CONVEYANCE AND RESERVATIONS OF MINERAL AND ROYALTY INTERESTS

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- 2013 ADVANCED REAL ESTATE DRAFTING COURSE, Houston, Texas, March 2013, "Avoiding the Unintended Consequences When Drafting Mineral Reservations," Celia C. Flowers and Melanie S. Reyes.
- 2012: 60TH AAPL ANNUAL MEETING AND EDUCATION SESSION, Montreal, Canada, June 25, "We Have to Drill Somewhere – A Survey of Surface Issues Across the Nation," Celia C. Flowers and Melanie Reyes.
- 2011 SECTION REPORT OF THE OIL, GAS & ENERGY RESOURCES LAW SECTION OF THE STATE BAR OF TEXAS, June 2011, "The Proof is in the Public Record…or is it? Navigating Evidentiary Issues Related to Texas Railroad Commission Documents", Celia C. Flowers and Melanie Reyes.
- Ms. Reyes is certified by the Texas Real Estate Commission to teach their ethics and legal courses
- 2009 TEXAS LAND AND TITLE INSTITUTE, November 2009, "Surface Use by Mineral Owners: The Title Insurance Solution," Celia Flowers, Melanie Reyes-Bruce, and Eric Schmalbach.
- 2009 EAST TEXAS ASSOCIATION OF PETROLEUM LANDMEN SEMINAR, February 2009, "Pitfalls in Title Examination: The Intricate Relationship Between Real Property Rights and Ownership," Celia C. Flowers and Melanie S. Reyes Bruce.
- 2007 REVIEW OF OIL AND GAS LAW XXII, Energy Law Section Dallas Bar Association, August 17, 2007, "Exercising the Power of Eminent Domain," Celia C. Flowers and Melanie S. Reyes.
- 2007 TEXAS LAND AND TITLE INSTITUTE, November 2007, "Minerals: Examination and Coverage Issues," Celia C. Flowers, Melanie S. Reyes, and Meredith N. Todd.
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William B. Burford, partner, concentrates his practice on oil and gas transactional matters. He is a leader in the field of oil and gas title examination and is a past chair of the Texas State Bar Oil, Gas and Energy Resources Law Section. His experience includes all aspects of oil and gas title and transactional matters, involving fee, state and federal lands in both Texas and New Mexico. He has been a frequent speaker on oil and gas topics before legal and industry groups and has been a member, since its inception, of the joint editorial board for the development of title examination standards established by the Real Property, Probate and Trust Law and Oil, Gas and Energy Resources Sections of the State Bar of Texas. He serves as the Texas reporter for the Rocky Mountain Mineral Law Foundation′s quarterly Mineral Law Newsletter.

Mr. Burford received a Bachelor of Science degree in geology, with honors, from the University of Texas at Austin in 1975. He received his law degree in 1978, also from the University of Texas, where he was a member of the Texas Law Review. He is a member of the State Bar of Texas and its Oil, Gas and Energy Resources and Real Property, Probate and Trust Law Sections, the Texas Bar Foundation, and the Midland County Bar Association.

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I. INTRODUCTION

A major purpose of this presentation is to identify potential pitfalls to title examiners and others engaged in the interpretation and drafting of mineral conveyances. Mineral and royalty deeds, of course, are subject to the innumerable and sometimes contradictory rules of deed and contract construction that fill multi-volume treatises. We cannot hope to address every problem area or each applicable rule of construction even if we concentrate on those particularly applicable to mineral conveyances and recommend, for example, Professor Kramer's comprehensive analysis. Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 Tex. Tech L. Rev. 1 (1993). Discussion of some of the more frequent sources of difficulty, though, should help to guide those who deal with conveyancing issues only occasionally and to remind the experienced.

II. LAND DESCRIPTIONS

A. Necessity of Adequate Description

Perhaps the most fundamental rule in the construction of all deeds, including mineral and royalty deeds, is that the deed must identify the land being conveyed with reasonable certainty. If a description is insufficient to identify the land, it is unenforceable as a violation of the Statute of Frauds, now embodied in Tex. Prop. Code Ann. § 5.021 (West 2004). Conveyances that depend on inadequate land descriptions are void. *Republic Nat'l Bank v. Stetson*, 390 S.W.2d 257, 261 (Tex. 1965); *Greer v. Greer*, 144 Tex. 528, 530, 191 S.W.2d 848, 849 (1946). Although land descriptions are not always given the attention they deserve, a defective description of the land intended to be conveyed is one of the most frequent instances of title failure in Texas. Fred A. Lange and Aloysius A. Leopold, *Land Titles and Examination* § 811 (2d ed., Texas Practice Series 1992).

1. Specific

It is not essential for a deed to contain a metes and bounds description or such a full description as will enable the land to be ascertained without extrinsic evidence. *Williams v. Ellison*, 493 S.W.2d 734 (Tex. 1973). However, the instrument must furnish, within itself or by reference to some other existing writing, the means or data by which the land can be identified. *Morrow v. Shotwell*, 477 S.W.2d 538 (Tex. 1972). This is true even if it is clear the parties knew and understood what property was intended to be conveyed. *Id*.

A description is satisfactory, for example, if it refers to an earlier instrument in which the land was particularly described. A description of all the land owned by a grantor in a particular locale is valid. This reference gives the means by which the land can be identified: extrinsic evidence can be admitted to show what land the grantor owned. *Texas Consolidated Oils v. Bartels*, 270 S.W.2d 708 (Tex. Civ. App.—Eastland 1954, writ ref'd). But the essential elements may never be supplied by parole. The framework or skeleton must be contained in the writing. Extrinsic evidence is not for the purpose of supplying the location or description of the land, but only for identifying it with reasonable certainty *from the data in the memorandum*. *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150 (1945). Descriptions are given liberal construction so that conveyances may be upheld if capable of explanation, though there must be a "nucleus" of a description affording the necessary clue or key. *Gates v. Asher*, 154 Tex. 538, 280 S.W.2d 247, 248 (1955); *Siegert v. Seneca Resources Corp.*, 28 S.W.3d 680, 682-83 (Tex. App.—Corpus Christi 2000, no pet.).

Texas courts adhere to a number of rules that aid in interpreting land descriptions that might otherwise be too imprecise. Land titles and title examination benefit immensely from the rule that if there is an evident mistake in the description, the courts should attempt to correct errors so as to give effect to the deed. For example, where a call was made for the southeast corner of a survey but the northeast corner was obviously intended, the description is to be given effect according to the parties' intention notwithstanding the literal call. *Turner v. Sawyer*, 271 S.W.2d 119 (Tex. Civ. App.—Eastland 1954, writ ref'd n.r.e.). Likewise, when a deed's reference to another instrument for descriptive purposes gives an incorrect volume or page reference, the conveyance will be upheld if it is clear what instrument the parties intended to refer to. *Overand v. Menczer*, 82 Tex. 122, 18 S.W. 301 (1892). Even if one of the calls in a metes and bounds description is missing, the deed is not void if the missing call can be supplied by reference to the other calls and other instruments in the chain of title. *Montgomery v. Carlton*, 56 Tex. 431 (1882).

A reference to a map or plat may form the basis of a valid land description. *See, e.g., Lewis v. E. Tex. Fin. Co.*, 136 Tex. 149, 146 S.W.2d 977 (1941). Indeed, descriptions of land within platted subdivisions almost always depend upon reference to the recorded plat. For a description that relies on a map or plat to be a valid one, nevertheless, the drawing must contain enough information that the land intended can be located. *River Road Neighborhood Ass'n v. S. Tex. Sports*, 720 S.W.2d 551, 558 (Tex. App.—San Antonio 1986, writ dism'd w.o.j.). Title examiners and drafters should exercise caution in relying on a description that refers

to an outline on a map, for example, unless the location of the depicted boundary is very clear and there is no question of the area the map shows, although the courts have exhibited surprising liberality in upholding such descriptions. *See*, *e.g.*, *Coe v. Chesapeake Expl., L.L.C.*, 695 F.3d 311 (5th Cir. 2012); *Dixon v. Amoco Prod. Co.*, 150 S.W.3d 191 (Tex. App.—Tyler 2004, pet. denied).

2. General/Global

Often a conveyance will describe specific property the grantor intends to convey, followed by a clause expressing the intent to convey all the grantor owns in a specified city, county, etc. *See*, *e.g.*, *Holloway's Unknown Heirs v. Whatley*, 133 Tex. 608, 131 S.W.2d 89 (1939); *Cook v. Smith*, 107 Tex. 119, 174 S.W.1094 (1915). However, if the specific description is subsequently found to be incorrect, a subsequent general/global clause will not cure the mistake and the conveyance will not be sustained. *J. Hiram Moore, Ltd. v. Greer*, 172 S.W.3d 609 (Tex. 2005).

3. Irregular

A grantor sometimes utilizes a description obtained from his lessee, tax assessor, or even the Railroad Commission, rather than a legal description derived from a survey. These irregular descriptions may not meet the standard of the Statute of Frauds, rendering the conveyance void. A classic example appears in *Hanzel v. Herring*, 80 S.W.3d 167 (Tex. App.—Ft. Worth 2003, no pet.), where a sheriff's deed included descriptions like the following:

> Tract 1 - .025000 overriding royalty interest, Crumption - Williams wells, Lease 1404, Texas Railroad Commission No. 19281, T. H. Wooley Survey, Abstract 1634 and James Carcher Survey, Abstract 276, Palo Pinto County, Texas (Tax accounts nos. 140420007515, 140420007151.)

A Railroad Commission witness identified the file documents connecting the Railroad Commission numbers and the property descriptions. However, the lease that the Railroad Commission number represented was not a part of the trial record. On that basis the court of appeals affirmed the trial court's decision that the property descriptions in the sheriff's deed were inadequate, so that the instruments were void under the Statute of Frauds. *See also Long Trust v. Griffin*, 222 S.W.3d 412 (Tex. 2006) (per curiam).

B. Unspecified Acreage "Out Of" a Tract

One of the most frequently encountered instances of fatally defective land descriptions is the reference to a certain number of acres or a tract of a certain size "out of" or "being a part of" some larger described tract, without any reference to a more particular description or other guide to the location of the tract. A conveyance with such a description is void. *See Republic Nat'l Bank v. Stetson*, 390 S.W.2d 257 (Tex. 1965); *Granato v. Bravo*, 498 S.W.2d 499 (Tex. Civ. App.—San Antonio 1973, no writ). (Descriptions giving no guidance as to the location should be contrasted with those defining the land being conveyed as a specified number of acres out of a side or corner of a tract, which the courts have upheld by using a presumption that the parties intended boundaries parallel to the sides of the larger tract. *See Woods v. Selby Oil & Gas Co.*, 2 S.W.2d 895 (Tex. Civ. App.—Austin 1927), *aff'd*, 12 S.W.2d 994 (Tex. Comm'n App. 1929, judgm't adopted); *Scott v. Washburn*, 324 S.W.2d 957 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.).) Title examiners must be cautious before passing descriptions such as "40 acres in the form of a square around the Smith No. 1 Well," especially if the precise well location is not given.

It may be tempting to think that a description of a certain number of acres out of a larger tract is sufficient where earlier deeds in the chain of title describe a tract of just such size. Bear in mind, again, that the deed must furnish *within itself* the means or data by which the land can be identified. Thus, in *Pickett v. Bishop*, 148 Tex. 207, 223 S.W.2d 222 (1949), a deed was given effect that described "my property of 20.709 acres out of the John Stephen 640 acre Survey in Tarrant County, Texas." Without the words "my property" the deed would have provided no means to identify what 20.709 acres it referred to and would have been void.

Care must be taken with descriptions of tracts of specified acreage even if the intention is clear that the acreage is to be taken off one side or out of a corner of a survey. Note that the "East 320 acres" of a section of land is not the same as the East half unless the section contains precisely 640 acres. If parties in the chain of title have used the two different descriptions interchangeably and it develops that the actual acreage is not as had been assumed, serious confusion over the correct boundary may result.

C. "More or Less" as Part of Description

Use of the words "more or less" in relation to a tract's acreage is common and ordinarily good practice, but it can lead to a void deed where acreage is part of the description itself. In a well-known but often overlooked case, *Wooten v. State*, 142 Tex. 238, 177 S.W.2d 56 (1944), the supreme court held, in effect, that a description of "North 60 acres, more or less," of a tract was rendered indefinite and thus void by

inclusion of the words "more or less." Because the words were not merely inserted after the land description as part of a recital of the estimated quantity conveyed but instead formed part of the description itself, it became impossible to identify the boundaries of the tract.

Finally with respect to land descriptions, a defect or uncertainty in the description of a tract excepted or excluded from a larger tract being conveyed affects only the excluded tract. *Hornsby v. Bartz*, 230 S.W.2d 360 (Tex. Civ. App.—El Paso 1950, no writ); *Connor v. Brown*, 226 S.W.2d 229 (Tex. Civ. App.—Texarkana 1950, writ ref'd n.r.e.). If the description of the tract intended to be excepted is void for uncertainty, title to the entire larger tract passes to the grantee.

D. Land Bounded by Narrow Strip

Ownership of even a very small tract can become very important if it is found, or believed, to contain a large volume of oil or gas. Practitioners should be aware of some conveyancing rules that may affect ownership of narrow but potentially valuable strips.

The general rule can be stated that if a deed conveys an interest in land bounded by a stream or by the right-of-way of a street, alley, highway or railroad in which the grantor owns the fee, the grantee will take title to the center line of the stream or right-of-way strip, unless the deed expressly provides otherwise. *Muller v. Landa*, 31 Tex. 265 (1868); see *Welder v. State*, 196 S.W. 868 (Tex. Civ. App.—Austin 1917, writ ref'd) (streams); *Texas Bitulithic Co. v. Warwick*, 293 S.W. 160 (Tex. Comm'n App. 1927, judgm't adopted) (city streets); *Weiss v. Goodhue*, 102 S.W. 793, 796-97 (Tex. Civ. App. 1907, writ ref'd) (alleys); *Mitchell v. Bass*, 26 Tex. 372, 379-80 (1862) (highways); *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S.W.2d 1080 (1932) (railroads). (Note, however, that the rule cannot apply to navigable streams, statutorily defined as those averaging thirty feet in width from the mouth up under Tex. Nat. Res. Code Ann. § 21.001(3) (West 2011), the ownership of whose beds is retained by the state.) The rule holds true even if the metes and bounds description stops at the side line of the right-of-way, *Cox v. Campbell*, 135 Tex. 428, 143 S.W.2d 361 (1940), or if the calls for the meander lines of a boundary stream follow its bank or cross the stream. *Stover v. Gilbert*, 112 Tex. 429, 247 S.W. 841 (1923).

There are some fact-specific exceptions to the rule that a conveyance of land bounded by the line of a right-of-way extends to the center line. For example, if the grantor owns the fee title to the entire width of a right-of-way strip lying on the margin of the conveyed tract, but not the land on the other side, a deed bounded by the right-of-way will convey the entire strip. *Cantley v. Gulf Production Co.*, 135 Tex. 339, 143 S.W.2d 912, 915-16 (1940). Many of the exceptions to the strips and gores doctrine, however, turn on issues involving subdivisions of larger tracts and the abandonment of a particular easement. For instance, in cases involving a subdivision of property and findings that the easement at issue has been abandoned, if the land within an adjacent, abandoned easement strip is "larger and perhaps more valuable" than the tract described in the deed, the grantor will not be presumed to have intended to convey the adjoining, abandoned easement tract. *Angelo v. Biscamp*, 441 S.W.2d 524, 527 (Tex. 1969).

In a similar case, *Goldsmith v. Humble Oil & Ref'g Co.*, 145 Tex. 549, 199 S.W.2d 773 (1947), the court held that a deed did not include any part of an adjoining strip, because 1) the deed made no reference to an adjoining highway, street or passageway and, in fact, 2) there was no proof that an easement existed within the strip. Stated otherwise, an easement must actually exist, regardless of the general rule that the deed itself does not have to expressly mention said easement.

The court in *Strayhorn v. Jones*, 157 Tex. 136, 300 S.W.2d 623 (1957) considered strips of land along a navigable waterway. The court declared it to be "against public policy to leave title of a long narrow strip of land in a grantor conveying a larger tract adjoining or surrounding this strip." The Strayhorn case cites to *Haines v. McLean*, 154 Tex. 272, 276 S.W.2d 777, 782 (1955), which illustrates well the potential complexity of the issues considered here. The rule will apparently be applied to "relatively narrow strips of land, small in size and value in comparison to the adjoining tract conveyed by the grantor . . . when it is apparent that the narrow strip has ceased to be of benefit or importance to the grantor of the larger tract." *Compare Angelo*, 441 S.W.2d at 526-27, holding that where an abandoned right-of- way tract is larger and possibly more valuable than the tract actually described, the grantor will not be divested of such a tract. Whether an adjoining strip is relatively small enough or of low enough value to fall within the strip-and-gore doctrine may be a question of fact for jury determination. *See Haby v. Howard*, 757 S.W.2d 34 (Tex. Civ. App.—San Antonio 1988, writ denied), and, as noted, variables such as conveyance timing, easement abandonment, navigable streams, and subdivisions of larger tracts are often weighed in the equation.

Application of the strip-and-gore doctrine to a small strip or tract adjoining a larger tract specifically conveyed may or may not depend on whether the small tract contains a road or easement. At least one court applied it to a small non-road tract, stating the rule to be that the tract must be small in comparison to the land specifically conveyed, must be adjacent to or

surrounded by the land conveyed, and must be, by itself, of no apparent benefit or importance to the grantor at the time of the conveyance. *Alkas v. United Sav. Ass'n*, 672 S.W.2d 852, 857 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

Before any of the foregoing is addressed, it is of course often necessary to determine whether a conveyance relative to a narrow strip of land has conveyed the fee title to the land or merely a right-of-way. If the deed, according to its terms, purports to grant a right-of-way over the land, rather than the land itself, it conveys only an easement and not the fee title. *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, 106 Tex. 94, 157 S.W. 737 (1913). Conversely, if a deed's granting clause conveys the land itself, it carries the fee even if subsequent clauses define its purpose as being right-of-way or purport to limit its use. *Texas Electric Ry. Co. v. Neale*, 151 Tex. 526, 252 S.W.2d 451 (1952).

III. CONVEYANCES OF FRACTIONAL MINERAL INTERESTS

A. Describing the Interest Being Conveyed

If anything less than the entire fee simple interest in the land is being conveyed, a deed's proper and adequate identification of that interest is just as important as the description of the land itself. This paper focuses on the effect of some of the innumerable different ways that conveyances may describe and define interests in the oil, gas and other minerals within a tract. It is beyond our scope to discuss how the courts have defined minerals, as distinguished from the surface estate, and how drafters might go about expressing their clients' intentions regarding the respective rights of surface and mineral ownership upon severance. We will, later in the paper, touch on such topics as the ways in which conveyances of mineral interests may be distinguished from those conveying only royalty. We will first examine some of the ways fractional mineral interests may be described and misdescribed and some of the pitfalls awaiting the unwary examiner or drafter.

1. Conveyances of Mineral Acres

Problems can arise from even the most straightforward kinds of mineral conveyances, those intended to convey a simple fractional interest in the oil, gas and other minerals. Frequently the price of a mineral interest is based on the number of mineral acres being sold. In order to make certain that the buyer is conveyed no more and no less than he has paid for, mineral deeds are sometimes drafted to describe an undivided specified number of acres out of a particular tract. Special problems can arise from this form of deed. Very commonly the parties do not know the exact acreage of the tract out of which the undivided acreage interest is conveyed (which may be why the device of describing an undivided acreage interest was used to begin with). Until the tract has been surveyed and its acreage precisely determined, the relative allocation of royalty and other lease benefits between the grantor and grantee remains subject to some conjecture. *See* 1 Patrick H. Martin and Bruce M. Kramer, *Williams & Meyers Oil and Gas Law*, § 320.2 (2012); *see also Daniel v. Allen*, 129 S.W.2d 392 (Tex. Civ. App.—Texarkana 1939, no writ). Moreover, if it develops that the grantors have previously conveyed their interests in part of the land and so are left with a smaller tract than the one described, the grantee of an undivided acreage interest will be entitled to the full complement of acreage spread over the smaller tract (i.e., a fractional interest whose numerator is the specified number of mineral acres and whose denominator is the size of the grantor's remaining land). *Crayton v. Phillips*, 297 S.W. 888 (Tex. Civ. App.—Austin 1927), *aff'd*, 4 S.W.2d 961 (Tex. Comm'n App. 1928, judgm't adopted). Unless it is particularly important to the parties that the grantee receive no more or less acreage than paid for, the interest of certainty will be served by a conveyance expressed as a numerical fraction or percentage rather than acreage.

The problem is exacerbated where, as occurs not infrequently, a deed conveys, in its granting clause, a specified fraction of the minerals but thereafter expresses the intention to convey a specified number of mineral acres that turns out to be inconsistent with the fractional interest. Which interest should be given precedence? The question seems not to have been definitely answered in Texas. Williams and Meyers prefer a construction in favor of the number of acres as reflecting the probability that the purchase price was paid on that basis but cite authority from other states not only supporting that construction but also favoring the stated fractional mineral interest or finding the conflict to create an ambiguity, requiring resolution by parole evidence. 1 Patrick H. Martin and Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 320.2, at 670-74 (2012).

2. Unspecified Undivided Interest

Another frequent source of difficulty is the careless conveyance of "an undivided interest" in a tract of land, without any indication of the interest intended to be conveyed. Undoubtedly most cases of this nature stem from the use of forms with a blank between "an undivided" and "interest," where the parties have, inadvertently or failing to realize its importance, failed to complete the blank. Texas courts unequivocally hold that such a conveyance of an undivided but unspecified mineral interest is void. *Dahlberg v. Holden*, 150 Tex. 179, 238 S.W.2d 699 (1951); *W. T. Carter & Bro. v. Ewers*, 133 Tex. 616, 131 S.W.2d

86 (1939). In both of those cases the courts rejected arguments that the deeds should be construed to convey "our" or "my" undivided interest, which would have validated them. Where a deed includes an initial description in a similar form, it may be made effective by a subsequent specific description if the parties' intention to have conveyed the specified interest is manifest from the four corners of the deed. *Pan American Petroleum Corp. v. Texas Pacific Coal & Oil Co.*, 340 S.W.2d 548 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.). (In *Templeton v. Dreiss*, 961 S.W.2d 645 (Tex. App.—San Antonio 1998, pet. denied), which probably must be considered confined to its facts but which the interested practitioner may nevertheless desire to review, the court rather unpersuasively purported to distinguish the doctrine of *Carter v. Ewers* in holding a conveyance of "an undivided interest" in a strip of land used for an access road to have conveyed the entire fee simple.)

3. Term Interests

Occasionally mineral or royalty deeds are made for a limited term, typically, like the usual form of oil and gas lease, for a stated term and so long thereafter as oil or gas is produced from the land included in the deed. Often the grantee under such a deed fails, however, to negotiate provisions for extension of the term, like those found in typical oil and gas leases, by means other than oil and gas production. Extension of the term may be accomplished only by actual production under such circumstances, and this is not modified by the subsequent execution of an oil and gas lease whose term may be extended, for example, by the completion of a shut-in gas well and payment of shut-in royalty. *Archer County v. Webb*, 161 Tex. 210, 338 S.W.2d 435 (1960). A term mineral or royalty interest might be saved in the absence of a saving clause by application of the temporary cessation of production doctrine, in the same manner as an oil and gas lease might under similar circumstances, *DeBenavides v. Warren*, 674 S.W.2d 353 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.), but it will expire on permanent cessation unless some provision of the deed itself applies to save it. Further, merely making the deed subject to existing oil and gas leases, without clearly expressing the intent to incorporate the leases' saving clauses, will not permit the extension of the term interest by virtue of operations or some other substitute for production that extends the term of the lease.

Riley v. Meriwether, 780 S.W.2d 919 (Tex. App.—El Paso 1989, writ denied). A drafter on behalf of a grantee of a term mineral or royalty interest or on behalf of a grantor reserving such an interest must therefore bear in mind the same considerations that are important to oil and gas lessees with respect to extension of the term.

B. Problems with Outstanding Interests and Burdens

The most difficult problems of mineral deed construction generally revolve around the allocation of interests between grantor and grantee when mineral, royalty or leasehold interests already outstanding in others must be taken into consideration. These may result from imprecision in describing the interest intended to be conveyed, similarly to the issues already addressed, a misunderstanding of the quantity or nature of outstanding interests, lack of knowledge of the legal effect of words appearing in deeds or simple carelessness regarding their use, or some combination of these.

1. Lands “Conveyed” or “Described” and Similar Sources of Confusion

Imprecise descriptive language may lead to uncertainty about the interest being conveyed when a grantor, owning less than the entire mineral interest in a tract, conveys or reserves a fractional part of his interest but leaves some doubt whether the portion is a fraction of the whole or a fraction of the interest otherwise being conveyed. As demonstrated by the case law addressing same, the distinction generally turns on whether the reservation clause describes the interest as being reserved from the land “conveyed” or from the land “described.” Two classic examples of the difficulty, resolved in opposite directions, are represented by *King v. First National Bank*, 144 Tex. 583, 192 S.W.2d 260 (1946), and *Hooks v. Neill*, 21 S.W.2d 532 (Tex. Civ. App.—Galveston 1929, writ ref'd).

Hooks set forth the governing rule in circumstances where a deed reserves a fractional interest under the land “conveyed.” *Hooks*, 21 S.W.2d at 538. Specifically, in *Hooks*, the grantor owned an undivided one-half interest in a tract of land. *Id.* In the deed at issue, the grantor conveys his undivided one-half interest in a tract of land. *Id.* In a reservation clause, however, the grantor reserved a 1/32 interest in oil under the “said land and premises herein described and conveyed.” *Id.* The court focused on the use of the words “and conveyed” in the reservation clause, and held that the deed unambiguously reserved 1/32 of the 1/2 mineral interest that the grantor conveyed, or a 1/64 mineral interest. *Id.* As the Supreme Court states in a subsequent holding in *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 893 (Tex. 1986), “[i]f the deed reserves a fraction of the minerals under the land conveyed, then the deed reserves a fraction of the part of the mineral estate actually owned by the grantor and conveyed in the deed.” *See also Dowda v. Hayman*, 221 S.W.2d 1016 (Tex. Civ. App.—Fort Worth 1949, writ ref'd) (construing a reservation from a deed conveying a 7/8 mineral interest, held that the grantor's "one half of the oil, gas and minerals of whatever kind on and under the

premises herein conveyed" was only 1/2 of 7/8, not 1/2, of the mineral estate).

Conversely, *King* establishes the controlling rule in instances where the deed reserves a fractional interest under the land "described." *King*, 192 S.W.2d at 263. There, a granting clause conveyed an undivided one-half interest in a parcel of land that was then physically described as a whole. *Id*. at 262. Similarly, the court in *Averyt*, considered a reservation of 1/4 of the royalty on oil, gas and other minerals "in, to and under or that may be produced from the lands above described . . . ." 717 S.W.2d 891 (Tex. 1986). The land description in the deed was followed by an exception: "LESS, HOWEVER, AND SUBJECT TO an undivided 1/2 interest in the oil, gas and all other minerals" described in a certain prior deed. Pointing out that the "subject to" clause was a limitation of the estate granted and not part of the land description, the court followed *King* and held that the grantors reserved a full 1/4 of the royalty. 717 S.W.2d at 895.

Middleton v. Broussard, 504 S.W.2d 839 (Tex. 1974), construed a deed conveying a 1/64 royalty interest in certain "tracts of land . . . being particularly described as follows," which language was followed by a description of various undivided interests in nine different tracts. The deed did not limit the royalty to the land "conveyed," the court pointed out; instead, the granting clause and several other references in the deed expressed the interest as applying to the "tracts" or to the "lands." The grantors were therefore held to have conveyed the full 1/64 royalty in all of the lands described. 504 S.W.2d at 842-43.

The courts have established a rule now well entrenched in oil and gas law, declared the *Middleton* court, which it quoted from Will G. Barber, *Duhig to Date: Problems in the Conveyancing of Fractional Mineral Interests*, 13 Sw. L. J. 320, 322-23 (1959), as follows: "Where a fraction designated in a deed is stated to be a mineral interest in land described in a deed, the fraction is to be calculated upon the entire mineral interest," whereas, "[W]here a fraction designated in a reservation clause is stated to be a mineral interest in land conveyed by the deed, the fraction is to be calculated upon the grantor's *fractional* mineral interest . . . . " 594 S.W.2d at 842. (Emphasis in original.) The distinction made by the courts, then, is that between the land described and the land conveyed. The rule is helpful in many cases that might otherwise be hopelessly ambiguous but will not resolve all possible uncertainties. The result may not be clear if a deed purports to reserve or convey an undivided interest in certain described "property," where undivided interests are described with one or more tracts of land, or where "interests" referred to in an instrument may refer to the land or to particular fractional interests somewhere referred to in the deed. A drafter using only the slightest care can easily avoid confusion, of course, but anyone considering conveyances and reservations involving fractional interests must decide whether a deed in which this problem occurs is clear in referring either to the land described or the land conveyed.

2. Fractional Interest "Out Of" a Larger Interest

A somewhat similar construction problem may arise from a deed conveying a fractional interest "out of" the grantor's interest. Texas courts have held that the phrase "out of" indicates only the source out of which the interest is to be taken, whereas the use of the word "of" alone would require reduction of the interest conveyed. *Minchen v. Hirsch*, 295 S.W.2d 529, 532 (Tex. Civ. App.—Beaumont 1956, writ ref'd n.r.e.). Thus, a "one sixteenth (1/16) royalty out of our [1/4] interest" in the land is a full 1/16 interest, not 1/64. 295 S.W.2d at 532-33. Likewise, a deed describing an undivided 1/2 of the minerals "out of the interest owned by" the grantors conveyed an undiminished 1/2 mineral interest. *Black v. Shell Oil Co.*, 397 S.W.2d 877, 884-87 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.). The court in *Winegar v. Martin*, 304 S.W.3d 661 (Tex. App.—Fort Worth 2010, no pet.), however, seems to have ignored the distinction observed here, holding that the reservation of 1/3 of royalty in a tract "out of" the grantor's undivided 1/3 interest in the land conveyed in the deed was only 1/3 of the grantor's 1/3 of the royalty.

3. Overconveyances: The *Duhig* Doctrine

When a grantor who owns an undivided mineral interest executes a deed that cannot be given full effect because the interest conveyed to the grantee and that reserved to the grantor amount to more than the grantor owned, how should the grantor's interest be allocated between grantor and grantee? The situation, not altogether unusual, is the one addressed in *Duhig v. Peavy-Moore Lumber Co*., 135 Tex. 503, 144 S.W.2d 878 (1940). In *Duhig*, the grantor of a 1912 deed owning one-half the minerals in a tract of land, executed a warranty deed in which he purported to convey the land to the grantee with the reservation of one-half the minerals to himself. Given that one-half the minerals were unquestionably in a prior owner, the question was who, grantor or grantee, became entitled to the other half. The court held that the grantee acquired half the minerals, leaving the grantor with nothing. According to the majority opinion of the commission of appeals, adopted by the supreme court, the grantor was estopped by his warranty from claiming the 1/2 mineral interest he purported to convey, thus vesting the reserved interest, by operation of the after-acquired title doctrine, in the grantee.

Despite the *Duhig* court's somewhat strained reliance on the warranty to estop the grantor from claiming the interest he purported to reserve, what has been called the "real" *Duhig* rule appears to be much more straightforward. See Willis H. Ellis, *Rethinking the Duhig Doctrine*, 28 Rocky Mtn. Min. L. Inst. 947, 954 (1982). As suggested by Judge Smedley, the author of the *Duhig* opinion, the manifest intention of the parties to the deed, after applying established rules of construction, was to invest the grantee with title to the surface and one-half the minerals, withholding only the one-half already outstanding in others. 144 S.W.2d at 879-80. Thus considered, no resort to the principle of estoppel arising from the warranty is necessary.

Blanton v. Bruce, 688 S.W.2d 908 (Tex. App.—Eastland 1985, writ ref'd n.r.e.), supports the proposition that a warranty is unnecessary to application of the *Duhig* rule. In *Blanton* the court considered a 1934 deed, without warranty, in which the grantor, owning 3/4 of the minerals, conveyed the tract with reservation of 1/2 the minerals. The court held, despite the lack of a warranty, that the grantee became entitled to 1/2 the minerals and that the outstanding 1/4 must be deducted from the grantor's reservation. What is important is not the grantor's covenant of warranty, the court reasoned, but whether the deed purports to convey a definite interest in the property. 688 S.W.2d at 913-14.

Texas courts, explained *Blanton*, have applied the after-acquired title doctrine relied upon by the *Duhig* court regardless of the presence of a warranty, *Lindsay v. Freeman*, 83 Tex. 259, 18 S.W. 727 (1892), and the estoppel against the grantor arises from his assertion of the interest, not the warranty of it. 688 S.W.2d at 911-14. Additional support for application of the *Duhig* rule regardless of the presence of a title warranty on the basis that it arises instead from the grantor's assertion of title and his undertaking to convey it, is found, *Blanton* further notes, in *American Republics Corp. v. Houston Oil Co.*, 173 F.2d 728 (5th Cir. 1949), in which the court applied Texas law, and in the works of leading authorities. *See, e.g.*, Richard W. Hemingway, *The Law of Oil and Gas* § 3.2(D), at 129 (3d ed. 1991), 1 Patrick H. Martin and Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 311.1, at 584.2 (2012).

Where a deed conveys a tract of land without exception or reservation, it purports to include the entire mineral estate. *Schlittler v. Smith*, 128 Tex. 628, 101 S.W.2d 543 (1937). It follows that unless a deed is limited to whatever interest the grantor owns, it purports to convey all interests except those that are specifically excepted or reserved. *Cockrell v. Texas Gulf Sulphur Co.*, 157 Tex. 10, 299 S.W.2d 672 (1956). Properly considered, therefore, the *Duhig* rule requires that a deed be construed from the viewpoint of the grantee, to ascertain the interest the instrument purports on its face to convey. If the grantor has that interest at the moment of the deed, the grantee receives it; any other outstanding interest must be absorbed by, or deducted from, whatever interest the grantor may have purported to reserve.

By logic the *Duhig* rule applies whether the interest outstanding and the interest purportedly reserved are mineral interests or royalty interests. Thus, for example, where a 1943 deed purports to grant a particular mineral interest and reserve the remainder, without mentioning an outstanding nonparticipating royalty, the outstanding interest is borne entirely by the grantor, not proportionately by both grantor and grantee. *Selman v. Bristow*, 402 S.W.2d 520 (Tex. Civ. App.—Tyler), *writ ref'd n.r.e. per curiam*, 406 S.W.2d 896 (Tex. 1966). And, where a 1930 deed conveys a tract, purporting to reserve a 1/64 nonparticipating royalty interest to the grantor without mentioning an identical 1/64 royalty interest reserved by a prior grantor, the grantor has retained nothing. *Jackson v. McKenney*, 602 S.W.2d 124 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

4. The "Subject To" Clause

a. Use of the words "subject to"

The ordinary use of the words "subject to" in a deed is to limit or qualify the description of the estate being conveyed, not to create affirmative rights. *Kokernot v. Caldwell*, 231 S.W.2d 528 (Tex. Civ. App.—Dallas 1950, writ ref'd). The words will not, in and of themselves, reserve an interest to the grantor unless that intention is clearly expressed. *Monroe v. Scott*, 707 S.W.2d 132 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

> Much difficulty and confusion has nevertheless been generated by careless and inappropriate use of clauses making mineral conveyances "subject to" outstanding oil and gas leases or prior reservations. *See* Ernest E. Smith, *The "Subject To" Clause*, 30 Rocky Mtn. Min. L. Inst. ch. 15 (1984), for a more thorough treatment of the issues that commonly arise than can be presented here.

b. Deeds subject to existing lease

Problems with construction of mineral conveyances made subject to existing oil and gas leases date at least to the early case of *Caruthers v. Leonard*, 254 S.W. 779 (Tex. Comm'n App. 1923, judgm't adopted). In that case the court held that a conveyance of a fractional mineral interest did not carry with it the right to receive a proportionate share of delay rentals. Under the reasoning of the case, presumably, the grantee of a mineral interest would nevertheless receive none of the lease benefits unless they were specifically mentioned and conveyed. To

avoid this result drafters of mineral deeds began using forms that practically universally included provisions that the conveyance was made "subject to" the existing lease, but "covers and includes" the specified fraction of rentals, royalties and other benefits of the lease. *Caruthers* was overruled in *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (1943), but the form of deed devised in its wake, without much change, is in general use to this day. Its use has generated more than a few controversies.

One of the first cases to construe a deed containing the "subject to ... but covers and includes" language was *Hoffman v. Magnolia Petroleum Co.*,

273 S.W. 828 (Tex. Comm'n App. 1925, holding approved). In *Hoffman* the grantor had conveyed an undivided 1/2 mineral interest in 90 acres out of a 320- acre leased tract with a deed providing that the sale was made "subject to said lease but covers and includes one-half of all the oil royalty and gas rental or royalty due to be paid under the terms of said lease." The court held that the grantee became entitled to one- half the royalty on production not only from the 90acres described in the deed but from all 320 acres included in the lease. Although the granting clause only conveyed the 90 acres, the "subject to" clause, explained the court, operated as a second grant which operated on "all" royalty under the lease, i.e., the entire 320 acres.

What if a deed conveys only a portion of a larger tract and is made subject to a lease covering the entire tract, like the *Hoffman* deed, but it does not contain the language construed in *Hoffman* to pass the royalty under the lease, as to all of the leased premises, to the grantee? Might a landowner claim that the royalty under the lease should be apportioned on an acreage basis between grantor and grantee? The court in *Japhet v. McRae*, 276 S.W. 669 (Tex. Comm'n App. 1925, judgm't adopted), considered just such a contention by the owner of the lessor's interest in one of two tracts segregated from each other by deed after the execution of a lease, upon the discovery of "much oil" on the other tract. The court held that only the owner of the land where the well was located was entitled to the royalty, announcing the "non-apportionment" rule followed in Texas ever since. The court pointed out that the situation was unlike that in *Hoffman* in that the parties had not contracted for apportionment. 276 S.W. at 670.

Although much criticized, *Hoffman* remains good law. Its result is typically avoided by provisions within the deed's "subject to" clause making it clear that the grantee's rights in the royalty and other lease benefits are limited to the land included in the deed and the oil and gas produced from it. The examiner must nevertheless be alert to the possibility that the language of a "subject to" clause might be broad enough to encompass, under *Hoffman v. Magnolia*, production from other land. It should be pointed out as well that the possible existence of a deed in this form undoubtedly increases the risk of limiting title examination to less than all the premises covered by an existing oil and gas lease.

c. Inconsistent fractions

The "two-grant" theory applied in *Hoffman v. Magnolia* has sometimes been used in courts' many attempts to construe deeds in which the fractional interest stated in the granting clause is inconsistent with the fractions of lease benefits that the "subject to" clause states the conveyance to "cover and include." This presentation will not attempt to go much beyond a description of this complex problem, which is illustrated by the provisions of the deed construed in the Texas Supreme Court's most recent pronouncement on the issue, *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451 (Tex. 1998). In the 1937 deed, the owner of a 1/12 mineral interest conveyed, in the granting clause, an undivided 1/96 interest in and to all of the oil, gas and other minerals. The conveyance was made subject to any existing lease and was stated to cover and include 1/12 of all rentals and royalty payable under such lease, insofar as the same pertained to the tract described. The lease that had been in effect at the time of the deed was long expired, and the deed contained no guidance, beyond the granting clause, specifically concerning ownership of future lease benefits. The court presumably would have had no difficulty, under the existing precedent of *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466 (Tex. 1991), and *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991), in holding unequivocally that the grantee was entitled to 1/12 of the minerals, if the "subject to" clause had included 1/12 of benefits under future leases or specified that the grantee would own 1/12 after the expiration of any existing lease. The "subject to" clause of this deed included no reference to future leases or to ownership after expiration of the existing lease, however, and the court split 5-4. In perhaps the most expansive reliance on the "subject to" clause yet, the court held that the deed conveyed 1/12 of the minerals. All justices would apply the "four corners" doctrine, but the four- justice plurality sought to harmonize the different fractions (although the "subject to" clause, again, did not expressly apply to future leases) on the basis that the prevailing royalty rate at the time was 1/8 and that both fractions evinced an intent to convey all the grantor's interest. The plurality expressly disavowed the *Hoffman v. Magnolia* style of "two-grant" analysis.

Forms of mineral deeds in general use today usually avoid the problem, although many still include a "subject to" clause very similar to that of the old forms and, by leaving a blank, invite misuse. In

counties where there has historically been significant oil and gas activity, there are deeds that raise the potential issue of inconsistent fractions. Title examiners must still be alert. It seems reasonably clear after *Concord v. Pennzoil* that deeds made subject to an existing lease, with inconsistent fractions in the granting clause and the "subject to" clause, will be construed under the four-corners doctrine, with the court attempting to harmonize all provisions to arrive at the parties' true intent. *See, e.g., Hausser v. Cuellar*, 345 S.W.3d 462 (Tex. App.—San Antonio 2011, pet. denied). It seems also fairly clear that if the larger fraction expressed in the "subject to" clause is stated to apply to future leases or to mineral ownership, the grantee will be entitled to it and will not be confined to the smaller interest conveyed in the granting clause. Given the split in the *Concord* court, however, the question of ownership under such a deed, at least where there is no reference to benefits under future leases, must be considered still in doubt. Much more thorough treatments of the history and legal reasoning behind the construction of mineral deeds of the sort discussed here may be found in 1 Ernest E. Smith and Jacqueline Lang Weaver, *Texas Law of Oil and Gas*, §3.8(A)(3), at 3-59-67 (2d ed. 1998), David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical Foundations*, 47 Inst. on Oil & Gas L. & Tax'n § 1.01, §§ 1.05-1.06 (1996), and Laura H. Burney, *The Regrettable Rebirth of the Two–Grant Doctrine in Texas Deed Construction*, 34 S. Tex. L.J. 73 (1993).

d. Limitation of grant

A "subject to" clause is routinely used to limit a grant or reservation, and careless use of such a clause may lead to unexpected results. In *Bass v. Harper*, 441 S.W.2d 825 (Tex. 1969), the grantor conveyed an undivided one-half interest in a tract of land, followed by the statement, "This Grant is subject to the Mineral Reservation contained in the following Deed[s] : . . . . " The deed thereafter listed several prior deeds in which the grantor's predecessors-in-interest had reserved a total of 6/14ths of the royalty. The grantee's successor in interest contended, and the court of appeals held, that the grantor conveyed one-half of his remaining 8/14ths interest in the royalty, the "subject to" clause merely having been inserted to protect the grantor on his warranty. The grantor, however, contended that he conveyed a 1/2 interest in the entire estate, which would be 7/14ths, but because his interest was already burdened by 6/14ths, the net result was that the grantee only acquired a 1/14th. In reversing the court of appeal's decision and agreeing with the grantor, the Texas Supreme Court pointed out that the grant was quite plain, that there were no words limiting it to whatever interest the grantor owned, and that the grant itself was subject to the mineral reservations in the recited prior deeds. The instrument did not relate the outstanding royalty interest to the warranty, as it could have done. Thus, the entire outstanding 6/14ths of the royalty must be deducted from the grantee's interest, so that the deed conveyed only 1/14 of the royalty. (The *Bass* decision was recently distinguished on fact specific grounds in an unpublished opinion out of the Corpus Christi court of appeals. See *Wenske v. Ealy*, 2016 WL 363735 (Tex. App.---Corpus Christi Jan. 28, 2016, pet filed)).

Where a grantor's interest is subject to prior burdens, therefore, a prudent grantee of a fractional portion must not accept a deed in which his interest is simply made "subject to" such burdens unless he is willing to bear the entire recited burden. If the burden is to be borne proportionately, the deed should so state. Conversely, the grantor of a partial interest must take care to make the conveyance subject to a proportionate part of any existing burdens, or otherwise provide for their allocation, unless he intends to bear them entirely out of his own retained interest.

5. Other Rules in Construction of Reservations

Among the longstanding rules to which Texas courts continue to adhere is that a grantor may not reserve an interest to a stranger. A may not convey to B, reserving an interest in C, without first reserving the interest to A herself and then expressly conveying to C. *See Joiner v. Sullivan*, 260 S.W.2d 439 (Tex. Civ. App.—Texarkana 1953, writ ref'd). This may seem unduly mechanical, but its purpose is to prevent interests from becoming vested in third parties unless that is the parties' clear intention.

The rule and its purpose are illustrated by *Canter v. Lindsey*, 575 S.W.2d 331 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.), in which Roberts, who had previously conveyed a 1/32 nonparticipating royalty to Lindsey, conveyed a 3/4 mineral interest to Mabee, excepting an interest identified as 1/4 of the royalty in Lindsey. After the land was leased for 3/16 royalty, Lindsey claimed to be entitled to 1/4 of the 3/16, not just 1/32 of production. The court rejected the argument, pointing out that the exception from the Roberts-Mabee deed did not purport to create any new interest in Lindsey and that even if it had, it would have been ineffective under the doctrine prohibiting exceptions or reservations in favor of third parties. 575 S.W.2d at 335. Similarly, the court in *Little v. Linder*, 651 S.W.2d 895 (Tex. App.—Tyler 1983 writ ref'd n.r.e.), held that a mineral interest reserved from a deed joined by both husband and wife, conveying the wife's separate property, did not vest any of the reserved interest in the husband.

Another rule of some importance is that against implied reservations, relied on in, among other cases,

Sharp v. Fowler, 151 Tex. 490, 252 S.W.2d 153 (1952). In that case the court construed a deed conveying 50 acres in which the grantor owned the surface and 1/4 of the minerals, "being the same land described in" a certain earlier deed. The prior deed had reserved all the minerals, and the grantor's successor in interest claimed that the reference to it had, in effect, qualified the grant and excepted the minerals. The Texas Supreme Court rejected this argument, pointing out that a reservation of minerals must be in clear language. 252 S.W.2d at 154. To the same effect are *Chambers v. Huggins*, 709 S.W.2d 219 (Tex. App.—Houston [14th Dist.] 1986, no writ), and *Ladd v. DuBose*, 344 S.W.2d 476 (Tex. Civ. App.—Amarillo 1961, no writ), in both of which the courts held that a clause making the deed subject to an outstanding term interest did not impliedly reserve to the grantor the reversionary estate upon expiration of the term. Beware, though, that one court's rejected reservation by implication may be another's clear reservation. The Texas Supreme Court in *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798 (1956), construed a deed very similar to the one involved in *Sharp v. Fowler*, except that the description of the prior deed was followed by "reference to which is made for all purposes." Without explicitly distinguishing *Sharp v. Fowler*, the court held that since reference was made to the prior deed "for all purposes" and not just description, the parties had intended to except from the grant a 1/2 mineral interest that had been reserved in the prior deed. 294 S.W.2d 800.

The rule against implied reservations is undoubtedly related to the more general rule that language in a deed will be construed against the grantor as passing the greatest possible estate. *E.g., Allen v. Creighton*, 131 S.W.2d 47 (Tex. Civ. App.—Beaumont 1939, writ ref'd); *Clemmens v. Kennedy*, 68 S.W.2d 321 (Tex. Civ. App.—Texarkana 1934, writ ref'd). This has sometimes been held to be true even if the deed was prepared by the grantee's attorney. *McGuire v. Bruce*, 332 S.W.2d 110, 113 (Tex. Civ. App.—Beaumont 1959, writ ref'd).

IV. DEFINING AND CONSTRUING CONVEYANCES OF ROYALTY AND OTHER INTERESTS LESS THAN ALL OF MINERAL FEE

A. The Unbundled Mineral Estate

The mineral estate in a tract of land, as distinct from the surface, includes five essential attributes, (1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments. *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986); Richard W. Hemingway, *The Law of Oil and Gas*, §§ 2.1-2.7 (3d ed. 1991). These various components can be separately conveyed or reserved. *E.g., French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795, 797 (Tex. 1995). All of these are real property interests and are capable of ownership entirely separate from the others or in any combination. *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 (Tex. 1990).

When a mineral interest is conveyed or reserved, however, it is presumed that all attributes remain with the mineral interest unless a contrary intention is expressed. *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669 n.1 (Tex. 1990). Thus, the conveyance or reservation of a fractional interest in the oil, gas and other minerals in and under and that may be produced from a tract of land carries with it a like undivided fraction of the royalty reserved in any lease, *Delta Drilling Co. v. Simmons*, 161 Tex. 122, 338 S.W.2d 143 (1960), as well as bonus and delay rental rights. If a grantee acquires a 1/16 mineral interest and the land is leased at a royalty rate of 3/16, the grantee becomes entitled to 1/16 of 3/16 of production.

B. Royalty Alone

By contrast, a bare royalty interest is generally considered to consist of a specified interest in all production from the land (that is, 100%, not just the royalty fraction payable under a lease). Thus, a "1/16 royalty" interest in the oil, gas and other minerals produced from a tract of land entitles the grantee receiving it or the grantor reserving it to 1/16 of total production, not just 1/16 of the 3/16 (or whatever fraction) of production reserved as lease royalty. *Caraway v. Owens*, 254 S.W.2d 425 (Tex. Civ. App. — Texarkana 1953, writ ref'd). A royalty owner typically has no right to execute oil and gas leases or to develop the land himself. *Klein v. Humble Oil & Refining Co.*, 126 Tex. 450, 86 S.W.2d 1072, 1079 (1935); *Hawkins v. Texas Oil & Gas Corp.*, 724 S.W.2d 878, 888 (Tex. App.—Waco 1987, writ ref'd n.r.e.).

C. Mineral or Royalty?

Problems have developed in the construction of deeds that convey or reserve a specified fraction of the oil, gas and other minerals in and under a tract in the manner of a typical mineral deed but then, with limiting language or reservations, strip the interest of some or all of the usual attributes, often the right to execute leases and to receive bonuses and delay rentals. Is a mineral interest thus denuded of most or the entire bundle of rights making up the mineral estate except the right to receive royalty still a "mineral" interest, so that the owner receives only the specified fraction of *royalty* production, or has it become a "royalty" interest, entitling its owner to such fraction of *total* production? *See* Richard C. Maxwell, *Mineral or Royalty - The French Percentage*, 49 SMU L. Rev. 543

(1996).

Where the description of a reserved or conveyed mineral interest has left the owner with any of the attributes of the mineral estate other than the right to receive royalty, such as the executive right without the right to bonus or delay rentals, as in *Diamond Shamrock Corp. v. Cone*, 673 S.W.2d 310 (Tex. Civ. App.—Amarillo 1984, writ ref'd n.r.e.), or the right to receive delay rentals, as in *Buffalo Ranch Co. v. Thomason*, 727 S.W.2d 331 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), the courts have usually had little difficulty in holding that the interest is a mineral interest, not a royalty. Conversely, key phrases have been held sufficiently indicative of royalty, as in *Barker v. Levy*, 507 S.W.2d 613 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.), in which the deed granted a fraction of the minerals "produced and saved," while omitting "in and under" or any other indication that the owner was to have any interest except upon production (i.e., no right to develop).

The courts have had the most trouble with cases in which the grant or reservation of the minerals has been stripped altogether of any apparent interest other than the right to receive royalty. In an early leading case, *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699 (1955), the deed in question reserved to the grantor a 1/16 interest in and to all of the oil, gas and other minerals in and under and that may be produced from the land but provided that the grantee would have the right to execute leases and to receive all bonus and delay rentals. Finally, the grantor would "receive the royalty retained herein only from actual production." Because the grantor parted with essentially all mineral rights except the right to royalty and because the concluding statement identified the reserved interest as royalty, the court held that it entitled the grantor to 1/16 of total production.

Subsequent cases, while never overruling *Watkins v. Slaughter*, have appeared to call it into serious question. Emphasizing that the granting clause conveyed an interest on its face a mineral interest "in and to all of the oil, gas and other minerals in and under and that may be produced from" the land, the court in *Altman v. Blake*, 712 S.W.2d 117 (Tex. 1986), pointed out that the mineral interest described in the granting clause would not have its essential character altered by the removal, in later clauses, of the right to lease and to receive delay rentals. This approach was carried to its extreme in *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795 (Tex. 1995). In that case the granting clause to a 1943 deed created what clearly would be a mineral interest if not for any qualifying language, but it went on to provide not only that the mineral grantee would have no control of the leasing and would receive no leasing revenue or rentals but that "this conveyance is a royalty interest only." Following *Altman v. Blake*, the court held that the mineral character of the interest indicated by the phrasing of the granting clause was not altered by the subsequent removal of the other attributes of the mineral estate, leaving only royalty remaining. If the parties had intended the conveyance of only royalty, the court reasoned, the mention of the leasing, rental and bonus rights retained by the grantor would have been redundant. 896 S.W.2d at 798. The identification of the conveyed interest as a "royalty interest only" did not sway the court, which mentioned that the court of appeals had distinguished *Watkins v. Slaughter*, unconvincingly, on the basis that the *French* deed did not provide for the grantee to receive the interest only out of "actual production." 896 S.W.2d at 797.

Watkins v. Slaughter appeared to be all but dead until the appearance of *Temple-Inland Forest Products Corp. v. Henderson Family Partnership, Ltd.*, 958 S.W.2d 183 (Tex. 1997). The two 1938 deeds at issue there each conveyed an undivided 15/16 interest in, to and of all oil, gas and other minerals on, in, under and that may be produced from the tracts covered, providing with respect to the grantor's reserved 1/16 that it "shall always be a royalty interest," would not bear any of the cost of exploration, development and production, and that "Grantor's one-sixteenth (1/16) royalty interest" was to be delivered free of cost. The grantor would not have leasing rights or share in bonus or delay rentals. Considering the language of the deed in its entirety, and particularly noting the numerous times the deeds referred to the reserved interest as a royalty, the court concluded that the grantor was entitled to a royalty interest of a full 1/16 of total production. In doing so the court noted that *Watkins v. Slaughter* had not been overruled and, indeed, explicitly relied on it. 958 S.W.2d at 185.

In *Temple-Inland* the mechanical approach of *Altman v. Blake* and *French v. Chevron* seems to have given way to a more decidedly four-corners one. *See Luckel v. White*, 819 S.W.2d 459 (Tex. 1991). The seemingly redundant use of the word "royalty" appears to have been the court's key to divining the parties' intent. The result seems correct, but certainty in construing deeds of this kind remains elusive. One use of the word "royalty," according to *French*, is not enough to show intent to distinguish a royalty interest from a mineral interest, but several more will be, per *Temple-Inland*. The cautious will not presume to know which kind of interest a deed creates except where the language is unequivocal or nearly identical to a deed construed in one of the decided cases.

D. Fractional "Royalty Interest" or "Of Royalty"

It is well known to oil and gas title examiners, but may come as a surprise to many others, including

professionals in the oil and gas industry and attorneys specializing in other fields, that the law makes a major distinction between a fractional "royalty interest" and the same fraction "of royalty." That the word "of" should make such a crucial difference may seem incongruous to some, but numerous cases illustrate the point.

Where a conveyance or reservation is phrased as a fractional royalty interest, for example a "1/32 royalty interest" in oil and gas produced, the owner is entitled to the stated fraction of total production of the oil and gas produced from the land. *Brown v. Smith*, 141 Tex. 425, 174 S.W.2d 43 (1943). This interest in production is fixed and does not vary with the fractional royalty that may be payable under a particular lease. 2 Patrick H. Martin and Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 327.1 (2012), and cases cited therein. Thus, generally, an interest stated to be 1/4 of 1/8, or 1/4 of the "usual" 1/8, royalty interest in production amounts to a fixed 1/32 of total production. *Helms v. Guthrie*, 573 S.W.2d 855 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); *Allen v. Creighton*, 131 S.W.2d 47 (Tex. Civ. App.—Beaumont 1939, writ ref'd). The rule can hold even if the stipulated fractional royalty interest is exceptionally high. See *White v. White*, 830 S.W.2d 767 (Tex. App.—Houston [1st Dist.] 1992, writ denied), in which the deed at issue conveyed a 3/8 royalty interest applied to the grantor's 1/7 mineral interest, and *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.), in which the deed reserved a 1/4 royalty interest. The reservation of an undivided 1/2 nonparticipating royalty entitling the grantor to 1/2 of all production is not even questioned in *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690 (Tex. 1986).

In recent years, however, a series of cases have been published that call the general rule regarding the fixed royalty into question. *See Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016); *Medina Interests v. Trial*, 469 S.W.3d 619 (Tex. App.--San Antonio 2015, pet denied); *Butler v. Horton*, 447 S.W.3d 514, 516–17, 519 (Tex.App.–Eastland 2014, no pet.). It is important to note, as the San Antonio court of appeals did in *Graham v. Prochaska*, 429 S.W.3d 650, 658 (Tex. App. --- San Antonio 2013, pet denied), that "[s]ometimes, however, the context of the entire deed leads courts to harmonize variations of the "fraction of one-eighth" in favor of finding a floating royalty." This was certainly the case in the recent Texas Supreme Court case of *Hysaw v. Dawkins*. 483 S.W.3d 1.

Hysaw involved the construction of a will. *Id*. at 4. Specifically, the testatrix had owned three tracts of land at her death. *Id*. She devised a fee simple interest of various sizes in these tracts to her three children. *Id*. Each child was further devised an "undivided one-third (1/3) of an undivided one-eighth (1/8)" non-participating royalty interest under all three tracts. *Id*.

A successor of one of the children who received 600 acres from the testatrix executed a lease with a 1/5 Lessor's royalty. *Id*. at 5. The dispute arose between the successor-in-interest and the other two children as to whether the other two children were to receive a 1/3 of 1/8 royalty or whether they, too, were entitled to a 1/3 of 1/5 of the royalties. *Hysaw*, 483 S.W.3d at 6.

In following the general rule, the San Antonio Court of Appeals interpreted the royalty clause in the will as a fixed percentage of total production and held that the other two devisees were entitled to only a 1/24 royalty interest. *Dawkins v. Hysaw*, 450 S.W.3d 147 (Tex. App.--San Antonio 2014) *rev'd* at 483 S.W.3d 6. This holding was supported by the previous cases that construed such language as creating a fixed royalty. *Id*. at 153-54. The Texas Supreme Court, however, in looking at the royalty clause in the context of the four corners of the entire will, disagreed with the lower court. *Hysaw*, 483 S.W.3d 1.

As stated succinctly by Ernest E. Smith in his Case Law Update, presented at the 42nd Annual Ernest E. Smith Oil, Gas and Mineral Law Institute on April 15, 2016 in connection with the high court's holding in *Hysaw*:

> Several factors provide evidence of the testatrix's intent to divide royalties equally among her three children. These include the use of identical language with respect to each child's royalty inheritance; the use of double fractions in lieu of a single fixed fraction, with one fraction (1/3) connoting equality among the three children and the other fraction (1/8) raising the specter of use of the then standard royalty as a synonym for the landowner's royalty. Moreover, the will's final royalty clause contains equal-sharing language. Additionally, the really telling provision indicating the testatrix's intent is the clause providing that if she sold a royalty interest before her death, each child would receive one-third of the unsold royalty. This demonstrates that if an event diminished the royalty, the children's share would be diminished in equal proportions . . . if an event increased the royalty, each child should also share equally in the increase, and not merely the child who received the land to which the increased royalty production was attributable. *Id*.

Although *Hysaw* is not a complete departure from the general rule regarding fixed royalties, there is dicta throughout the opinion that relies heavily on the fact that prior to the 1970s, oil, gas, and mineral leases routinely

provided for a 1/8th landowner's royalty (a concept related to the estate misconception, which is beyond the scope of this paper):

> [T]he reality is that use of 1/8 (or a multiple of 1/8) in some instruments undoubtedly embodies the parties' expectation that a future lease will provide the typical 1/8th landowners' royalty with no intent to convey a fixed fraction of gross production.11 Indeed, as commentators have noted, there is "little explanation" for the use of double factions to express a fixed interest absent a misunderstanding about the grantor's retained ownership interest or use of 1/8 as a proxy for the customary royalty. 2 Howard R. Williams & Charles J. Meyers, Oil and Gas Law § 327.2, at 90–91 (Patrick H. Martin & Bruce M. Kramer eds., 2015) (noting that estate misconception is most likely at play in double-fraction cases but advocating multiplication of double fractions to effectuate plain meaning); Laura H. Burney, *Interpreting Mineral and Royalty Deeds: The Legacy of the One–Eighth Royalty and Other Stories*, 33 St. Mary's L.J. 1, 24 (2001) (arguing that the appearance of 1/8 in a double fraction is patent evidence the parties were operating under the estate misconception).

Thus, from the early days of oil and gas development, the "usual 1/8" was just that – what usually appeared in leases. Today, however, lease royalties are typically much higher than a 1/8th, and many commentators have speculated that drafters of early oil and gas conveyances and reservations may not have anticipated a higher royalty amount in future leases, which, in turn, resulted in such clauses as "of the 1/8th", "of 1/8th", or "of the usual 1/8th". As such, principles of equity seem to sometimes guide courts in seeking a way around the general rule in order to hold such conveyances to be variable royalties within the context of a given conveyance or reservation. *See Hysaw*, 483 S.W.3d 1; *Medina Interests*, 469 S.W.3d 619; *Butler*, 447 S.W.3d 514; *Graham*, 429 S.W.3d 650.

Nevertheless, and in contrast to the construction of fixed royalty conveyances/reservations, there is a litany of cases where specific language, in and of itself, is generally held to create a variable royalty. A conveyance or reservation of a fractional portion "of" or "in and to" the royalty consists of the stated fraction of whatever royalty may be provided for in the lease covering the land. *Harriss v. Ritter*, 154 Tex. 474, 279 S.W.2d 845 (1955). The owner's interest in production will thus depend on the amount of royalty payable to the lessor under the current oil and gas lease. *Luckel v. White*, 819 S.W.2d459 (Tex. 1991); 2 Patrick H. Martin and Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 327.2 (2012), and cases cited therein.

Of course, the rules are not always as easy to apply as they are to state. The Texas Supreme Court in *Brown v. Havard*, 593 S.W.2d 939 (Tex. 1980), was faced with a reservation of "an undivided one-half non-participating royalty (being equal to, not less than an undivided 1/16)" of all oil, gas and other minerals. Ambiguity arose both from the infusion of the parenthetical phrase and within the parenthetical, and the trial court had properly admitted extrinsic evidence of the parties' intent. 593 S.W.2d at 942.

Although *Brown* is technically still good law, there have been numerous cases distinguishing it almost to the point of obscurity based on similarly worded deeds using the "not less than" language. Basically, as the dissent in *Brown* concludes, many Texas courts of appeals have reasoned that the "not less than" language sets a floor that guarantees the royalty provided in the deed would never be less than the stated amount. The floor is a minimum amount of royalty, which in turn implies that the royalty could always be for a higher amount. A holding that such a royalty is fixed would conflict with the idea that the language sets a minimum amount. *See Range Res. Corp v. Bradshaw*, 266 S.W.3d 490 (Tex. App.---Fort Worth 2008, pet. denied); *Coghill v. Griffith*, 358 S.W.3d 834 (Tex. App.---Tyler 2012, pet. denied).

Although the courts seem to have seldom been called upon to address them, title examiners encounter with some frequency circumstances in which an owner of a fractional royalty interest has conveyed royalty interests consisting of fractions of the royalty, or vice versa. Ordinarily not much difficulty is presented by a conveyance of a fixed fractional royalty interest out of a fraction of royalty. Usually the fractional royalty conveyed is based on the assumption that the royalty is 1/8, so that the total conveyance is no more than the grantor's fraction of the royalty multiplied by 1/8. If lease royalty is more than 1/8, the grantor has simply retained the difference between the 1/2 of royalty he owned, for example, and the 1/16 royalty interest he conveyed. Where, on the other hand, a grantor owning a 1/16 royalty interest purports to convey 1/2 of the royalty, the grantor has over-conveyed whenever the lease royalty exceeds 1/8. Certainly the grantee or grantees cannot collectively own more than their grantor did. If the overconveyances resulted from successive deeds purportedly totaling 1/2 of the royalty, then the rules discussed here presumably would require that the earliest in time and recordation be given effect. *See Hunley v. Bulowski*, 256 S.W.2d 932 (Tex. Civ. App.—Texarkana 1953, writ ref'd n.r.e.) Possibly the last of them, if the grantor's stated royalty

interest has become exhausted, will not be effective at all under such circumstances.

E. Sharing of Extraordinary Interests in Production

Some discussion is in order concerning the nature and extent of interests that will be regarded as "royalty" so that owners of undivided interests in the royalty may claim their respective shares. Clearly, any non-expense bearing interest that continues for the life of the lease is royalty, so that any mineral or royalty owner entitled to a share of the royalty must receive his proportionate part, regardless of any characterization of the interest by the parties to the lease as a "bonus royalty" or "overriding royalty" over and above the royalty appearing elsewhere in the lease. *Griffith v. Taylor*, 156 Tex. 1, 291 S.W.2d 673 (1956); *Lane v. Elkins*, 441 S.W.2d 871 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.).

More controversial is whether the same rule applies to an interest substituting for actual production or payable out of production but not necessarily extending for the life of the lease. Texas courts have held that compensatory royalty and minimum royalty payments are subject to sharing with owners of nonparticipating royalty interests. *Andretta v. West*, 415 S.W.2d 638 (Tex. 1967) (compensatory royalty); *Morriss v. First Nat'l Bank*, 249 S.W.2d 269 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.) (minimum royalty).

On the other hand, in *State Nat'l Bank v. Morgan*, 135 Tex. 509, 143 S.W.2d 757 (1940), the commission of appeals characterized a production payment of $600 per acre out of 1/8 of 7/8 of oil and gas production, in addition to the usual 1/8 royalty, as being in the nature of bonus and therefore not subject to the claim of the owner of 1/2 of the royalty. The case has never been overruled, but it would be a mistake to read it as granting carte blanche to a lessor to deprive nonparticipating royalty owners of whatever interest the lessor desires (at least any interest over 1/8) by structuring it as a production payment. The court in *Morgan* seems to have relied, at least in part, on the fact that the production payment was out of production over and above the "usual" 1/8 royalty. 143 S.W.2d at 761-62. Today, of course, there probably is no "usual" royalty; or, if it can be said there is, it varies widely according to locale. Given the high standards now imposed on owners of executive rights with respect to non-executives, *see KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70, 80-81 (Tex. 2015); *Lesley v. Veterans Land Bd. of State*, 352 S.W.3d 479, 490 (Tex.2011); *In re Bass*, 113 S.W.3d 735, 745 (Tex.2003); *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984), any lessor seeking advantage for himself in the reservation of a production payment would certainly face possible damage claims and serious difficulty in proving that the reserved interest is not merely a substitute for higher royalty that could have been obtained from the lessee. The *Morgan* holding itself seems vulnerable in today's climate.

IV. CONCLUSION

It would be practically impossible, for a presentation such as this one, to compile a complete guide to the conveyancing rules applicable to mineral and royalty deeds and their application by Texas courts. We hope this paper will serve to highlight some of the conveyancing issues the practitioner is most likely to encounter in title examination and drafting, and to remind and alert the audience to both helpful rules and hidden dangers.