME COURT
JAN16 1904
F. J. Conway
Clerk.

FILED IN
Court of Civil Appeals.
DEC 10 1903
Geo. W. Blair,
Clerk 5th District.

P. 12 10. 03. Copy $2.20

W. A. EAST, APPELLANT,

vs

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, APPELLEE.

MOTION FOR REHEARING.

TO THE HONORABLE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS:--

Now comes appellee, Houston & Texas Central Railroad Company, and shows to the court that it is sole appellee herein and is represented by Messrs. Head & Dillard, a firm of attorneys residing in Grayson County, Texas. That the sole appellant herein is W. A. East, a resident citizen of Grayson County, Texas, represented by Messrs. Mosely & Eppstein, who reside at Denison, Grayson County, Texas.

Appellee says there was error in the action of the court in reversing and rendering the judgment of the lower court herein and it prays the court to grant it a rehearing of this cause on account of these errors and it says there is error in the following particulars:

FIRST- The court erred in considering the first assignment of error because it was so vague and general as not to comply with the rules and so vague and general that it ought not have been considered.

SECOND- The court erred in considering the second assignment of error because it was so vague and general as not to comply with the rules and so vague and general that it ought not to have been considered.

THIRD- The court erred in considering the third assignment of error because it was so vague and general as not to comply with the rules and so vague and general that it ought not to have been considered.

FOURTH: The court erred in sustaining the first assignment of error and the propositions made thereunder, which assignment and propositions were as follows:

"FIRST ASSIGNMENT OF ERROR.

The court erred in its conclusion of law that under the facts the defendant was not liable.

FIRST PROPOSITION.

The defendant had the right to use its land in any way in which it saw fit, subject only to the qualification that it must so use it as not to injure the property of another.

SECOND PROPOSITION.

Adjoining proprietors of land have correlative rights in all underground percolating waters, and though each of them may use the water under his own land, his right to do so is subject to the rule that his use of same must be reasonable, under all of the circumstances, and if in the unreasonable use of such percolating waters he destroys his neighbor's supply, he is liable in damages.

THIRD PROPOSITION.

The defendant had the right to dig wells upon its land and take therefrom all the water that it needed in order to obtain the fullest enjoyment and usefulness of its land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture or for whatever else the land might serve, but it could not unreasonably use it to the injury of others.

FOURTH PROPOSITION.

Plaintiff has the right to prevent the unreasonable use by defendant of its land, when such unreasonable use abstracts the natural and usual supply of water to which it is entitled from his land, provided defendant's use of its property is not such as the said land could be reasonable used for as land. And a fortiori can plaintiff recover damages for such injury.

FIFTH PROPOSITION.

Defendant having destroyed plaintiff's well by extracting therefrom its natural supply of water, by digging wells upon its own land and extracting therefrom an unreasonable quantity of water, more than its land as land was entitled to, which said unreasonable use caused the injury complained of by plaintiff, is liable to the plaintiff for the amount of his damages, to-wit: $206.25."

Because it was found by the lower court and this court that the wells were dug without any intention on the part of defendant of injuring the property of plaintiff. That the only purpose of digging it was for a legitimate use of defendant in obtaining water in its locomotive and machine shops in the City of Denison. That the wells were dug on land owned in fee simple by defendant, that it had no knowledge that in digging its well it would drain plaintiff's well and did not intend to drain it and that the waters which ran into defendant's well were only percolating waters, hence the finding of this court should have been that under these circumstances there was no liability on the part of defendant.

FIFTH- The court erred in sustaining appellant's second assignment of error which is as follows: "The court erred in overruling plaintiff's motion for a new trial." And The propositions made thereunder, which are the same as the propositions made under the first assignment above shown, for the following reasons: Because it was found by the lower court and this court that the wells were dug without any intention on the part of defendand of injuring the property of plaintiff. That the only purpose of digging it was for a legitimate use of defendant in obtaining water in its locomotive and machine shops in the City of Denison. That the wells were

dug on land owned in fee simple by defendant, that it had no knowledge that in digging its well it would drain plaintiff's well and did not intend to drain it and that the waters which ran into defendant's well were only percolating waters, hence the finding of this court should have been that under these circumstances there was no liability on the part of defendant.

SIXTH- The court erred in sustaining the third assignment of error which is as follows: "The court erred in failing to render judgment for plaintiff upon said facts," and the propositions made thereunder which are the same as the propositions made under the first assignment above shown because it was found by the lower court and this court that the wells were dug without any intention on the part of defendant of injuring the property of plaintiff. That the only purpose of digging it was for a legitimate use of defendant in obtaining water in its locomotive and machine shops in the City of Denison. That the wells were dug on land owned in fee simple by defendant, that it had no knowledge that in digging its well it would drain plaintiff's well and did not intend to drain it and that the waters which ran into defendant's well were only percolating waters, hence the finding of this court should have been that under these circumstances there was no liability on the part of defendant.

SEVENTH- The court erred in sustaining the first additional proposition under the first assignment of error which is as follows: "The underground percolating waters in plaintiff's land belonged to him and the abstraction of them by defendant is unlawful," because there is no ownership in percolating waters by the person through whose lands they percolate and no right save the right to use them while they are on his land, and if from any cause they shall percolate upon the lands of another and be used by such other he will not be liable to the owner from whose lands the water percolated, even though they would not so have left the lands of this owner but for acts of the person using them not maliciously done.

EIGHTH- The court erred in sustaining the second additional proposition under the first assignment of error as follows: "Such underground waters is as much the property of the owner of the land as the ores, rocks, etc., beneath the surface." The reasons why it was error to sustain this proposition are shown in the last ground of this motion.

NINTH- The court erred in sustaining the third additional proposition under the first assignment of error, which is in these words: "Defendant in this case is a trespasser. Actual entry upon the land is not necessary, if damage be done to the land," because under the findings of the court above set forth defendant was in no sense a trespasser upon plaintiff's land or against plaintiff, but only in the lawful use of his own land used such percolating waters as under the law he had the right to use.

TENTH- The court erred in reversing and rendering the judgment of the court below because the court below, having found that defendan's well was upon land owned it in fee simple and was dug to supply water for the use of its locomotive and machine shops, operated by it in the City of Denison in which said land was injured and without any intention of injuring the property of plaintiff or knowledge that it would have such effect and that the water in said well was supplied by percolation through the soil, judgment should have been as it was rendered in the court below for defendant. The law is that the owner of land can use all the water he can obtain thereon by digging wells which are supplied by water percolating through the soil, ppovided said wells are not dug for the purpose of maliciously injuring adjoining proprietors, and this though such adjoining proprietors may be entirely deprived of water which otherwise would have percolated into their own land, and the law so standing, judgment should have been rendered for defendant as in the court below.

We respectfully submit the motion and request that a rehearing be granted and the judgment affirmed.

Baker Botts Baker & Lovett.
Head & Dillard
Attorneys for Appellee, Houston & Texas
Central Railroad Company.

Appl No 4050.

FILED IN
SUPREME COURT
JAN 19 1904
Clerk

Houston & Texas Central Railroad Co., Plaintiff in Error,

vs.

W. A. EAST, Defendant in Error.

APPLICATION FOR WRIT OF ERROR.

BAKER, BOTTS, BAKER & LOVETT,
HEAD & DILLARD,
ATTORNEYS FOR PETITIONER, HOUSTON & TEXAS
CENTRAL RAILROAD CO.

GRANTED

SHERMAN PT'G CO.

FILED IN
Court of Civil Appeals
JAN 19 1904
Geo. W. Blair,
Clerk

GRANTED

Houston & Texas Central Railroad Co., Plaintiff in Error,

vs.

W. A. EAST, Defendant in Error.

APPLICATION FOR WRIT OF ERROR.

To the Honorable Supreme Court of the State of Texas:

Your petitioner, the Houston & Texas Central Railroad Company, respectfully shows that this is a suit instituted in the District Court of Grayson County, Texas, by W. A. East to recover of petitioner damages in the sum of $1100.00 for injury to a well on his property in the city of Denison, Grayson county, Texas. The trial in the District Court resulted in a judgment in favor of the defendant, but on appeal to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District the judgment of the lower court was reversed and a judgment was rendered in that court in favor of the said East for the sum of $206.25, and in so reversing the judgment of the lower court and rendering the judgment aforesaid, the Honorable Court of Civil Appeals for the Fifth Supreme District of Texas committed numerous errors as follows:

First. The Court of Civil Appeals erred in con-

sidering the first assignment of error, because it was so vague and general as not to comply with the rules and so vague and general that it ought not to have been considered.

Second. The Court of Civil Appeals erred in considering the second assignment of error, because it was so vague and general as not to comply with the rules and so vague and general that it ought not to have been considered.

Third. The Court of Civil Appeals erred in considering the third assignment of error because it was so vague and general as not to comply with the rules and so vague and general that it ought not to have been considered.

Fourth. The Court of Civil Appeals erred in sustaining the first assignment of error and the propositions made thereunder, which assignment and propositions were as follows:

FIRST ASSIGNMENT OF ERROR.

"The court erred in its conclusion of law that under the facts the defendant was not liable.

FIRST PROPOSITION.

The defendant had the right to use its land in any way in which it saw fit, subject only to the qualification that it must so use it as not to injure the property of another.

SECOND PROPOSITION.

Adjoining proprietors of land have correlative rights in all underground percolating waters, and though each

of them may use the water under his own land, his right to do so is subject to the rule that his use of same must be reasonable, under all of the circumstances, and if in the unreasonable use of such percolating waters he destroys his neighbor's supply, he is liable in damages.

THIRD PROPOSITION.

The defendant had the right to dig a well upon its land and take therefrom all the water that it needed in order to obtain the fullest enjoyment and usefulness of its land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land might serve, but it could not unreasonably use it to the injury of others.

FOURTH PROPOSITION.

Plaintiff has the right to prevent the unreasonable use by defendant of its land, when such unreasonable use abstracts the natural and usual supply of water to which it is entitled from his land, provided defendant's use of its property is not such as the said land could be reasonably used for as land. And *a fortiori* can plaintiff recover damages for such injury.

FIFTH PROPOSITION.

Defendant having destroyed plaintiff's well by extracting therefrom its natural supply of water, by digging wells upon its own land and extracting therefrom an unreasonable quantity of water, more than its land as land was entitled to, which said unreasonable use caused the injury complained of by plaintiff, is liable to the plaintiff for the amount of his damages, to-wit: $206.25."

Because it was found by the lower court and the

Court of Civil Appeals that the wells were dug without any intention on the part of defendant of injuring the property of plaintiff. That the only purpose of digging it was for a legitimate use of defendant in obtaining water in its locomotive and machine shops in the city of Denison. That the wells were dug on land owned in fee simple by defendant, that it had no knowledge that in digging its well it would drain plaintiff's well, and did not intend to drain it, and that the waters which ran into defendant's well were only percolating waters, hence the finding of the Court of Civil Appeals should have been that under these circumstances there was no liability on the part of defendant.

Fifth. The Court of Civil Appeals erred in sustaining appellant's second assignment of error, which is as follows: "The court erred in overruling plaintiff's motion for a new trial." And the propositions made thereunder, which are the same as the propositions made under the first assignment above shown, for the following reasons: Because it was found by the lower court and the Court of Civil Appeals, that the wells were dug without any intention on the part of the defendant of injuring the property of plaintiff. That the only purpose of digging it was for a legitimate use of defendant in obtaining water in its locomotive and machine shops in the city of Denison. That the wells were dug on land owned in fee simple by defendant, that it had

no knowledge that in digging its well it would drain plaintiff's well and did not intend to drain it, and that the waters which ran into defendant's well were only percolating waters, hence the finding of the Court of Civil Appeals should have been that under these circumstances there was no liability on the part of defendant.

Seventh. The Court of Civil Appeals erred in sustaining the first additional proposition under the first assignment of error, which is as follows: "The underground percolating waters in plaintiff's land belonged to him and the abstraction of them by defendant is unlawful," because there is no ownership in percolating waters by the person through whose lands they percolate and no right save the right to use them while they are on his land, and if from any cause they shall percolate upon the lands of another and be used by such other, he will not be liable to the owner from whose lands the water percolated, even though they would not so have left the lands of this owner but for acts of the person using them not maliciously done.

Eighth. The Court of Civil Appeals erred in sustaining the second additional proposition under the first assignment of error as follows: "Such underground waters are as much the property of the owner of the land as the ores, rocks, etc., beneath the surface." The reasons why it was error to sustain this proposition are shown in the last ground of this motion.

Ninth. The Court of Civil Appeals erred in sustaining the third additional proposition under the first assignment of error, which is in these words: "Defendant in this case is a trespasser. Actual entry upon the land is not necessary, if damage be done to the land," because under the findings of the court, above set forth, defendant was in no sense a trespasser upon plaintiff's land or against plaintiff, but only in the lawful use of his own land used such percolating waters as under the law he had the right to use.

Tenth. The Court of Civil Appeals erred in reversing and rendering the judgment of the court below, because the court below, having found that defendant's well was upon the land owned by it in fee simple and was dug to supply water for the use of its locomotive and machine shops, operated by it in the city of Denison in which said land was injured, and without any intention of injuring the property of plaintiff or knowledge that it would have such effect and that the water in said well was supplied by percolation through the soil, judgment should have been as it was rendered in the court below, for defendant. The law is that the owner of land can use all the water he can obtain thereon by digging wells which are supplied by water percolating through the soil; provided said wells are not dug for the purpose of maliciously injuring adjoining proprietors, and this though such adjoining proprietors may be entirely deprived of water which otherwise would have percolated

into their own land, and the law so standing, judgment should have been rendered for defendant as in the court below.

Eleventh. The Court of Civil Appeals erred in holding that plaintiff in error would be liable to defendant in error for drying up his well, without any evidence or finding that the water used by plaintiff in error, or any part of it, had ever reached defendant in error's premises or was drawn or taken therefrom by plaintiff in error.

Wherefore your petitioner, the Houston & Texas Central Railroad Company, prays that it be granted by this Court a writ of error herein, and that the judgment of the Court of Civil Appeals be reversed and that of the trial court in all things be affirmed.

BAKER, BOTTS, BAKER & LOVETT,
HEAD & DILLARD,

ATTORNEYS FOR PETITIONER, HOUSTON & TEXAS CENTRAL RAILROAD CO.

ARGUMENT.

In presenting this case to the Honorable Court of Civil Appeals in our original brief we confidently relied upon the proposition that the overwhelming weight of the authorities established the law to be that the owner of land has the right to use for his own purposes the subteranean waters found thereon which had percolated through the soil, as distinguished from running

in a defined stream, and we still confidently rely upon the soundness of that position, and insist that the action of the Court of Civil Appeals, in effect, ignoring all distinction between percolating waters and waters running in defined streams, is without justification either in reason or authority.

To sustain our views upon the main question involved we feel that we can add nothing to what is said in the authorities cited in our brief to the Court of Civil Appeals, and can only pray this court to carefully examine them before passing upon this application for writ of error.

We wish to especially direct the attention of the court to the able review of the authorities contained in the recent case of Miller v. Blackrock Springs Imp. Co., 40 S. E. 27, referred to with disapproval by the Honorable Court of Civil Appeals.

We also desire to direct the attention of the court to the case of Hougan v. Ry. Co., 35 Iowa 558, on account of its application of the views here contended for to facts strikingly like those involved in this case. It will be noted that the Iowa court in the case referred, holds that a railway company has the right to use the percolating water found on its land for the purpose of supplying its engines even though a well upon the land of an adjoining proprietor be injured thereby.

It will also be noted that the New York case relied on by the Court of Civil Appeals recognizes the right

of the owner of the land to use the water thereon for *manufacturing* purposes, which would clearly include defendant's machine shops.

We also desire to call the attention of the court to the fact that the text writers, so far as we are aware, without exception are opposed to the views expressed by our Court of Civil Appeals.

We especially invite an examination of the latest edition of Gould on Waters, cited in our brief, and to 2 Lewis on Em. Dom. §584, where the Iowa case is cited with approval. Also see 27 A. & E. Ency. Law, 1st ed. 424-5.

We believe if this court will carefully examine the authorities here referred to it will conclude that the New York case so much relied upon by the Court of Civil Appeals should not be followed even if the facts here involved be found to be identical with those there considered. To do so will certainly be to array our State on the side of a very small minority upon a question that has been much considered both in this country and in England.

But the facts of this case are not identical with those involved in the New York case. In that case the water company was, by the use of powerful machinery, drawing the water *from the land of an adjoining owner* and using it, not for its own purposes, but to sell to others, and the court was of opinion that this might be likened to a trespass. In the case at bar there is noth-

ing in the findings of the trial court to sustain the inference of the Court of Civil Appeals that any of the water used by the defendant was ever upon, or came from, the land of the plaintiff. It does appear that the use of the water from defendant's well has had the effect to dry up the well of plaintiff but this could be produced as well, yea, more naturally, by appropriating the water before it reached plaintiff's land than by drawing it through the soil out of his land. It could not, however, by any stretch of imagination be termed a *trespass* upon plaintiff's land for the defendant to use the percolating water found on its own land which had never been on that of the plaintiff.

It will, therefore, be observed that in order to sustain the decision of the Court of Civil Appeals it will be necessary to go farther than the New York court, and hold that the owner has no right to interfere with the percolation of water through his land to that of his neighbor. This will in effect be to hold that each proprietor has an easement in the land of his neighbor for the purpose of retaining the water therein until it percolates through it to his own. This would be to eliminate all distinction between streams and subteranean percolating waters, which the Court of Civil Appeals in effect does.

Let us again impress upon the court that there is no finding or evidence that defendant has ever taken

any water *from* plaintiff's well or land so that no element of a trespass exists in this case.

We also desire to direct the attention of the court to the fact that the Court of Civil Appeals holds the defendant liable for the entire value of plaintiff's well without regard to the extent to which it would have been affected by what the court might consider a reasable use of water by defendant. Certainly it will not be contended that the plaintiff is entitled to all the water in defendant's land, and even under the views entertained by the Court of Civil Appeals, in order to entitle plaintiff to a judgmdnt for the *full* value of his well, a distinct finding that it would not have been injured to any extent by a reasonable use of water by defendant, would be necessary.

All of which is respectfully submitted.

BAKER, BOTTS, BAKER & LOVETT,
HEAD & DILLARD,

ATTORNEYS FOR PETITIONER, HOUSTON & TEXAS CENTRAL RAILROAD CO.

APPLICATION.

NO 4050. FIFTH DISTRICT.

W. A. EAST. Appellant.

VS.

HOUSTON & TEXAS CENTRAL R'Y CO
Appellee.

FROM GRAYSON COUNTY.

Writ of error & Cit. issd May 3d 1904.

Granted Apl. 28. 1904

FILED IN
SUPREME COURT
JAN16 1904
J. T. Conway
Clerk.

Set.
May. 26. 1904

W . A . E A S T . #
#
4018 VS. # From District Court Grayson County.
#
HOUSTON & TEXAS CENTRAL R'Y CO. # Saturday November 28th 1903.

Opinion of the court delivered by Mr Rookhout Associate Justice.

This cause came on to be heard on the transcript of the record and the same being inspected,because it is the opinion of this Court that there was error in the Judgment,it is therefore considered,adjudged and ordered that the Judgment of the Court below be reversed and judgment is now here rendered as follows; It is ordered,adjudged and decreed by the Court that Appellant W.A.East do have and recover of Appellee the Houston and Texas Central Railroad Company the sum of Two Hundred and Six and 25/100 Dollars with interest thereon at the rate of 6% per annum from the 22nd, day of December 1902 together with all costs by him in this behalf expended both in the Court below and in this Court,for which execution may issue and this decision be certified below for observance.

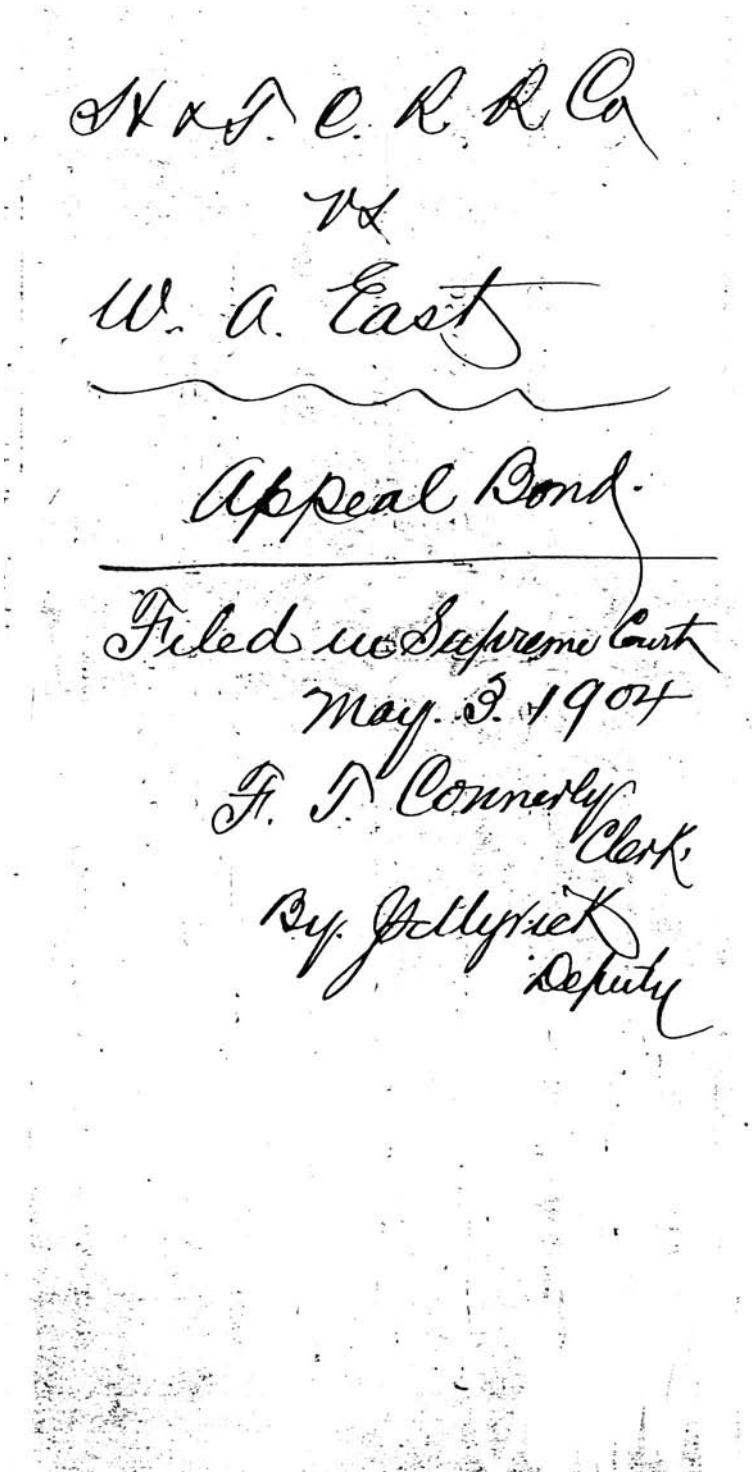
W . A . E A S T . #
3464
4018 VS. # Saturday December 19th 1903.
#
HOUSTON & TEXAS CENTRAL R'Y CO. # This day came on to be heard the motion of Appellee for a rehearing of this cause and the same being inspected,it is considered,adjudged and ordered that the said motion be overruled.

oooooooooooooooooo

I Geo.W.Blair Clerk of the Court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas,do hereby certify that the foregoing is a true copy of the Judgment and order overruling motion for rehearing in the case of W.A.East Vs.Houston & Texas Central R'y Co,No, 4018 as appear of record in my Office in the Minutes of said Court.

Given under my hand and seal of Office at Dallas Texas, this 14th day of January A.D.1904.

_____ Clerk.


N & G. C. R. R. Co
vs
W. A. East

Appeal Bond.

Filed in Supreme Court
May 3. 1904
F. J. Connerly Clerk.
By J. Gillespie Deputy

THE STATE OF TEXAS,
COUNTY OF GRAYSON.

KNOW ALL MEN BY THESE PRESENTS: That, Whereas, in a certain cause pending in the District Court of Grayson County, Texas, styled W.A. East vs. Houston & Texas Central Railroad Company, the plaintiff in said cause had judgment rendered against him and in favor of the defendant railroad company; and

Whereas, said plaintiff, W.A. East, appealed from said Judgment to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, which said Court reversed the said judgment of the trial Court and rendered juagment in favor of the said W.A. East against the defendant, Houston & Texas Central Railroad Company, for $206.25; and

Whereas said Houston & Texas Central Railroad Company filed in the Supreme Court its application for writ of error in said cause to said Court of Civil Appeals, which said application was on the 28th day of April, 1904, granted by said Court, upon the filing by the said Applicant in said Court of a bond in the sum of Two Hundred Dollars, conditioned to pay the costs of the Supreme Court, the said Court of Civil Appeals and the District Court, and payable to the adverse party;

NOW, THEREFORE, The said Houston & Texas Central Railroad Company, as principal, and _____ and _____, as sureties, acknowledge ourselves bound to pay to the said W.A. East the sum of Two Hundred ($200.00) Dollars, conditioned that the said Houston & Texas Central Railroad Company shall pay all costs of the Supreme Court, the Court of Civil Appeals and the District Court, and in case the judgment of the Supreme Court shall be against it, it shall perform its judgment, sentence or decree, and pay all cash damages as said Court may award against it.

HOUSTON & TEXAS CENTRAL RAILROAD CO.
By. Head & Dillard, its attorneys.
C.B. DORCHESTER. J.F. HARRISON.

Approved and Filed April 30, 1904. ---------- C.S. ARNOLD, Cl'k D.C.

THE STATE OF TEXAS,
COUNTY OF GRAYSON.

I, C.S. ARNOID, Clerk of the District Court of Grayson County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the bond filed in the above cause, as same now appears on file in my office.

Given under my hand and seal of said Court,
at office in the City of Sherman,
this April 30, 1904.

C.S. Arnold

Clerk of the District Court,
of Grayson County,
Texas.

N. & W. C. R. R. Co

vs

W. A. East.

Appeal Bond.

Filed in Supreme Court
May. 3rd 1904.
F. J. Connelly
Clerk
By. Hellyrick
Deputy

THE STATE OF TEXAS,
COUNTY OF GRAYSON.

KNOW ALL MEN BY THESE PRESENTS: That, Whereas, in a certain cause pending in the District Court of Grayson County, Texas, styled W.A. East vs. Houston & Texas Central Railroad Company, the plaintiff in said cause had judgment rendered against him and in favor of the defendant railroad company; and

Whereas, said plaintiff, W.A. East, appealed from said judgment to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, which said Court reversed the said judgment of the trial Court and rendered judgment in favor of the said W.A. East against the defendant, Houston & Texas Central Railroad Company, for $206.25; and

Whereas said Houston & Texas Central Railroad Company filed in the Supreme Court its application for writ of error in said cause to said Court of Civil Appeals, which said application was on the 28th day of April, 1904, granted by said Court, upon the filing by the said Applicant in said Court of a bond in the sum of Two Hundred Dollars, conditioned to pay the costs of the Supreme Court, the said Court of Civil Appeals and the District Court, and payable to the adverse party;

NOW, THEREFORE, the said Houston & Texas Central Railroad Company, as principal, and _____ and _____, as sureties, acknowledge ourselves bound to pay to the said W.A. East the sum of Two Hundred ($200.00) Dollars, conditioned that the said Houston & Texas Central Railroad Company shall pay all costs of the Supreme Court, the Court of Civil Appeals and the District Court.

HOUSTON & TEXAS CENTRAL RAILROAD CO.
By..Head & Dillard, its attorneys.

C.. DORCHESTER. J.F.HARRISON.

Approved and Filed April 30, 1904. C.S. ARNOLD, Cl'k. D.C.

THE STATE OF TEXAS,
COUNTY OF GRAYSON.

I, C.S. ARNOLD, Clerk of the District Court of Grayson County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the bond filed in the above cause, as same now appears on file in my office.

Given under my hand and seal of said Court,
at office in the City of Sherman,
this April 30, 1904.

C S Arnold

Clerk of the District Court,
of Grayson County,
Texas.

No. 4018

CERTIFIED COPY

BILL OF COSTS

—IN THE—

COURT OF CIVIL APPEALS

DALLAS, TEXAS.

FILED IN SUPREME COURT

MAY 18 1904

W. A. F. Tattomerly CLERK

VS.

Houston & Texas Central R. Co

FILED IN SUPREME COURT

18 1904

F. J. Connerly CLERK

JESSE WILLIAMSON, PRINTER, DALLAS.

CLERK'S OFFICE—Court of Civil Appeals at Dallas.

W. A. East

No. 4018 vs.

Houston & Texas Central R. Co.

CERTIFIED COPY

BILL OF COSTS

—IN THE—

Court of Civil Appeals, 5th District.

Filing Record		50	Cost of Transcript		
Docketing Cause		50	Sheriff's Fees Grayson Co.	1	95
Appearances	1	00	Cost in Supreme Court		
Filing Briefs		80	Clerk Court Civil Appeals	20	05
Filing and Entering Motion		35		$22	00
Orders	2	50			
Certorari					
6 Notices	3	00			
Filing Extra Papers		90			
Copy of Judgment, Etc.	1	50			
Oath					
Continuance		20			
Judgment	1	00			
Taxing Costs		50			
Certificates, with Seal					
Mandate					
Recording Opinion	2	60			
Certified Copy of Opinion					
Certified Copy Bill of Costs	1	00			
Precept	1	00			
Execution for Costs					
Recording Return of Execution					
Alias Return Express Chgs.		50			
Pluries and Return					
Certified Copy of Motion	2	20			
TOTAL	$20	05			

I, GEO. W. BLAIR, Clerk of the Court of Civil Appeals, 5th Supreme Judicial District of Texas, at Dallas, hereby certify that the above copy of the Original Bill of Costs is true and correct.

WITNESS MY HAND and seal of said Court, at Dallas, this 5th day of May A. D. 1904

Geo. W. Blair

CLERK.

III. Texas Supreme Court, Austin Texas

5-2-DNL

No._____

In Supreme Court.

N. & T. C. R. R. Co.

vs.

W. A. East.

CITATION.

Issued May 3rd 190 4

F. T. Connerly

Clerk Supreme Court.

By J. Allyrick

Deputy.

CERTIFIED COPY.

121

The State of Texas,

To the Sheriff or Any Constable of Grayson County, Greeting:

You are Hereby Commanded, *by delivering to* W. A. East *if found in your County, or to* Mosely & Eppstein *attorney of record, the accompanying certified copy of this writ, to summons said* W. A. East *to be and appear before the Supreme Court of the State of Texas, now in session at Austin, Texas, on Thursday, the* 26th *day of* May *1904, provided this writ shall have been served ten days prior to that time; but if this writ shall not have been so served, then on the first Thursday next ensuing, ten days after such service, pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the* Fifth *Supreme Judicial District, and issued on the* 3rd *day of* May *1904, wherein* Houston & Texas Central Railroad Company *is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in that behalf. And of this writ, with your action endorsed thereon, make due return within ten days from the date hereof.*

Witness, *the Hon. REUBEN R. GAINES, Chief Justice of the Supreme Court of Texas, the* 3rd *day of* May *in the year of our Lord one thousand nine hundred and* Four.

F. T. Connerly
Clerk.

By Jellyrick
Deputy.

I Hereby Certify, *that the above is a true and correct copy of the original.*

F. T. Connerly
Clerk of the Supreme Court of Texas.

By Jellyrick
Deputy.

Sheriff's Return.

Came to hand on the 4th day of May, A.D. 1904. and executed on the 5th day of May, A.D. 1904. By delivering to W A Eas$ the within named defendant in persor with a tr ue copy of this writ, said service having been made in Grayson, County, Texas.

W S Russell, Sheriff, Grayson, County, Texas

By L. M. Layne Deputy

Fees one copy $.05
Mileage 1 20
$1.95

NO. 1333.

Houston & Texas Cent.Ry.Co.,

vs

W. A. E a s t

---::o::---

------:: OPINION ::----------

Judgment of Court of Civil Appeals REVERSED and Judgment of District Court AFFIRMED.

Williams, Asso.Jus.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, Plaintiff in Error,

No.1333. -vs- From Grayson County, Fifth District.

W. A. EAST, Defendant in Error.

----------ooooo0ooooo----------

This case is thus stated by the Court of Civil Appeals:

"This is a suit by W. A. East against the Houston and Texas Central Railroad Company for damages growing out of the alleged destruction by defendant of plaintiff's well. The case was tried before the court without a jury and resulted in a judgment for defendant and plaintiff appealed. The trial court filed conclusions of fact which in the absence of a statement of facts are to be taken as the facts of the case. Said conclusions are as follows:

"'1st. The defendant, the Houston and Texas Central Railroad Company was the owner in fee simple of six (6) lots in the City of Denison, Grayson County, Texas, at the time mentioned in plaintiff's petition, and dug thereon a well twenty (20) feet in diameter and sixty-six (66) feet deep. It put therein a steam pump of sufficient strength to supply a three inch pipe, and with the exception of three or four days since August, 1901, has daily taken from said well by means of said pump about twenty-five thousand (25,000) gallons of water. This water was taken from said well and used by it in its locomotives and machine shops operated by it in the City of Denison, in which said land is situated. Said well is supplied entirely by water percolating through its soil and that of adjacent lands and not by any underground or other stream of any kind. Before digging said well, defendant made an examination of its surroundings, including the well of the plaintiff, and made test holes with a view of obtaining the desired supply of fifty thousand (50,000) gallons of water per day. Plaintiff was present when such examinations were being made and consented for his well to be examined by defendant, and had no further conversation or communication with the defendant upon the subject. From the examination made by it, defendant became satisfied that it could procure the desired supply of water upon the land as aforesaid, and dug said well for purposes of obtaining the same for the

uses hereinbefore set out. The wells were dug without any intention on the part of defendant of injuring the property of either of the plaintiffs and did not know that such would be the effect. The water percolated into defendant's well at different depths, some of it coming into the bottom thereof. The well of plaintiff is about five feet in diameter and about thirty-three feet in depth; is on land owned by plaintiff in fee simple and is used as a homestead by plaintiff, was dug prior to defendant's well and had always been used by plaintiff, up to the time defendant's well was dug, for household purposes, and prior to that time, had always supplied an adequate supply of water for such uses; that this well has been dried up by the digging and use to which defendant has put its well. That the damage that plaintiff and his land has sustained, by the drying up of his well, is the sum of two hundred and six dollars and twenty-five cents (206.25) including both past and prospective injury to himself and the lots described in his petition.

"'2nd. I further find that the use to which defendant puts its well was not a reasonable use of their property as land, but was an artificial use of their property, and if the doctrine of reasonable use, as applicable to defined streams to such cases, this was unreasonable.'"

The Court of Civil Appeals reversed the judgment of the district court in favor of the defendant and rendered judgment for plaintiff for the dameges claimed. We are of the opinion that this judgment is wrong and that of the district court right.

Since the decision in the case of Acton v. Blundell (12 Mees.& W., 324), the law as therein laid down,so far as it controls this case,has been recognized and followed in the courts of England,and probably by all the courts of last resort in this country before which the question has come,except the Supreme Court of New Hampshire. (Bassett v. Salisbury Mfg. Co., 43 N. H.,569; Swett v. Cutts, 50 N. H.,439.) That doctrine is thus stated: "That the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in

his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action." The argument in favor of the application to such cases of the doctrines applicable to defined streams of water were thoroughly presented at the bar in Acton v. Blundell, and the reasons for the conclusion of the court against such application were carefully stated in the opinion. In all that has been said in subsequent discussions little, if anything, has been added to the arguments of counsel and of the court in that case. (Acton v. Blundell, supra; Chasemore v. Richards, 7 H. L. Cas.,364; Frazier v. Brown, 12 Ohio St.,294; Miller v. Blackrock Springs Imp.Co.,40 N.E.,(Va.)27.)

The many other authorities on the subject are cited in the cases referred to,and so thorough has been the discussion that we feel that it would be useless to attempt any addition. The practical reasons upon which the courts base their conclusions fully meet the more theoretical view of the New Hampshire court and satisfy us of the necessity of the doctrine. Those reasons are thus summarized by the Supreme Court of Ohio in Frazier v. Brown: "In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (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. (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, and the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility."

The mere quantity of water taken by the owner from his land has no where been held to affect the question. Exhaustion resulting from excavating and pumping for mining purposes has been considered in several

cases to give rise to no liability. So the authorities generally state that the use of the water for manufacturing, brewing and like purposes, is within the right of the owner of the soil, whatever may be its effect upon his neighbor's wells and springs.

In Chasemore v. Richards, supra, the defendant, in supplying the wants of a town, used to such an extent the water which had percolated through his land into a water course as to reduce the water in the stream and to leave the plaintiff's mill thereon without adequate power, and yet it was held that there was no liability. There is possibly a conflict which we need not undertake to resolve between this decision and those in the two New York cases stated below. But in Chasemore v. Richards, Lord Wensleydale, who alone among several delivering opinions, expressed doubt as to the correctness of the conclusion reached, admitted the soundness of the principle laid down in Acton v. Blundell, and that the owner of the soil is at liberty to dig therein and take away the percolating water for any legitimate purpose of his own, "even though they carried on trades requiring more water (breweries for example) than would be used for domestic purposes only; it would still be for their purposes only." His doubt arose out of the fact that the defendant was not using the water for his own purposes but was selling it to others. If persons using lands in mining, manufacturing and brewing may take therefrom all the water required in the prosecution of such businesses, what reason can exist why a railroad company may not do the same thing for such purposes as those to which it applies this well? We think none can be given. In the case of Hougan v. Railway Co.,(35 Ia.,558) the doctrine was applied to a situation like that shown by the facts of this case, except that there the railway company had only the right of way over, while here it owns the fee of the land; a difference in favor of this defendant. The decision is useful in establishing the proposition that such uses of water by railway companies are legitimate and proper uses in the sense of the rule we are considering. The other question, upon which the court was more doubtful, viz: whether or not such a company, with only a right of way over the land, has the right

to thus draw the water from it, is not here involved.

Besides the New Hampshire decisions which deny the whole doctrine of the other authorities, plaintiff relies on the cases of Forbell v. New York, 51 L.R.A.,696; Smith v. Brooklyn, 45 L.R.A.,664, s.c. 46 N.Y. Supp.,141, and Stillwater Co. v. Farmer, (93 N.W.(Minn.)907.) The courts in New York, by previous decisions, had unequivocally accepted the doctrine of Acton v. Blundell in this language: "An owner of soil may divert percolating water, consume or cut it off, with impunity. It is the same 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." (Pixley v. Clark, 35 N.Y.,520.) In the two cases relied on, the courts expressly adhered to this doctrine, but considered that certain facts in the cases before them took them out of its operation. One of the facts was, the cities had drained an immense area to supply their inhabitants with water and were "making merchandize" of it, a fact which gave rise to the doubt expressed in Chasemore v. Richards. Another was, that an artificial force was applied to draw the water from the adjoining lands, which was held to constitute a trespass; and still another, that the water of defined streams was affected by the exhaustion by the cities of their sources. The existence of these facts was expressly made the ground of the holding that the general doctrine as to taking ~~water~~ out of one's own soil water that comes there by percolation did not apply. In the Minnesota case, the defendant made no use whatever of the water, but, for no useful purpose, drained it away and discharged it through the sewers of a town, thus taking it from plaintiff who was supplying it to the inhabitants of the town for drinking purposes. The court recognized the soundness of the doctrine which we have stated, but held that as the defendant was making no legitimate use of the water he was properly enjoined from thus wasting it. Whether or not the courts in these cases succeeded in establishing ~~m~~ just distinctions between them and others

SUPREME COURT,
AUSTIN.

No.1333----6.

applying the general rule we are not called on to determine.

It is readily seen that none of them, in their facts or the principles enforced, sustain this action. The defendant here is making a reasonable and legitimate use of the water which it takes from its own land, which use is not in quality different from or in its consequences to plaintiff more injurious than many upheld in the decisions. There is no claim of malice or wanton conduct of any character, and the effect to be given to such a fact when it exists is beside the present inquiry. No reason exists why the general doctrine should not govern the case.

The judgment of the Court of Civil Appeals is therefore reversed and that of the district court affirmed.

F. A. Williams

Associate Justice.

No No 1263
No 1333

HOUSTON & TEXAS CENTRAL R.R. CO.,
PLAINTIFF IN ERROR,

VS.

A. EAST, DEFENDANT IN ERROR.

6

MOTION FOR RE-HEARING.

Copy of Mecep[illegible] issued
August 30 1904.

Filed in Supreme
Court June 28. 1904
F. J. Conway
Clerk

No.

W. A. EAST, VS. H. & T. C. R.R. CO.

IN THE SUPREME COURT OF THE

-:-

STATE OF TEXAS.

Comes now W. A. East by his attorneys, Perry Morris and L. B. Eppstein, and moves this Honorable Court to grant him a re-hearing in the above entitled and numbered cause, and shows to the court that the original defendant, the Houston and Texas Central Railroad Company, who is Plaintiff in Error in this court, is represented by Head & Dillard, Attorneys at Law who reside at Sherman in Grayson County, Texas,. That the opinion of this Honorable Court was filed on the 13th day of June, A. D., 1904.

I.

Defendant in Error is of the opinion that this court erred in holding that there are no correlative rights in underground percolating waters.

II.

This court erred in holding that Plaintiff in Error, the Houston and Texas Central Railroad Company, was not liable under the facts found in this cause, because the Plaintiff in Error had the right to use any quantity of water that accumulated under its land by percolating through the soil, so long as the purpose for which such water was procured and used was justifiable.

III.

This court erred in finding that the use made by Plaintiff in Error of the water extracted from the soil in this case was a reasonable use of water, because whether or not such use was reasonable was a question of fact under all circumstances of the case, and the fact having been

passed upon by the District Court and the Court of Civil Appeals and both of these courts having held that the use made by the railroad company of the water extracted from the soil in controversy was under all circumstances of this case unreasonable, the Supreme Court had no right to reverse them in this respect.

IV.

And because of the foregoing and various other errors manifest in the opinion of the court, Defendant in Error respectfully requests that a re-hearing be granted him in this cause and that the judgment of the Court of Civil Appeals be affirmed.

All of which is

Respectfully submitted.

Perry Morris

S. B. Eppstein

ATTORNEYS FOR DEFENDANT IN ERROR.

SUPREME COURT.

K. & T. C. R.R. Co.

No. 1333 vs. W. A. Cash

PRECEPT.

Issued August 30th 1904

F. F. Connerly Clerk.

Deputy.

SHERIFF'S RETURN.

Came to hand Aug. 27' 1904

Executed Aug. 27' 1904

by delivering to the within named Head & Dillard.

in person, the accompanying certified copy of motion.

M. M. Maxwell

Sheriff Grayson County.

By W. J. Hogan Deputy.

Sheriff's Fee, $ .85

Received back Aug 30 1904.

121

THE STATE OF TEXAS,

To the Sheriff of Grayson County, Greeting:

YOU ARE HEREBY COMMANDED, that you serve upon Mead & Dillard Attorney of record for Plaintiff in Error in the case of M. K. & T. Co. R.R. Co. Plaintiff in Error,

vs.

W. A. Eash Defendant in Error,

the accompanying certified copy of motion for rehearing

made by L. B. Eppstein and Perry Morris Attorney of record for Defendant in Error in said cause, now on file in this office.

HEREIN FAIL NOT, but of this writ make due return, under the penalty prescribed by law, with your indorsement thereon, showing how you have executed the same.

WITNESS, the HON. REUBEN R. GAINES, Chief Justice of our said Supreme Court, with Seal thereof annexed, at Austin, this the 20th day of August 1904

T. J. Connelly Clerk.

By _____ Deputy.

No. No. 1263
No 1333
N. & T. C. R.R. Co.
vs
W. A. Cash

Defendant in Error's
Request to Dismiss
Motion for Rehearing.

Granted Oct 6. 1904.

Filed in Supreme
Court August 24. 1904.
F. J. Conway
Clerk

ARTHUR G. MOSELEY.
LOUIS B. EPPSTEIN.

LAW OFFICES
MOSELEY AND EPPSTEIN
226 MAIN STREET.
DENISON, TEXAS.

F J Connerly
Austin Tex

Dear Sir:

Please dismiss our motion for rehearing in re East v Houston & T Ry Co. and send me bill of costs

Very truly
L B Eppstein

Aug 22 1904

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