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THE COMMINGLING DOCTRINE & HORIZONTAL WELLS: WHOSE BURDEN IS IT ANYWAY?

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> "[T]he burden is on the one commingling the goods to properly identify the aliquot share of each owner; thus, if goods are so confused as to render the mixture incapable of proper division . . . , the loss must fall on the one who occasioned the mixture."
>
> The Honorable Zollie C. Steakley, Jr., Associate Justice of the Texas Supreme Court, *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 818 (Tex. 1974)

I. SCOPE OF ARTICLE

The article will cover the origins of the commingling doctrine from Old English common law to early U.S. and Texas precedent, as well as various factual circumstances where commingling has been applied. This article will then move to a discussion of the dual shifting evidentiary burden necessary to establish the application of the doctrine in Texas. Finally, the article will discuss commingling's application in a modern oil and gas context and visit the controversy over the application of commingling to horizontal drilling across multiple tracts of land with different mineral owners.

II. EARLY COMMINGLING IN AMERICAN COMMON LAW

Commingling is defined as the homogeneous mixing of goods of similar nature and value belonging to different owners, such that "the property of each cannot be distinguished." *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 818 (Tex. 1974). "[I]f goods are so confused as to render the mixture incapable of proper division . . . , the loss must fall on the one who occasioned the mixture." *Id.* Commingling has its origins in the doctrine of confusion of goods, which "has been a part of English and American law for continuous centuries." *Troop v. St. Louis Union Trust Co.*, 166 N.E.2d 116, 122 (Ill. App. Ct. 1960).

In fact, one of the earliest mentions of the confusion of goods doctrine in United States common law happened to involve English plaintiffs and American defendants. *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756 (C.C.D. N.H. 1814) (No. 13,156). The opinion contains a lengthy and interesting analysis over whether the Society for the Propagation of the Gospel (the "Society") had standing to sue in U.S. District Court. *Id.* at 763–766. In October, 1814, citizens of Great Britain were considered to be "alien enemies" under the law while the War of 1812 was being waged, which, naturally, may affect their legal rights in America. *See id.*

After the court cleared the standing hurdle, it then examined the facts presented in *Wheeler*. *Id.* at 767. The Society owned land in New Hampshire upon which Wheeler and others were tenants. *Id.* The tenants had made improvements to the land, and after a suit to recover the property by the Society, the tenants sought to recover the value of their improvements. *Id.* In its analysis, the court cited the confusion of good doctrine to illustrate its point:

> If every man ought to have the fruits of his own labor, that principle can apply only to a case, where the labor has been lawfully applied, and the other party has voluntarily accepted those fruits without reference to any exercise of his own rights. For if, in order to avail himself of his own vested rights, and use his own property, it be necessary to use the improvements wrongfully made by another, it would be strange to hold, that a wrong should prevail against a lawful exercise of the right of property. **In the case of a tortious confusion of goods, the common law gives the sole property to the other party without any compensation**. Yet the equity in such case, **where the shares might be distinguished**, would seem such stronger than in the present case.

Id. at 768 (emphasis added).

Here, *Wheeler* shows that the confusion of goods doctrine, along with what some consider to be its harsh remedy "to give[] the sole property to the other party without any compensation," have been a part of Western jurisprudence for centuries.

III. EARLY COMMINGLING IN TEXAS

Commingling appeared very early on in Texas's existence, as well. One of the first examples seen by the Texas Supreme Court

involved the commingling of "farm and garden seeds and grain" in the *Holloway Seed Co. v. City Nat. Bank* opinion. 47 S.W. 95, 96 (Tex. 1898). "[T]he seed company obtained possession of the stock of goods it carried on a business with it, buying and selling in the usual course of trade, so as to make the original articles incapable of identification." *Id.* at 97. The Texas Supreme Court in *Holloway* clearly defines confusion of goods as nothing more than an evidentiary rule. *Id.* "The wrongful mingling of one's own goods with those of another, when the question of identification of the property arises, throws upon the wrongdoer the burden of opinting [sic] out his own goods, and, if this cannot be done, he must bear the loss which results from it." *Id.* This assignment by the Court of the evidentiary burden to the commingler instead of the plaintiff is derived from the concept of spoliation of evidence. *Id.* "It is but an application of the principle that all things are presumed against the spoliator; that is to say, against one who wrongfully destroys or suppresses evidence." *Id.* The Court denied commingling relief, and instead, remanded the case to the trial court for the plaintiff's failure to "plead[] the facts from which the liability arises." *Id.* at 98.

Another early opinion from the Court of Civil Appeals of Texas involved cattle that had been "so branded, mixed, and intermingled . . . as that they cannot now be certainly identified and pointed out." *Belcher v. Cassidy Bros. Live-Stock Commission*, 62 S.W. 924, 925 (Tex. Civ. App. 1901). In *Belcher*, several hundred head of cattle subject to different mortgages were mixed together inadvertently. *Id.* The jury found that the mortgage in question covered 304 head in total: "123 cows, 61 calves, 37 three year old heifers, 44 yearlings, 38 two year old heifers, and 1 two year old steer." *Id.* Pursuant to the jury finding, the trial court ordered a foreclosure and sheriff's sale "as to said 304 head of cattle of the class and kinds of cattle hereinabove described . . . ." *Id.* The Court of Civil Appeals of Texas, however, looked to the doctrine of confusion of goods, stating:

> "The doctrine of the confusion of goods has been often discussed, and may be considered as clearly and distinctly settled. If the goods of several intermingled can be easily distinguished and separated, no change of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular; if the portion of each owner is known, and a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine, or other article of the same kind and quality,-then each may claim his aliquot part."

Id. at 926 (quoting *Robinson v. Holt*, 39 N. H. 557, 563
(1859)).

The Court then makes a distinction between two types of confusion: wrongful ("by negligence, or unskillfulness, or inadvertence") and not wrongful ("arising from mere accident and unavoidable casualty"). *Id.* "In the latter case . . . the civil law deemed the property to be held in common . . . ." *Id.* (citations omitted). The Court applied this principle in *Belcher*, finding that the mixing was not the fault of any party, and further, that "the proportion of interest of each claimant may be reasonably ascertained notwithstanding the confusion." *Id.* In other words, since the jury found which class or kind of animals were covered by the mortgage, then a reasonable and fair division of them could be made. While the judgment of the trial court in this respect was approved, the Court nonetheless reversed and remanded the case. The Court held that the trial court improperly granted judicial power to a ministerial officer (the sheriff) to make the division of the commingled property, instead of relying on an applicable statute concerning the partition of personal property. *Id.* at 927.

Coming forward nearly forty years, the Texas Supreme Court dealt with commingling by a trustee of his own personal property with property held in trust in the *Eaton v. Husted* opinion. 172 S.W.2d 493 (Tex. 1943). Eaton managed a testamentary trust as trustee for his deceased mother, of which a long, lost niece, Husted, was a beneficiary. *Id.* at 494–95. Eaton "had kept no books, he left no evidence of what he owed [Husted] or of any claim he might have against [Husted]
. . . . He had, in truth, dealt with the estate 'as his own.'" *Id.* at 497. Due to Eaton's unique position of knowledge and responsibility with regards to trust property, the Court placed the burden on Eaton of proving how much of the commingled property was trust property and how much was his own. *Id.* at 497–98.

Title search: The Commingling Doctrine & Horizontal Wells: Whose Burden is it Anyway?

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