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The Ryan v. Pickens: The Case for Compulsory Pooling in Texas

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RYAN v. PICKENS:

THE CASE FOR COMPULSORY POOLING IN TEXAS

This article is predicated upon the doctrine of ownership in place of oil and gas. It recognizes that under the police powers, the Railroad Commission of Texas has the right to regulate the spacing of wells, provided that each landowner is given a reasonable opportunity to recover his fair share of the recoverable hydrocarbons under his land. It is the author's position that in the principal case, the operation of Rule 37[1] and the conjunctive voluntary subdivision rule was unreasonable and a violation of due process of law. It is suggested that a solution more just than that arrived at under these rules was available to the commission, and that the best solution would be compulsory pooling, which can be brought about only by legislative action.

RYAN v. PICKENS:[2] THE CASE

Plaintiff, the Ryan Consolidated Petroleum Corp., brought suit for equitable relief from the confiscation of oil and gas by defendants Pickens and Coffield. Ryan owned the mineral lease upon one-half and defendants the lease covering the other half of a tract voluntarily subdivided after Rule 37 became applicable in the area. Defendants secured a permit and drilled a well on their one-half. Ryan was denied a permit to drill upon its one-half and brought suit to obtain an equitable share of the oil produced from the entire tract. Defendants won a take-nothing judgment in the trial court which was affirmed by the Court of Civil Appeals.[3] Judgment was reversed and the cause remanded to the District Court by the Texas Supreme Court in March 1955.[4] In November, the opinion rendered in March was withdrawn and judgment of the trial court and the Court of Civil Appeals affirmed.

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[1] RULES AND REGULATIONS OF THE TEXAS RAILROAD COMMISSION, Statewide Rule 37, promulgated November 26, 1919.

[2] Ryan Consolidated Petroleum Corp. v. Pickens, et al., ...Tex....., 285 S.W.2d 201 (1955).

[3] Ryan Consolidated Petroleum Corp. v. Pickens, et al., 266 S.W.2d 526 (Tex. Civ. App. 1954).

[4] Ryan Consolidated Petroleum Corp. v. Pickens, et al., 24 Tex. Sup. Ct. Rep. 288. (1955).

The controversy involved lots 10, 11, 12, and 13 in the Hawkins Townsite. Each lot contained approximately .1 acre, and had dimensions of 30 x 113 feet. Pickens and Coffield acquired their interest by a lease executed on lots 10 and 11 a short time prior to Ryan's lease on lots 12 and 13. Ryan acquired its lease with knowledge of defendants' lease. Both leases were acquired from the same lessors and represented a voluntary subdivision under Rule 37, the spacing rule of the Texas Railroad Commission. Under the general provisions of this rule the original tract constituting the four lots would not have been entitled to a well unless it was granted as an exception "to prevent waste or to prevent the confiscation of property." The commission has declared that subdivisions subsequent to the adoption of the original spacing rule would not be entitled to an exception to prevent confiscation.[5] Therefore, the parties to this suit were relegated to such rights to drilling permits as the original .4 acre tact was entitled.

Defendants Pickens and Coffield applied for a permit to drill one well upon their lots two days prior to Ryan's application. After a denial and two rehearings, the commission granted the defendant's application but placed the well location at the exact center of the original tract, which was on the boundary line separating plaintiff's and defendants' leases. The order granting the permit stated that "it is the intention of the Commission to grant one well on the four lots and let both applicants share equally in the benefits. . . ." At a subsequent rehearing, the permit was granted to defendants upon their lot 11 after they requested that the notice of rehearing include that "[t]he application involves, and is intended to involve the oil and gas lease-hold rights, and development rights, past, present, and future in lots 10 and 11 as well as lots 12 and 13, and particularly as those rights existed . . ." prior to the subdivision.

Ryan appealed to the District Court of Travis County. There the judgment denied both permits stating that under the commission's own rules, the lease owners were ". . . relegated to the situation . . . prior to the subdivision . . ., which was a joint right to drill . . . and are not so relegated until their separate lease tracts have been re-

[5] Order of May 29, 1934, promulgated as part of Rule 37 in Oil and Gas Circular No. 16-B.

united . . . either by pooling or by application for joint development." The trial court further stated that the commission ". . . should have denied both applications or withheld action thereon until such has been done, and its failure to do so is . . . arbitrary . . . and unjust" as an attempt to decide ". . . priority of rights when no priority of rights exist."

Both parties appealed. The defendants' brief, which is in evidence in this case, emphasized that the well granted by the commission's permit would adequately drain the hydrocarbons under all four lots.

The Court of Civil Appeals reversed the judgment of the District Court insofar as it set aside the order granting defendants a permit to drill. In rendering its decision, the Court of Civil Appeals stated: "The Railroad Commission does not have the power to force a pooling agreement upon unwilling owners of mineral estates, and the trial court in this case did not have the power or authority to force a pooling of the mineral estate. . . . This judgment is without prejudice to the assertion by Ryan or other interested parties of any right they may have in or to the oil and gas produced . . . from the well drilled by . . . [the defendants]."

Defendants drilled the well in accordance with the permit and Ryan brought this suit for equitable relief. After the take-nothing judgment of the trial court was affirmed by the Court of Civil Appeals, the Texas Supreme Court in a 5-4 decision reversed and remanded.[6] The majority opinion held that the defendants were estopped to deny that their well was in fact producing from all four lots by reason of their having obtained judicial relief sustaining their permit on the grounds that the one well would produce all of the oil and gas from the four lots. They also pointed out that the law of capture has no application to a situation where, as under the facts of this case, ". . . equal rights to drill are denied."

A rehearing was granted, the above opinion was withdrawn, and the take-nothing judgment of the trial court was affirmed.

In answer to their own question ". . . who is entitled to the oil?", the majority reply "There is only one answer . . . Pickens and Coffield are entitled to keep 7/8ths of the oil produced from the well

[6] See *supra*, note 3.

. . ." and the lessors are entitled to 1/8th. In support of their position they state that "[t]o hold otherwise would be contrary to the well settled law in Texas."

Brown v. Hitchcock[7] is cited for the proposition that the original tract was entitled to a well permit as a matter of law. *Gulf Land Company v. Atlantic Refining Company*[8] is extensively quoted from in making the following points: "It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil or gas under his land, or their equivalents in kind. Any denial of such right would be 'confiscation'. The right to be protected against 'confiscation' under commission oil and gas rules is not absolutely unconditional or unlimited . . ." and that ". . . subdivisions of land, as such, which have or hereafter may come into existence are not protected at all against confiscation."

The majority go on to hold that petitioner's position in this suit for equitable relief ". . . is inconsistent with the law of capture, which is a well settled rule of property in this jurisdiction." As to the effect of conservation laws upon the rule of capture the majority state that "[t]he Railroad Commission cannot change the laws of Texas."

The Mississippi cases of *Hassie Hunt Trust v. Proctor*[9] and *Griffith v. Gulf Refining Co.*,[10] which are contrary to the majority holding here, are dismissed on the grounds that they were influenced by a Mississippi statute — passed after the causes of action had accrued in these two cases — making it the duty of the State Oil and Gas Board to safeguard correlative rights.

To further buttress their contention that the law of capture should control, *Japhet v. McRae*[11], decided in 1925, is quoted as follows: ". . . In spite of the scientific knowledge of geologists, the [oil] industry stil partakes largely of a gamble. It seems to us the only safe rule, and the only one free from much confusion, is the one which gives the oil to the man who owns the land upon which the well is located. . . ."

The majority conclude their opinion that Ryan has proceeded

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[7] 235 S.W.2d 478 (Tex. Civ. App. 1950) *error refused.*
[8] 134 Tex. 59, 131 S.W. 2d 73 (1939).
[9] 60 So. 2d (1952).
[10] 60 So. 2d 518 (1952).
[11] 276 S.W. 669 (Tex. Comm. App. 1925).

upon "... an erroneous assumption that respondents' application for a permit involved all four lots." This assumption is deemed erroneous because the mineral rights were segregated when a lease was given on only half the tract.

The dissent contends that the main premise of the majority — the rule of capture — is not applicable to this case because Ryan is deprived of his right to protect himself by drilling an offset well. *Stephens County v. Mid-Kansas Oil and Gas Co.*[12] is relied upon to support the contention that "[d]rainage of adjoining property under the law of capture [is] rationalized with ownership in place ... on the basis of equal rights to drill."

In the absence of such equal right to drill, the dissent feels that constitutional questions are raised. First it is stated that the "... equal right to drill has always supported the constitutionality of the rule of capture." And then, "[t]he constitutional basis for the granting of this exception well permit in the first place — preventing the confiscation of oil under lots 10, 11, 12 and 13 — partially fails if Ryan, as the true owner of the oil under lots 12 and 13, has that oil confiscated by Pickens and Coffield."

The dissent contends that the defendants should be estopped from denying that their well permit was granted to prevent confiscation from under all four lots in the original tract. Such an estoppel was found in defendants' application stating that it involved all four lots. An additional ground for estoppel was that the basis of the exception well is to prevent waste and confiscation under the original tract. To do this it would be necessary for the well to produce the equivalent of all oil under the four lots comprising the tract.

The dissenting opinion agrees with the majority that "... the Commission has not been given the power to determine property rights as between litigants." However, the dissent asserts that the majority has placed that very burden on the commission, in that the movement of the well location an insignificant distance would transfer the enjoyment of the oil under all four lots.

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[12] 113 Tex. 160, 254 S.W. 290 (1923).

THE LAW OF CAPTURE[13]

The law, or rule, of capture as defined in *Elliff v. Texon Drilling Co.*,[14] is that " . . . the owner of a tract of land acquires title to the oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands . . . " Though the principle was stated in earlier cases, *Barnard v. Monogahela Gas Co.*,[15] decided in 1907, is considered the leading case. Here, is was held that " . . . every landowner or his lessee may locate his wells wherever he pleases, regardless of the interests of others. . . . He may crowd the adjoining farms so as to enable him to draw the oil and gas from them. What, then, can the neighbor do? Nothing; only go and do likewise." The Pennsylvania Supreme Court frankly admitted that " . . . [exact knowledge of this subject is not at present attainable . . ." and " . . . [t]his may not be the best rule; but neither the legislature nor our highest court has given us any better."

If this rule was formulated with such reservations, why does it exert the influence — as indicated by the majority opinions in the *Ryan* case — on Texas law almost fifty years later? Can it be that neither the Texas Legislature nor Texas' highest court has given us any better?

A question more pertinent to the *Ryan* case would be whether the rule of capture has been affected by Texas conservation statutes and rules. The majority say that " . . . [t]he Legislature of Texas has not seen fit to enact legislation which would authorize the Railroad Commission to adopt and promulgate rules which would have the effect of rendering ineffective the rule of capture . . . " But in *Corzelius v. Harrell*,[16] the Supreme Court held that " . . . the law of capture [is] subject to regulation under the police power of this State . . .", and went on to allow the Commission to allocate production to adjust correlative rights. It is clear that regulation does not necessarily render the law of capture ineffective, but in the present case regulation has rendered the neighbor's defense

[13] For complete discussion, see Shank, *Present Status of the Law of Capture*, PROCEEDINGS OF SIXTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION, 257 (1955).

[14] 146 Tex. 575, 210 S.W.2d 558 (1948).

[15] 216 Pa. 362, 65 Atl. 801 (1907).

[16] 143 Tex. 509, 186 S.W.2d 961 (1945).

to the operation of the law of capture ineffective. Should not the rule fall with the defense?

The *Barnard* case states that the neighbor's defense to the law of capture is "to go and do likewise." Even prior to the *Barnard* case, the United States Supreme Court in *Ohio Oil Co. v. Indiana*[17] held that "... the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property." Has not the Railroad Commission, in its order supported by the majority opinion, absolutely deprived Ryan of the right to his oil? The Supreme Court of Texas in *Stephens County v. Mid-Kansas Oil and Gas Co.* held that "... [i]f the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own." In these cases, the connotation is certainly that the defense is necessary to prevent a violation of due process rights.

In *Elliff v. Texon Drilling Company*, involving drainage as a result of a negligent blowout, the Supreme Court of Texas held that the law of capture should not be extended to include the negligent waste or destruction of oil and gas. As the party drained in this case could not "go, and do likewise" by creating another blowout, the court seemed to be saying that the law of capture does not apply where the neighbor is deprived of his correlative right under the law of capture.

The cases cited in the last two paragraphs would seem conclusive as to the proposition that the law of capture is clearly predicated upon adjacent landowners being free to drill offset wells to protect themselves from drainage. As Ryan was deprived of this right, the dissenting opinion's contention that the law of capture was not applicable to the case in question is well taken.

The majority's reliance upon *Japhet v. McRae* in support of the law of capture is understandable from the succinct statement of the rule therein. However, that case is clearly distinguishable in that there was no denial of the right to drill on the adjacent portion of the

[17] 177 U.S. 190 (1899).

tract, in that there were only royalty interests involved, and in that there was principally in issue the interpretation of a deed and contract. In addition, the rule stated therein is founded on the ignorance of reservoir dynamics that existed thirty years ago. Such ignorance can no longer be attributed to the highly technical oil industry.

SPACING REGULATIONS

Although the dissent attributes the holding in the *Ryan* case to the law of capture, the majority has leaned heavily upon the conservation laws relating to spacing regulations. Although these two subjects are necessarily interrelated, they are discussed separately in an effort to find the real problem posed by *Ryan v. Pickens.*

It is generally accepted that all property is held subject to the valid exercise of the police power. Therefore, there is no violation of due process where the use of private property is restricted by statutory enactments which are reasonable and bear a fair relationship to the purpose for which the legislation was enacted.

As applied to conservation laws, *Ohio v. Indiana* states that "the legislative power . . . can be manifested for the purpose of protecting all the collective owners, by securing a just distribution . . . of their privilege to reduce to possession, and to reach the like end by preventing waste." But the same decision also recognizes that the landowners and lessees can " . . . not be absolutely deprived of this right [to reduce the hydrocarbons to possession] without a taking of private property." Therefore, when restrictions are imposed upon the owner's right to drill where he chooses, a substitute must be provided to protect their property interests if such can be reasonably done.

Under the authority contained in the conservation act of 1919,[18] Rule 37 was first issued on November 26, 1919. Many amendments have been made, but the general provision is to prevent the drilling of wells closer than certain specified distances from each other or from property lines. It is also provided that the commission, in order to prevent waste or confiscation, may grant exceptions. By order of May 29, 1934, the commission declared that subdivisions of property occurring after the adoption of the

[18] TEX. ACTS 1919, c155, TEX. REV. CIV. STATS. (1925) arts. 6014-6029.

original spacing rule would not be considered in determining whether confiscation was occurring.[19]

The constitutionality of Rule 37, including the voluntary subdivision order, was upheld in *Brown v. Humble Oil and Refining Company*.[20] Here, the Texas Supreme Court quoted liberally from *Ohio v. Indiana* in sustaining the constitutionality of the rules. They also held that the rule " . . . guarantees the opportunity in each owner to recover his oil by providing an exception to a uniform spacing regulation that would otherwise prevent him from doing so. The exercise of the police power under this rule does not change the rule of property. It merely regulates and controls the way in which his property shall be used and enjoyed. Each person still owns the oil and gas in place under his land, and each still has the right to possesion, use, enjoyment, and ownership of the oil and gas produced through wells located on his land. . . . " On rehearing, the court added that in granting exceptions, the commission has the duty " . . . to treat all interested parties justly, fairly, and impartially under all the facts and circumstances of the case . . . "

Was Ryan guaranteed an opportunity to recover the oil under his lease? Was Ryan's mineral interest merely regulated and controlled in its use and enjoyment? Was Ryan's ownership and right to possesion recognized? Was Ryan treated justly, fairly, and impartially?

If the constitutionality of Rule 37 is to stand upon the language of *Brown v. Humble*, its entire foundation has been cut away by the result of *Ryan v. Pickens*.

It is suggested that such a result was not necessary. All concerned agreed that the original tract qualified for one well. Two applications were before the commission, each by the owner of one half the original tract. As stated in *Railroad Commission v. Miller*,[21] the proper location of the exception well is " . . . a matter within the exclusive jurisdiction of the Commission . . . ," and the " . . . Commission has the unquestioned jurisdiction to so locate the required protecting well as to create the least disturbance in

[19] RULES AND REGULATIONS OF THE TEXAS RAILROAD COMMISSION, Statewide Rule 37, Special Order Dated May 29, 1934, Regarding Application of Rule 37.

[20] 126 Tex. 296, 83 S.W.2d 935 (1935).

[21] 165 S.W.2d 504 (Tex. Civ. App. 1942).

the drilling pattern." How better could the commission have treated the parties "justly, fairly and impartially" while locating the protection well so as "to create the least disturbance in the drilling pattern" than by locating it in the center of the original tract meriting the exception well?

Obviously the solution open to the commission in the *Ryan* case is not available in the great majority of exception well cases. Seldom are the subdivided tracts of equal size and of such shape as to provide for protection of property rights by varying the well location alone.

One possible answer to this problem would be allocation of production upon an acreage basis.[22] Such a solution would require altering the voluntary subdivision rule to read that the original tract would be entitled to the allowable necessary to prevent confiscation or waste, rather than to a well.

In the *Ryan* case this would work as follows: Having determined that the original tract merited a well, the allowable for this well would be determined in accordance with the allocation formula in effect within the field. Then if a permit were granted on one-half of the tract, the well would be entitled to but half the determined allowable. How would this help Ryan? He also would be allowed to drill a well on his half and receive the other half of the allowable.

But such a plan would involve waste—just what Rule 37 is designed to prevent. From an economic standpoint this is undoubtedly true, and no one would be more aware of that fact than the parties drilling the wells. In such a situation it should be easy for their latent spirit of cooperation to manifest itself in a voluntary pooling agreement for their mutual benefit.

From the standpoint of conservation of resources, no loss would be sustained even if the two parties were so stubborn as to drill both wells, for in these days of efficient completion practices, it is not the number of wells, but the excessive withdrawal of fluids which damage reservoirs. However, this does not mean that spacing regulations are not necessary and desirable. Economic considerations are as paramount in the oil industry as in any other

[22] Generally, see Hardwicke, *Inadequacies in Spacing Regulations*, 31 TEX. L. REV. 97 (1952).

business. The orderly and regular development of oil fields on that spacing which will allow the developers to realize the maximum economic recovery from the reservoir will result in the greatest benefit to the consuming public.

Therefore, such a solution would not be applicable to fields discovered and developed since the days of unrestricted town lot drilling. For allocation to provide a universal answer to the problem of protecting the correlation rights of both large and small tract owners, and opportunity must be provided for all mineral interest owners to participate in the production without requiring that each tract contain a well.

The situation confronting the commission and the courts in the *Ryan* case can be attributed to the early effort to control production of oil upon a well permit rather than a well allocation basis. In bringing order and conservation from the chaotic waste of the East Texas boom, the commission had to use available tools with which it was familiar. Thus the permit system became the principal regulatory device. That such a system was made to result in conservation is a tribute to the commission which overshadows the multitude of litigations and the smaller number of inequities which accompanied the great transition.

But this occurred more than twenty years ago. In those years the commission has laudably kept abreast of the vast amount of technical knowledge brought forth by the oil industry. In addition, they have mastered the myriad of intricate, interlocking, and detailed factors that go into regulating without stunting a rapidly growing industry. They have accomplished these tasks with such a minimum of arbitrary and unreasonable orders and lack of scandal that the commission enjoys a merited respect of both the public and the oil industry. Their excellent past performance justifies the further delegation of authority to prevent future injustices such as that suffered by *Ryan*.

Property Rights

Certainly it is expected that our courts will be deaf to expediency where principle is involved. In viewing the patently unjust result of the *Ryan* case, it might be questioned as to whether the majority heeded this sound maxim. If justice is the principle under

discussion, then it was sacrificed upon the altar of expediency that ". . . to hold otherwise would be contrary to the well settled law in Texas."

But hard facts still tend to make bad law. In the twenty-two years that the subdivision order under Rule 37 has been applied, innumerable exception wells have been granted to owners of subdivided mineral interests. The granting of the permits precluded other subdivision owners of the original tract from producing the oil under their tracts. Many conveyances of both the producing and non-producing subdivisions have occurred. The considerations for such conveyances have acknowledged the status of the property conveyed. If now these well owners were estopped to deny the interest of other subdivision owners in the production from the wells, the resulting flood of litigation would wreak havoc to long established property rights.

If the principle be property rights, the court has been deaf to the expediency of justice. Perhaps a more accurate expression would be that a deaf ear has been turned to the expediency of one small property right in order to preserve the principle of many large and long standing property rights. But the scales of justice are not to measure the relative magnitudes of the interests involved. Although often in our complex society the good of the community must be weighed against the harm to the individual, the destined goal of our judiciary is justice — justice for all. Therefore, if the injustice of *Ryan v. Pickens* can be prevented, those in whose hands the preventative means have been placed are under a duty to prevent such inequities in the future.

Compulsory Pooling

The allocation solutions to the problem of sharing in the production from exception wells granted on subdivided tracts are but levers to coerce the owners into a pooling agreement. Would it not be better to use a direct approach?

Compulsory pooling constitutes that approach. It involves requiring that the contiguous interests of small tract owners be integrated and that production and expenses be distributed according to the interests contributed. Such an arrangement gives all

owners the opportunity to recover their fair share without drilling unnecessary wells.

The principal drawback to this solution is lack of statutory authority to carry it out. The question of whether the commission may have authority to do so is rendered academic by the commission's denial of such authority and the majority opinion in *Ryan v. Pickens* to the effect that " . . . petitioner knew that the Railroad Commission did not have the power to cause a merger or unitization of the separately owned leasehold rights. . . . " Therefore it would seem clear that legislative action will be required if compulsory pooling is to be instituted in Texas.

The reluctance of the Texas Legislature to pass such legislation is difficult to understand in the light of present circumstances. Certainly the Commission merits the Legislature's confidence that it is capable of administering such a statute. It would seem clear that private property rights have been so well regulated and controlled by conservation rules that compulsory pooling should no longer be felt to involve " . . . such far reaching limitations of the right or use of private property . . . " [23] that the Commission could not be authorized to administer the program. Certainly anyone should prefer compulsory pooling to the compulsory inactivity forced upon Ryan while his neighbor drains the oil from beneath his leasehold.

Texas and Kansas are the only significant oil producing states without such a provision today. Compulsory pooling statutes are effective in at least seventeen other states, and in none have they given rise to the wholesale litigation or inequities of our own Rule 37.[24]

In both Texas and Kansas, local ordinances providing for compulsory pooling in connection with drilling regulations in

[23] Dailey v. Railroad Commission, 133 S.W.2d 219, (Tex. Civ. App. 1939) *error refused.*

[24] An example of such a statute is provided in Sec. 13, (Stat. Ann. 13.139)—of act No. 61, Michigan Public Acts of 1939, which reads as follows: "The pooling of properties or parts thereof shall be permitted, and, if not agreed upon, the supervisor [of wells] after conference with and recommendation by the [advisory] board, may require such pooling in any case when and to the extent that the smallness or shape of a separately owned tract or tracts would, under the enforcement of a uniform spacing plan or proration or drilling unit, otherwise deprive or tend to deprive the owner of such tract of the opportunity to recover or receive his just and equitable share of the oil and gas and gas energy in the pool.

cities have been upheld.[25] Other than the cases testing constitutionality, there has been a minimum of litigation concerning these compulsory pooling provisions. Surely these examples should provide Texas with assurance that compulsory pooling legislation would not only do away with the unfair distribution of production and the unnecessary drilling arising under Rule 37, but would also reduce the number of suits invariably arising from the unjust results of an inadequate rule.

CONCLUSIONS

A review of the principles involved in the case of *Ryan v. Pickens* has led to four conclusions. These are summarized as follows:

1. It would seem to have been within the Commission's authority under Rule 37 to have arrived at a just result wherein both mineral leasehold owners would have participated equally. The Commission was under the duty to treat the applications of both leasehold owners justly, fairly, and impartially.[26] The commission had the power to locate the exception well anywhere upon the original tract.[27] The duty and the power could be appropriately coupled by granting the permit at the exact center of the tract. However, this solution would have but limited application in other cases and would have given rise to additional complications here. The litigation resulting from the order of the commission clearly indicates that the real problem — that of determining who shall share in the production from a well — can be adequately solved only by compulsory pooling.

2. As pointed out by the dissent, the principal basis upon which the majority opinion upholds Pickens' and Coffield's right to all the oil produced are ill-founded. The law of capture, as the first basis, should not be applicable because Ryan was denied his correlative right to drill. In a long line of cases,[28] including the

[25] Tysco Oil Co. v. Railroad Commission, 12 F. Supp. 202 (S.D. Tex. 1935), and Marrs v. City of Oxford 32 F. 2d 134 *certiorari denied* 200 U.S. 573.

[26] Brown v. Humble, *supra*, note 24.

[27] Railroad Commission v. Miller, *supra*, note 25.

[28] Ohio v. Indiana, *supra*, note 18; Bernard v. Monogahela, *supra*, note 14; Elliff v. Texon Drilling Co., *supra*, note 13; Hassie Hunt Trust v. Proctor, *supra*, note 8; and Griffith v. Gulf Refining Co., *supra*, note 9.

leading case promulgating the rule,[29] it has been held that the law of capture is contingent upon the correlative right of the law of capture. If the neighbor is deprived of this correlative right, a taking of private property without due process of law occurs.

The second basis, the acknowledgedly valid spacing rule in its usual application, is constitutionally jeopardized when the majority interpret it to give results directly opposite to the purposes for which it was upheld.[30] Certainly Ryan was not "guaranteed the opportunity to recover his oil," "treated justly," or protected in his "right to possession." In spite of the claim that ". . . property rights . . . are unaffected by the valid rules and regulations of the Commission . . . ," [31] the oil beneath Ryan's land is being produced by Pickens under color of the law. However, it is apparent that the court was motivated by a commendable desire to prevent widespread confusion as to just who is to share in the production of the hundreds of exception wells granted in the past. That our highest court of justice should be forced to permit a rank injustice in order to continue stability of property rights provides ample reason for altering current conservation laws fathering such a dilemma.

3. It is believed that the Railroad Commission could avoid future inequities such as Ryan suffered by altering the voluntary subdivision rule to provide that the original tract should receive an allowable — rather than a well — sufficient to prevent confiscation. This allowable would be allocated on the basis of the ratio of the area of the subdivision to the total area of the original tract. Such a rule would eliminate the advantage gained by Pickens and Coffield in winning the contested permit. The operation of such a rule would emphasize the advantages and resultant rewards of cooperative effort.

4. The result of *Ryan v. Pickens* emphasizes Texas' immediate and drastic need for a compulsory pooling statute. Disregarding legal niceties, the adjudication of a contested exception well permit is the determination of property rights. To require the Commission to decide such rights without providing it with the power to

[29] Bernard v. Monogahela, *supra*, note 14.
[30] Brown v. Humble, *supra*, note 24.
[31] Mueller v. Sutherland, 179 S.W.2d 801 (Tex. Civ. App. 1943) *error refused, n.r.e.*

furnish the losing owner with an adequate substitute for his right to drill is a taking of property without due process of law.

The decision in the Ryan case places the burden of remedying the situation upon the legislature. The success of other oil producing states with compulsory pooling acts and the exemplary manner in which the Railroad Commision of Texas has discharged all conservation duties delegated to it should leave no room for legislative qualms. Texas, the nation's greatest oil producing state and acknowledged conservation leader, has too long lagged in insuring equality for the small mineral interest. The shocking injustice done Ryan can be atoned only by positive action to guarantee justice to all involved in future exception cases.

Granville Dutton