



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

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1

## Scope of Article

- ▶ Origins of the commingling doctrine from Old English Common Law to U.S., Texas & other jurisdiction precedent.
- ▶ The shifting evidentiary burden necessary to apply the remedy.
- ▶ Application of commingling in the oil and gas context.
- ▶ Controversy of applying the doctrine to horizontal wells.



2

## What is commingling? What is the remedy?

- ▶ The mixing of homogeneous 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).
- ▶ 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.”

3

- ▶ The earliest reference to the confusion of goods theory is a New Hampshire case from 1814.
  - ▶ *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756 (C.C.D. N.H. 1814) (No. 13,156).
- ▶ A Society made up of British citizens sued American citizens to recover New Hampshire land that had been leased to the Americans.
- ▶ The tenants counterclaimed asking for the value of their improvements.
- ▶ “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.”

## Origins of commingling

4

# Texas Commingling



- ▶ *Holloway Seed Co. v. City Nat. Bank*, 47 S.W. 95 (Tex. 1898).
- ▶ A seed company obtained farm and garden seeds, mixed them, and then bought and sold them making the source of the seeds and grain impossible to identify.
- ▶ When a party wrongfully commingles, the wrongdoer has “the burden of pointing out his own goods, and, if this cannot be done, he must bear the loss which results from it.”
- ▶ This burden shift arises from the concept of spoliation of evidence.
- ▶ All things are presumed against the spoliator, i.e., “*against one who wrongfully destroys or suppresses evidence.*”

5

## Texas Commingling

*Belcher v. Cassidy Bros. Live-Stock Commission*,  
62 S.W. 924 (Tex. Civ. App. 1901).

“cattle . . . branded, mixed, and intermingled . . .  
. as they cannot now be certainly identified and  
pointed out by means of the original . . . brand.”

“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.”

6

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First appeared as part of the conference materials for the

47<sup>th</sup> Annual Ernest E. Smith Oil, Gas and Mineral Law Institute session

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