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The Dilemma of Double Fractions: Has Hysaw Resolved the Fixed vs. Floating Non-Participating Royalty Interest Issue?

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THE DILEMMA OF DOUBLE FRACTIONS: HAS HYSAW RESOLVED THE FIXED V. FLOATING NON-PARTICIPATING ROYALTY INTEREST ISSUE?

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CHAPTER 20
The Dilemma of Double Fractions: Has *Hysaw* Resolved the Fixed vs. Floating Non-Participating Royalty Interest Issue?

Chapter 20

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THE DILEMMA OF DOUBLE FRACTIONS: HAS HYSAW RESOLVED THE FIXED V. FLOATING NON-PARTICIPATING ROYALTY INTEREST ISSUE?

I. INTRODUCTION

Lawyers, landmen, land owners and producers face a long list of perennial problems when interpreting or drafting documents that affect mineral estates. I and others have written extensively about these problems, including the “fixed versus floating NPRi” issue addressed in a recent Texas Supreme Court case, Hysaw v. Dawkins.1 In that case, three siblings, who were beneficiaries of their mother’s will, disputed the appellate court’s holding that the double fraction 1/3 of 1/8 created a fixed 1/24th non-participating royalty interest (nпри), rather than a floating 1/3 nпри. The dispute arose when one sibling leased her land and negotiated a 1/5th landowner’s royalty, rather than the once-common 1/8th. The case presented the Texas Supreme Court with the opportunity to clarify mixed results from appellate court cases. This paper reviews cases prior to Hysaw and discusses the lessons that opinion provides regarding the “fixed versus floating” nпри issue. That discussion reveals that while Hysaw avoids bright-line resolutions, it provides direction for interpreting existing deeds and drafting lessons for new documents in the shale era.

II. BACKGROUND: WHY DRAFTERS USE DOUBLE OR CONFLICTING FRACTIONS?

Property owners face two key decisions when creating, by grant or reservation, interests in their subsurface estates: first, whether to create a mineral interest or a royalty interest; and second, what the fractional size of that interest should be.3 This section examines courts’ interpretations of deeds affecting the second decision and the lessons those decisions teach regarding drafting in the shale era.

A. Why Conflicting Fractions Were Used and Why They Are Not Necessary

Assume Owner has decided to convey to Grantee an undivided 1/2 fractional mineral interest, rather than a royalty interest. Assume also that Owner has previously leased his land to Oil Company with a familiar lease form, which is commonly viewed as creating a fee simple determinable estate in the lessee. That lease is an older version requiring the lessee to pay the owner-lessee the traditional, but no longer common, 1/8 landowner’s royalty.4 This form lease conveys a fee simple determinable estate in all, or 8/8, of the mineral estate to Oil Company, leaving Owner with a non-possessory future interest, called a possibility of reverter, in all, or 8/8, of the mineral estate.5 Note that only in the oil patch will one find “the whole” defined as 8/8. As described below, this phenomenon and others stem from the legacy of the 1/8 royalty in older form leases.

Today it is clear that Owner’s pre-existing lease has not converted Owner’s interest in the mineral estate from an interest in all (8/8) to only 1/8.6 The lease’s royalty clause entitles Owner to a share of the proceeds from the sale of the production, but does not reduce the size of his possibility of reverter.7 Owner owns a non-possessory interest in all of the minerals, but he can convey a fractional interest subject to the pre-existing lease. To convey the desired undivided 1/2 mineral interest, the owner should use “mineral” language and insert the fraction 1/2 in the form’s designated space for the fractional interest Owner intends to convey.

12016 WL 352229 (Tex. Sup. Ct.). The author worked on this case in the Texas Supreme Court jointly with Mary Keeley, Boyce Cabaniss, and John McFarland, the lawyers who represented the Hysaw parties in the trial court and court of appeals.

2This part of the paper is from, Laura H. Burney, Oil, Gas, and Mineral Titles: Resolving Perennial Problems in the Shale Era, 62 K.U. L. REV. 97, 103-122 (2013).

3See White v. Smyth, 214 S.W.2d 967, 976 (Tex. 1948) (determining the mineral estate was not partitionable in kind). Therefore, owners tend to grant or reserve undivided interests in their subsurface estates. These undivided interests can be expressed with fractions or percentages. As demonstrated above, conflicting fractions have spawned the most litigation.

4See 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, 28 (acknowledging leases traditionally convey a 1/8 royalty).

5Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 460 (Tex. 1998); 1 ERNEST E. SMITH & JACQUELINE L. WEAVER, TEXAS LAW OF OIL AND GAS § 3.09(E), at 3–78 (2009) (noting possibility of reverter is vested interest lessor retains after granting a lease); see PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS MANUAL OF OIL AND GAS TERMS 818 (Aileen M. Sterling et al. eds., 11th ed. 2000) (describing a possibility of reverter as the “interest left in a grantor or lessee after a grant of land or minerals subject to a special limitation”).

6Laura H. Burney, The Interaction of the Division Order and the Lease Royalty Clause, 28 ST. MARY’S L.J. 353, 429 (1997) (“[I]t should be considered well-settled in Texas that the oil and gas lease vests 8/8ths of the oil and gas in the lessee, not 7/8ths, with the lessor retaining a possibility of reverter in 8/8ths.”).

7Id. (noting lessor retains a possibility of reverter in all 8/8).

8For examples of deed forms for accomplishing these goals, see, e.g., 4 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE
1. Why Multiclause Deed Forms Were Used and Why They Are Not Necessary

Another fact is clear today: as a matter of law, Grantee’s 1/2 undivided ownership in Owner’s mineral estate entitles her to a proportionate share of the rents and royalties payable under the terms of the pre-existing lease. Therefore, after the conveyance, Oil Company owes 1/2 of the 1/8 landowner’s lease royalty to Owner and the other 1/2 to Grantee. That fact, however, eluded early courts.

a. Development of the “Multiclause” Deed Form

For example, in Caruthers v. Leonard, the court held that a conveyance subject to an existing lease did not entitle the grantee to a proportionate share of the rents and royalties payable under that existing lease. In response to that decision, which was later overruled, a notorious deed form with multiple clauses and spaces for fractions developed to insure that Grantee received rents and royalties in proportion to the fractional mineral interest conveyed. Specifically, in addition to the granting clause, this deed form recited that the conveyance is made “subject to” the existing lease and “covers and includes” the specified fractional interest of rents and royalties in the existing lease. Another clause provided that the grantee would receive the stated fractional interest in rents and royalties payable under future leases. Notably, these additional subject to and future lease clauses lacked granting clause language.

The reason for this omission is simple: these clauses were inserted not to make additional grants, but to clarify that the grantee receives a proportionate amount of rents and royalties under any lease, existing or future.

Courts eventually corrected the errors of Caruthers. But the form, which should be avoided, exists in formbooks today. If filled out properly, with the same fraction in every clause, it presents no problems for title examiners or courts. Unfortunately, misconceptions among laypersons and legal minds have complicated drafting and interpreting these deeds. The primary offender is the “estate misconception.”

b. Role of the “Estate Misconception”

The estate misconception—a legacy of the “usual 1/8th landowner’s royalty”—describes the confusion regarding estate ownership after leasing property. In the example above, Owner, under the influence of the estate misconception, assumed the lease converted his ownership to 1/8 in the mineral estate. Therefore, if Owner intended to convey an undivided 1/2 interest, he multiplied that fraction by 1/8 and inserted the fraction 1/16 in the deed’s granting clause. Because of the wording of the other post-Caruthers clauses—the subject to and future lease clauses—Owner inserted the fraction 1/2 in those spaces, creating a deed with conflicting fractions.

References:

[14] Id. at 86.
[15] Id.
[16] Id.
[17] Id. (noting this form of deed was in response to correct the holding in Caruthers, which found “that when a grantee received an interest in a mineral estate that was already under lease, only a reversionary interest passed”).
[19] See, e.g., Burford, supra note 8, at § 1:2 (outlining the various clauses included in a mineral deed form and cautioning against “coupling with a grant of the minerals the words ‘royalty,’ ‘royalty interest,’ or minerals ‘produced and saved’ from the land” to avoid conveying a royalty interest).
[21] See Burney, Interpreting Mineral and Royalty Deeds, supra note 4, at 15 (explaining lessors sometimes believe they only own 1/8 interests in the minerals after the lease when in actuality they have a possibility of reverter in 8/8).
[22] See Burney, The Regrettable Rebirth, supra note 11, at 86-87 (emphasizing the effect of the Caruthers decision on deed forms and noting that grantors wishing to convey a 1/2 mineral interest “can do so by simply conveying a 1/2 mineral interest, regardless of an existing lease”).
B. Interpreting Multiclaue Deeds with Conflicting Fractions: The Birth and Demise of the “Two-Grant” Doctrine

These multiple fractions created uncertainty for title examiners. Which fraction represented the size of the interest Owner intended to convey? Or did the deed make multiple grants? Early cases provided an answer: deeds with multiple and conflicting fractions conveyed more than one interest. Writers labeled this interpretative approach the “two-grant” doctrine. In this section, I review the development and demise of the two-grant approach to interpreting deeds with conflicting fractions. The next section updates a related issue: deed forms with double or restated fractions.

1. Concord Oil Company v. Pennzoil Exploration & Production Company

The two-grant doctrine arose in Texas, where the multiclaue deed form originated. Texas courts adopted this interpretative approach for multiclaue deed forms with conflicting fractions beginning in the 1940s. The last supreme court case to address the two-grant doctrine is a 1998 opinion, Concord Oil Co. v. Pennzoil Exploration & Production Co.

In Concord Oil, courts were confronted with this deed: a 1937 conveyance of a mineral interest with the fraction 1/96 in the granting clause and the fraction 1/12 in a subsequent clause. At the time, the grantor owned a 1/12 mineral interest in the property, which was burdened by a pre-existing lease providing for a 1/8 landowner’s royalty. Notably, the deed through which the grantor had received his 1/12 mineral interest a year earlier was the same as the 1937 deed form but the fraction 1/12 appeared in both clauses.

By the 1990s, Pennzoil owned the grantor’s interest, if any, under the 1937 deed, and Concord Oil owned the grantee’s interest. Just as today’s shale plays are spawning lawsuits over mineral deeds delivered decades ago, renewed production on property covered by the 1937 deed prompted Pennzoil to sue Concord Oil in 1993.

Pennzoil relied on precedent establishing the two-grant approach for interpreting multiclaue deeds with conflicting fractions. Under that approach, Pennzoil argued that the 1937 deed had conveyed a 1/96 mineral interest and a 1/12 interest in rents and royalties under an existing lease, which had terminated. Therefore, Pennzoil claimed that Concord Oil, as successor to the grantee, owned only a 1/96 interest in the mineral estate, meaning Pennzoil owned the grantor’s remaining interest. Concord Oil, on the other hand, argued that the 1937 deed had conveyed the grantor’s entire 1/12 interest and Pennzoil had received nothing through its chain of title.

The trial court and court of appeals agreed with Pennzoil. Eventually, however, the Texas Supreme Court ruled in favor of Concord Oil, holding that the conflicting fractions could be harmonized from the four-corners of the document. In light of the particular language of the 1937 deed, the court held it conveyed a single 1/12 mineral interest.

However, because the opinion was a plurality, with concurring and dissenting opinions, the fate of the two-grant doctrine remained unclear. Concord Oil had urged the court to reject the two-grant doctrine and embrace the estate misconception as the explanation for conflicting fractions in multiclaue deed forms. As explained above, that misconception, which emanates from the typical 1/8 landowner’s royalty, explains why

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23 Some cases viewed these deeds as granting one fraction at delivery of the deed that expanded upon expiration of the existing lease. See, e.g., Jupiter Oil Co. v. Snow, 819 S.W.2d 466, 467 (Tex. 1991) (noting that, upon termination of the lease, the grantee’s interest “expanded into a full one-half [mineral interest] by operation of law”); see also Burney, The Regrettable Rebirth, supra note 11, at 92–94 (discussing the “expansion facet” and related decisions, including Jupiter Oil).

24 See Concord Oil Co., 966 S.W.2d at 454 (discussing the trial court’s reliance on the two-grant doctrine in its decision and defining the doctrine); 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 327.2 (2012) [hereinafter 2 WILLIAMS & MEYERS]; Tevis Herd, Deed Construction and the “Repugnant to the Grant” Doctrine, 21 TEX. TECH L. REV. 635, 651 (1990).

25 Burney, The Regrettable Rebirth, supra note 11, at 90.

26 966 S.W.2d 451

27 Id. at 453.

28 Id.

29 Id.

30 Id. at 453–54 (noting Concord Oil Company’s claim was brought through the grantee of the 1937 deed and that the 1937 grantor conveyed another mineral deed in 1961 which was subsequently conveyed to Pennzoil Exploration and Production Company).

31 Id. at 454.


33 Concord Oil Co., 966 S.W.2d at 453.

34 The opinion breaks down to a 4-1-4 decision. Id. at 454. The plurality found that the deed conveyed a single 1/12 mineral interest and harmonized the conflicting fractions within the deed. Id. (plurality opinion). The concurring opinion by Justice Enoch agreed that only a single estate was created but wrote separately to emphasize the overconveyance that would occur if the dissent’s interpretations were used. Id. (Enoch, J., concurring). The dissent argued for the “two-grant” doctrine to determine that two estates were created, “a 1/96 perpetual interest in the minerals, and a 1/12 interest in rentals and royalties . . . .” Id. at 465 (Gonzalez, J., dissenting).
the conflicting fractions follow a pattern: they are multiples of 1/8. Typically, drafters multiplied the intended fraction by 1/8 and inserted that number in the granting clause. Indeed, early case law sanctioned that approach.\(^{35}\)

The 1937 Concord Oil deed followed the pattern: 1/96 in the granting clause = 1/8 times 1/12 (the fraction in the subsequent clause).\(^{36}\) As another example, the deed at issue in a 1991 Texas Supreme Court case, Luckel v. White, contained the fractions 1/4 in the subject to and future lease clauses, but the smaller fraction 1/32 in the granting clause (1/4 times 1/8 = 1/32).\(^{37}\) As noted in Concord Oil, in light of the language appearing in the subsequent clauses, that fraction, rather than the smaller fraction in the granting clause, reflects the drafter’s intent about the size of the interest the grantor intended to convey.

### a. The Court Declined to Follow the Kansas Approach Regarding the Estate Misconception

To convince the Texas court to incorporate the estate misconception into the interpretative process, Concord Oil pointed to Kansas decisions. Specifically, in Shepard v. John Hancock Mutual Life Insurance Co., the Kansas Supreme Court construed a reservation in a deed that described the size of the interest as “an undivided 1/4 of the landowners [sic] 1/8 royalty, or, 1/32 of the interest in and to all oil, gas or other minerals . . . .”.\(^{38}\) The court held the grantor had reserved a 1/4 mineral interest.\(^{39}\) In reaching this conclusion, the court incorporated into its interpretative process the pervasive confusion among “not only persons in the petroleum industry” but with courts:

> As the most common leasing arrangement provides for a one-eighth royalty reserved to the lessor, the confusion of fractional interests stems primarily from the mistaken premise that all the lessor-land-owner owns is a one-eighth royalty. In conveying minerals subject to an existing lease . . . mistake is often made in the fraction of the minerals conveyed by multiplying the intended fraction by one-eighth.\(^{40}\)

In Concord Oil, however, the Texas Supreme Court declined to fully follow the Shepard approach. Instead, the court noted the estate misconception, but viewed it as “instructive, but not dispositive.”\(^{41}\) In fact, the court declined to adopt any bright-line rules for this interpretative issue, focusing instead on the lack of any two-grant language in the 1937 deed.\(^{42}\)

### b. Guidelines from Concord Oil’s “Four-Corners” Approach

Yet, as I wrote in an earlier article, the Concord Oil opinion provided “useful guidance to title examiners” for interpreting multiclause deeds:

First, according to the opinion, a deed with multiple fractions should not be interpreted as making two grants unless express language to that effect appears in the deed. Such language would include the phrases ‘separate from’ or ‘in addition to,’ phrases which were absent from the Concord deed. Notably, [the additional clauses in multiclause deed forms] do not contain such granting language. Therefore, multiclause deed forms should rarely, if ever, be interpreted as making separate grants.\(^{43}\)

Because of the multiple opinions in Concord Oil, title examiners remained cautious about interpreting multiclause deed forms with conflicting fractions. The concurring opinion created particular concern by focusing on the future lease clause.\(^{44}\) In his opinion, Justice Enoch criticized the plurality opinion for having

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\(^{35}\)Tipps v. Bodine, 101 S.W.2d 1076, 1079 (Tex. Ct. App. 1937); see also Concord Oil Co., 966 S.W.2d at 464–65 (Tex. 1998) (Enoch, J., concurring) (blessing the use of different fractions to convey a single interest); see also Burney, The Regrettable Rebirth, supra note 11, at 102 (noting the reliance on Tipps in interpreting multiclause deeds).

\(^{36}\)Concord Oil Co., 966 S.W.2d at 453.

\(^{37}\)819 S.W.2d 459, 461 (Tex. 1991). For a summary of the Luckel decision, see Burney, Interpreting Mineral and Royalty Deeds, supra note 4, at 9–11 (rejecting the “granting clause prevails” standard under Alford and instead relying on the presence or absence of a future lease clause in determining the intent of the parties and the fraction conveyed).

\(^{38}\)268 P.2d 19, 21 (Kan. 1962). The Shepard deed was not a multiclause deed form, but it contained multiple fractions. The Shepard deed form involved “double and restated” fractions discussed in the next section. See infra Part II.C.

\(^{39}\)Id. at 27.

\(^{40}\)Id. at 26 (citing Magnusson v. Colorado Oil & Gas Corp., 331 P.2d 577, 583–84 (Kan. 1958)); see also Burney, Interpreting Mineral and Royalty Deeds, supra note 4, at 22 (noting the pervasiveness of the 1/8 royalty in other jurisdictions). Shepard did not involve a multiclause deed form; rather, the language fits the “restated” or “double fraction” problem; see also Heyen v. Hartnett, 679 P.2d 1152, 1157–58 (Kan. 1984) (construing deed with fractions 1/16 and 1/2 as conveying an undivided 1/2 mineral interest).

\(^{41}\)Concord Oil Co., 966 S.W.2d at 460.

\(^{42}\)Id. at 460–61.

\(^{43}\)Burney, Interpreting Mineral and Royalty Deeds, supra note 4, at 16.

\(^{44}\)Concord Oil Co., 966 S.W.2d at 464 (Enoch, J., concurring) (“Further, we were wrong to conclude that the ‘subject to’ clause of the Crosby deed includes future
emphasized a future lease clause in the deed as the basis for concluding the 1937 deed conveyed a 1/12 interest. However, the plurality opinion adopted a four-corners approach and placed no significance on the presence or absence of any clause, particularly a future lease clause. On the contrary, that opinion states that the “decision in this case does not depend on the presence or absence of a ‘future lease’ clause, which the court of appeals found dispositive.”

2. Post-Concord Oil Decisions: The Demise of the “Two-Grant” Doctrine

Despite these words from the Texas Supreme Court about the relative insignificance of a future lease clause, a post-Concord Oil appellate opinion considered it determinative. Neel v. Killam Oil Co. involved a multiclause deed form that departed from the typical pattern. Specifically, in the 1945 Neel deed, the larger fraction 1/2 appeared in the granting clause and subject to clause, and the smaller fraction 1/16 appeared in the future lease clause. The parties agreed the interest was a royalty interest, rather than a mineral interest. Regarding the size of the interest, grantee’s successor argued the deed conveyed a 1/2 royalty, which would entitle the grantee to 1/2 of the royalty reserved in any existing or future leases. To counter assertions that the granting clause and future lease clause made separate grants, the grantee pointed to this sentence in the deed’s granting clause: “[t]his grant shall run forever.” The controversy arose after the existing lease, with the typical 1/8 landowner’s royalty, terminated and new leases were executed providing for a 1/4 royalty. The court of appeals ruled against the grantee, holding the grantee was entitled to a fixed 1/16 interest in production under the new leases as provided in the future lease clause. In other words, in Neel the court reverted to the two-grant doctrine.

In reaching this conclusion, the Neel court cited Concord Oil and Luckel, explaining that those cases required it to seek the parties’ intent from the four corners of the document. However, the Neel opinion omits any review of the two-grant saga, or of the specifics from Concord Oil, such as the court’s admonition that to create separate grants a deed should contain clear evidence of such intent. Had the Neel court followed Concord Oil’s guidance, the deed would have been interpreted as conveying the 1/2 “of” royalty forever as set forth in the granting clause. The estate misconception explains the fraction in the future lease clause: 1/16 reflects the amount of production owed to the owner of a royalty entitled to 1/2 of the 1/8 royalty reserved in the typical lease royalty clause.

Although the Texas Supreme Court declined to review Neel, a recent opinion from the same court of appeals “disapprove[d] of [its] analysis in Neel.” Hauser v. Cuellar involved a multiclause deed form that, like the deed in Neel, contained conflicting fractions that departed from the Concord Oil pattern. In Hauser, the clauses provided as follows: granting clause: 1/2; subject to clause: 1/2; future lease clause: 1/16. After determining that the deed conveyed a royalty interest, the court considered whether it was a fixed 1/16 or a 1/2 royalty interest that entitled the owner to 1/2 of the 1/4 landowner’s royalty in new leases on the property. In adopting the 1/2 royalty option, the court cited its 2006 opinion in Garza v. Prolific Energy Co., and explained its analysis as follows: “As in Garza, our decision is consistent with Concord Oil Co. because the [Hauser] deed does not contain any language suggesting two differing estates were being conveyed. Rather, the [Hauser] deed, like

...
the deeds in Garza, involves a single conveyance with fixed rights. 60

A dissenting opinion in Hauser argued that the future lease clause should have controlled. 61 However, in light of the majority's disapproval of Neel, its adherence to Concord Oil's guidelines, and other recent appellate court decisions that acknowledge the role of the estate misconception, 62 the two-grant doctrine should disappear in Texas. Fortunately, other jurisdictions have wisely declined to adopt Texas's approach. 63 Therefore, title examiners may report, without exaggerating, the death of the two-grant doctrine for interpreting multiclause deeds with conflicting fractions in the shale era. Unfortunately, as described in the next section, court opinions have not sufficiently incorporated the estate misconception or the "legacy of the 1/8th royalty" into the interpretative process for related issues: deeds with double or restated fractions.

C. "Double" or "Restated" Fractions—The Continued Legacy of the "Usual 1/8th Landowner's Royalty"

Writing before the shale era, I addressed these two interpretative issues: how should courts interpret deeds when the fractional interest conveyed or reserved is expressed (1) as a double fraction, such as "1/2 of 1/8," or (2) as a restated fraction, such as "an undivided 1/2 non-participating royalty (being equal to, not less than an undivided 1/16)." 64 In one article, I note courts' failure to address the "legacy of the usual 1/8th landowner's royalty," which contributes to the estate misconception, and its effect on drafting and interpreting double and restated fractions. 65 Because parties focused on that royalty, they expressed fractions with a double fraction, where one was invariably 1/8, or by restating with a fraction equal to a multiple of 1/8, as in the restated example above. Rather than analyze that legacy in light of other language in the deed, courts tended to ignore it or merely multiply the fractions.

For example, in a 1984 Texas Supreme Court case, Alford v. Krum, the multiclause deed contained a double fraction, 1/2 of 1/8 in the granting clause. 66 The court viewed that clause as conveying a 1/16 interest, without noting or analyzing this mode of expressing that single fraction. 67 This phenomenon, like the use of the fraction 8/8 to express the term "all," appears only in the oil patch. And again, the legacy of the usual 1/8 royalty explains the practice since one of the two fractions is invariably the traditional 1/8 landowner's royalty. Yet in Alford and other cases, court opinions multiply the fractions without analyzing the reason for the formula.

Before Alford, proponents of the analysis approach had argued that courts should incorporate the legacy of the 1/8 royalty into the interpretative process for these fractional issues. 68 Under such an approach, the double or restated fractions "should not be multiplied, but analyzed to determine the parties' intent." 69 Not all commentators agree with this approach, however. Specifically, the Williams & Meyers Treatise argues that double fractions should be multiplied under a plain meaning approach to document interpretation. 70 As

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60 Id. at 470 (citing Garza, 195 S.W.3d at 146; Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 457 (Tex. 1998)).
61 Id. at 472–73 (Marion, J., dissenting). Note the same judge wrote the majority opinion in Neel v. Killam Oil Co., Ltd., 88 S.W.3d 334, 337 (Tex. App. 2002), disapproved of by Hauser, 345 S.W.3d at 470.
63 Burney, Oil, Gas & Mineral Titles, supra note 2, at 24 (describing the courts' methods of dealing with mineral deeds); see also Burney, Interpreting Mineral and Royalty Deeds, supra note 4, at 23 ("[T]he Arkansas Supreme Court considered the issue that led the Texas courts down the path to the creative two-grants rule . . . .") (quoting Owen L. Anderson, Recent Developments in Nonregulatory Oil and Gas Law, 45 INST. ON OIL & GAS L. & TAX'N § 1.03(4), at 1–14 (1994)).
67 Id. at 873–74. Alford adopted the "granting clause" prevails rule for the multiclause deed problem, but was subsequently overruled by Luckel, 819 S.W.2d at 461.
68 Burney, Interpreting Mineral and Royalty Deeds, supra note 4, at 24 (citing Ernest E. Smith, Conveyancing Problems, STATE BAR OF TEX., ADVANCED OIL, GAS, & MINERAL LAW COURSE G, G–2 (1981)).
69 Id. at 25. Not all commentators agree with this approach. See 2 WILLIAMS & MEYERS, supra note 24, at § 327.3, at 94.1 (2012).
70 See, e.g., 2 WILLIAMS & MEYERS, supra note 24, § 327.3, at 94.1; Phillip E. Norvell, Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating
described below, recent court opinions also reflect contradictory opinions in resolving these disputes.

1. Shale Era Cases: Conflicting Approaches from Appellate Opinions

Demonstrating that shale-production surges produce title-litigation surges, Texas courts addressed several disputes involving double and restated fractions. Most of these cases involve the grant or reservation of royalty interests in which the dispute centers on one question: whether the deed created a "fixed" or an "of" royalty interest. A "fixed" royalty entitles the owner to a set share of the proceeds from the sale of production, regardless of the fractional size of the landowner's royalty in any lease. An "of" royalty interest varies with the size of the landowner's royalty in leases. As demonstrated in the cases discussed below, these disputes arise when the royalty in a new lease departs from the traditional 1/8 landowner's royalty.

Hudspeth v. Berry, a 2010 opinion, involved a dispute over a 1943 deed reserving an "undivided 1/40th royalty interest (being 1/5th of 1/8th)" with grantee reserving leasing rights, and the grantor receiving 1/5 of the usual 1/8 royalty. The Berrys owned the reserved interest and claimed their predecessors were each entitled to 1/5 of the 1/5 landowner's royalty reserved in a new lease, or 1/25 of the proceeds from production. As a result, the Berrys claimed they were entitled to a total of 2/25 of the production proceeds. The trial court agreed with the Berrys' interpretation. The court of appeals, however, held the deed reserved two fixed 1/40 royalty interests, a ruling the Berrys did not appeal to the Texas Supreme Court.

However, an opinion decided two years before Berry addressed a deed with similar language, including an express reference to a royalty the size "of" the usual 1/8 lease royalty. The deed in that case, Range Resources Corp. v. Bradshaw, reserved:

an undivided one-half (1/2) Royalty (Being equal to not less than an undivided one-sixteenth ([1/16]) of all the oil, gas and/or other minerals . . . to be paid or delivered to said Grantors . . . free of cost Forever . . . In the event oil, gas or other minerals are produced . . . Grantors . . . shall receive not less than one-sixteenth (1/16) portion (being equal to one-half (1/2) of the customary one-eighth (1/8) Royalty) . . .

Both the trial court and the court of appeals interpreted the reservation as a fraction "of" royalty rather than as a "fixed" fractional royalty. The appellate court opinion contains an extensive discussion of the difference between the two types of interests and reviews a 1980 Texas Supreme Court case involving a reservation that raised the "restated" fraction problem. In that case, Brown v. Havard, the majority concluded that the deed

567 S.W.2d 295, 296 (Ark. 1978). The author concludes that, "[o]ne cannot quarrel with the construction of the 'double fraction' formula by the Arkansas Supreme Court in Lide [sic]. . . . However, one is haunted by the fear that the 'horrors of the double fraction' may be the result of an error based simply on the parties' selection of the wrong royalty deed form." Norvell, supra note 70 at 951.

71 Smith & Weaver, supra note 5, at § 3.7, at 3-46 n.187.2.

72 See Range Res. Corp. v. Bradshaw, 266 S.W.3d 490, 493 (Tex. App. 2008) (comparing a fraction "of" royalty versus a "fractional" royalty and stating that a fraction "of" royalty "'floats in accordance with the size of the landowner's royalty contained in the lease"); see also Williams & Meyers, Oil and Gas Law § 327 (2012) [hereinafter Williams & Meyers]. There is an additional difference: the effect of the executive's duty to lease. With an "of" royalty, the executive could potentially breach the duty of "utmost good faith" by negotiating a landowner's royalty that was too low. See Bradshaw v. Steadfast Fin., LLC, 395 S.W.3d 348, 364-65 (Tex. App. 2013). If the royalty interest is fixed, however, the negotiated royalty cannot affect the "fixed" owner's share of production. See id. (discussing cases in which the executive breached the duty of utmost good faith by entering into a lease depriving the royalty owner of benefits they would have received in a lease to a disinterested party).

73 No. 2-09-225-CV, 2010 WL 2813408 (Tex. App. July 15, 2010). In the interest of full disclosure: I provided an expert opinion in support of Berry's position.

74 Id. at *2.

75 Id. at *1.

76 Id.

77 Id. at *4.


79 See id. at 493-94 (emphasis added).

80 Id. at 497.

81 See id. at 493-97 (discussing Brown v. Havard, 593 S.W.2d 939 (Tex. 1980)).
was ambiguous, but the dissent viewed the deed as having unambiguously created a fraction “of” royalty. In *Range Resources*, the court addressed differences between the two deeds, but ultimately favored the dissent’s approach in *Brown*. The losing party in *Range Resources* asked the Texas Supreme Court to review the appellate court decision, but the court declined its petition.

A case decided in 2011 appears consistent with *Range Resources* rather than *Berry*. In *Sundance Minerals v. Moore*, a deed reserved “an undivided and non-participating one-half interest in the oil, gas and other mineral rights” or “one half of the usual one eighth royalty” received for such [sic] oil, gas and other minerals produced. The court held the deed reserved 1/2 “of” the 1/5 landowner’s royalty in the subsequent lease.

Although the result in *Sundance Minerals* reflects the analysis approach, that opinion, like the *Range Resources* opinion, does not overtly address the estate misconception or the legacy of the 1/8 royalty. However, in reaching their conclusions both opinions cite extensively to *Luckel v. White* and follow its harmonizing approach. That 1991 Texas Supreme Court opinion, in which the court interpreted a deed with the conflicting fractions 1/4 and 1/32, expressly acknowledges the effect of the 1/8 royalty on drafting:

> We do not quarrel with the assumption that the parties probably contemplated nothing other than the usual one-eighth royalty. But that assumption does not lead to the conclusion that the parties intended only a fixed 1/32nd interest. It is just as logical to conclude that the

As in *Range Resources*, the losing party in *Sundance Minerals* petitioned the Texas Supreme Court to review the appellate court’s ruling. That petition stressed the surge of shale production in Texas and the decline of the usual 1/8 landowner’s royalty, and asked the court to provide guidance:

> Practitioners and lower courts dealing with the resurgence of cases need guidance on significant, recurring issues like the deed construction dispute presented in this petition for review. Especially when language in deeds use differing fractions to express the intent of the parties regarding the character and size of the interest reserved, it is vitally important that all of the reviewing courts consistently apply the rules of interpretation and follow established precedent to reach the same results.

Despite this plea for guidance, the Texas Supreme Court declined to review the court of appeals’ decision in *Sundance Minerals*. The court also denied a petition for review in another appellate opinion from 2012, *Coghill v. Griffith*. That opinion relies heavily on *Luckel* and cites *Range Resources* in concluding that a deed with restated and double fractions created an “of” royalty interest.

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84 Id. at 512–13 (affirming trial court’s grant of summary judgment interpreting that the deed reserved 1/2 of the 1/5 royalty).
85See, e.g., *Range Res. Corp.*, 266 S.W.3d at 496 (“Construing the deeds as a whole, and harmonizing all parts to give effect to the parties’ intent, we determine that a ‘fraction of royalty’ was conveyed.”); *Sundance Minerals v. Moore*, 354 S.W.3d 507, 511 (Tex. App. 2011) ("All parts of the deed are to be harmonized, construing the instrument to give effect to all of its provisions.").
90Id. at 838–40 (“The language used in *Range Resources Corp.* and in the instant case establishes that the interest
However, another recent opinion retreats to the "multiply" approach. In Moore v. Noble Energy, the court viewed the following language as creating a fixed 1/16 royalty interest: "a one-half non-participating royalty interest (one-half of one-eighth of production)." In that opinion, the court relies heavily on the Williams & Meyers treatise, which approves of multiplying rather than analyzing double fractions, and attempts, unsatisfactorily, to distinguish Range Resources.

Another recent appellate court opinion also strains to distinguish Range Resources and Sundance Minerals and, like the Moore opinion, retreats to the multiply approach. Wynne/Jackson Development v. PAC Holdings, Ltd., involves Barnett shale production from property in Denton County, Texas. The relevant language provided that the grantor reserved:

a non-participating royalty of one-half (1/2) of the usual one-eighth (1/8) royalty in and to all oil, gas, and other materials produced, saved and sold from the above-described property, provided, however, that although said reserved reserved royalty is non-participating and Grantee shall own and possess all leasing rights in and to all oil, gas and other minerals, Grantor shall, nevertheless, have the right to receive one-half (1/2) of any bonus, overriding royalty interest, or other payments, similar or dissimilar, payable under the terms of any oil, gas and mineral lease covering the above-described property.

The parties framed the issue as whether the deed reserved a fixed or fraction "of" royalty. In reversing the trial court and holding the deed reserved a fixed fractional royalty, the court relied on cases, such as a 1955 Texas Supreme Court decision, that multiplied, rather than analyzed, double fractions. In other words, unlike Range Resources and Sundance Minerals, the Wynne/Jackson decision ignores the legacy of the usual 1/8 landowner’s royalty, despite the express reference to that royalty in the deed.

2. Lessons from the Double and Restated Fraction Cases for the Shale Era

The results reached in Sundance Minerals, Range Resources, and Coghill reflect the analysis approach for double and restated fractions. That approach respects the goal of deed interpretation, which is to ascertain the intent of the parties. The analysis approach also promotes title stability by seeking intent from the four corners of the deeds, without resorting to outside evidence. Sundance Minerals, Range Resources, and...
Coghill reach results consistent with language within the deeds. Specifically, the deeds in each of those cases mention the “usual 1/8 lease royalty” and describe the interest at issue as a fraction “of” that royalty. By noting those provisions and relying on Luckel’s “harmonizing” approach, those opinions incorporate the legacy of that once-common royalty on drafting into the interpretative process.

The Berry, Moore, and Wynne/Jackson opinions, on the other hand, ignore express references to the “usual 1/8 royalty” and other language, including the reference to a 1/5 interest in Berry and a 1/2 interest in Moore and Wynne/Jackson. Further departing from the four-corners rule, the Moore and Wynne/Jackson opinions insert language not found in the document—the fraction 1/16. In short, these three decisions merely multiply and fail to analyze the language in the deeds.

For future drafting, the decisions discussed above and others teach these lessons: drafters should state expressly whether they intend to convey or reserve a “fixed fractional interest” rather than a fraction “of” the royalty reserved in existing and any future leases. An additional statement should expressly clarify that, for instance, a fraction is not a “fixed” interest, if an “of” royalty interest is intended. And the size of that “fraction of royalty” or “fixed royalty” should be stated as a single rather than a double fraction.

However, as a Texas court noted in Barker v. Levy when reviewing drafting advice regarding the “mineral or royalty” issue, “It is quite probable that these [parties] now heartily agree with this advice. However, it was written [decades] too late to have been helpful” in the shale era. Title examiners could view the Texas Supreme Court’s decisions declining petitions for review in Sundance Minerals, Range Resources and Coghill as approval of those better-reasoned opinions. The Texas Supreme Court’s opinions in Luckel and Concord Oil also support the approach in those three cases by acknowledging the legacy of the 1/8 royalty. Absent firmer endorsement from the state’s high court, however, these mixed opinions may motivate parties to file lawsuits over deeds with double and restated fractions in the shale era. The next section addresses whether the recent Hysaw opinion has provided that endorsement.

III. HYSAW V. DAWKINS: THE TEXAS SUPREME COURT ADDRESSES THE “DOUBLE FRACTION” DILEMMA

In addition to the appellate cases discussed above, the fourth court of appeals produced two other opinions reflecting different analytical approaches to double and restated fractions. One was Dawkins v. Hysaw, the opinion eventually reversed by the Texas Supreme Court, and another was Graham v. Prochaska. Handed down only a few months before Dawkins, Graham held that a grantor reserved a floating 1/2 of the lease royalty in a new lease based on the reservation of “one-half (1/2) of the one-eighth (1/8) royalty . . . same note 2. at 129 (analyzing Oklahoma approach, which allows the term “royalty” to change depending on existence of lease at time of drafting). See also Wynne/Jackson, 2013 WL 2470898, at *1–2, *5 (interpreting deed language describing a “‘one-half (1/2) of the usual one-eighth (1/8) royalty in and to all oil, gas and minerals, produced, saved and sold from [such property]’” as granting a fixed royalty of 1/16 of the production).


The same reasoning would apply to the Texas Supreme Court’s decision not to accept petitions for the multiclause deed cases, Garza and Hausser. But see Tex. R. App. P. 56.1 (noting petitions denied do not carry the same precedential value as petitions refused, which are viewed as Supreme Court opinions).

See Luckel v. White, 819 S.W.2d 459, 462 (Tex. 1991) (discussing the “usual one-eighth royalty”); Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 459 (Tex. 1998) (noting the prevailing royalty in private oil and gas leases was a 1/8 royalty during the Era in which the Concord deed was executed).


being equal to one-sixteenth (1/16th) of all oil, gas and other minerals. In *Graham*, the court relied on *Concord Oil* and reasoned that the fraction 1/16 could be harmonized in light of the once-standard 1/8 lease royalty.\(^{109}\) Dissenting justices disagreed, having concluded that the majority opinion had improperly relied on outside deeds in reaching its conclusion.\(^{110}\) In its opinion in *Dawkins*, however, the fourth court of appeals’ opinion does not cite *Concord Oil*, or invoke the effects of the “estate misconception” or the “legacy of the 1/8th lease royalty.” Instead, the opinion viewed devises of an 1/3 of 1/8th non-participating royalty as creating a fixed 1/24th in certain lands, even though the fraction 1/24 does not appear anywhere in the mother’s will. The losing parties in *Graham* and *Dawkins* filed petitions for review. Ultimately, the court denied the *Graham* petition and granted the petition in *Dawkins*.

A. Hysaw Facts\(^{111}\)

The Will. Ethel Hysaw (“Ethel”) executed her Will in 1947 and died in 1949. She was survived by her three children, Inez Hysaw Foote (“Inez”), Howard Caldwell Hysaw, Jr. (“Howard”) and Dorothy Frances Hysaw Burris (“Dorothy”). At the time she executed her Will, Ethel owned three non-contiguous tracts of land. Under the Will, she gave each child a specific tract of land—the north 600 acres of a 1065-acre tract went to Inez; the remaining 465 acres of that tract went to Dorothy; and a separate 200-acre tract (her homestead) and a 150-acre tract went to Howard.

The Hysaw/Burris heirs, who lost in the court of appeals, argued that although Ethel gave different surface estates to each child, Ethel gave each child equal royalty interests in all of the tracts, including the surface tract willed to each child. The Will accomplishes this royalty grant in three paragraphs. The first paragraph sets out the basic grant to all three children and then provides a long clarification passage regarding what is granted to Inez. The second two paragraphs set out identical clarifying language with respect to Dorothy and Howard. The three paragraphs are set out below:

That each of my children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced from any of said lands, the same being a non-participating royalty interest; that is to say, that neither of my children, to wit, Inez Hysaw Foote shall not participate in any of the bonus or rentals to keep any lease or leases in force: that it shall not be necessary for the said Inez Hysaw Foote to execute any oil, gas or mineral lease over the lands of Dorothy Frances Hysaw Burris or over the lands of Howard Caldwell Hysaw, Jr., and that it shall not be necessary for Inez Hysaw Foote to obtain the consent either orally or written of the said Dorothy Frances Hysaw Burris or Howard Caldwell Hysaw, Jr., to lease any portion of said land so willed to her for oil, gas or other minerals, but that the said Inez Hysaw Foote shall receive one-third of one-eighth royalty, provided there is no royalty sold or conveyed by me covering the lands so willed to her, and should there be any royalty sold during my lifetime then the said Inez Hysaw Foote, Dorothy Frances Hysaw Burris and Howard Caldwell Hysaw, Jr. shall each receive one-third of the remainder of the unsold royalty.

That Dorothy Frances Hysaw Burris shall not participate in any of the bonus or rentals to keep any lease or leases in force; that it shall not be necessary for the said Dorothy Frances Hysaw Burris to execute any oil, gas or mineral lease over the lands of Inez Hysaw Foote or over the lands of Howard Caldwell Hysaw, Jr., and it shall not be necessary for Dorothy Frances Hysaw Burris to obtain the consent, either orally or written, of the said Inez Hysaw Foote or Howard Caldwell Hysaw, Jr., to lease any portion of said land so willed to her for oil, gas or other minerals, but that the said Dorothy Frances Hysaw Burris shall receive one-third of one-eighth royalty; provided there is no royalty sold or conveyed by me covering the lands so willed to her, and should there be any royalty sold during my lifetime then the said Dorothy Frances Hysaw Burris, Inez Hysaw Foote and Howard Caldwell Hysaw, Jr., shall each receive one-third of the remainder of the unsold royalty.

That Howard Caldwell Hysaw, Jr., shall not participate in any of the bonus or rentals to keep any lease or leases in force; that it shall not be necessary for the said Howard Caldwell Hysaw, Jr., to execute any oil, gas or mineral lease over the lands of Inez Hysaw Foote or over the lands of Dorothy Frances Hysaw Burris, and it shall not be necessary for Howard Caldwell Hysaw, Jr., to obtain the consent either orally or written of the said Inez Hysaw Foote or Dorothy Frances Hysaw Burris to lease any portion of said land so willed to him for oil, gas or other minerals, but

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\(^{109}\) *Id.* at 659–60.

\(^{110}\) *Id.* (Barnard, J., dissenting).

\(^{111}\) The facts provided here appeared in the Hysaw's Brief on the Merits in the Texas Supreme Court.
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that the said Howard Caldwell Hysaw, Jr., shall receive one-third of one-eighth royalty, provided there is no royalty sold or conveyed by me covering the lands so willed to him, and should there be any royalty sold during my lifetime then the said Howard Caldwell Hysaw, Jr., Inez Hysaw Foote and Dorothy Frances Hysaw Burris shall each receive one-third of the remainder of the unsold royalty. (emphasis added).

The Hysaw and amici curiae briefs urged the Court to consider that Ethel’s grant to each child of different surface tracts and a grant to each child of an equal share in the royalties in all tracts is a common approach in partitioning surface and mineral estates. When partitioning surface and mineral estates by deed or will, owners often grant unequal surface estates to family members but—because mineral estates cannot be easily valued—require equal sharing in the oil and gas production from all tracts. The Hysaw Brief on the Merits also cites E. Smith & J. Weaver, Texas Law of Oil and Gas, Sec. 2.3[A][4] p. 2-41 (“Because parties to a voluntary partition are often unwilling to run the risk that only part of the land may contain oil and gas, it is not uncommon for cotenants to partition only the surface and continue to own undivided interests in the minerals estate.”).

In 1946, before she executed the Will, Ethel gave each child an equal share in some of her royalties in the 200- and 150-acre tracts given to Howard. The six deeds making these conveyances give each child an equal portion of Ethel’s royalty in each tract. The Hysaw and Weaver Petitioners (“Hysaws”) are Howard’s descendants. The Burris, the Burris partnership and the Dziuk Petitioners are Dorothy’s descendants or successors. The Burris and Hysaws are referred to collectively as the “Hysaw/Burrisses.” The Dawkins and Oxford Respondents are Inez’s descendants and are collectively referred to as the “Dawkins.”

The Dispute: This dispute arose after production occurred on a 1/5 royalty lease the Dawkins executed on Inez’s 600 acres. Under a 1/8 royalty lease that was the standard when Ethel executed her Will, all parties would have agreed that the Will provided each of her three children with equal shares of the royalty. The Dawkins, however, contended that, under the 1/5 royalty lease they executed, the Will provided them with over three times the royalty provided to Howard and Dorothy’s descendants. The Hysaw/Burrisses contended that the Will created equal floating 1/3 of royalty interests, meaning all three children share equally regardless of the size of the lease royalty in all of the lands devised under the Will.

The Dawkins argued that Howard’s and Dorothy’s descendants each received only a fixed 1/24 royalty in Inez’s land and that the Dawkins therefore get all royalty in excess of a 2/24 royalty on Inez’s lands. At the same time, the Dawkins claimed that equal sharing is required on Howard’s two tracts because Ethel conveyed some of the royalty on those tracts before she died. For this argument, they rely on the final phrase regarding any “sale” of royalties before Ethel’s death. The parties stipulated to the pertinent facts and filed cross-motions for summary judgment. The district court granted the Hysaw/Burrisses’ motion, requiring equal sharing to apply for royalties in all of the lands. The Dawkins appealed.

The court of appeals reversed. In its opinion, the court began by examining the three phrases in the royalty paragraphs “individually” and determining what each one meant. The court first addressed the phrase that “each of my children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced” and held that this language “clearly and unambiguously describes a fractional royalty interest”—a 1/24 royalty. The court stated this phrase was a “reservation” of fixed 1/24 royalties only for Dorothy and Howard. Later in the opinion, the court also calls it a “grant.”

The court held that the second phrase, that “[each child] shall receive one-third of one-eighth royalty” also “clearly describes a fractional royalty interest—a fixed fraction of production” and further held that it “simply restates the first provision’s grant.” The court treated this phrase as applying to all three children and stated it did not “limit [the surface estate owner of any royalty in excess of 1/24 of production], indicating the surface estate owner’s ownership of royalty in excess of 1/8 came from ‘the earlier grant of fee simple title.’” Finally, the court held that the third phrase was “clear and unambiguous” and “conditionally conveys a fraction of royalty interest” i.e., a second grant of a floating 1/3 of the royalty in Howard’s lands to each child because Ethel had conveyed some of those

112 The Hysaw’s Brief on the Merits urged the court to consider this customary approach to partitioning land and minerals as did Mr. Jeff Akins in an amicus curiae brief he filed. Two other amicus curiae briefs were filed. One by two former chairs of the Oil, Gas and Energy Resources Section of the State Bar of Texas, Cottie Miles and Allen Cummings, and another on behalf of Trinity Minerals, Inc., filed by J. Byron Burton III.


114 Id. at 155.

115 Id. at 154, 156.

116 Id. at 156.
royalties to her children before she died. The court refers to this third phrase both as a conveyance and as a "conditional reservation of a fraction of royalty."\textsuperscript{117}

These holdings resulted in Inez's descendants receiving royalties under the Dawkins' lease more than three times greater than her siblings' descendants but sharing equally in royalties from any lease on the tracts given to Howard. In contrast, under the Hysaw/Burrises' interpretation of Ethel's Will, the children share equally by owning a floating 1/3 NPRi in all three tracts. In its opinion, the Texas Supreme Court agrees with this equal-sharing interpretation.

B. The Texas Supreme Court Opinion: Affirming a "Holistic" Approach Rather than "Merely Multiplying" Double Fractions

The Texas Supreme Court's opinion begins with this description of the issue:

Questions arise about whether double fractions must be multiplied and the royalty interest fixed without regard to the royalty negotiated in a future mineral lease (fractional royalty) or whether 1/8 was intended as a synonym for the landowner's royalty, meaning the interest conveyed varies depending on the royalty actually obtained in a future mineral lease (fraction of royalty).\textsuperscript{118}

In answering these questions, the court reaffirmed its commitment to a "holistic approach" aimed at ascertaining intent from the entire document.\textsuperscript{119} For that reason the court eschewed mechanical or bright-line rules, such as merely multiplying double fractions.\textsuperscript{120} In criticizing the court of appeals' decision, the court opined that the lower court had departed from this holistic and instead viewed the separate clauses in the will in isolation.\textsuperscript{121}

Demonstrating its commitment to the "holistic approach," the opinion carefully and thoroughly addressed all the language in the will.\textsuperscript{122} Key phrases the court emphasized included the deliberate recitation of identical language to effect each child's royalty, the use of a double fraction in lieu of single fixed fractions, with one suggesting equal 1/3 sharing and the others "raising the specter of "estate misconception" or the use of the then-standard 1/8th royalty as a synonym for "landowner's royalty." With that acknowledgement, the court confirmed its statement in 	extit{Concord Oil} that the "estate misconception" is instructive but not determinative in the deed-interpretation process.\textsuperscript{123}

Returning to the express language of Ethel's will, the court also noted the equal-sharing language in the third and final provision of each royalty clause supported a conclusion that she intended for each of her three children to share equally in the royalties under all the divided tracts.\textsuperscript{124} After a thorough review of case law and the language in the will, the court concluded as follows:

The only plausible construction supported by a holistic reading of the will is that Ethel used ‘one-eighth royalty’ as shorthand for the entire royalty interest a lessor could retain under a mineral lease, anticipated the siblings would share that royalty equally, and intended proportional equalization of any royalty remaining following an inter vivos transaction. We therefore hold that Ethel’s will devised to each child 1/3 of any and all royalty interest on all the devised land tracts.\textsuperscript{125}

IV. CONCLUSIONS: LESSONS FROM HYSAW FOR INTERPRETING AND DRAFTING IN THE SHALE ERA

Because 	extit{Hysaw} reaffirms a "holistic" approach that requires reviewing all language and provisions in documents, one cannot proclaim that the decision has ended the "fixed v. floating" interpretative issue in Texas. However, the opinion should provide confidence to title examiners who have declined to "merely multiply" double fractions when one of those fractions is the once-common 1/8th landowner’s royalty. And for those considering litigation, other courts are likely to view the 1/8th as meaning "landowner’s royalty," and the fraction paired with the 1/8th as reflecting the parties' intent regarding the size of the non-participating royalty interest conveyed or reserved.

For drafting these interests in the future, parties should use the "fixed or floating" labels: Grantor hereby conveys to Grantee a fixed 1/16th non-participating royalty interest. If the parties intend to create an npr1 that will "float" with the royalty reserved in any lease on the property, existing or future, the document should make that statement. In describing the size of the floating fraction, which was 1/3 in 	extit{Hysaw}, parties should avoid double fractions. (The "1/3 of 1/8th" from 	extit{Hysaw}). In fact, part of the "legacy of the 1/8th lease

\textsuperscript{117}ld.
\textsuperscript{119}ld. at *1
\textsuperscript{118}ld.
\textsuperscript{120}ld. at *7–8.
\textsuperscript{121}ld. at *3 and 9.
\textsuperscript{122}ld. at *4.
\textsuperscript{123}ld. at *6.
\textsuperscript{124}ld. at 10.
\textsuperscript{125}ld.
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royalty” includes the lesson that it has no place in
drafting Shale Era mineral and royalty interests.