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Oil and Gas Promotion Formulas for Small Tracts: Compulsory Pooling in Texas

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Oil and Gas Proration Formulas for Small Tracts: Compulsory Pooling in Texas?

Appellee applied to the Texas Railroad Commission for a permit to drill a first gas well on its .3-acre tract under an exception to the well spacing rule. Appellee alleged that denial of the permit would result in confiscation of minerals underlying its land through drainage to wells on surrounding tracts. Appellant opposed the granting of the permit, alleging that under the rules adopted for the field very substantial uncompensated drainage would take place from under appellant's and other surrounding tracts to appellee's proposed well. The field rules included a 320-acre well spacing pattern and an allocation formula distributing the field allowable to the operators 1/3 among the wells and 2/3 according to the acreage in the field. The Railroad Commission granted the drilling permit and was upheld by the district court. *Held, reversed:* Absent special considerations, an allocation formula which will result in substantial uncompensated drainage of gas from surrounding tracts is an unreasonable basis upon which to prorate production. *Atlantic Ref. Co. v. Railroad Comm'n*, — Tex. —, 346 S.W.2d 801 (1961).

Ownership of oil and gas presents special problems which cannot be dealt with in terms of ordinary property law due to the unique migratory properties of these minerals.[1] Texas has adopted the theory of ownership in place, which declares that underlying minerals are owned by the person under whose land they lie, for the time they tarry there.[2] Before conservation statutes modified the case law, this ownership theory was limited by the "rule of capture."[3] This rule recognized ownership in place but declared that one acquired title to all the minerals he could produce, though they might have migrated from under another's land.[4] An adjoining landowner had no recourse to the courts to prevent this uncompensated drainage, but could only "go and do likewise,"[5] usually producing a race to drill as many wells as was economically feasible.[6] Thus, one could recover

[1] See Westmoreland Cambria Nat. Gas Co. v. DeWitt, 130 Pa. 235, 18 Atl. 724 (1889).

[2] Marrs v. Railroad Comm'n, 142 Tex. 293, 177 S.W.2d 941, 948 (1944); Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935 (1935).

[3] Japhet v. McRae, 276 S.W. 669, 672 (Tex. Com. App. 1925).

[4] Ryan Consol. Petroleum Corp. v. Pickens, 155 Tex. 221, 285 S.W.2d 201, 207 (1956); Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 561 (1948); see Barnard v. Monongahela Nat. Gas Co., 216 Pa. 362, 65 Atl. 801, 802 (1907).

[5] Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 940 (1935).

[6] "[W]e find an unrestricted race, the prize being the oil and gas under both tracts. The result is great physical waste of oil and gas, as well as the economic waste that flows

oil and gas in excess of that underlying his land through uncompensated drainage from under surrounding tracts, the quantity depending on how fast the wells would flow. To remedy the often chaotic and wasteful conditions resulting from this extreme individualism, conservation statutes were enacted which sought not only to prevent waste of irreplaceable natural resources in the public interest, but also to adjust and protect "correlative rights" between landowners.[7] These statutes, varying in scope in various jurisdictions,[8] have been upheld as a valid exercise of the police power of the state for both purposes.[9] Necessarily, both the law of ownership in place[10] and the rule of capture[11] had to give way to the extent inconsistent with these statutes. In Texas, the Railroad Commission has been delegated broad discretionary powers to administer the conservation statutes by adopting rules and orders governing the drilling and production of oil and gas.[12] After early difficulties,[13] the federal courts recognized the constitutionality of production quotas based upon market demand and capacity to produce as well as prevention of physical waste.[14] Also, as a reasonable exercise of police power to prevent waste

from the drilling of unnecessary wells." Meyers, The Law of Pooling and Unitization 20 (1957).

[7] *E.g.*, Tex. Rev. Civ. Stat. Ann. art. 6008 (1949).

[8] The simpler and basic forms of conservation are well-spacing, whereby wells can be drilled only at certain intervals and at prescribed distances from property lines, and proration, which limits the rate of flow in an effort to match market demand.

Pooling and unitization are contractual arrangements whereby maximum efficiency and minimum expense are the objectives. These are described in Meyers, *op. cit supra* note 6, at 1:

> The consolidation of oil and gas leases or other mineral interests in a field of common source of supply . . . is generally referred to as "unitization" as distinguished from the word pooling, which is applied to such interests covering comparatively small tracts. Typical of this latter is the consolidation of separately owned mineral interests to form a drilling or proration unit.

The statutes authorizing these agreements may provide for compulsory as well as voluntary pooling. Texas and Kansas are the only two significant oil-producing states without compulsory pooling.

[9] Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940); Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).

Corzelius v. Harrell, 179 S.W.2d 419 (Tex. Civ. App. 1944—Austin) *error granted, dism. as moot,* 143 Tex. 509, 186 S.W.2d 961 (1945), was the first Texas case expressly holding that adjustment of correlative rights was a proper constitutional function, not depending on the existence of waste. See Note, 24 Texas L. Rev. 97 (1945).

[10] Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 940 (1935).

[11] See Henderson v. Terrell, 24 F. Supp. 147, 153 (W.D. Tex. 1938); Corzelius v. Harrell, 179 S.W.2d 419, 425 (Tex. Civ. App. 1944—Austin) *error granted, dism. as moot,* 143 Tex. 509, 186 S.W.2d 961 (1945).

[12] Tex. Rev. Civ. Stat. Ann. art. 6049c (1949).

[13] In Macmillan v. Railroad Comm'n, 51 F.2d 400 (W.D. Tex. 1931), the federal district court held proration orders of the Commission invalid because based on market demand and not on prevention of physical waste, and because allegedly designed for fixing prices and preventing economic waste, contrary to applicable statutes. See Hardwicke, *Legal History of Proration of Oil Production in Texas,* 56 Texas L. Rev. B.A. No. 99, 109 (1937).

[14] Oklahoma's market demand statute was upheld in Champlain Ref. Co. v. Oklahoma Corp. Comm'n, 286 U.S. 210 (1932). Rulings of the Texas Railroad Commission on this matter were upheld in Amazon Petroleum Corp. v. Railroad Comm'n, 5 F. Supp. 633 (E.D. Tex. 1934).

and hazardous conditions, the courts sustained the requirement that wells in the field can be drilled only according to the spacing pattern set by the Commission.[15] However, the practice of granting exceptions to the spacing rules "to prevent confiscation" of the minerals underlying small or irregularly shaped tracts has produced a great deal of controversy and litigation in Texas.[16] This policy is especially significant in Texas since there is no compulsory pooling statute, and the courts and the Commission have not required an applicant for a drilling permit under an exception to Rule 37 to show he has been unable to pool as a part of proof of prospective confiscation of his minerals.[17]

The Texas statutes delegate to the Railroad Commission the authority to prevent waste and protect correlative rights in the gas fields of the state,[18] to prorate production on a reasonable basis,[19] and to give each well its fair share of the gas in the reservoir.[20] The Texas Supreme Court has charged the Commission to give each person only his "fair share" of the oil and gas in a reservoir, which is defined as that substantially equivalent to the recoverable oil and gas underlying his tract.[21] Indeed, the performance of this duty would seem to be clearly directed as the necessary implementation of the prevailing doctrine of ownership in place. However, no little confusion has resulted from the tendencies of the Railroad Commission, with the usual acquiescence of the courts, to grant exceptions to Rule 37 as a matter of course and to set allowables with significant well factors.[22] The usual result is, of course, that a small tract operator is allowed to recover minerals in excess of those underlying his land. These practices have been at the expense of the orderly

[15] Oxford Oil Co. v. Atlantic Oil & Prod. Co., 16 F.2d 639 (5th Cir. 1927), *cert. denied*, 277 U.S. 585 (1928); Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 941 (1935).

[16] The Texas well-spacing rule of 1919, numbered "37," was the first in the United States. For convenience, "Rule 37" has been used to refer to all well-spacing regulations promulgated since that time. A "Rule 37 case" is one involving a well-spacing order by the Commission. An exception permitting wells on tracts smaller than set out in the general rule was first provided in 1921 and has been carried up to the present. It is this exception which saves the rule from attack on constitutional grounds as being confiscatory. See Hardwicke, *Oil-Well Spacing Regulations and Protection of Property Rights in Texas*, 31 Texas L. Rev. 99, 102 (1952); Meyers, *op. cit. supra* note 6, at 11.

[17] Compare Hardwicke, *supra* note 16, at 120-22.

[18] Tex. Rev. Civ. Stat. Ann. art. 6008, § 10 (1949).

[19] Tex. Rev. Civ. Stat. Ann. art. 6008, § 12 (1949).

[20] *Ibid.*

[21] *E.g.*, Railroad Comm'n v. Gulf Prod. Co., 134 Tex. 122, 132 S.W.2d 254, 255 (1939); Gulf Land Co. v. Atlantic Ref. Co., 134 Tex. 59, 131 S.W.2d 73 (1939); Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 944 (1935).

[22] See generally Meyers, *op. cit. supra* note 6, at 111-18, concerning problems created by the granting of exceptions and setting of excessive allowables, and reasons why the Commission has carried on these policies.

development of the oil and gas fields of the state which should result from an adherence to the fair share idea and the doctrine of ownership in place.[23] An owner of a tract which does not contain the requisite number of acres to qualify for a well under the spacing rules for a particular field has been able to obtain a permit to drill from the Commission as a matter of course. The justification given for allowing the well is to prevent confiscation of underlying minerals.[24] Some Texas cases have stated that a tract is entitled to a first well as a matter of law, regardless of size.[25] The tract, however, must not have been created from a "voluntary subdivision" of a larger tract subsequent to the application of the spacing rules to the field.[26] Once a small tract operator is given a drilling permit, some cases have said he is entitled to make a profit over and above the costs of drilling and producing,[27] necessitating a production allowable so weighted with a substantial well factor as to insure this profit.[28] This practice is seemingly in contradiction with the statute creating the authority of the Commission[29] and the decisions pronouncing the fair share doctrine,[30] but the courts have refused to dictate formulas to be used by the Railroad Commission in allocating production.[31] However, for an abuse of discretion—a finding that

[23] See C. Sidney McClain, *End of an Era—Small Tract Version 6*, Address before Mineral Law Section, 1961 Texas Bar Convention (July 1961), reported in 24 Tex. B.J. 727 (1961). In discussing these practices, McClain cited the case of Halbouty v. Darsey, 326 S.W.2d 528 (Tex. Civ. App. 1959—Austin) *error ref. n.r.e.*, as an example of an attitude the courts have sometimes taken: "This decision contained the statement that the Commission could not violate vested rights in seeing that oil and gas fields were developed in an orderly and scientific manner." The words "vested rights" were used to describe the "rights" flowing from the rule of capture.

[24] See discussion in note 16 *supra*.

[25] Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935 (1935); Stanolind Oil & Gas Co. v. Railroad Comm'n, 96 S.W.2d 664 (Tex. Civ. App. 1936—Austin) *no writ hist.*

[26] *E.g.*, Railroad Comm'n v. Humble Oil & Ref. Co., 151 Tex. 51, 245 S.W.2d 488, 490 (1952); Brown v. Hitchcock, 235 S.W.2d 478 (Tex. Civ. App. 1950—Austin) *error ref.*

In discussing the origin of this rule, Hardwicke, *supra* note 16, at 108 said:

> Apparently it is based primarily on the addition to Rule 37, effective May 29, 1934, providing that no exception to prevent confiscation would be granted with respect to a tract carved from a larger tract "if such subdivision took place subsequent to the promulgation and adoption of the original spacing rule."

[27] Railroad Comm'n v. Humble Oil & Ref. Co., 193 S.W.2d 824, 832 (Tex. Civ. App. 1946—Austin) *error ref. n.r.e.* Hardwicke, *supra* note 18, at 117, says the idea of a right to a profit can be traced to a dictum in the *Humble* case, *supra*, which he considers to be unsound.

[28] A field allowable is usually divided partially, *e.g.*, ½ in the case of oil, and ⅓ in the case of gas, among all the wells in the field, with the remainder allocated on an acreage basis. Thus, a small tract with a producing well will be enabled to produce considerably more oil or gas per acre than a well on a larger tract, and make a profit over expenses, if there is a substantial (⅓ or more) well factor included in the allocation formula.

[29] Tex. Rev. Civ. Stat. Ann. art. 6008, § 12 (1949).

[30] Cases cited note 21 *supra*.

[31] 346 S.W.2d at 812.

there is no substantial evidence to support an order—a court will reverse the Commission.[32] As a justification for allowing production greatly disproportionate to acreage with the accompanying uncompensated drainage from under surrounding tracts, the courts have invoked the rule of capture.[33] The reasoning has been that the rule of capture, allowing one to keep what he has legally produced, authorizes the *prospective* uncompensated drainage to a well on a small tract operating under an allowable so weighted as to allow a profit.[34] The result has been that voluntary pooling of small tracts in a proven field has been greatly discouraged since one may simply refuse to pool, allege confiscation, get a drilling permit under an exception to Rule 37, and proceed to realize far greater net income by operating under a generous allowable formula.[35]

In an attempt to overturn a Railroad Commission order which would have allowed this result, the appellant brought the principal case to the Texas Supreme Court on direct appeal from the district court as authorized by statute.[36] The district court had held the order of the Railroad Commission granting a drilling permit as an exception to Rule 37 was based on substantial evidence,[37] citing *Ryan Consol. Petroleum Corp. v. Pickens*[38] and its rule of capture doctrine as controlling.[39] The supreme court reversed, holding there was no substantial evidence justifying such a wide discrepancy in the rate of production as would result from the order of the Commission.[40] Specifically, the 1/3-2/3 allocation formula was declared an unreasonable basis upon which to prorate gas production from the Normanna Field.[41] The appellant's evidence was apparently adopted as substantially correct. This evidence showed that if the Commission's order were sustained, over the life of the field the appellee would be

[32] Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424, 441 (1946); Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 161 S.W.2d 1022, 1029 (1942). In these cases the court emphasized that the important point is not whether the Commission's decision was proper, but whether it was arbitrary and without regard to the facts.

[33] Halbouty v. Darsey, 326 S.W.2d 528, 532 (Tex. Civ. App. 1959—Austin) *error ref. n.r.e.*; Railroad Comm'n v. Humble Oil & Ref. Co., 193 S.W.2d 824, 832 (Tex. Civ. App. 1946—Austin) *error ref. n.r.e.*

[34] The late cases rely on Ryan Consol. Petroleum Corp. v. Pickens, 155 Tex. 221, 285 S.W.2d 201 (1955), as authority.

[35] In Railroad Comm'n v. Humble Oil & Ref. Co., 193 S.W.2d 824 (Tex. Civ. App. 1946—Austin) *error ref. n.r.e.*, the court upheld a drilling permit for a .1 acre tract under a 50-50 allowable formula. The amount a .1 acre tract would receive under a pooling agreement would be negligible in proportion to the amount produced under such special treatment.

[36] Tex. Rev. Civ. Stat. Ann. art. 1738a (1945); Tex. R. Civ. P. 499(a).

[37] 346 S.W.2d at 803.

[38] 155 Tex. 221, 285 S.W.2d 201 (1956).

[39] 346 S.W.2d at 803.

[40] 346 S.W.2d at 811.

[41] *Ibid.*

allowed to produce in excess of two and one-half million dollars worth of gas from its proposed well.[42] Appellee's tract contained something less than .3 acres, with the underlying reserves valued at about 7,000 dollars, according to appellant's evidence. The court held that *Ryan v. Pickens* was not authority for the trial court's holding because it was not a proration case.[43] The rule of capture was held not in point concerning prospective drainage as would occur were the Commission's order sustained in the principal case.[44] The court emphasized that the cases voicing the fair share doctrine meant what they said—that one is entitled to recover only the approximate amount of minerals underlying his land.[45] Two earlier important cases were distinguished, and a limitation of the fair share doctrine recognized, by the court's acknowledgment that where operators in a field have long acquiesced in the existing field rules they should not be heard to complain.[46] Expressly rejected was appellee's contention that a small tract's rights should be measured by what it could have produced before conservation statutes were enacted.[47] Moreover, the court did not close its eyes, as the Commission and courts have often done in the past, to the substantial inequities that have resulted from the headlong rush to allow exceptions to Rule 37 "to prevent confiscation," with the accompanying allowables designed to allow a profit. The court did not merely see the possible confiscation of the minerals underlying appellee's small tract but recognized the equally significant and certain confiscation which would have resulted from uncompensated drainage from under the surrounding land of appellant and others to appellee's proposed well. Upon the court's denial of motion for rehearing, two justices dissented.

[42] 346 S.W.2d at 804.

[43] 346 S.W.2d at 810. The court pointed out that the *Ryan* case was a suit for an equitable claim on minerals already produced from a well on a well-spacing unit composed in part of mineral lands of a non-well owner. It agreed that the *Ryan* case would apply in the present case if the court had earlier sustained the ⅓-⅔ proration formula and appellant had been suing for the value of minerals drained from under its land by appellee. The court put the rule of capture in its proper place by stating, 346 S.W.2d at 810:

> It was the application of Rule 37 which gave Pickens . . . the right to produce . . . and not the rule of capture. It was, however, the rule of capture which prevented Ryan from collecting damages . . . for the oil drained from under Ryan's lots.

[44] 346 S.W.2d at 810. This implicitly discredits the cases applying rule of capture reasoning to sustain the validity of proration formulas allowing substantial uncompensated drainage to a well drilled as an exception to Rule 37.

[45] 346 S.W.2d at 808, 809. McClain, *supra* note 23, at 7, said concerning this case: "The dominant theme of the decision is 'fair share', with those words or words of similar context appearing in the opinion more than twenty times."

[46] 346 S.W.2d at 811.

[47] 346 S.W.2d at 811. Appellee's contention assumes that adjoining landowners have the right to "go and do likewise" by drilling additional wells to offset drainage to a well on a small tract. This right does not, of course, exist under Rule 37 or most present day conservation statutes.

They saw in the majority opinion an attempt to compel appellee to pool[48] with adjoining landowners in order to recover his underlying minerals, contrary to Texas statutory and case law.[49] These justices felt that *Ryan v. Pickens* and the rule of capture were controlling[50] despite the inequities presented in this case. The majority opinion was also said to be a departure from established precedent concerning procedures governing review of Commission orders.[51]

The court in the principal case declared the order of the Commission invalid but did not attempt to set an allocation formula, recognizing that to do so would be an illegal interference with the discretion reposed in the Commission.[52] The Commission responded with a radically revised allocation formula in the new rules for the Normanna Field[53] which allocated production among the operators in the field on a 100 per cent acreage basis. Under the new rules an operator having the right to drill upon a tract containing less than 100 acres is given a measure of relief by a proviso allowing the Commission to grant him a special allowable. To qualify for this, however, he must prove that drilling a well is not economically feasible under the existing allowable *and that adjoining landowners have refused to pool on a reasonable basis*, which is stated to be a 100 per cent acreage basis. The proviso also limits the special allowable to no more than that set for a tract of 100 productive acres.[54]

[48] The dissenting judge used the word "unitize" instead of "pool." Unitization is generally used to describe consolidation of leases in an entire field, and is inaccurate for the smaller area involved in this case. Meyers, *op. cit. supra* note 6, at 1; see discussion in note 8 *supra*.

[49] 346 S.W.2d at 814: "It is well established that there can be no compulsory unitization in Texas. To grant the injunction in the present case would practically effect unitization."

[50] 346 S.W.2d at 815-17. But in quoting an historical analysis from Ralph B. Shank, *Present Status of Law of Capture*, Sw. Leg. Found. 6th Inst. on Oil & Gas L. and Tax. 257, 272 (1955), the dissent shows its outmoded view of the law of capture: "The correlative right to the law of capture *was* [not *is*] the law of capture." (Emphasis added.) This quotation only serves to point out that, historically, the remedy of an adjoining landowner for drainage *was* his right to drill as many wells and pump as much oil and gas as was possible. Under conservation statutes this "remedy" is sharply limited, and serves as no justification for allowing uncompensated drainage to a small tract well.

The dissent draws strength from a quotation from Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 940 (1935): "And it [the law of capture] is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one's land by the exercise of the same right of capture." Note, however, the date of the case.

[51] 346 S.W.2d at 820: "The opinion of the majority constitutes a departure from the well-established rules of procedure as laid down by the statutes governing the Commission in adopting field rules."

[52] 346 S.W.2d at 812. However, the court made clear the duty of the Commission: "The responsibility rests with the Commission to devise some rule of proration which will conserve the gas in the field in question and at the same time be fair and just to all parties without depriving any of them of his property."

[53] Special Order No. 2-46673, Tex. R.R. Comm'n R. & Regs., § 7, at 917, 14 Oil & Gas Rep. 885 (1961).

[54] The Commission explained its position in its remarks preliminary to setting out the

The principal case may well have a revolutionary effect on the future of small tract oil and gas operations.[55] It has already been cited as controlling in one Texas Supreme Court case[56] and seems to have initiated a trend in Texas oil and gas law.[57] This trend at last takes a realistic look at the conditions which have resulted in the past from a liberal granting of exceptions to Rule 37 using an allowable formula with a significant well factor. Under the rules for the Normanna Field, containing the 100 per cent acreage allocation formula, a drilling permit under an exception to Rule 37, assuming it is granted, will frequently be an illusory right due to the high costs of drilling and operation on a small tract as compared with the amount of minerals that can be legally recovered under such a formula. This case and resulting order seem to mean that the "right to a profit" doctrine is dead except where a small tract owner can show he has been refused pooling on a reasonable basis by adjacent owners of mineral operating rights. The relief afforded by the proviso to the 100 per cent acreage allocation formula will protect the formula from charges of confiscation, while in practice it rarely

revised rules, *id.* at 917, 14 Oil & Gas Rep. at 886:

> [S]uch solution in all probability is best resolved through the use of a special allowable that would encourage a small tract owner to negotiate with his neighbors for fair and just treatment, but would also provide a sufficient allowable to such small tract to encourage a reasonable attitude in such neighbors so that they would endeavor to work out this common problem . . . .

[55] Though the holding concerns a gas pool, and applies to only the Normanna Field, there is little doubt that policies affecting the oil fields of the state will also undergo a similar change. In oil fields the most usual allocation formula has been 50% wells and 50% acreage—at least as objectionable under the court's reasoning as the ⅓ wells—⅔ acreage formula condemned in the instant case.

[56] Halbouty v. Railroad Comm'n, ___ Tex. ___, ___ S.W.2d ___, 5 Tex. Sup. Ct. Journal 246 (1962). On similar facts, except that 40 small tract owners had been given permits to drill, as compared with one in the instant case, the court held that a ⅓-⅔ gas allocation formula was invalid because not affording an opportunity to all of the parties to produce and save their fair share of the minerals in the common reservoir. Uncompensated drainage was said not authorized except "when *no other means* of recovering the minerals which underlie . . . [the] . . . land are available." 5 Tex. Sup. Ct. Journal at 254. (Emphasis added.)

[57] Some months after the instant case, the court in Railroad Comm'n v. Williams, ___ Tex. ___, 356 S.W.2d 131 (1962), held that a small tract was not necessarily entitled to a first well. Contrary to language in earlier cases, the court said the right to drill a well is not something vested in the tract of land, but pertains to the need of an owner for a well to prevent confiscation. The opinion seems to indicate that if a small tract has ever been in an ownership that was receiving its "fair share" from other wells in the same pool, no subsequent owner would be entitled to a well in the tract.

Out of step with the "trend" is a recent civil appeals decision, Coloma Oil & Gas Corp. v. Railroad Comm'n, 348 S.W.2d 390 (Tex. Civ. App. 1961—Austin) *error granted.* The court, in sustaining a Commission order granting a permit to drill, held that the fact of common ownership of two close but non-contiguous tracts could not be taken into consideration in action on an application for a permit to drill a well on one as an exception to Rule 37, where there was a producing well on the other. Non-contiguity appears to be the only element which could distinguish this case from Railroad Comm'n v. Williams, *supra.*