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**Roman Law in the Water, Mineral and Public
Land Law of the Southwestern United States**

by

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Roman Law in the Water, Mineral and Public Land Law of the Southwestern United States

Much of the arid zone of the Southwestern United States was under Spanish (and later, Mexican) rule until the fourth and fifth decades of the 19th century. This includes the present states of Texas, New Mexico, Arizona, California, Utah, Nevada, and parts of southern Colorado. Only Texas, New Mexico, and California were populated before the change of sovereignty. Texas had about 36,000 inhabitants in 1836, 24,000 of whom were English-speaking. The populations of New Mexico (55,000) and of California (3,000) were Spanish-speaking. There were also small Spanish-speaking settlements in Arizona and in Colorado before 1848.

The present legal systems of these states are based on the common law, which was introduced in Texas in 1840, in California in 1849, and New Mexico in 1876. To a greater or a lesser extent, these legal systems respect rights acquired under Spanish and Mexican law. Mexican property rights are also protected by the Treaty of Guadalupe Hidalgo (1848). Until 1821, the law applicable in the settled areas of the American Southwest was what is commonly called the "derecho castellano e indiano," i.e., the law specifically enacted for the ultramarine possessions of the Spanish Empire, supplemented by the law of Castile. After Mexican independence (September, 1821), Mexican central legislation, and (after 1824) Mexican state legislation was superimposed on this corpus of Spanish imperial and Royal Castilian law, but neither Mexican water law nor Mexican mineral law were (as such) codified or even substantially modified in the few decades of Mexican rule in what is now the Southwestern United States.

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Substantially the same lecture was given, in English and in German, at various places in 1992. For more comprehensive orientation, see H.W. Baade, "The Historical Background of Texas Water Law—A Tribute to Jack Pope," 18 *St. Mary's L.J.* 1 (1986); "Springs, Creeks, and Groundwater in Nineteenth-Century German Roman-Law Jurisprudence with a Twentieth-Century Postscript," in David S. Clark, (ed.), *Comparative and Private International Law. Essays in Honor of John Henry Merryman on his Seventieth Birthday* 61 (1990); and G.E. Hall, "Shell Games: The Continuing Legacy of Rights to Minerals and Water on Spanish and Mexican Land Grants in the Southwest," 36 *Rocky Mountain Mineral L. Inst. Proceedings* 1 (1990).

Virtually the entire corpus of nineteenth-century Mexican public land law, however, dates from the first two decades of Mexican independence. This includes, most prominently, Emperor Iturbide's Colonization Law of 1823, the federal Colonization Law of 1824 and its Regulations of 1828, and the series of colonization laws of the States of Tamaulipas and Coahuila y Texas, starting with the Coahuiltecan Colonization Law of 1825. Since there are few if any Spanish-era land grants, compositions, or sales outside the "Nueces Strip" along the lower Rio Grande and the few settled townships or villages in Texas, New Mexico, or California, virtually all land grants in those states ante-dating Texas independence and United States sovereignty are based on Mexican federal and state legislation. The water and mineral rights attaching to those grants, however, were based on the law of Castile of the Indies, as that law stood at the time of Mexican independence.

To take mineral rights first: Pursuant to the Mining Ordinances of New Spain, of May 22, 1783, minerals were part of the Royal patrimony, but subject to acquisition and exploitation upon discovery or "denunciación" upon payment of the Royal Quint or Tenth. Mining rights were property rights, but subject to a legal regime distinct from that governing the surface estate. Most importantly, they did not pass out of the public domain unless granted expressly. Since there were few if any express grants of mining rights under Spanish or Mexican rule in the Southwestern United States, the startling consequence is that virtually the entire mineral wealth of this area, even if located under privately owned land, passed to the new sovereign as state property upon Texas independence in 1836 and the Guadalupe Hidalgo and Gadsden cessions in 1848 and 1853, respectively.

In Texas, Spanish and Mexican mining law continued to be in effect until 1866; elsewhere, it was replaced more quickly. The present mining law of the Southwestern United States bears little trace of this legacy. It will not be too difficult, nevertheless, to discover parallels and even some elements of conformity between the Mining Ordinances of New Spain and (by way of the Nueva Recopilación of Castile) the mining law of the Roman imperial fisc in the Iberian peninsula.

These parallels are, however, readily explained by the nature of the subject in combination with the "Sachzwänge" of the Regalian system. Beyond that, Mexican law, Spanish law, and (finally) Roman law have left only one discernible trace in the present-day mining law of the Southwestern United States: the notion that mineral rights not specifically granted as mineral rights by the sovereign belong to the State. This notion co-exists with others, but it exists, and at least in Texas, it decides cases. It is, however, counterbalanced by

another basic notion, which as Iavolenus tells us in Dig. 18, 1, 77 was already a matter of comment by Tubero as well as Labeo: Once the mining rights and the surface estate as to the same tract have passed into private property, mining rights become subject to separate disposition by grant or by reservation.

It would be foolish, nevertheless, to suggest that there is a direct historical link between the mineral lease as developed in Oklahoma and Texas in the first decades of this century and the opinions voiced by Labeo and Tubero almost two millennia earlier. There are obvious similarities between the present American private mineral lease and the law of private mineral rights in the Roman heartland of the classical era, just as there are obvious similarities between the epiclassical-era mineral licensing systems of the Roman fisc in its Hispanic and Lusitanian provinces and the mineral leasing mechanisms of the State of Texas and the United States as sovereigns over the public domain west of the Mississippi. Neither of these similarities, however, derives directly from the civil-law heritage of the Southwestern United States. That tradition may have facilitated the selection of the solutions found, but the choice between legal regimes was shaped decisively by the nature of the subject.

Not so, however, with water rights. Water not only fructifies the soil, but it also delimits the boundaries of land grants. This is especially the case with the seashore and its beaches in Texas and California, and with river beds and banks everywhere. Due to the aridity of the region, water is the lifeblood of the Southwestern United States. Ranchers, farmers, municipalities, and manufacturers all depend on it, and must strive for a reliable supply of what is (due to the "mining" of aquifers) a diminishing supply for an expanding population. The second natural resource of the Southwestern United States is its mineral wealth, especially in oil and gas. Here, entitlements are delimited mainly in terms of ownership of the surface estate. The ownership of river and creek beds and banks is just as crucial for mineral rights as the ownership of their waters is for riparian and downstream irrigators.

As a basic rule, the boundaries and the water rights of lands in the Southwestern United States are governed even today by the law prevailing *in loco* at the time of the original grant out of the public domain by the sovereign then in power. It follows that Mexican water law, as that law stood between 1821 and 1836 in Texas and up to 1848-1853 in New Mexico and California, is of vital importance for the determination of the boundaries and the water rights of lands granted by the Mexican central, federal, and state sovereigns in those years. Since Mexican water law was not codified or otherwise reformed substantially in the brief interlude of Mexican rule in Texas, New Mexico, and California, the water law thus applicable to

the definition and quantification of the boundaries and water rights of Mexican-era land grants in these states is the law of Castile and of the Indies. Because surface ownership now generally determines the spatial extent of the mineral rights, this long-extinct legal system of New Spain is also a major factor in the delimitation of mineral rights today. Indeed, exactly half of the key cases to be discussed here are mineral-rights disputes.

Let us now turn to the law of Castile and of the Indies, and to the place of Roman law in that system. As a practical matter, the chief pertinent sources for present purposes are, in that order, Book 4, Title 12 of the Recopilación of the Indies, relating to "mercedes de tierra y aguas," and Title 28 of the third Partida, on the subject of property and its acquisition. As recently documented by J. Sanchez-Arcilla Bernal, "La Pervivencia de la Tradición Jurídica Romana en España y La Recepción del Derecho Común," in *Estudios Jurídicos En Homenaje al Maestro Guillermo Floris Margadant* 379 (1988), the "common law" of Spain (and hence, Castilian law) derives essentially from Roman law. This is especially the case with respect to the key provisions of the Siete Partidas relating to the sea shore and to the beds and banks of rivers and streams.

Most (but as we shall see, not all) key passages of Part. 3, 28, in particular, are readily identified as having been copied from, or as being close paraphrases of, Justinian's Institutes. Thus, for instance Laws 3, 4, and 6 are composites of Inst. 2, 1, §§ 2 & 4. These derivations are well-known, and cited as a matter of course in Spanish and Mexican texts. See, e.g., *Curia Philipica* III, 1, §§ 1-15 (1797 ed.); 2 *Sala Mexicano* 6 note 1 (1845). Law 31 paraphrases Inst. 2, 1, 23 and also Ulpian's commentary on the praetorian edict as reproduced in Dig. 43, 12, 1, § 7. Part. 3, 32, 19, reflects, in the main, Ulpian's commentaries on that edict as reproduced in Dig. 39, 3, 1, 12. It would be incorrect, nevertheless, to describe Roman law to have been *as such*, in early nineteenth-century Mexico, part of the inherited law of the Indies, either directly or by reference to Castilian law.

The reason for this is in part historical: In 533 A.D., the Western Empire had been lost, and the *Corpus Iuris Civilis* could not be formally enacted in the Iberian Peninsula. Nevertheless, as Professor Sanchez-Arcilla has shown, the rudiments of Roman law survived even under Moorish rule, and the *ius commune* was received in Spain, mainly through the Church and the universities, by the thirteenth century. Even more importantly, until about the middle of the eighteenth century, Latin was the language, and Roman law the substance, of civil-law instruction at the Spanish and ultramarine universities. Justinian's codification furnished the text, and the professor occasionally referred to the *derecho real*, *i.e.*, the Royal law sanctioned by the King of Spain (also called *derecho pa-*

trio, or law of the country) by way of illustration. The standard book of instruction in use in Peninsular law faculties was A. Vinnius, *Institutionum Imperialium Commentarius*, a four-volume commentary on Justinian's Institutions written by a Netherlands scholar. See especially, Peset Reig, Derecho Romano y derecho patrio en las universidades del siglo XVIII, 45 *Anuario de Historia de Derecho Español* 273, 317 (1975).

All this changed in the latter half of the eighteenth century, as well described *id.* at 325-39. At a transitory stage, commentaries of Justinian's *Institutes* were expanded through the inclusion of references to the derecho real (or patrio), which in Peninsular editions did not include the legislation of the Indies. An exception in this respect is *Elucidationes ad Quatuor Libros Institutionum Imperatoris Justiniani Opportune Locupletate Legibus, Decisionibusque Juris Hispani* by J. Magro, posthumously completed by E. Bentura Belaña and published in Mexican in 1787 with some annotations to the law of the Indies, which, however, their author judged to be insufficient. See *id.* 1, *ad lectorem*, 4th unnumbered page.

By the end of the eighteenth century, Royal insistence on instruction in the derecho patrio had brought about a fundamental change. The order of instruction was almost exactly reversed, with the derecho patrio (in Castilian) furnishing the text, and Roman law, the (occasional) examples. A Castilian-language work, Juan Sala's *Ilustracion el Derecho Real de España* (1st ed. 1803) became the standard book of instruction as well as one of the leading sources for practitioners. After setting forth the prelation of Mexican, "Indian," and Castilian law as outlined above, the 1845 edition of the "Sala Mexicano" states, with respect to Roman law:

Las leyes romanas no son ni deben llamarse leyes en España, sino sentencias de sábios, que solo pueden seguirse en defecto de ley, y en cuanto se ayudan por el derecho natural, y confirman el real, que propiamente es el derecho común, y no el de los romanos, cuyas leyes ni las demas estrañas no deben ser usadas ni guardadas. (The Roman laws are not, and may not be called, laws in Spain. They are learned opinions, which may only be followed where there is a gap in the law, and to the extent that they are inspired by natural law and follow the Royal law (derecho real). The latter, not Roman law, is the derecho común, and neither the laws of the Romans nor other foreign ones are to be used and observed). 1 Sala Mexicano 159 (footnote omitted; italics in original).

Nevertheless, we might add, old habits live on, and in 1840, the author of the *Pandectas hispano-mexicanas* (Juan Rodriguez de San Miguel) felt compelled to write a *Streitschrift* "Contra el abuso de

estudiar el derecho con que se gobernaban los romanos, con referencia al que rige en nuestra sociedad, y aun con su positivo abandono."

With this background in mind, let us look at some of the major cases in the Southwestern United States where Roman law—as contradistinguished from the law of Castile and of the Indies—was applied (or denied application) judicially. Our first example is the *Chamizal* case, an international arbitration between Mexico and the United States decided in 1911. At issue was a segment of the boundary between these two countries along the Rio Grande. The Chamizal tract was formed on the United States side of the river between what are now Juarez and El Paso, between 1853 and 1868. Its origins are due to an alluvial shift, but the major part of the tract was ultimately found to consist of earth violently gouged out of the Mexican bank and deposited on the United States bank during the 1868 flood period. Since the bed of the river did not change, there was no avulsive change as defined by treaty in 1884.

Land transferred to the United States side gradually and imperceptibly through alluvion became the property of the United States under a prior treaty between the two countries, which to this extent reflects Inst. 2, 1, § 20. There was, however, no treaty provision covering sudden and perceptible transfers of land through flooding. In the course of the proceedings, the president of the Tribunal had stated, and United States counsel had agreed, that resort was to be had to general principle where there was no treaty provision in point. The general principle to be applied was, of course, Inst. 2, 1, § 21, which had been previously accepted by the United States as authoritative. Pursuant to that text, title to tracts thus torn off and transferred to the opposite bank remains with the original owner. Unfortunately, perhaps, the majority of the Tribunal did not expressly cite Inst. 2, 1, § 21 for this part of its decision, but this provision had been pleaded by Mexico (*Memoria documentada del juicio de arbitraje del Chamizal*, Vol. 2 (1911)). With spectacular ill grace, the United States refused to recognize the *Chamizal Award* for over half a century, but it has now been implemented by separate agreement to that effect.

As the *Chamizal* case shows, Roman-law rules relating to boundaries formed by watercourses tend to be recognized and applied as incorporating "general principle." Such principles do not prevail, however, over specific rules of positive law. This is illustrated by the *Luttet* case, decided by the Supreme Court of Texas in 1959. *Luttet v. State*, 159 Tex. 500, 324 S.W.2d 167 (1959). There, the Court had to determine the law governing the seaward boundary of Padre Island, which was granted to the Balli family by the Mexican State of Tamaulipas in 1829. The State of Texas contended, in the

main, that the littoral boundary should be fixed at the highest *winter* tide line as provided by Inst. 2, 1, § 4: *Est enim litus maris, quaterus hibernus fluctus maximus excurrit*. The littoral landowner, on the other hand, strove for a line fixed by the *average* high tide over the entire tidal cycle of 18.6 years, basing himself on Part. 3, 28, 4, which describes the seashore to include lands covered by the waters of the sea, "quando mas crece en toda el año, quier en tiempo del invierno o del varano." The Supreme Court of Texas quite properly gave effect to the (literally applicable) *partida* in preference to Justinian's Institutes. It described the relation of these two sources in the Texas law of historical land titles as follows:

We harbor no doubt that the Mexican (Spanish) law, whatever it may be, in effect at the date of the grant, is what must furnish the applicable rule, and that such is the effect of every decision, observation or assumption that has ever been made by this Court on the subject. Any confusion that may exist by reason of a previously somewhat unstudied use of the broad term "civil" law in texts and decisions, as distinguished from the applicable Mexican (Spanish) law, is confusion only as to what effect is to be given to the Roman law of Justinian's time in interpreting the vague terms of the Mexican (Spanish) law of several centuries later for application to the very practical question of fixing a line on the ground today.

This passage is almost identical with Juan Sala's view as to the relation of Roman law to the *derecho patrio*, expressed more than a century earlier. It also reflects a fundamental refinement of judicial attitudes—at least in Texas—towards the law of prior Hispanic sovereigns. General references to "the Civil Law" (as opposed to "the" common law) would no longer suffice; the pertinent sources had to be set forth in their proper order of *prelación*, and interpreted by techniques prevalent in early nineteenth-century Mexico.

In *Luttes* itself, the Supreme Court of Texas had contented itself with the original sources, and used expert assistance only for linguistic purposes. It was quite clear by then, however, that this was no longer sufficient. The State of Texas had employed a panoply of out-of-state legal talent (most significantly including a Mexican legal scholar) in its so-called "Tidelands Oil" litigation with the United States over title to the oil resources of the territorial sea adjacent to the Gulf coast. While neither "civil" law nor Mexican law were of much relevance in this connection, the interaction between leading foreign and internationally renowned United States legal experts and the Texas public legal "establishment" had brought about a veritable sea change in judicial attitudes. This was, to a considerable extent, the joint work of J. Chrys Dougherty, a well-connected

Texas lawyer with fluency in Spanish and in French who recruited and marshalled the Texas legal forces, and of Professor Santiago Oñate (Sr.) of Mexico City, soon to become the leading authority on Spanish and Mexican historic water rights in Texas.

The first reported Texas decision actually incorporating findings on Roman law and nineteenth century Mexican law brought to the attention of the court by foreign civil-law experts is *McCurdy v. Morgan*, 265 S.W.2d 269 (Tex. Civ. App.—San Antonio 1954), writ refused. That case held that a Mexican land grant of October 30, 1834, had included the *bed* (lat.: *alveus*) of the Chiltipin Creek, a nonperennial stream lying within the boundaries of the grant. In order to arrive at that conclusion, the court had to draw a sharp distinction between the beds of perennial non-perennial watercourses under early nineteenth-century Mexican law, the bed of a *perennial* stream was public. As to *rios*, this follows all but directly from Part. 3, 28, 31, reflecting a well-known passage from Ulpian's comment on the Praetorian edict reproduced in D. 43, 12, 1, § 7:

Ille etiam alveus, quem sibi flumen fecit, eitsi privatus ante fuit, incipit tamen esse publicus, quia impossibile est, ut alveus fluminis publici non sit publicus.

Thus, in classical Roman law as well as in Castilian law and through the latter, the law of the Indies and of early nineteenth-century Mexico, the beds of "public" rivers were public. The law of Castile and of the Indies provided no guidance, however, as to the distinction between public and non-public rivers, and as to the ownership of the beds of non-public ones.

The classical Roman law sources, on the other hand, were reasonably clear as to the former of these two questions. Let us again turn to Ulpian's commentary on the Praetorian edict: A public river is distinguished from a private one *magnitudine . . . aut existimatione circumcolentium*, Dig. 43, 12, 1, § 1. Rivers can be perennial or torrential; a perennial river is one which always flows. *Id.* § 2. Ulpian then proceeds to note that Cassius defined a public river as a perennial one, that Celcus had approved this definition, and that it could thus be viewed as probable. *Id.* § 3. The primary need for distinguishing between public and private rivers becomes apparent *id.* at § 4: The praetor's interdict (or judicial injunction) runs only to interference with navigation on public rivers, for a private river is not different from any other private premise: *nihil enim differt a ceteris locis privatis flumen privatum*.

Although Ulpian's remarks were addressed to the narrow issue of the availability the Praetorian interdict to protect the public use of public water courses, this final conclusion could well be generalized into the proposition that private rivers (and hence, their *alvei*) were private. This conclusion was drawn by Vinnius: *Alveum*

fluminis extra usum publicum existimari partem vicinorum praediorum; et ideo siccatum praedis cedere. Crucially, the same view of the matter was taken by Juan Sala, recognized as an eminent practical authority in early nineteenth-century Mexico.

In *McCurdy v. Morgan*, these authorities were brought to the attention of the court through two lengthy opinions authored by Professors Felipe Sánchez-Román and Ramón Martínez-Lopez, presented by Mr. Dougherty in the appendix to his brief on appeal. The Court said, in holding that the *alveus* of the non-perennial Chilitipin Creek had passed with the Coahuiltecan land grant of 1834:

It seems that under the basic Mexican civil law the doctrine of sovereign ownership to the beds of streams applied only to perennial streams. . . . A marked distinction is noted between perennial streams, which never or very rarely completely dry up in summer, and "torrents," which run only during periods of heavy rainfall.

Thus, we see Roman law applied in the *Chamizal Case* as stating "general principle," rejected in *Luttes* as contrary to a Partida directly in point, and applied in *McCurdy* as backdrop law suppletive and interpretive of the law of Castile. The final case to be considered here involves a conflict (or perhaps, a possible conflict) between Roman law and the law of the Indies.

In the great *Valmont* case, *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), judgment adopted, 163 Tex. 381, 355 S.W.2d 502 (1962), the Texas courts had held that lower Rio Grande riparians holding under Spanish or Mexican surface grazing and/or dry farming grants had no riparian irrigation rights in and to the waters of that river. In *Cibolo*, that holding was extended to perennial streams in Coahuila y Texas proper. It is based on a careful analysis of the water law of the Indies by Mr. Justice (later Chief Justice) Jack Pope, who concluded that under that law, water rights, like mineral rights, did not pass with the surface estate but required express grants from the sovereign. The relevant authorities had been brought to the attention of the court by the expert testimony of Santiago Oñate (Sr.), and by his "Memorandum on Water Rights in the Lower Rio Grande in the Spanish Colonial and Early Mexican Periods."

Some two decades later, the *Medina River Adjudication*, 670 S.W.2d 250 (Tex. 1989) presented the Texas courts with the ultimate question as to Spanish and Mexican water law in Texas: Did the ownership of a Mexican-era surface grant encompassing a section of traversing nonperennial waters carry with it irrigation rights in and to these waters? Such rights could exist, if at all, only by operation or implication of law, since the classification of the grant there in-

volved as grazing land with a few *labores* fit for dry farming directly contradicted any implied factual intent to grant irrigation rights.

Understandably, the land owner relied on *McCurdy* and on Roman-law authorities dealing with non-perennial streams. These were brought to the attention of the court by the testimony of Professor Santiago Oñate *fiis* (presently the Mexican Ambassador to the Organization of American States). These authorities clearly gave the *alveus* of the non-perennial stream here involved to the encompassing land owner. Whether they did so as to the *waters* of non-perennial creeks seems more doubtful. Inst. 2, 2, 1 states without qualification that *aqua profluens*, or running water, is common to all, in the same manner as the air and the oceans. While Marcianus qualified an equally unequivocal statement as to the public right to rivers by adding the word "*paene*," or almost, he made no such qualifications as to *aqua profluens*; compare Dig. 1, 8, 4, § 1 with *id.* 2, § 1; and none appears in Ulpian's lengthy discussion of the subject as reported in Dig. 43, 12. It seems logical to assume, therefore, that all running water was regarded as inherently incapable of private ownership, and that the waters of private rivers, as well, were in the public domain. The contrary argument is made, but without elaboration, by Vinnius, who simply equates *aqua*, as is used in Inst. 2, 1, 1, with *aqua iugis*, or perennial water. Comment on Inst. 2, 1, 1, preface; vol. 1, p. 157 of the Heineccius edition (1761). A similar interpolation is made, in all probability in reliance on Vinnius, by Magro, who uses the term *perennis aqua* in this connection.

In my testimony and opinion given on behalf of the State of Texas in the *Medina* case, I spelled out these doubts, but argued, in the main, that the classical Roman law of water rights was not applicable in the Indies, having been replaced by the requirement of express irrigation water rights as at least implied by the *Recopilación* of the Indies. This argument relied, of course, on the authority of *Valmont* as to the requirement of express grants, and drew much support from the opinion of Santiago Oñate (*père*) in that case. The son prevailed over the father in the trial court and (by split decision) in the intermediate appellate court. The Supreme Court of Texas, however, found my view (and those first advanced by Santiago Oñate the Elder) more persuasive. With respect to the *McCurdy* case, it said:

McCurdy held that the bed of a non-perennial stream belongs to the adjacent landowner. We do not believe that principle dispositive of the rights to the water in a non-perennial stream. It was the law of New Spain that any gaps in the *Recopilación* [of the Indies] were to be filled by reference to the laws of the Peninsula. There was no provision in the *Recopilación* concerning the ownership of the beds of

nonperennial streams. So, Spanish law, which held that the bed of a non-perennial stream was private, applied. As to the waters of the stream, however, there was no need to refer to the law of Castile.

This was so because as to water rights in general, the *Recopilación* of the Indies required express grants by the sovereign.

Thus, we see that Juan Sala's view as to the place of Roman law in the hierarchy of the sources of early nineteenth-century Mexican law has stood the test of time, at least in Texas. In the *Chemizal Case*, it supplied the gap-filling "general principle" to which resort had to be made "en defecto de ley." In *Luttes*, it receded before the law of the Partidas—the *derecho real*. That law, and not "el de los romanos," was "propriamente el derecho común" of Castile, and hence, of pre-codification Mexico. In *McCurdy*, where there was no Partida and no *recopilada* of either Castile or of the Indies in point, Roman law as received by Spanish (and New Spanish) authority once more filled the gap. In *Medina*, finally, the *Recopilación* of the Indies, interpreted in the light of the jurisprudence of the Viceroyalty of New Spain, prevailed over what was arguably a rule of classical Roman law to the contrary.

All four of these are Texas cases (although *Chamizal* is, of course, an international adjudication). They have been selected here because, as a general proposition, the level of judicial sophistication as to "Civil Law" sources which has prevailed in Texas at least since *Luttes* is not readily apparent in other Southwestern and Western States. As recently as 1982, for instance, the Supreme Court of California held that tidelands conveyed by a Mexican grant "remained subject to the public's interest" to the same extent as common-law titled California lands under that state's "public trust" doctrine. The Supreme Court of the United States was able to revoke the retroactive membership of King Alphonso the Wise in the Sierra Club by holding that the matter was precluded by the *federal* patent validating the Mexican grant, thus avoiding (but pointedly leaving open) the question of Mexican law. *Summa Corp. v. Calif. ex rel. Lands Comm'n*, 466 U.S. 198 (1984).

Some decades earlier, the Supreme Court of California had rejected an utterly devastating attack on the validity of that state's so-called "pueblo water rights doctrine," supposedly based on Mexican law. Right or wrong, the California Court held, that doctrine had become a "rule of property" in California through constant judicial reiteration. In the *Laredo River Adjudication*, 675 S.W.2d 257 (Tex. App.—Austin 1984), writ ref'd n.r.e., happy to relate, the Texas courts have reached the opposite conclusion, and in New Mexico as well, they have set the scene for a test case based on a record con-

sisting mainly of the affidavits of historians and of legal historians whom modesty precludes me from describing as eminent.

Roman law is not, as such, relevant to such cases, which concern, in the main, the colonization laws and practices of New Spain, chiefly as codified in the Recopilación of the Indies. In Texas, on the other hand, a few questions remain on which Roman law might be of assistance. The most important of these relates to rights to ground water underlying Spanish and Mexican grants. *Portio enim agri videtur aqua viva*, said Ulpian in his commentary on the Praetorian edict (D. 43, 24, 11 pr.). In Roman as well as in Castilian law, the owner of the surface estate could not open new wells so as to diminish the flow of his neighbors' wells if he acted with malice (*Quod praesumitur*, says Gregario Lopez in his gloss to Part. 3, 32, 19 sub 1, *ex eo quod nullam utilitatem sentit*). Perhaps this can now be read to be the equivalent of the requirement of "beneficial use" in current Texas water law. Beyond that restriction, however, the surface owner's right of water extraction was limited in classical Rome only by the mechanical devices then available. Would the rules elaborated by the classical jurists have been formulated as comprehensively if these jurists had been aware of the possibilities of mechanical pumping?

This brings me to considerations of a more general nature. Roman law has been in force in Texas, within the confines set out by Sala but nevertheless as Texas law, from the founding of the Spanish ultramarine province of Texas in 1692 to the adoption of the common law of England in 1840. Since that time, it has been dead law in Texas, but nevertheless very much alive there when rights established before 1840 are to be adjudicated. The Roman historical law applied on such occasions should surely be not the law of the classical jurists, nor that of the epiclassical empire, nor yet the *ius commune*, but (at the very least) the *usus modernus* of pre-codification nineteenth-century Europe. I consider it appropriate, therefore, to seek guidance from the water law jurisprudence not only of nineteenth-century Spain, but also from that of Scotland and the "golden age" of German Pandektistik—the last six decades of the nineteenth century.

Scotland, however, is anything but arid, and Pandektistik, too, is dead. That leaves us, rather obviously, with South Africa. South African courts, too, have struggled with their Roman-law heritage, and they apply Roman law only to the extent that it can be shown to have been actually received into the law of the Province of Holland and Zeeland. But once this process of verification is complete, the dead law of Rome (at least its dead *water law*) has come to life, and has quickly adjusted to local circumstances. As eloquently

stated by Chief Justice Innes of South Africa in the *Van Niekerk* case in 1917:

The elasticity of the civil and the Roman-Dutch systems has enabled South Africa Courts to develop our law of water rights along lines specially suited to the requirements of the country. The result has been a body of judicial decisions, which, though eminently favourable to our local circumstances, could hardly be reconciled in its entirety with the law either of Holland or of Rome 1917 A.D. 359, 377 (S.A.).

Let me conclude by expressing the hope that in days to come, the Roman law of Texas, too, will be found to have been rejuvenated whenever it is revived judicially.