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## The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction

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# THE REGRETTABLE REBIRTH OF THE TWO-GRANT DOCTRINE IN TEXAS DEED CONSTRUCTION

LAURA H. BURNEY\*

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### I. INTRODUCTION

Deed construction has been a perennial task for courts virtually since the Statute of Uses accorded legal approval to written transfers of land in 1536.<sup>1</sup> As guidance, courts eventually established the determination of the intent of the parties as their primary goal.<sup>2</sup> Yet, the English and American courts also embraced a number of other rules, many of which admittedly worked to disregard the actual intent of the parties.<sup>3</sup> One example is the rule that the language in the granting clause prevails when it conflicts with other provisions.<sup>4</sup>

In Texas, this rule was given preeminent status in deed construction in *Alford v. Krum*.<sup>5</sup> In *Alford*, a multiclause deed<sup>6</sup> was construed as passing the interest expressed in the granting clause when there were irreconcilable conflicts with other clauses in the document.<sup>7</sup> Recently, much to

1. 7 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 387-88 (1926). Before the Statute of Uses was passed, the law courts required a ceremony before corporeal interests in land would pass to the grantee. The ceremony was known as feoffment with livery of seisin. THOMAS BERGIN & PAUL HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 11 (2d ed. 1984). See generally John C. Payne, *The English Theory of Conveyancing Prior to the Land Registration Acts*, 7 ALA. L. REV. 227, 238-43 (1955).

The passage of other statutes worked in conjunction with the Statute of Uses which insured that deeds would wholly supplant the ceremony as a means of conveying land. Statute of Enrollments, 1536, 27 Hen. 8, ch. 16 (Eng.); Statute of Frauds, 1676, 29 Car. 2, ch. 3 (Eng.). See generally ROGER A. CUNNINGHAM, ET AL., THE LAW OF PROPERTY § 11.1, at 712 (1984).

2. See HOLDSWORTH, *supra* note 1, at 394. See also discussion *infra* part II.

3. See HOLDSWORTH, *supra* note 1, at 393-94. The Rule in Shelley's Case is perhaps the most notorious example. See *infra* note 17.

4. See HOLDSWORTH, *supra* note 1, at 389-90; see, e.g., *Hornet's Nest Girl Scout Council Inc. v. Cannon Found., Inc.*, 339 S.E.2d 26, 31 (N.C. Ct. App. 1986) (noting the rule is one which frustrates intent). This rule is also known as the "repugnant to the grant rule." See generally Tevis Herd, *Deed Construction and the "Repugnant to the Grant" Doctrine*, 21 TEX. TECH. L. REV. 635 (1990) (discussing and criticizing use of rule).

5. 671 S.W.2d 870, 872 (Tex. 1984), *overruled by* *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991).

6. The term "multiclause deed" will be used to refer to deeds with several provisions, in addition to the granting clause, describing the interests conveyed. These additional provisions include the "subject-to" clause and the "future-lease" clause. See generally, RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 593-94 (3d ed. 1991). A deed form with a granting clause, subject-to and future-lease clause has also been called a three-grant deed. See Herd, *supra* note 4, at 637. That label is avoided herein because it improperly suggests that the use of that deed form indicates an intention to make several conveyances in one instrument. Instead, the history behind the development of this deed form reveals that it came into use to insure that royalties and rentals passed proportionately with a single conveyance of a fractional mineral interest. See *infra* part II.

7. 671 S.W.2d at 873.

the delight of practicing attorneys, *Alford* was expressly overruled in *Luckel v. White*.<sup>8</sup> In that case, the Texas Supreme Court appears to have reinstated ascertaining the intent of the parties from the four corners of the document as the primary postulate in deed construction.<sup>9</sup> Unfortunately, however, *Luckel and Jupiter Oil Co. v. Snow*,<sup>10</sup> may also signal the rebirth of another theory of construction which had a dubious presence in Texas case law prior to *Alford*: the two-grant doctrine. Under this theory of construction, a multiclause deed is construed as making separate grants of different types of interests in a particular tract of property or varying sizes of one interest at different times.<sup>11</sup>

The purpose of this article is to explore the ramifications of the holdings in *Luckel* and *Jupiter Oil* and to expose the inappropriateness of resurrecting the two-grant doctrine. Part I will review rules of construction in general and their use in Texas mineral and royalty conveyances in particular. Part II will focus on the evolution of the two-grant doctrine until its implicit demise in *Alford*. The doctrine is revealed as the unfortunate progeny of two aberrations in oil and gas jurisprudence. The first is an overruled case which spawned the use of the multiclause deed form used in *Alford* and *Luckel*.<sup>12</sup> The second is the "estate misconception," which is the pervasive confusion about the estates owned by mineral owners and their lessees.<sup>13</sup>

Part III will analyze *Luckel v. White* and *Jupiter Oil Co. v. Snow*. The former opinion approves the approach of a pre-*Alford* supreme court case, *Garrett v. Dils Co.*<sup>14</sup> In *Garrett*, the Texas court harmonized conflicting fractions in light of language in the entire deed and by taking judicial notice of the fact that the royalty in most mineral deeds is one-eighth. However, whether *Garrett* can be hailed as replacing *Alford* is not clear. In *Luckel*, the court slipped in and out of two-grant syntax, and in *Jupiter Oil* it overtly applied that doctrine in an opinion that misuses authority and functions under the estate misconception.<sup>15</sup> To compound the confusion, the concurring opinions in both cases urged the adoption of the dissent in *Alford*, but that opinion erroneously viewed *Garrett* as a two-grant case.<sup>16</sup>

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8. 819 S.W.2d 459 (Tex. 1991).

9. *Id.* at 461.

10. 819 S.W.2d 466 (Tex. 1991).

11. See *infra* part II (discussing the two facets of the two-grant doctrine).

12. The case is *Caruthers v. Leonard*, 254 S.W. 779 (Tex. Comm'n App. 1923, judgment adopted), which is discussed fully in part II.

13. The "estate misconception" is explained fully in part II.

14. 159 Tex. 91, 299 S.W.2d 904 (1957). *Garrett* is discussed at length in part II.

15. See *infra* part II.

16. See *infra* part II (explaining that *Garrett* did not use the two-grant doctrine).

Part IV will argue that the two-grant theory is not a viable rule of construction under case law or the policy embraced in *Luckel* of effectuating the intent of the parties by harmonizing conflicting fractions from the four corners of the deed. Instead, *Luckel* should be interpreted as a reaffirmation of the *Garrett v. Dils Co.* approach and *Jupiter Oil* should be discounted due to its faulty exegesis. To further promote title certainty, the Texas Supreme Court should define the contours of the *Garrett* approach by formulating fact-specific rules of construction in light of the tainted origin of the multiclause deed and the pervasive misconceptions among drafters and courts about the estates owned by mineral owners and lessees. Adopting the *Garrett* approach would comply with the malleable rules for document interpretation and would promote title certainty more effectively than other methods of construction, such as determining that all deeds with conflicting provisions are ambiguous. Moreover, unlike the two-grant doctrine, it will also preserve the sanctity of the parties' intent.

## II. DEED CONSTRUCTION

### A. In General

Once the written document supplanted the ceremony as a means of conveying real property in England, the need for rules to interpret these documents arose. By the seventeenth century, a lengthy list of rules had been compiled by the common-law courts. Included on this list were the following rules:

- 1) of two repugnant clauses in a deed the first should prevail; . . . .
- 2) words shall be construed according to the intent of the parties;  
. . . .
- 3) every part of the deed ought to be compared with the other and one entire sense ought to be made thereof . . . .
- 4) in the common law the grant of every common person is taken most strongly against himself and most favourably towards the grantee; . . . .
- 5) extrinsic evidence is not admissible to add to, alter, or contradict the terms of a deed . . . .<sup>17</sup>

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17. HOLDSWORTH, *supra* note 1, at 389-92 (citations omitted) (numbers added). At common law the rules regarding use of extrinsic evidence for interpretation were refined by Lord Bacon who determined that no extrinsic evidence of any kind was admissible to remedy a patent ambiguity, but evidence of intention was permissible to solve a latent ambiguity. *Id.* at 392. The patent/latent distinction is not used by most courts today in determining the use of extrinsic evidence in interpretation of documents. See CUNNINGHAM, *supra* note 1, § 11.1, at 717-18 (noting most courts freely admit testimony that will help resolve the ambiguity without bothering to classify it as latent or patent).

This list includes both rules of construction and rules of law. The difference is that rules of construction are applied if intended, while rules of law are applied to a certain set of facts

This list is not exhaustive, but only representative of the laundry list approach that the courts developed. As the number of rules on this list grew, it was clear, even to the judges themselves, that the real intent of the parties was often disregarded.<sup>18</sup>

In the United States, the rules developed at common law are still used today in construing deeds, wills, and contracts.<sup>19</sup> However, regardless of the document involved, ascertaining the intent of the parties has become the "polestar" of construction.<sup>20</sup> Therefore, rules which tend to frustrate rather than elucidate the intent of the parties have been wholly abrogated, or at least subordinated, by both statutes and judicial decisions.<sup>21</sup>

## B. Document Construction in Texas

### 1. In General

Whether the document at issue is a contract, deed, or will, Texas courts have consistently proclaimed that the primary goal is to ascertain

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regardless of the true intent of the parties. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY, ch. 6, § 2, at 144 (3d ed. 1988). One of the most notorious rules of law developed at common law is the Rule in Shelley's Case. *Id.*

18. See HOLDSWORTH, *supra* note 1, at 393-94.

19. See, e.g., State Sec. Ins. Co. v. Burgos, 583 N.E.2d 547, 554 (Ill. 1991) (construing insurance contract against drafter); Thomas v. Steuernol, 460 N.W.2d 577, 581 (Mich. Ct. App. 1991) (construing deeds to pass greatest estate); Verzeano v. Carpenter, 815 P.2d 1275, 1278 (Or. Ct. App. 1991) (citing general rule that an ambiguity in a deed is construed against the grantor, but noting an exception for reservation of an easement); Hornet's Nest Girl Scout Council, Inc. v. Cannon Found. Inc., 339 S.E.2d 26, 31 (N.C. Ct. App. 1986) (applying repugnancy rule reluctantly).

20. See Gafford v. Kirby, 512 So. 2d 1356, 1360 (Ala. 1987) (calling the grantor's intent the "polestar that guides us"). See also 6A RICHARD R. POWELL, THE LAW OF REAL PROPERTY, § 899[3], at 108 (Patrick J. Rohan et al. eds., 1988).

21. See, e.g., Luckel v. White, 819 S.W.2d 459, 464 (Tex. 1991) (rejecting rule that granting clause prevails when it conflicts with other provisions in favor of four-corners approach); Hornet's Nest Girl Scout Council, Inc., v. Cannon Found., Inc., 339 S.E.2d 26, 31 (N.C. Ct. App. 1986) (reluctantly following rule that granting clause prevails when repugnant to other clauses, but recognizing it as "an inflexible rule of property which arbitrarily prefers certain formal parts of the deed over the plainly expressed intent of the grantor"). See POWELL, *supra* note 20, § 901[1], at 154 (repugnancy doctrine generally renounced). This change applies to both rules of law and rules of construction. See, e.g., TEX. PROP. CODE ANN. § 5.001 (Vernon 1984) (words required at common law to transfer fee no longer necessary); N.Y. REAL PROPERTY LAW § 240 (McKinney 1992) (construing instruments of conveyance according to intent of parties); WIS. STAT. ANN. § 706.10 (West 1991) (passing all of an estate unless a different intent is expressed or implicated). The most notorious rule of law that crossed the Atlantic from England is probably the Rule in Shelley's Case. That rule has been virtually abolished in the United States. See OHIO REV. CODE ANN. § 2107.49 (Baldwin 1991); N.H. REV. STAT. ANN. § 551.8 (1974); MISS. CODE ANN. § 89-1-9 (1973); See also, BERGIN & HASKELL, *supra* note 1, at 97. The rule tended to frustrate the grantor's intent because words were given an unintended meaning. The rule had been formulated during the era of feudalism but had survived as a rule of property. *Id.* at 94.

the true intentions of the parties as expressed in the instrument.<sup>22</sup> This rule of construction is modified, however, by the caveat that it is not the intent that the parties meant but failed to express, but the intention that is expressed.<sup>23</sup> If the document fails to reflect the parties' true intent due to mutual mistake, the remedy is reformation, not construction.<sup>24</sup>

When the court's task is construction, Texas follows the general rule that intent is to be gathered from the four corners of the document.<sup>25</sup> The four-corners rule requires that the parties' intention be gathered from the instrument as a whole and not from isolated parts.<sup>26</sup> Extrinsic evidence is not admissible unless the document is ambiguous.<sup>27</sup> When an ambiguity exists, a summary judgment is not proper.<sup>28</sup>

In Texas, as in all jurisdictions, courts have articulated a consistent litany of rules for determining whether an ambiguity exists. First, the

22. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (construing a contract); *McMahon v. Christmann*, 157 Tex. 403, 407, 303 S.W.2d 341, 344 (1957) (interpreting an oil and gas lease); *Harris v. Windsor*, 156 Tex. 324, 328, 294 S.W.2d 798, 800 (1956) (construing a deed); *Perfect Union Lodge No. 10 v. Interfirst Bank*, 748 S.W.2d 218, 220 (Tex. 1988) (construing a will).

23. *Prairie Producing Co. v. Schlachter*, 786 S.W.2d 409, 412 (Tex. App.—Texarkana 1990, writ denied); *Harlan v. Vetter*, 732 S.W.2d 390, 392 (Tex. App.—Eastland 1987, writ ref'd n.r.e.).

24. *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987).

The underlying objective of reformation is to correct a mutual mistake made in *preparing* a written instrument, so that the instrument truly reflects the *original* agreement of the parties . . . . By implication, then, reformation requires two elements: (1) an original agreement and (2) a mutual mistake, made *after* the original agreement, in reducing the original agreement to writing.

*Id.* at 379 (emphasis added).

25. *See, e.g.*, *Henderson v. Parker*, 728 S.W.2d 768, 770 (Tex. 1987) (will construction); *City of Midland v. Waller*, 430 S.W.2d 473, 478 (Tex. 1968) (contract construction); *Ulbricht v. Friedsam*, 159 Tex. 607, 613, 325 S.W.2d 669, 673 (1959) (deed construction).

26. *See, e.g.*, *Mayfield v. de Benavides*, 693 S.W.2d 500, 503 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *Shown v. Getty Oil Co.*, 645 S.W.2d 555, 559 (Tex. App.—San Antonio 1982, writ ref'd). *See also* *Republic Nat'l Bank v. Fredericks*, 155 Tex. 79, 83, 283 S.W.2d 39, 43 (1955) (stating that the entire instrument should be considered).

27. *Stauffer v. Henderson*, 801 S.W.2d 858, 863 (Tex. 1990); *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525 (Tex. 1982) (considering whether extrinsic evidence is improper when the terms are unambiguous); *see generally*, HEMINGWAY, *supra* note 6, § 3.2, at 120 (3d ed. 1991). *See* CUNNINGHAM, *supra* note 1, at 717-18 (observing that most courts today freely admit extrinsic evidence without the patent/latent distinction).

Texas courts generally do not use the latent/patent distinction, discussed *supra* note 18, for determining whether extrinsic evidence is admissible in deed interpretation. *See* *Neece v. AAA Realty Co.*, 159 Tex. 403, 407, 322 S.W.2d 597, 600 n.3 (1959) ("The Baconian distinction between patent and latent ambiguities should be disregarded by the Texas courts.") (citing 2 CHARLES T. MCCORMICK & ROY R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1683 (Texas Practice 3d ed. 1980)).

28. *Reilly v. Rangers Management, Inc.* 727 S.W.2d 527, 529 (Tex. 1987) (contract construction).

question of ambiguity is a question of law for the court.<sup>29</sup> The Texas Supreme Court has stated that this determination is made “by looking at the contract as a whole in light of the circumstances existing at the time the contract was entered into.”<sup>30</sup> This statement does not permit consideration of extraneous evidence to determine the ambiguity question; instead, it directs how language in the document should be interpreted.<sup>31</sup> If in light of surrounding circumstances the language appears to be capable of only a single meaning, the court will be confined to the writing.<sup>32</sup> If the language can be interpreted in different manners, rules of construction are used. An instrument is ambiguous only when the application of these rules leaves it unclear which meaning is the correct one.<sup>33</sup> If the instrument can be harmonized, however, it is not ambiguous.<sup>34</sup>

The process of interpretation or construction, including the determination of ambiguity and the use of extrinsic evidence, is presented as beguilingly precise, but scholars admit “the rules are complex, technical, and difficult to apply.”<sup>35</sup> The process also frequently frustrates the

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29. *Id.*

30. *Id.* See also *Houston Oilers, Inc. v. Floyd*, 518 S.W.2d 836, 838 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.) (construing the language of a release in light of circumstances surrounding its execution). Extrinsic evidence of surrounding circumstances is admissible to assist the court in determining the sense in which words were used. *Kelley v. Marlin*, 714 S.W.2d 303, 305 (Tex. 1986); *Kelly v. Womack*, 153 Tex. 371, 377, 268 S.W.2d 903, 906 (1954) (stating that deference to intent is a cardinal principle and courts determine intent from the language in conveyance, in light of the circumstances of its formulation).

31. See *Reilly v. Rangers Management, Inc.* 727 S.W.2d 527, 529 (Tex. 1987) (stating that existence of an ambiguity is a question of law, not a question of fact).

32. *Watkins v. Petro-Search, Inc.*, 689 F.2d 537, 538 (5th Cir. 1982). See also *Kelley v. Marlin*, 714 S.W.2d 303, 305 (Tex. 1986) (“Since the parties agree that [the will] is unambiguous, parol evidence of what the testator intended is inadmissible. However, extrinsic evidence of surrounding circumstances is admissible to ascertain the meaning of words used in the will.”) (citations omitted). Parol evidence will not be received except to explain an ambiguity. *Lewis v. East Texas Fin. Co.*, 136 Tex. 149, 154, 146 S.W.2d 977, 980 (1941); *Lincoln Liberty Life Ins. Co. v. Goodman*, 535 S.W.2d 7, 11 (Tex. Civ. App.—Amarillo 1976, writ ref’d n.r.e.) (interpreting an insurance policy).

33. *Prairie Producing Co. v. Schlachter*, 786 S.W.2d 409, 413 (Tex. App.—Texarkana 1990, writ denied).

34. *Id.* See also *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991). The Texas cases have not articulated the rules as a three-tiered process but the approach is similar to that set forth in a Mississippi Supreme Court case which described the three-tiers as: 1) “the court will attempt to ascertain intent by examining the language contained within the ‘four corners’ of the instrument in dispute;” 2) the use of applicable canons of contract construction; and 3) consideration of extrinsic or parol evidence. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 351-53 (Miss. 1990). This process does not require that a court follow all three steps. Rather, subsequent steps are taken only if intent remains unclear. *Id.*

35. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 3-16, at 177 (3d ed. 1987). The authors also opine that:

There is no unanimity as to the content of the parol evidence rule or the process called interpretation . . . . It would, however, be a mistake to suppose that the courts



judges making the determination. For example, one Texas Supreme Court Justice commented that, "I find it odd that all parties to this dispute, the trial court, the court of appeals, and this court agree that the contract in question is clear as a bell and yet disagree as to its meaning."<sup>36</sup> This is also evident in appellate cases that reverse the lower courts' determinations of ambiguity<sup>37</sup> and in inconsistent opinions about how conflicting provisions should be harmonized.<sup>38</sup> Construction by courts is also frequently constrained by the parties' failure to plead ambiguity, insisting, instead, that their opposing interpretations are unambiguously expressed.<sup>39</sup>

A preferable alternative to struggling with the amorphous nature of the rules recited in the interpretation process is to adopt fact-specific rules for construction of particular problems. This alternative has been used by the Texas Supreme Court in construing specific problems encountered in mineral and royalty conveyances.<sup>40</sup> As argued in Part IV, intent and title certainty could both be preserved if specific rules are also

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follow any of these rules blindly, literally or consistently. As often as not they choose the standard or the rule that they think will give rise to a just result in the particular case. We have also seen that often under a guise of interpretation a court will actually enforce its notions of "public policy" which is "nothing more than an attempt to do justice."

*Id.*

36. *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 950 (Tex. 1990) (Gonzalez, J., dissenting). An appellate court justice expressed a similar concern in 1933:

To my mind, no more ambiguous instrument has ever been presented to me for construction . . . Courts are concerned primarily with arriving at the intention of the parties, and a slight variation from a clear expression in an instrument is sufficient to create an ambiguity authorizing admission of oral testimony to determine the intent.

*Jones v. Bedford*, 56 S.W.2d 305, 309 (Tex. Civ. App.—Eastland 1933, writ ref'd) (Hickman, C.J., dissenting):

37. *See, e.g.*, *Richardson v. Hart*, 143 Tex. 392, 395, 185 S.W.2d 563, 564 (1945) (determining document was not ambiguous and reversing lower court's finding of ambiguity); *Tipps v. Bodine*, 101 S.W.2d 1076, 1079 (Tex. Civ. App.—Texarkana 1936, writ ref'd) (trial court used remedy of reformation; appellate court affirms but on basis that deed is unambiguous).

38. *See, e.g.*, *Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991) (stating that the *Alford* opinion fails to correctly harmonize the deed provisions); *Woods v. Sims*, 154 Tex. 59, 64, 273 S.W.2d 617, 620-21 (1955) (appellate decision fails to correctly harmonize deed provisions).

39. *McMahon v. Christmann*, 303 S.W.2d 341, 343 (1957) (interpreting an oil and gas lease) ("As is often true in litigation involving the interpretation and construction of written instruments both parties insist that the instrument is 'plain and unambiguous' and admits of no reasonable meaning other than that for which they contend."). *See also* *Garrett v. Dils Co.*, 157 Tex. 92, 94, 299 S.W.2d 904, 906 (1957) (neither party claimed deed was ambiguous).

40. *See, e.g.*, *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 895 (Tex. 1986) (adopting rule that if deed reserves fraction of minerals under land "described" rather than "conveyed," it reserves fraction of minerals under entire physical tract, regardless of part of mineral estate actually conveyed); *Moser v. United States Steel Corp.*, 676 S.W.2d 99, 101 (Tex. 1984) (adopting ordinary and natural meaning test for construction of "other minerals" clauses).

adopted for determining the quantum of interest conveyed in a multiclause mineral or royalty deed.

## 2. Construction of Mineral and Royalty Deeds

The rules for construing deeds are basically the same as those for construing other documents. The only distinguishing factor is the preference for rules that promote title certainty in order to facilitate the transfer of property rights.<sup>41</sup> For example, in *Moser v. United States Steel Corp.*,<sup>42</sup> the Texas Supreme Court rejected the surface destruction test in favor of the ordinary and natural meaning test in construing "other minerals" clauses to promote the stability of land titles by avoiding the necessity of litigation to determine various fact issues.<sup>43</sup> In *Altman v. Blake*,<sup>44</sup> the Texas court again stressed the significance of promoting title certainty in adopting guidelines for determining whether a deed conveyed a mineral or a royalty interest.<sup>45</sup>

In construing mineral and royalty conveyances, Texas courts follow the general rule that ascertaining intent from the entire deed is the pri-

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41. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 3.1, 3.10, at 30, 67-69 (3rd ed. 1986).

[The] legal protection of property rights creates incentives to use resources efficiently. . . . In order to facilitate the transfer of resources from less to more valuable uses, property rights, in principle, should be freely transferable. . . . Efficiency requires that property rights be transferable; but if many people have a claim on each piece of property, transfers will be difficult to manage. . . . Problems in transferring property rights are part of a larger problem, that of deciding who owns what property.

*Id.* Concerning problems in the interpretation of oil and gas leases, see, e.g., Stephen F. Williams, *Implied Covenants in Oil and Gas Leases: Some General Principles*, 29 U. KAN. L. REV. 153, 153 (1981) (arguing that formulas generally used to interpret lessor's duties under oil and gas leases are vague and circular). Clarifying the rules for interpreting mineral deeds will produce lower transaction costs. See Joseph T. Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, 6 J. LEG. STUD. 213, 213 (1977) (asserting that complicated property rights raise transaction costs of transferring property).

42. 676 S.W.2d 99 (Tex. 1984).

43. *Id.* at 101; *Altman v. Blake*, 712 S.W.2d 117, 120 (Tex. 1986) (recognizing the necessity for stability and certainty in construction of mineral conveyances). Dean Eugene Kuntz has noted, "In matters of land titles, and most certainly in the field of oil and gas where heavy expenditures of capital are incident to exploration, development and production, certainty is of the utmost importance." Eugene Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 114 (1949). It is debatable whether the *Moser* opinion in fact achieved its goal. See Laura H. Burney, "Oil, Gas, and Other Minerals" Clauses in Texas: *Who's on First?*, 41 SW. L.J. 695 (1987).

44. 712 S.W.2d 117 (Tex. 1986).

45. *Id.* at 120. The issue in *Altman* was whether a deed could be construed as a mineral conveyance, rather than a royalty, when the grantee did not receive all the attributes of the mineral estate, specifically the right to lease and the right to receive rentals. *Id.* at 117. The court held that this did not prevent the deed from being construed as a mineral conveyance. *Id.* at 120.

mary goal.<sup>46</sup> In this endeavor, many of the rules developed at common law are used. For example, many cases, including one that is significant for the purposes of this article, *Garrett v. Dils Co.*,<sup>47</sup> have invoked the rule that a document should be construed against the grantor to convey the greatest estate possible.<sup>48</sup> In *Lott v. Lott*,<sup>49</sup> this rule was cited in conjunction with the rule that "the granting clause prevails over other provisions of a deed."<sup>50</sup>

In addition to using common law rules, Texas has also fashioned its own rules for the construction of mineral or royalty deeds. The *Moser* and *Altman* cases noted above are two instances in which the Texas Supreme Court has clarified rules for construing specific problems encountered in mineral and royalty deeds. A more notorious example of a Texas creation is the *Duhig* doctrine.<sup>51</sup> The two-grant doctrine, which is analyzed in Part II, is another.<sup>52</sup> The two-grant doctrine has two facets.

46. See *Harris v. Windsor*, 294 S.W.2d 798, 800 (Tex. 1956) ("[T]he intention of the parties, when it can be ascertained from a consideration of all parts of the instrument, will be given effect when possible."). Even *Alford v. Krum*, recognized that "the court must attempt to harmonize all parts of a deed, since the parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement." 671 S.W.2d 870, 872 (Tex. 1984).

47. 157 Tex. 92, 95, 299 S.W.2d 904, 906 (1957).

48. See, e.g., *Garrett v. Dils Co.*, 157 Tex. 92, 95, 299 S.W.2d 904, 906 (1957) (construing deed against grantor); *Lott v. Lott* 370 S.W.2d 463, 465 (Tex. 1963) (construing deed to convey greatest estate possible); *Waters v. Ellis*, 158 Tex. 342, 347, 312 S.W.2d 231, 234 (1958) (construing deed to convey greatest estate possible); *Candlelight Hills Civic Ass'n Inc. v. Goodwin*, 763 S.W.2d 474, 477 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (construing deed to convey greatest estate to grantee); *Brown v. Davila*, 807 S.W.2d 12, 14 (Tex. App.—Corpus Christi 1991, no writ) (construing document against grantor); *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828, 829 (Tex. Comm'n App. 1925, holding approved) (construing deed to grant greatest estate to grantee); *Humble Oil Co. v. Harrison*, 146 Tex. 216, 205 S.W.2d 355, 360 (1947) (construing ambiguous language against grantee); *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981) (construing document against the grantor). See also *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984) (construing writing against author); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 115 (Tex. 1979) (construing contract against author and construing to give validity).

49. 370 S.W.2d 463 (Tex. 1963).

50. *Id.* at 465 (citing *Waters v. Ellis*, 158 Tex. 342, 347, 312 S.W.2d 231, 234 (1958)). Both *Lott* and *Ellis* were relied upon by the Texas Supreme Court in *Alford v. Krum*, 671 S.W.2d 870, 872 (Tex. 1984). Tevis Herd has demonstrated that these cases do not justify the holding in *Alford*. See Herd, *supra* note 4, at 648-49 (*Lott* and *Ellis* based on validation doctrine not repugnant-to-the-grant rule).

51. See *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940). The *Duhig* doctrine provides that where the conveyance represents that the grantor is the owner of a particular interest in property and such interest is conveyed by the deed, the grantor is estopped by his covenant of general warranty to claim that the deed conveyed a less estate than the grantor's ownership. *Duhig*, 135 Tex. at 507, 144 S.W.2d at 880. See generally HEMINGWAY, *supra* note 6, § 3.2, at 129.

52. See *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828 (Tex. Comm'n App. 1925, holding approved). In discussing the two-grant doctrine, Professor Smith notes that Texas has

Under the first, deeds have been construed as conveying two different interests in one tract of land, for example, one interest in the land and another in royalties due under an existing lease.<sup>53</sup> Under the second facet, a deed is construed as conveying one interest in two different sizes at different times.<sup>54</sup> In 1984, in *Alford v. Krum*,<sup>55</sup> the Texas Supreme Court implicitly rejected the second facet in favor of the rule that the granting clause prevails when there are conflicts with other clauses.<sup>56</sup>

### 3. *The Rise and Fall of Alford v. Krum*

Prior to 1984, the Texas court had continually embraced principles for construction of mineral and royalty conveyances that are antithetical to preferring one clause in a document. For example, in 1957, the Texas Supreme Court made the following commentary on the use of common law rules in deed construction:

We have long since relaxed the strictness of the ancient rules for the construction of deeds, and have established the rule for the construction of deeds as for the construction of all contracts,—that the intention of the parties, when it can be ascertained from a consideration of all parts of the instrument, will be given effect when possible. That the intention, when ascertained, prevails over arbitrary rules.<sup>57</sup>

The Texas court also repeatedly required an attempt to harmonize all parts of a deed, because “the parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement . . . .”<sup>58</sup>

In spite of the foregoing pronouncements by the Texas Supreme Court, in 1984 the court gave one arbitrary rule preeminent status in

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“given birth to far more than its fair share of unfortunate oil and gas conveyancing doctrines.” Ernest E. Smith, *The “Subject To” Clause*, 30 ROCKY MTN. MIN. L. INST. 15-1, § 15.02[1] (1985). It is the purpose of this article to suggest that the two-grant doctrine is another “unfortunate” doctrine that should be denounced.

53. See *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828 (Tex. Comm’n App. 1925, holding approved); *Wood v. Sims*, 154 Tex. 59, 273 S.W.2d 617 (1954) (construing deed as conveying two different interests in one tract of land). See *infra* part II for a thorough discussion of both facets of the two-grant doctrine.

54. See *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466, 468 (Tex. 1991). See *infra* part II for a thorough discussion of this facet.

55. 671 S.W.2d 870 (Tex. 1984).

56. *Id.* at 873. See *infra* part II.

57. *Harris v. Windsor*, 156 Tex. 324, 328, 294 S.W.2d 798, 800 (1956).

58. *Woods v. Sims*, 154 Tex. 59, 64, 273 S.W.2d 617, 620 (1954); see also *Garrett v. Dils Co.*, 157 Tex. 92, 96-97, 299 S.W.2d 904, 907 (1957) (construing the deed as a whole to determine the intent of the parties); *Humble Oil & Ref. Co. v. Harrison*, 146 Tex. 216, 224, 205 S.W.2d 355, 359 (1947) (construing deed as a whole to conclude that an undivided one-half interest was conveyed).

deed construction. In *Alford v. Krum*,<sup>59</sup> the court held that "when there is an irreconcilable conflict between clauses of a deed, the granting clause prevails over all other provisions."<sup>60</sup> The deed at issue in *Alford* was a multiclaused deed which attempted to convey a fraction of the grantor's mineral estate.<sup>61</sup> The granting clause of the deed used the fraction "one-half of the one-eighth interest in and to all of the oil, gas and other minerals."<sup>62</sup> Another clause recited that the sale is made subject to an existing oil and gas lease but "covers and includes 1/16 of all the oil royalty . . . due and to be paid under the terms of said lease."<sup>63</sup> A final clause, the future-lease clause, provided that if the existing lease terminated, the grantees would own "a one-half interest in all oil, gas and other minerals in and upon said land, together with one-half interest in all future rents."<sup>64</sup> The supreme court held that an irreconcilable conflict existed between the granting clause and the future lease clause that must be resolved in favor of "the clear and unambiguous language of the granting clause."<sup>65</sup>

Chief Justice Pope dissented and argued for the adoption of the method used in *Garrett v. Dils Co.*<sup>66</sup> Although most commentators consider *Garrett* as rejecting or ignoring the two-grant doctrine,<sup>67</sup> Pope interpreted it as using the doctrine and holding that two separate estates were granted under the granting clause and the future lease clause.<sup>68</sup>

*Alford* was soundly criticized by the bench and bar.<sup>69</sup> In 1991, the Texas Supreme Court expressly overruled it in *Luckel v. White*.<sup>70</sup> The

59. 671 S.W.2d 870 (Tex. 1984).

60. *Id.* at 872. The majority in the civil appeals decision had also decided the deed was unambiguous. See *Krum v. Alford*, 653 S.W.2d 464, 466 (Tex. App.—Corpus Christi 1982), *rev'd*, 671 S.W.2d 870 (Tex. 1984). However, in that opinion it was determined that the deed conveyed a 1/16 interest under the existing lease which increased to an undivided 1/2 interest. *Id.*

61. The history behind the use of this type of deed is explained in part II.

62. *Alford*, 671 S.W.2d at 871.

63. *Id.* at 872.

64. *Id.* at 873.

65. *Id.* at 874. See generally, Herd, *supra* note 4 (criticizing the *Alford* decision).

66. *Alford*, 671 S.W.2d at 876 (Pope, C.J., dissenting). See *infra* note 128.

67. See, e.g., HEMINGWAY, *supra* note 6, § 9.1, at 593 (stating that court departed from two-grant doctrine in *Garrett*); 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 340.2, at 242-43 (1991) (*Garrett* ignored two-grant theory); Herd, *supra* note 4, at 654 (viewing *Garrett* as using the four-corners rule).

68. *Alford*, 671 S.W.2d at 876 (Pope, C.J., dissenting). Chief Justice Pope viewed the future lease clause as "the ridgepole that divides the rights conveyed before reverter from those conveyed after the reversion." *Id.* at 874.

69. See *Jupiter Oil Co. v. Snow*, 802 S.W.2d 354, 358 (Tex. App.—Eastland 1990), *rev'd*, 819 S.W.2d 466 (Tex. 1991) (suggesting that the supreme court reconsider *Alford*). See also, Herd, *supra* note 4 (criticizing the repugnant to the grant rule and *Alford*).

70. 819 S.W.2d 459, 464 (Tex. 1991).

deed in *Luckel* was similar to that in *Alford* since different fractions were used in separate clauses of the conveyance.<sup>71</sup> The court held that "the majority in *Alford* incorrectly failed to harmonize the provisions under the four corners rule and then erred in applying the 'repugnant to the grant' rule in disregard of the future lease clause."<sup>72</sup> Although the fraction 1/32 was used in the granting clause and 1/4 in the future lease clause, the court held the deed was "properly harmonized to mean that the interest conveyed was one-fourth of the royalties reserved under the existing and all future leases."<sup>73</sup>

In *Luckel*, the fraction in the granting clause was not accepted as written but interpreted in light of the other clauses. This would indicate that the two-grant doctrine was not used. However, the concurring and dissenting opinions in *Luckel* seem to disagree about whether the majority used the doctrine. The concurrence felt compelled to urge the express adoption of Pope's dissent in *Alford*,<sup>74</sup> while the dissent criticized the majority for finding two grants.<sup>75</sup>

In a case decided the same day, *Jupiter Oil Co. v. Snow*,<sup>76</sup> which also involved the use of different fractions in separate deed clauses, the court held that *Luckel*'s holding regarding *Alford* did not apply because the deed unambiguously conveyed one interest under an existing lease that expanded into a larger interest at its termination.<sup>77</sup> This differs from the holding in *Luckel* since the fraction in the granting clause was enforced as written. No attempt was made to harmonize it in light of the fractions used in other clauses.

After *Luckel* and *Jupiter*, it is clear that the rule that the granting clause prevails is no longer the litmus test for intent in deed construction. The question remains, however, whether, in the construction of mineral or royalty conveyances with conflicting fractions in separate clauses, the court has adopted a liberal four corners approach requiring harmonizing the fractions, or the blanket use of the two-grant doctrine, which would enforce the conflicting fractions as written. To answer this query, the evolution of the two-grant doctrine will be reviewed and the decisions in *Luckel* and *Jupiter* will be closely analyzed.

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71. *Luckel* was different in that it was clearly a royalty deed and *Alford* involved a mineral deed. The *Luckel* court determined that this difference would not affect the rules of construction used. *Id.* at 463-64.

72. *Id.* at 464.

73. *Id.* at 465. The court also held that the grantee was not to receive less than 1/32 of production, which was one-fourth of the usual one-eighth royalty.

74. *Id.* at 465 (Mauzy, J., concurring).

75. *Id.* at 466 (Phillips, C.J., dissenting).

76. 819 S.W.2d 466 (Tex. 1991).

77. *Id.* at 467 & n.1, 469.

## III. THE TWO-GRANT DOCTRINE

## A. Background

## 1. The Multiclaue Deed

It is evident from the review in Part I that the controversial conveyances involve documents with two or three main divisions: 1) the granting clause, which is similar to clauses in other real property conveyances; 2) the subject-to clause, which informs that the conveyance is made subject to an existing lease and covers and includes the benefits of that lease; and 3) the future-lease clause, which provides for ownership rights after the existing lease expires.<sup>78</sup> This form is referred to as a three-grant deed.<sup>79</sup> That label is a misnomer, however, because it assumes that multiple conveyances are intended. Instead, this deed form was developed to clearly express the intent to make a single conveyance of a fractional mineral interest and the rights appurtenant thereto.

The three-grant or multiclaue deed was created in response to an early Texas case, *Caruthers v. Leonard*,<sup>80</sup> which held that when a grantee received an interest in a mineral estate that was already under lease, only a reversionary interest passed—not the delay rentals, and presumably, not the royalties.<sup>81</sup> This suggests that economic benefits would only pass if expressly assigned. Thus, the three-grant deed came into vogue, not to provide parties with a mode for making separate conveyances in one deed, but to insure that a single grant of a fractional mineral interest included a proportionate interest in benefits under existing and future leases.<sup>82</sup>

*Leonard* has been overruled.<sup>83</sup> Texas now recognizes the prevailing view that a fractional conveyance of the mineral estate carries with it, as appurtenances, a like fraction of the economic benefits of the mineral estate.<sup>84</sup> These benefits include the right to receive royalties, bonus payments, and delay rentals, as well as the right to lease, or the executive right.<sup>85</sup> Therefore, a grantor wishing to convey a 1/2 mineral interest

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78. See HEMINGWAY, *supra* note 6, § 9.1, at 593-94 (3d ed. 1991). Professor Smith has explained that the prime function of the subject-to clause is to protect the grantor against a breach of warranty claim when the property he is conveying is already leased. Smith, *supra* note 51, §§ 15.01, 15.2.

79. Herd, *supra* note 4, at 637.

80. 254 S.W. 779 (Tex. Comm'n App. 1923, judgm't adopted).

81. *Id.* at 782. See also Smith, *supra* note 52, § 15.02, (arguing royalties are apparently not payable under the lease).

82. See Smith, *supra* note 52, § 15.02[2].

83. *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (1943).

84. *Day Co. v. Texland Petroleum*, 786 S.W.2d 667, 669 n.1 (Tex. 1990).

85. *Id.* See generally HEMINGWAY, *supra* note 6, § 9.1, at 592.

and a like interest in the appurtenant rights can do so by simply conveying a 1/2 mineral interest, regardless of an existing lease. This will be sufficient to entitle the grantee to 1/2 of the benefits under the existing and future leases.

Forms used today reflect this understanding and provide space for only one fraction.<sup>86</sup> Unfortunately, the legacy of *Caruthers v. Leonard* has been the extensive use of multiclauses or three-grant deeds, which require the parties to fill in a fraction in three different clauses. Since drafters and the judiciary frequently misconstrue the estates created by an oil and gas lease, this seemingly perfunctory task has resulted in conflicting fractions that have plagued the courts in deed construction cases.

## 2. *The Estate Misconception*

Shortly after the discovery of oil and gas in commercial quantities at the turn of the century, courts were faced with numerous questions for which the common law provided few direct answers. The conceptual grappling with the economic benefits of the mineral estate in *Caruthers v. Leonard* is one example.<sup>87</sup> Another issue that immediately perplexed the courts concerned the estates created in the lessor and the lessee by an oil and gas lease.<sup>88</sup> In *Stephens County v. Mid-Kansas Oil & Gas Co.*,<sup>89</sup> the Texas Supreme Court determined that an oil and gas lease creates a fee simple determinable in the lessee in the mineral estate.<sup>90</sup> The lessee owns this fee in the entire mineral estate. The lessor retains the future interest that accompanies a fee simple determinable, a possibility of reverter, in

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86. 6 WEST'S TEXAS FORMS § 1.3, at 28 (2d ed. 1991). The multiclauses deed form is also still used. See *id.* § 1.4, at 30-31.

87. *Caruthers v. Leonard*, 254 S.W. 779, 782 (Tex. Comm'n App. 1923, judgment adopted). See also *Railroad Comm'n v. Manziel*, 361 S.W.2d 560, 568 (Tex. 1962) (rejecting application of common-law trespass rules in determining if trespass occurred in secondary recovery project); *Schlittler v. Smith*, 128 Tex. 628, 629, 101 S.W.2d 543, 544 (1937) (questioning whether royalty owner was entitled to bonus and delay rental payments); *Hager v. Stakes*, 116 Tex. 453, 471, 294 S.W. 835, 840 (1927) (comparing royalties to rents and determining that royalties are real property for taxation purposes); *Humble Oil & Ref. Co. v. Kishi*, 276 S.W. 190, 191 (Tex. Comm'n App. 1925, judgment adopted) (fashioning remedy for damage to leasing value where common-law remedies proved inadequate). The struggle with oil and gas estate concepts continues. See *Day & Co. v. Texland Petroleum*, 786 S.W.2d 667, 669 (Tex. 1990) (determining that the executive right is realty, reversing earlier cases treating it as personalty).

88. See *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923). See generally A. W. Walker Jr., *Fee Simple Ownership of Oil and Gas*, 6 TEX. L. REV. 125, 126-28 (1928); A. W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEX. L. REV. 1 (1928).

89. 113 Tex. 160, 254 S.W. 290 (1923).

90. *Id.* at 295. This is the estate created when an "unless" lease, rather than an "or" lease is used. See generally HEMINGWAY, *supra* note 6, § 6.2, at 285-86.



the whole estate.<sup>91</sup> Pursuant to the lease terms, the lessor also has a right to royalties, delay rentals, and other economic benefits and is permitted to explore for oil and gas and retain a portion of production. During the lease, the lessee has the right to develop all of the oil and gas. When the lease expires, the lessor regains possessory rights in the entire mineral estate due to the possibility of reverter.<sup>92</sup>

Since most leases provide for a 1/8 royalty, however, drafters and courts perceived the estate to be a fee simple determinable in only 7/8 in the lessee, with the lessor retaining a 1/8 fee interest.<sup>93</sup> This misconception stems from a failure to distinguish between the mineral estate owner's right to receive royalties and the value placed on that right in the lease. Although the lessor only retains a 1/8 royalty interest, the lessor still has a possibility of reverter in the entire mineral estate. Similarly,

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91. BERGIN & HASKELL, *supra* note 1, at 58. Bergin and Haskell describe the possibility of reverter as follows: "A possibility of reverter is the future interest a transferor keeps when he transfers an estate whose maximum potential duration equals that of the estate he had to start with and attaches a special limitation that operates in his own favor." *Id.* Applying this concept to an oil and gas lease, the lessor has conveyed the "estate he had to start with" (a fee simple estate in the minerals) but has attached a limitation, the production of oil and gas in paying quantities. When that condition is breached, the lessor will again have unencumbered rights in the whole mineral estate.

92. *See Stephens County*, 113 Tex. at 173, 254 S.W. at 295 ("The instruments . . . passed to appellee determinable fees in the lands; leaving in the grantors, their heirs or assigns, the possibility of reacquiring the absolute fee-simple titles, less whatever minerals may be meantime produced and marketed.").

93. *See Jupiter Oil Co. v. Snow*, 819 S.W.2d 466, 468 (Tex. 1991); *McBride v. Hutson*, 157 Tex. 632, 637, 306 S.W.2d 888, 891 (1957). In *McBride*, the issue was whether a conveyance by the grantor of a 1/3 interest in minerals that were under lease was a grant of 1/3 of 7/8 or 1/3 of 8/8 of the grantor's minerals. The court relied on *Stephens* and held that the grant was 1/3 of 7/8 since the grantor's reversion was only in 7/8, not 8/8 of the minerals. *Id.* In *Tipps v. Bodine*, the appellate court assumed that the fraction 1/16 is proper to convey 1/2 of the minerals when that estate is under lease. 101 S.W.2d 1076, 1079 (Tex. Civ App.—Texarkana 1936, writ ref'd).

Early Texas Supreme Court cases that decided whether royalties should be treated as realty or personalty for tax purposes contributed to the misconceptions. *See Hager v. Stakes* 116 Tex. 453, 471, 294 S.W. 835, 840 (1927). *Hager* held that the lease at issue only invested the lessee with a 7/8 interest because the oil royalty was payable in kind; it distinguished *Stephens* since the lease at issue there provided that the lessee at his option could pay the stipulated royalties in oil or cash. *Id.* at 839. Most leases today give the lessee the option of paying royalty in kind or in cash. The prevailing view is that the royalty payment is real property, although payable in money, and the oil and gas lease is viewed as placing the entire mineral estate in the lessee. *See State v. Quintana Petroleum Co.*, 134 Tex. 179, 186, 133 S.W.2d 112, 115 (1939); *Sheffield v. Hogg*, 124 Tex. 290, 297, 77 S.W.2d 1021, 1025 (1934) (disapproving of unnecessary dicta in *Hager*); *see generally* HEMINGWAY, *supra* note 6, § 2.5, at 59 n.94, 61.

Other jurisdictions have emphasized the estate misconception in deed construction. *See, e.g., Heyen v. Hartnett*, 679 P.2d 1152, 1158 (Kan. 1984).

although the lessee only has a right to  $7/8$  of production after costs, the lessee still owns a fee simple determinable in  $8/8$  of the minerals.

The estate misconception leads to the use of conflicting fractions in a multiclause deed. For example, a lessor who has leased the entire mineral estate, but desires to sell one half of the minerals, would assume that he owned  $1/8$  of the minerals due to the existing lease. Therefore, the lessor would use the fraction  $1/16$ , or a double fraction,  $1/2$  of  $1/8$ , to convey  $1/2$  of what he perceived he owned. In the subject-to clause, he would use the fraction  $1/2$  to insure that the grantee got  $1/2$  of the  $1/8$  royalty provided for in the existing lease. The lessor would also use the fraction  $1/2$  in the future lease clause, since he perceives that when the existing lease terminates, his interest then becomes  $8/8$  rather than  $1/8$ .<sup>94</sup>

### B. *Development of the Two-Grant Doctrine*

The two-grant doctrine, as it has been applied by various Texas courts, has two facets. One involves using the theory to hold that two different interests, the royalty and the mineral interest, have been conveyed in a single deed in a particular tract of land. The second facet involves construing a multiclause deed as conveying the same interest, either a mineral or royalty interest, in different sizes at different times.

#### 1. *The Hoffman Facet*

Ironically, the case that propagated the two-grant doctrine did not involve the use of conflicting fractions or thrive on the estate misconception. The three-grant or multiclause deed, however, does provide the format for development of the doctrine. In *Hoffman v. Magnolia Petroleum Co.*,<sup>95</sup> the grantor, who owned 320 acres that were under lease to an oil company, conveyed a one-half interest in the oil, gas, and other minerals under a certain 90 of the 320 acres to the grantee. The controversy stemmed from the subject-to clause, which provided that "it is understood and agreed that this sale is 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."<sup>96</sup> The grantee claimed that this clause entitled him to one-half of all royalty payable under the entire lease rather than restricting him to one-half of the royalty from wells drilled on the 90 acres granted to him. The Texas Commission of Ap-

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94. See generally HEMINGWAY, *supra* note 6, § 9.1. See also WILLIAMS & MEYERS, *supra* note 66, § 340.2, at 242-43 (explaining that double fractions are often used due to what this author has coined "estate misconception").

95. 273 S.W. 828 (Tex. Comm'n App. 1925, judgm't adopted).

96. *Id.* at 830.

peals agreed, holding that the granting clause conveyed the one-half mineral interests in the 90 acres to the grantee and that the subject-to clause operated as a second grant that conveyed a one-half interest in the royalty under the entire 320 acre tract.<sup>97</sup> Thus, in 1925, the unfortunate legacy of *Caruthers v. Leonard* was realized, and the two-grant doctrine was born.

This facet of the doctrine was subsequently used in three supreme court cases. The first was *Richardson v. Hart*<sup>98</sup> in 1945. The case involved construction of a multiclaused deed, but the same double fraction, 1/16 of 1/8, was used in each clause.<sup>99</sup> The appellate court had determined that the deed was ambiguous and affirmed the trial court's consideration of the parties' construction of the instrument.<sup>100</sup> The Texas Supreme Court, however, determined that the deed was not ambiguous, but clearly "conveyed two separate and distinct estates in the land."<sup>101</sup> The first was determined to be 1/16 of 1/8 or a 1/128 interest in the oil, gas, and minerals, and the second estate was 1/128 of the royalties paid under any lease (1/8 of 1/128 or 1/1024).<sup>102</sup>

The *Hart* decision is troublesome for two reasons. First, it assumes that it is logical for parties to use double fractions to convey a fractional interest in the mineral estate. The court was evidently unimpressed that one of the two fractions in the equation was the same as the royalty in the existing lease, 1/8. Yet, this should be considered patent evidence that the parties were functioning under the estate misconception and intended to convey a 1/16 mineral interest and the royalty that would be appurtenant thereto, 1/8 of 1/16. This would explain the use of the double fraction, a question left unanswered by the court.<sup>103</sup>

Second, the court discounted the fact that the supposed "second conveyance" would follow as a matter of law from the holding that a

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97. *Id.*

98. 143 Tex. 392, 185 S.W.2d 563 (1945).

99. *Id.* at 394, 185 S.W.2d at 563.

100. *Richardson v. Hart*, 183 S.W.2d 235, 237 (Tex. Civ. App.—Texarkana 1944), *modified*, 143 Tex. 392, 185 S.W.2d 563 (1945).

101. *Hart*, 143 Tex. at 396, 185 S.W.2d at 564.

102. *Id.* at 396, 185 S.W.2d at 565. (showing subsequent lease provided for a 1/8 royalty).

103. See WILLIAMS & MEYERS, *supra* note 67, § 327.2. Williams and Meyers recognize that the use of the double fraction results from the parties' mistaken conception that they own a 1/8 interest; they consider, however, that as a matter of construction the deed is unambiguous, and if a mistake was made, the proper remedy is reformation. *Id.* In *Richardson v. Hart*, the court of appeals found that the successors to the parties to the deed had treated it as conveying a 1/128 mineral interest. 183 S.W.2d at 236. However, in the supreme court, the appellant argued that the use of the double fraction "1/16 of 1/8" was intended to convey 1/16 of 1/8 of all the royalty. *Richardson*, 143 Tex. at 396, 185 S.W.2d at 564. A 1/16 mineral interest would entitle a grantee to 1/16 of 1/8 of the royalty.

1/128 mineral interest had been conveyed: "The fact that it fixes the share in the present royalties the same as would have obtained by operation of law does not lessen its force and effect as a conveyance. As is often the case such payment of royalty might have been larger or smaller than a pro rata share."<sup>104</sup>

By emphasizing the truism that mineral owners can convey royalties under an existing lease in a proportion different from the size of the mineral estate conveyed, the opinion in *Richardson v. Hart* detracts from the fact that parties rarely intend to do so.<sup>105</sup> From this premise, the court proceeded to use the two-grant doctrine when it was unnecessary and propagated a rule of construction that detracts from the parties' true intent.

In a 1953 case, *Benge v. Scharbauer*,<sup>106</sup> the Texas court again championed the right of parties to provide for disproportionate conveyances of mineral and royalty interests and achieved new levels of absurdity when the two-grant doctrine was applied in conjunction with the *Duhig* doctrine. In *Benge*, the grantor conveyed land to the grantee and reserved a 3/8 mineral interest.<sup>107</sup> The deed also gave the grantee the right to execute all future leases but required that "said leases shall provide for the payment of three-eight[h]s (3/8) of all the bonuses, rentals and royalties to the grantors."<sup>108</sup> Under *Duhig*, the grantor's mineral interest was reduced from 3/8 to 1/8.<sup>109</sup> However, the court held that the grantor was entitled to 3/8 of royalty, bonus, and rentals, because to hold otherwise would suggest that "the parties are powerless" to provide for disproportionate conveyances of mineral and royalty, bonus, and rentals.<sup>110</sup>

A year later, in *Woods v. Sims*,<sup>111</sup> the Texas Supreme Court relied on *Benge*, *Hart*, and *Hoffman* to further propagate the view that three-

104. *Hart*, 143 Tex. at 396, 185 S.W.2d at 565.

105. See WILLIAMS & MEYERS, *supra* note 67 ("The oft-repeated expression that a grantor has the power to convey by one instrument different interests in the possibility of reverter and under the subsisting lease should not obscure the fact that very few grantors really intend to convey interests of different magnitude.").

106. 152 Tex. 447, 259 S.W.2d 166 (1953).

107. *Id.* at 450, 259 S.W.2d at 167.

108. *Id.* at 452, 259 S.W.2d at 168.

109. *Id.* *Duhig* applied because there was an outstanding 1/4 mineral interest in a third party. *Id.*

110. *Benge*, 152 Tex. at 454, 259 S.W.2d at 169. Professors Meyers and Williams labeled this opinion "deplorable" since it created a mineral interest "something like the Cheshire Cat of *Alice in Wonderland*: '... and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.'" Charles J. Meyers & Howard R. Williams, *Hoffman v. Magnolia Petroleum Co.: A Further Comment*, 35 TEX. L. REV. 363, 371 (1957).

111. 154 Tex. 59, 273 S.W.2d 617 (1954).

grant mineral deeds convey separate and distinct estates in land.<sup>112</sup> Ironically, most of these opinions also recited four corners principles.<sup>113</sup> Their holdings subvert those principles, however, by using the two-grant doctrine to justify viewing separate clauses in isolation.

The repeated use of the first facet of the two-grant doctrine by the Texas Supreme Court from 1925 to 1955 deceptively suggests that it was settled precedent for construing a deed to convey separate, and usually disproportionate, interests in minerals and royalties. Yet, the doctrine was frequently ignored or discounted during this period. In 1933, the commission of appeals, in *Mitchell v. Simms*,<sup>114</sup> overturned the lower court's application of the two-grant theory with facts very similar to those in *Hoffman*.<sup>115</sup> In *Humble Oil & Refining Co. v. Harrison*,<sup>116</sup> the supreme court again ignored the *Hoffman* analysis,<sup>117</sup> and in 1957, an appellate court painstakingly distinguished it in *Robinson v. Humble Oil & Refining Co.*<sup>118</sup>

In spite of the ethereal presence of the two-grant doctrine from 1925 to 1957, it must be recognized that the Texas Supreme Court had approved one facet of the doctrine: its application to hold that two different, and usually disproportionate, interests—the mineral and royalty, can be created by one deed in a particular tract of land. The second facet,

112. *Id.* at 65, 273 S.W.2d at 621. In *Woods*, a multiclaue deed used the fraction 25/200 in every clause. In one clause, however, it was provided that an undivided 25 acre mineral interest was conveyed. *Id.* at 64, 273 S.W.2d at 620. It was subsequently determined that the grantor owned 226.88 acres rather than 200. The court held that the deed conveyed a 25/226.88 mineral interest but a 25/200 interest in the royalty. *Id.* The disproportionate interests were justified "[s]ince different estates in the minerals in place and in the royalty payable under the lease may be conveyed by the same instrument." *Id.* at 65, 273 S.W.2d at 621.

113. *Id.* at 64, 273 S.W.2d at 620-21 (stating that court will construe contradictory parts of an instrument to harmonize with one another and not strike down a part unless the conflict is irreconcilable); *Benge*, 152 Tex. at 451, 259 S.W.2d at 167 (holding that all parts of the instrument must be given effect if possible and court must construe the language of the instrument to harmonize); *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828, 830 (Tex. Comm'n App. 1925, judgment adopted) (stating that instrument must be made to speak consistently as a whole).

114. 63 S.W.2d 371 (Tex. Comm'n App. 1933, holding approved).

115. *See id.* at 373-74. Professor Williams opined that this case cast considerable doubt on the validity of the *Hoffman* rule. *See* Howard R. Williams, *Hoffman v. Magnolia Petroleum Co.: The 'Subject To' Clause in Mineral and Royalty Deeds*, 30 TEX. L. REV. 395, 417 (1952).

116. 146 Tex. 216, 205 S.W.2d 355 (1947).

117. *Id.* at 225, 205 S.W.2d at 360. *Compare with Hoffman*, 273 S.W. at 830 (*Humble* holding the document ambiguous, whereas *Hoffman* used the two-grant theory to hold the deed unambiguous). The majority in *Humble* cited *Hoffman*, but only for the proposition that "where the language of the grant is ambiguous, it is to be construed against grantors rather than against grantee." *Humble*, 146 Tex. at 224, 205 S.W. at 360. Professor Williams considered *Humble* an implicit rejection of *Hoffman*. *See* Williams, *supra* note 115, at 417-19.

118. 301 S.W.2d 938, 946 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.).

using the doctrine to hold that either a mineral or royalty interest is conveyed in different sizes at different times, was not embraced by the supreme court until *Jupiter Oil*.<sup>119</sup> Instead, the court had ignored the expansion facet in *Garrett v. Dils Co.*<sup>120</sup> in 1957, when presented with facts very similar to those in *Alford*,<sup>121</sup> *Luckel*,<sup>122</sup> and *Jupiter Oil*.<sup>123</sup>

Without mentioning *Garrett*, the appellate court in *Alford* held that the expansion facet should be applied.<sup>124</sup> That opinion was reversed by the supreme court and should be considered as a rejection of the expansion facet.<sup>125</sup> With *Alford* overruled, the question becomes whether the two-grant theory's expansion facet should or could be resurrected.

## 2. The Expansion Facet

The appellate court in *Alford* decided that the deed was unambiguous and could be construed under the expansion facet of the two-grant doctrine.<sup>126</sup> Therefore, it held that the deed conveyed an undivided 1/16 mineral interest under an existing lease (since the double fraction 1/2 of 1/8 was used in the granting clause), which expanded to a 1/2 interest after the termination of that lease (since that fraction was used in the future-lease clause).<sup>127</sup> The opinion cites three cases, none of which mention or apply either facet of the two-grant doctrine.<sup>128</sup> It does cite

119. *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466 (Tex. 1992).

120. 157 Tex. 92, 299 S.W.2d 904, 906-07 (1957) (see discussion of *Garrett*, *infra* parts III.B.3, V).

121. *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984).

122. *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991).

123. *Jupiter*, 819 S.W.2d at 466.

124. *Krum v. Alford*, 653 S.W.2d 464, 466 (Tex. App.—Corpus Christi 1983), *rev'd*, 671 S.W.2d 870 (Tex. 1984). The court does not use the term "expansion facet." That is this author's term. However, the court does use the concept.

125. *Alford*, 671 S.W.2d at 874. In a post-*Alford* decision, an appellate court determined that *Alford* had negated the expansion facet where a clause irreconcilably conflicts with the granting clause, but had not negated the *Hoffman* facet. See *Hawkins v. Texas Oil and Gas Corp.*, 724 S.W.2d 878, 886 (Tex. App.—Waco 1987, writ ref'd n.r.e.) (tracing history of *Hoffman* facet and determining it is still viable since *Alford* involved expansion).

126. The court does not use the term "expansion facet."

127. *Alford*, 653 S.W.2d at 466.

128. *Id.* The first case cited is *Associated Oil Co. v. Hart*, 277 S.W. 1043 (Tex. Comm'n App. 1925, judgm't adopted). The issue in that case was whether a grant of property, described by metes and bounds, and a subsequent reservation of all minerals under the property was void for repugnancy. *Id.* at 1043. The court held it was not void because the grant was general and the reservation specific. *Id.* at 1044. Therefore, the effect of the deed was to create a permissible severance of the mineral and surface estates. *Id.* at 1045. The case does not involve the construction of a multiclaused deed with conflicting fractions. Therefore, it is not authority for either facet of the two-grant doctrine. Instead, the opinion urges the rejection of arbitrary rules in favor of ascertaining the intent of the parties from the whole document. *Id.* at 1044.

The second case relied upon is *Texas and Pac. R.R. Co. v. Martin*, 123 Tex. 383, 71

*Woods*<sup>129</sup> and *Hart*,<sup>130</sup> but only for the proposition that different estates in minerals may be conveyed by the same instrument.<sup>131</sup> Its only men-

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S.W.2d 867 (1934). This case does not involve a multiclaue deed, a conveyance or a reservation of oil, gas, or minerals. The issue is whether a deed that granted land "for depot purposes and uses" conveyed an easement or a fee. *Id.* at 386, 71 S.W.2d 869, 869.

The third case cited is *Delta Drilling Co. v. Simmons*, 161 Tex. 122, 338 S.W.2d 143 (1960). *Delta* does involve a multiclaue deed, but the deed in this case used the fraction 1/4 throughout. The controversy arose due to the reservation by the grantor of "the lease interest and all future rentals." *Id.* at 125, 338 S.W.2d at 145. The court relied on *Garrett v. Dils Co.*, 157 Tex. 92, 93, 299 S.W.2d 904, 905 (1957), and held that the term "lease interest" referred to the right to execute leases, or the executive right. Therefore, although the grantees received a 1/4 mineral interest, they did not have the right to lease that interest. *Delta*, 161 Tex. at 128, 338 S.W.2d at 146. Once again, the two-grant doctrine was not used. On the contrary, this case refers to criticism of *Tipps v. Bodine*, 101 S.W.2d 1076 (Tex. Civ. App.—Texarkana 1936, writ ref'd), which is relied upon heavily in *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466 (Tex. 1992), in applying the expansion facet of the two-grant doctrine. *Delta*, 161 Tex. at 128, 338 S.W.2d at 147 n.3.

Although the three cases cited by the court in *Alford* are totally inapposite to the two-grant doctrine, there are other cases that would have been more direct authority for the two-grant expansion facet. For example, in *Schubert v. Miller*, 119 S.W.2d 139, 141 (Tex. Civ. App.—Texarkana 1938, no writ), the court of appeals reversed a judgment on an oil and gas lease for failure to join necessary parties, on the premise that the interests in the deed would be larger after the termination of an existing lease. The case of *Etter v. Texaco*, 371 S.W.2d 702, 704 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) has been considered an expansion-facet case, yet, its exegesis is representative of the faulty use of authorities that permeates most cases confronted with construction of a multiclaue deed. In *Etter*, the granting clause provided for a 1/32 interest or 1/4 of 1/8 interest in the minerals; the subject-to clause covered 1/4 of all the royalty; the future-lease clause provided that the grantor was entitled to all lease interests and all future rentals. The parties had deleted, with a typewriter, another portion of the form that allowed the parties to state the interests owned by the grantor and grantee in the minerals and rents. *Id.* It was argued that the use of the double fraction and the deletion meant the parties intended a conveyance of 1/4 of the royalty rather than 1/32 of the royalty or a 1/32 mineral interest. The court held that a 1/32 mineral interest was conveyed. *Etter* does not appear to hold that any expansion of interest occurred. Although the facts are more akin to those in *Garrett v. Dils Co.* than those in *Delta Drilling Co. v. Simmons*, the *Etter* court unconvincedly held that *Delta* controlled instead of *Garrett*. *Id.* at 705. As in *Richardson v. Hart*, 185 S.W.2d 563 (Tex. 1945), the court refused to accord any significance to the use of double fractions. *Etter*, 371 S.W.2d at 706. Similarly, rather than use a four corners approach and consider the effect of the express deletion, the court refused to consider it at all. *Id.* The *Etter* court completes its ad hoc analysis by quoting a law review article out of context. *Id.* (quoting but misapplying Joseph W. Morris, *Mineral Interest or Royalty Interests?*, 29 SW. LEGAL FOUND. 259, 269). The court cited the Morris article for the proposition that language in the future lease clause is unreliable. See *Etter*, 371 S.W.2d at 706. The article, however, does not make that suggestion. Instead, it stresses that the subject-to and future lease clauses are unnecessary, because the grantee is "entitled to share in bonuses, rentals and royalties in the same identical proportion as his mineral ownership bears to the entire mineral estate." See Morris, *supra*, at 269. The author then cites *Hoffman v. Magnolia Petroleum* in support of the proposition that these clauses have been construed in a manner that frustrates intent. *Id.*

129. *Alford*, 653 S.W.2d at 466.

130. *Id.* at 465-66.

131. *Woods v. Sims*, 154 Tex. 59, 273 S.W.2d 617 (1954).

tion of *Garrett* is in support of the greatest estate possible rule.<sup>132</sup> As in the dissent, the court did not consider the use of double fractions to show intent or to suggest an ambiguity.<sup>133</sup>

The expansion facet was also advocated as the proper construction method by the dissent when *Alford* reached the supreme court. In support of that position, Chief Justice Pope viewed *Garrett v. Dils Co.* as applying the expansion facet of the two-grant doctrine, while most commentators have viewed it as rejecting that doctrine.<sup>134</sup> An analysis of *Garrett*, however, reveals that the court was interpreting the deed under the four corners doctrine rather than the two-grant doctrine.

### 3. *Garrett v. Dils Company—Rejection of the Two-Grant Doctrine*

*Garrett* involved the construction of a three-grant deed. The granting clause conveyed to the grantee "an undivided one sixty-fourth interest in and to all of the oil, gas and other minerals."<sup>135</sup> The subject-to clause provided that the conveyance "includes one-eighth of all of the oil royalty"<sup>136</sup> due under the existing lease. The future-lease clause provided that:

It is understood and agreed that one-eighth of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said Grantee and in event that the above described lease for any reason becomes cancelled or forfeited, then and in that event an undivided one-eighth of the lease interest and all future rentals on said land for oil, gas and other mineral privileges shall be owned by said Grantee, he owning one-eighth of one-eighth of all oil, gas, and other minerals in and under said lands, together with one-eighth interest in all future rents.<sup>137</sup>

The initial lease terminated and another was executed which provided for a one-eighth royalty. The controversy was whether the successor to the grantee was entitled to 1/8 or 1/64 of the 1/8 royalty.<sup>138</sup> The court noted that the granting clause purported to convey a 1/64 mineral

132. *Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563 (1945).

133. *Id.* at 467 (Young, J., dissenting) ("Use of a double fraction in a deed is not ambiguous; the reader may calculate the interest very simply.").

134. *Compare Alford*, 671 S.W.2d at 876 (Tex. 1984) (Pope, C.J., dissenting) with authorities cited *supra* note 66. Chief Justice Pope viewed *Garrett* as holding "that the intent of the grantor was to convey a royalty of 1/64 or one-eighth of the one-eighth royalty . . . [T]he *Garrett* court held that a different and a greater interest was conveyed upon the reverter of the outstanding lease." *Alford*, 671 S.W.2d at 876.

135. *Garrett v. Dils Co.*, 157 Tex. 92, 93, 299 S.W.2d 904, 905 (1957).

136. *Id.*

137. *Id.* at 93-94, 299 S.W.2d at 905.

138. *Id.* at 94, 299 S.W.2d at 905.



interest. It chose not to view that fraction alone as representing intent, however:

Had other language in the deed not disclosed what the parties understood "one sixty-fourth" to mean, it would be our duty to give those words their usual meaning and construe the deed as a mineral deed to an undivided one sixty-fourth of the minerals in place. But there follows the granting clause language which clearly defines what the parties understood 'one sixty-fourth' of the minerals to mean.

....

Construing this deed as a whole and giving effect to each and every provision thereof, we are led to the conclusion that the royalty conveyed under future leases was the same as that conveyed under the then existing lease,—that is to say, one-eighth thereof. We further conclude that having the right to receive one-eighth of the royalty, together with a one-eighth lease interest and future rentals thereon, the respondent in reality is the owner of one-eighth of the minerals in the land.<sup>139</sup>

Since the controversy in *Garrett* concerned the royalty payable under a new lease, rather than the size and type of interest conveyed, some of the language in the opinion is prone to a two-grant spin. Yet, unlike the *Alford* opinions, the court in *Garrett* did not take the fraction in the granting clause at face value but interpreted it in light of several facts. It considered that the subject-to clause used the fraction 1/8, the future-lease clause used a double fraction, 1/8 of 1/8, and the usual royalty provided in a mineral lease is 1/8.<sup>140</sup> In concluding that the deed conveyed an undivided 1/8 of the minerals, the court also noted that the deed gave all the rights incident to ownership of 1/8 of the minerals to the grantee.<sup>141</sup>

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139. *Id.* at 95-97, 299 S.W.2d at 906-07.

140. *Id.* at 96, 299 S.W.2d at 906-07.

141. *Id.* at 96, 299 S.W.2d at 907. In a post-*Alford* appellate case, *Hawkins v. Texas Oil and Gas Corp.*, 724 S.W.2d 878, 886 (Tex. App.—Waco 1987, writ ref'd n.r.e.), the court determined that the *Hoffman* facet should have survived the overruling of that case, but not the expansion facet where a clause irreconcilably conflicts with the granting clause. The court noted that *Garrett* had mistakenly been labeled a two-grant doctrine case and then considered the application of that case. *Id.* at 884. It held that even if the *Garrett* approach survived *Alford*, *Garrett* could be distinguished because in the deed at issue the grantee did not receive all of the attributes of ownership of the mineral estate, as in *Garrett*. *Id.* at 888. This holding represents too narrow a reading of *Garrett* and should be rejected in light of *Luckel*. The Texas Supreme Court has clearly held that a deed need not convey all attributes of the mineral estate to a grantee in order to interpret it as a mineral, rather than a royalty conveyance. In *Altman v. Blake*, 712 S.W.2d 117 (Tex. 1986), the court construed the deed as conveying a mineral interest even though the grantee did not receive the executive right or the right to share in bonus and rentals. *Id.* at 120. The *Hawkins* court confused two separate construction issues: First, how to determine the size of the interest when a deed contains conflicting fractions in a multiclaused deed; and second, how to determine whether a mineral or royalty inter-

The consideration of these facts to explain the use of the fraction 1/64 as meaning a 1/8 mineral interest demonstrates that the two-grant doctrine, as it was applied in the *Alford* opinions, was not used. The *Garrett* holding was not that there was an expansion of interest or that separate conveyances were made. Instead, the *Garrett* court's approach rejected the *Hoffman-Hart* view of a multiclaused deed as making separate conveyances. Another distinctive aspect of the *Garrett* approach is that it recognizes the role of double fractions in determining intent.<sup>142</sup>

The *Garrett* court's approach also implicitly accorded significance to the estate misconception. This is evident in its considering the use of double fractions and taking judicial notice of the fact that the usual royalty is 1/8. If the grantor desired to convey 1/8 of the entire mineral estate, and he mistakenly considered that he only owned 1/8 of the minerals due to an existing lease entitling him to a 1/8 royalty, then he would use the fraction 1/64, or the double fraction 1/8 of 1/8.

In summary, the *Garrett* court's approach can be characterized as explicitly adopting a four corners approach with implicit consideration of the estate misconception, and as rejecting the view that a multiclaused deed is used to make separate conveyances. In contrast, in the *Alford* decisions the expansion facet of the two-grant doctrine was applied and each clause of the deed was viewed in a vacuum. There was no attempt to harmonize the conflicting fractions in light of other language in the deed or to consider why conflicting and double fractions were used. Instead, it appears both the majority in the appellate decision and the dissent in the Texas Supreme Court decision adopted the distorting view of *Hoffman, Hart, Benge, and Woods* that the use of the multiclaused deed evinces intent to make separate conveyances.

The majority opinion in *Alford* adopted an equally egregious position by focusing only on the fraction used in the granting clause. *Luckel* should be viewed as eradicating both of these approaches by reinstating ascertainment of the intent of the parties as the primary postulate in deed construction.

#### IV. THE LUCKEL AND JUPITER DECISIONS

##### A. Luckel v. White

In *Luckel v. White*, the Texas Supreme Court faced the problem of construing a multiclaused deed for the first time since its decision in *Alford*

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est was conveyed. *Altman* provides guidelines on the latter issue but does not involve conflicting fractions. To resolve that issue, this author suggests that *Luckel* should be viewed as a reaffirmation of the *Garrett v. Dils Co.* approach.

142. *Garrett*, 157 Tex. at 95, 299 S.W.2d at 906.

v. *Krum*. As in *Alford*, the granting clause and the future-lease clause used different fractions, and the parties did not assert that the deed was ambiguous.<sup>143</sup> In *Luckel*, the granting clause provided that the grantor conveyed to Luckel "an undivided one thirty-second (1/32nd) royalty interest." The habendum and warranty clause followed and referred to the above described 1/32 royalty interest. The subject-to clause provided that the grantee "shall receive one-fourth of any and all royalties paid under the terms of said lease." The future-lease clause stated that it is "expressly understood and agreed" that the grantee "shall be entitled to one-fourth of any and all royalties" under future leases.<sup>144</sup>

The existing lease terminated, and the property was subject to other leases providing for a 1/6 royalty. The grantee's successors claimed they were entitled to 1/4 of all of the royalties under these leases, or 1/24. The grantor's successor argued that the deed entitled them only to a fixed 1/32 royalty.<sup>145</sup>

The appellate court applied *Alford*.<sup>146</sup> The supreme court held that *Alford* could dictate even though it involved a mineral interest, and a royalty interest was clearly conveyed to Luckel.<sup>147</sup> Rather than apply the repugnant-to-the-grant rule, the court held that "the majority in *Alford* incorrectly failed to harmonize the provisions under the four corners rule."<sup>148</sup> The *Luckel* court ruled that the deed could be "properly harmonized to mean that the interest conveyed was one-fourth of the royalties reserved under the existing and all future leases."<sup>149</sup> The use of the fraction 1/32 in the warranty clause was harmonized by holding that the grantee was to "receive not less than 1/32nd of production, which is one-

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143. *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991).

144. *Id.* Additionally, in a final clause, the grant explained that since the grantor only owned one-half of the royalties under the terms of the present existing lease, and the other one-half had been conveyed by her to her children, grantor "conveyed one-half of the one-sixteenth (1/16th) royalty now reserved by her." *Id.* The court does not discuss this language in its analysis.

145. *Id.*

146. *Luckel v. White*, 792 S.W.2d 485, 490 (Tex. App.—Houston [14th Dist.] 1990), *rev'd*, 819 S.W.2d 459 (Tex. 1991). The supreme court also rejected the alternative holding adopted by the appellate court that required harmonizing the deed to hold that a fixed 1/32 royalty was conveyed. The supreme court determined that this was improper because it alters the clear language of the future-lease clause to convey a 1/4 royalty. *Luckel*, 819 S.W.2d at 464.

147. *Luckel*, 819 S.W.2d at 464. The deed did not have conflicting references to royalty and mineral interests. The interest was consistently referred to as a royalty interest and the grantee did not receive any of the attributes of the mineral estate. Therefore, the court was not presented with the additional problem of determining whether a royalty or mineral interest was conveyed. See discussion of *Hawkins*, *supra* note 141.

148. *Luckel*, 819 S.W.2d at 464.

149. *Id.* at 465.

fourth of the usual one-eighth.”<sup>150</sup>

Since the court held that the deed conveyed the same fractional royalty interest under existing and future leases, it appears that the expansion facet was not used. The first facet of the two-grant doctrine is inapposite, since the question in *Luckel* was not whether the deed created separate grants of mineral and royalty interests.<sup>151</sup> However, the court did use language consistent with the view that the deed created separate grants under the granting clause and the future lease clause. Most notably, it held that the language in the future lease clause is as effective to grant an interest as the language of the granting clause.<sup>152</sup> It also cited *Richardson v. Hart* and *Woods v. Sims*, two of the supreme court cases that used the *Hoffman* facet of the two-grant doctrine.<sup>153</sup> Yet, the court also held that its method of harmonizing is consistent with the approach used in *Garrett v. Dils Co.*<sup>154</sup>

Determining which rule or rules of construction the supreme court intends to use to supplant *Alford* requires harmonizing its simultaneous reliance on the *Hoffman-Hart* line of cases and *Garrett*. The most probable explanation is that the court still clings to the distorted view of the multiclaused deed as making separate grants. Another explanation is that another version of the two-grant doctrine was formulated. Since the court held that the same interest was conveyed under existing and future leases despite the use of different fractions, this version of the two-grant doctrine (if it exists) is different than the expansion facet used in *Jupiter Oil* and urged in the *Alford* decisions. It also differs from the application of the two-grant doctrine in *Richardson v. Hart*.<sup>155</sup> In those opinions, no attempt is made to harmonize the fractions used in light of other language in the deed or the fact that the usual royalty has been assumed to be 1/8. Instead, the court accepted the fractions in each clause as written.

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150. *Id.*

151. See *Luckel v. White*, 792 S.W.2d 485, 491 (Tex. App.—Houston [14th Dist.] 1990), *rev'd*, 819 S.W.2d 459 (Tex. 1991) (seeking to “foreclose any question of the applicability of the ‘double grant theory’ ” of *Hoffman*).

152. *Luckel*, 819 S.W.2d at 463. The court cited *Sun Oil Co. v. Burns*, 125 Tex. 549, 553, 84 S.W.2d 442, 444 (1935). That case is not authority for viewing a future-lease clause as making a separate conveyance. It merely determined that a mother Hubbard clause was sufficient to include additional acreage in a lease. *Id.*

As another example of the use of the two-grant doctrine, the supreme court in *Luckel* determined that the future-lease clause “presently conveyed the possibility of reverter to one-fourth fractional interest of the royalty interest.” *Luckel*, 819 S.W.2d at 464. It also focused on the interest conveyed after termination of the existing lease. *Id.*

153. *Id.* at 462-64.

154. *Id.* at 464.

155. 143 Tex. 392, 185 S.W.2d 563 (1945).

Another possible explanation for the two-grant tendencies apparent in the *Luckel* decision is that the question for decision was framed as "what effect the one-fourth language of the future lease clause should have" on the use of the four-corners rule and other traditional rules of construction.<sup>156</sup> The answer given is that the fraction in the future lease clause, as well as the assumption that the parties contemplated only the usual one-eighth royalty, explain the use of a conflicting fraction in the granting clause. When the holding in *Luckel* is posed in this manner, it appears that the four corners rule and the *Garrett* approach as outlined in Part II, and not the two-grant doctrine, have been designated as the successors to the repugnant-to-the-grant rule.

The concurring and dissenting opinions in *Luckel* also send mixed signals as to whether the majority opinion should be viewed as adopting any version of the two-grant doctrine. The concurring judge agreed that *Alford* should be overruled and that the intent in the deed at issue was to convey 1/4 of the royalties reserved under the existing and all future leases.<sup>157</sup> This indicates that Justice Mauzy did not assume that the expansion facet was or should be used. He was compelled, however, to suggest that Chief Justice Pope's dissenting opinion in *Alford* should be expressly adopted.<sup>158</sup> As demonstrated in Part II, Pope viewed *Garrett* as using the expansion facet. In describing Pope's opinion, however, the concurring judge explained that Pope rejected arbitrary rules and urged determining intent from a consideration of all parts of the instrument.<sup>159</sup> Thus, the concurring opinion seems to extoll the virtues of the four corners rule rather than the two-grant doctrine.

The dissent clearly views the majority as using the two-grant doctrine. In chastising the court for doing so, the dissenting opinion includes the following quote from a well-respected oil and gas treatise: "The oft-repeated expression that a grantor has the power to convey by one instrument different interests in the possibility of reverter and under the subsisting lease should not obscure the fact that very few grantors really intend to convey interests of different magnitude."<sup>160</sup> Although that advice should be heeded, the majority in *Luckel* did not hold that interests of different magnitude were conveyed. On the contrary, the court held that the same interest was conveyed under existing and future leases. The dissent would discard the distorting view of the multiclaused deed as making separate conveyances. However, it would apply the frac-

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156. *Luckel*, 819 S.W.2d at 462.

157. *Id.* at 465 (Mauzy, J., concurring).

158. *Id.*

159. *Id.*

160. *Id.* at 466 (Phillips, C.J., dissenting).

tion in the granting clause, 1/32, and explain the use of the fraction 1/4 in the future lease clause by assuming the parties "carelessly referred to the interest under future leases as one-fourth of all royalties rather than one fourth of a 1/8th royalty."<sup>161</sup> The more likely explanation is not that the grantors were careless in the future lease clause, but that they assumed the fraction 1/32 was the proper way to convey a 1/4 royalty in the granting clause since the land was under a lease providing for a 1/8 royalty.<sup>162</sup>

### B. Jupiter Oil Company v. Snow

While the *Luckel* opinion sends mixed signals about the approach it adopts, the majority opinion in *Jupiter Oil* clearly applies the expansion facet of the two-grant doctrine. The granting clause in the 1918 deed in *Jupiter Oil* conveyed an "undivided 1/16 interest in and to all the oil, gas, and other minerals."<sup>163</sup> The deed acknowledged that the tract was under a lease and in the third paragraph provided that the grantee was to have an undivided 1/2 interest in the event the lease terminated.<sup>164</sup>

As in *Luckel*, the issue in *Jupiter Oil* was framed specifically as, what is the interest conferred in the deed after the end of the existing lease?<sup>165</sup> The court began its opinion by holding that *Alford v. Krum* is inapplicable since this deed "unambiguously grants a one-sixteenth interest in the mineral estate as well as seven-sixteenths of the grantor's possibility of reverter."<sup>166</sup> The opinion concludes by holding that, "[t]he effect of this grant is that when the [existing] lease ended, Jupiter's interest in the mineral estate simultaneously expanded into a full one-half by operation of law."<sup>167</sup>

The analysis in *Jupiter Oil* is troublesome for several reasons. First,

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161. *Id.* at 465. The dissent assumes that it would be natural to use a double fraction to express intent to convey a 1/32 interest.

162. *Id.* at 466. The dissenting judge also saw no reason to overrule *Alford* since "no party has urged, nor does the court find, a conflict between the granting clause and any other clause of the deed." *Id.* Other than the fact that *Alford* involved a conveyance of a mineral interest and *Luckel* involved a royalty, it is difficult to distinguish between the two. Both cases involved the use of a smaller fraction in the granting clause than in the future-lease clause. *Id.* at 460.

163. *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466, 468 (Tex. 1991). Unlike the deed in *Luckel*, this deed involved the conveyance of a mineral interest. *Id.* at 467. It also predates the *Caruthers* decision. However, given the unsettled nature of oil and gas jurisprudence at that early date it seems certain that the estate misconception explains the conflicting fractions. See *supra* part II.

164. *Jupiter Oil Co.*, 819 S.W.2d at 468.

165. *Id.* at 467.

166. *Id.*

167. *Id.* at 469.

as the concurring judge notes, it is difficult to distinguish between the facts of this case and the facts of *Alford*.<sup>168</sup> Second, the court adopted the reasoning of a 1936 Texas appellate court case, *Tipps v. Bodine*,<sup>169</sup> which committed the estate misconception. That case involved a post-*Caruthers* multiclause deed that used the fraction 1/16 in the granting clause and the fraction 1/2 in the subject-to and future-lease clauses.<sup>170</sup> The court described the effect of the lease as giving the lessee a determinable fee in 7/8 of the minerals, with the grantor retaining 1/8.<sup>171</sup> As explained in Part II, the estates created by an oil and gas lease are a determinable fee in 8/8 of the mineral estate in the lessee, leaving the lessor with a possibility of reverter in 8/8. The provision for payment of royalty is the economic translation of the mineral estate owner's appurtenant right in the mineral estate.

Since the *Tipps* court believed, due to the estate misconception, that the grantor owned 1/8 of the minerals after the lease, it assumed the fraction 1/16 was the proper way to express intent to convey 1/2 of all the grantor owned at the time. The court, therefore, affirmed the trial court's ruling that had permitted reformation by replacing the fraction 1/16 with 1/2.<sup>172</sup> In *Jupiter*, however, the court adopts *Tipps*' descriptions of the estates, but then fails to assess, or harmonize, the use of the fraction 1/16. Therefore, the decision will propagate, rather than eradicate, the estate misconception.

The *Jupiter* decision is also troubling because the holding comports with the expansion facet of the two-grant doctrine, but it does not cite any of the two-grant cases or urge the adoption of the *Alford* dissent or appellate opinion. The opinion also fails to mention *Garrett v. Dils Co.* It is perplexing that it cites *Caruthers v. Leonard* without noting that it has been overruled or assessing its unfortunate effect on mineral and royalty conveyances.

The *Jupiter* decision cannot be reconciled with the holding in *Luckel*. The *Luckel* opinion expressly approves the *Garrett* opinion and the *Jupiter* opinion fails to mention it. In *Luckel*, the court harmonized the conflicting fractions and held that the same quantum of interest was

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168. *Id.* (Hecht, J., concurring) ("If *Alford* and this case are not twins, there is certainly a strong resemblance between them.").

169. 101 S.W.2d 1076, 1076 (Tex. Civ. App.—Texarkana 1936, writ ref'd).

170. *Id.* The date of the deed was 1930. *Id.* The future lease clause also provided that the grantee would own "1/16 of all oil, gas and other minerals in and under said lands, together with 1/2 interest in all future events." *Id.* at 1078.

171. *Id.*

172. *Id.* See also Thomas H. Lee, *Ambiguity and the "Subject To" Clause In Texas Mineral Conveyancing*, 5 S. TEX. L.J. 313, 319 (1961) (discussing court's analysis in permitting reformation).

conveyed under existing and future leases, while in *Jupiter* the court applied the expansion facet of the two-grant doctrine. If the *Jupiter* opinion had used the *Luckel-Garrett* approach, the holding would have been that a 1/2 mineral interest was conveyed under existing and future leases. This would not change the ultimate result since the original lease had terminated, but it would clarify the state of the law. It would also eradicate the estate misconception and the *Hoffman-Hart* view of multiclaue deeds. Instead, the current state of the law for construing mineral or royalty deeds with conflicting fractions is unclear. To provide clarity, the *Jupiter* decision should be discounted due to its faulty exegesis, and *Luckel* should be viewed as a reaffirmation of the approach in *Garrett v. Dils Co.*

## V. ADOPTION AND REFINING OF THE GARRETT APPROACH

### A. *Response to Criticisms of Garrett*

The *Garrett v. Dils Co.* approach has been criticized as using reformation disguised as construction in violation of the parol evidence rule.<sup>173</sup> The approach used in that case, however, does not purport to discover actual subjective intent, which is the basis of reformation. Nor is it relying on outside evidence to contradict the writing in violation of the parol evidence rule.<sup>174</sup> Instead, it adopts an objective explanation of intent based on the fractions used in the four corners of the document. This should be permissible under the liberal, harmonizing approach reaffirmed in *Luckel*. The court's explicit consideration of the usual 1/8 royalty and its implicit consideration of the estate misconception are also permissible under the general principle that meaning can be determined,

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173. See HEMINGWAY, *supra* note 6, § 2.7, at 95 (remarking that *Garrett* is an example of courts, "on behalf of befuddled litigants, benevolently and improperly granting reformation in the guise of a judgment for title."). In another section of his treatise, Professor Hemingway cites *Garrett* as support for the following statement: "Although courts usually follow the [rules for admission of parol evidence], instances may be found where relief in the form of reformation, modification, etc., has been given in suits for the purpose of determining title." *Id.* § 3.2, at 121. *But see*, Lee, *supra* note 172, at 326, (stating that the court in *Garrett* "does not add to the erroneous notion that after a lease the lessee owns 7/8 of the minerals and the lessor 1/8 but, [sic] it simply takes into consideration that some people think so, a laudable and practical approach to the problem.").

174. "Evidence offered strictly for the purpose of aiding in the construction of a written instrument is not within the prohibition of the Parol Evidence Rule." MCCORMICK & RAY, *supra* note 27, § 1681 at 399-400. That rule is invoked to prevent contradiction or additions once meaning has been established. See generally, Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964) (discussing general interpretation doctrines); Note, *The Interpretation of Mineral and Royalty Deeds—The Manipulation of the Parol Evidence Rule*, 38 MINN. L. REV. 857 (1954) (applying parol evidence rule to mineral and royalty deeds).



as a matter of law, in light of the circumstances existing at the time the document was drafted.<sup>175</sup> Given the imprecise nature of the litany of rules courts recite for determining ambiguity and the use of extrinsic evidence, it is counterproductive to reject the *Garrett* approach as violative of those rules. Instead, *Luckel's* reaffirmation of the *Garrett* approach should be welcomed as another instance in which Texas courts have adopted specific rules for particular constructional problems to enhance title stability.

*B. The Garrett Approach Refined: Adoption of Specific Rules*

In order to further promote title certainty without sacrificing intent, the court should define the contours of the *Garrett* approach. This can be done by extracting guidelines from *Garrett's* analysis of the use of double fractions, which includes taking judicial notice of the fact that the usual royalty has been 1/8, its explicit rejection of the *Hoffman-Hart* view of the multiclaused deed, and its implicit consideration of the estate misconception. These guidelines should include the following: 1) if the fraction in the future-lease clause times 1/8 equals the fraction in the granting clause, the fraction in the future lease clause expresses intent regarding the quantum of the present, as well as future, conveyance; 2)

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175. See *supra* part I for rules of construction. To subvert any allegations of disguised reformation or parol evidence violations, the court could take judicial notice of the estate misconception as it has the usual 1/8 royalty in mineral leases. This should not be necessary, however, since it is within the purview of the court to formulate rules of construction unless they clearly conflict with settled principles. Courts have taken judicial notice of the fact that the usual royalty in an oil and gas lease is 1/8. See, e.g., *Garrett v. Dils Co.*, 157 Tex. 92, 96, 299 S.W.2d 904-07 (1957); *Badger v. King*, 331 S.W.2d 955, 957 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.). See also *Harrell v. Nash*, 133 P.2d 748 (Okla. 1942). But see *White v. White*, 830 S.W.2d 767, 770 (Tex. App.—Houston [1st Dist.] 1992, no writ) (court refused to take judicial notice that usual royalty is 1/8).

Rule 201(b) of the Texas Rules of Civil Evidence provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. TEX. R. EVID. 201(b). See also Olin Guy Wellborn III, *Judicial Notice Under Article II of the Texas Rules of Evidence*, 19 ST. MARY'S L.J. 2, 13 (1987). See generally E. F. Roberts, *Judicial Notice: An Essay Concerning Human Misunderstanding*, 61 WASH. L. REV. 1435, 1437 (1986); C. William Kraft, Comment, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 530, 532, 552 (1968). See also *Parten v. Cannon*, 829 S.W.2d 327 (Tex. App.—Waco 1992, no writ). In *Parten*, the court was interpreting an oil and gas lease to determine if a filing requirement created a condition, which would cause automatic forfeiture if violated, or a covenant, which would not cause the entire lease to terminate. The court relied on the rule that if the surrounding circumstances suggest the contract is capable of only a single meaning, the court can confine itself to the writing. *Id.* at 330. The court determined that the surrounding circumstances, a letter, evinced no intent for a total forfeiture of the lease on portions maintained by production beyond the primary term. *Id.* at 331.

the use of double fractions should be considered in the interpretation process, for example, if a double fraction is used to convey a mineral interest, which consists of  $1/8$  accompanied by another fraction, the accompanying fraction is the intended quantum of the mineral estate to be conveyed;<sup>176</sup> 3) in light of the history behind the three-grant deed, a document should not be construed as making two grants due to the use of that form, unless additional evidence of intent is found; and 4) if the document cannot be harmonized under the first two rules, it should be considered ambiguous and extrinsic evidence should be considered.<sup>177</sup>

Title certainty has been a consistent goal for the Texas Supreme Court in formulating rules of construction.<sup>178</sup> The application of the *Garrett* approach and the foregoing recommended rules would promote this goal by permitting a determination of the estates created from the four corners of most multiclause deeds with conflicting fractions. A title examiner, then, could confidently determine ownership interests without litigation.

### C. *The Garrett Approach Compared to Other Possible Rules for Construing Multiclause Deeds with Conflicting Fractions*

#### 1. *The Two-Grant Doctrine*

The two-grant doctrine does have a positive aspect: it is easy to apply, since fractions are taken at face value, which would aid title certainty. The goal of title certainty, however, should not be achieved at the

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176. See discussion of double fractions in *Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563 (1945). This consideration of double fractions would change the result in a number of cases that have not attempted to ascertain the intent behind using double fractions from the four corners of the document. For example, in *Harriss v. Ritter*, 154 Tex. 474, 478, 279 S.W.2d 845, 847 (1955), an instrument reserved  $1/2$  of  $1/8$  of the oil, gas and other mineral royalty and  $1/2$  of bonus and rentals. The court held that a  $1/16$  "of" royalty together with  $1/2$  of bonus and rentals was reserved. Under the *Garrett* approach and proposed rules, the document would be interpreted to convey a  $1/2$  mineral interest, since the use of the double fraction can be explained by taking note of the usual royalty and the estate misconception.

The rules should be used to determine if a mineral or royalty interest is being conveyed. See *supra* text accompanying notes 25-56.

177. See e.g., *Stag Sales Co. v. Flores*, 697 S.W.2d 493, 495 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.). When a drafter is functioning under the estate misconception, the fraction in the granting clause is smaller. See *supra* part II. This case is unusual in that the fraction in the future lease clause is smaller than the fraction in the granting clause. Therefore, the rules outlined above would not be applicable, and it would be appropriate to consider the conflicting fractions as creating an ambiguity that should be resolved through the use of extrinsic evidence.

178. See *Altman v. Blake*, 712 S.W.2d 117, 120 (Tex. 1986) ("We recognize the necessity for stability and certainty in the construction of mineral conveyances."); *Moser v. United States Steel Corp.*, 676 S.W.2d 99, 101 (Tex. 1984) (severance of mineral estate from surface estate).

expense of the parties' intent. Dean Kuntz commented on the competing goals of ascertaining intent and title stability:

Nevertheless, the controlling policy is that certainty, though desirable, should be sacrificed in favor of preserving property ownership; that it is not desirable to achieve certainty at the risk of producing injustice to parties who through ignorance or neglect inadvertently make a poor choice of words in attempting to express their intentions in a written instrument.<sup>179</sup>

It is not disputed that parties may convey interests in different sizes at different times. Given the history behind the advent of the three-grant deed, compounded by the pervasiveness of the estate misconception, it is unlikely that two grants were intended in conveyances using that deed form.<sup>180</sup> Therefore, applying the two-grant doctrine frustrates the intent of the parties. The *Garrett* approach is preferable because it provides a more accurate assessment of intent without sacrificing title certainty.

## 2. *The Kansas Approach*

In a 1984 Kansas Supreme Court case, the court took express notice of the estate misconception in construing a deed with conflicting fractions.<sup>181</sup> The court determined that an ambiguity existed which permitted the use of extrinsic evidence.<sup>182</sup> This approach is laudable because it recognizes the explanation for conflicting fractions that insures an interpretation reflecting actual intent. The necessity of litigation that follows the determination of ambiguity, however, would be detrimental to title certainty.

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179. EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 16.1, at 474 (1987).

180. See e.g., *Snow v. Jupiter Oil Co.*, 802 S.W.2d 354, 358 (Tex. App.—Eastland 1991), *rev'd* 819 S.W.2d 466 (Tex. 1991) (evidence showed that parties had treated the deed as conveying 1/2 under the existing lease). The dissent in *Luckel* made this point and cited the Williams & Meyers treatise as support. See *Luckel v. White*, 819 S.W.2d 459, 466 (Tex. 1991) (Phillips, C.J., dissenting).

181. See *Heyen v. Hartnett*, 679 P.2d 1152, 1158 (Kan. 1984). The granting clause in *Heyen* provided for a 1/16 mineral interest, but the subject-to clause read, "an undivided 1/2 interest in the Royalties, Rentals and Proceeds." *Id.* at 1154. The court quoted extensively from an earlier supreme court case that carefully explained the estate misconception. *Id.* at 1158 (quoting *Shepard v. John Hancock Mut. Life Ins. Co.*, 368 P.2d 19, 26 (Kan. 1962)). In *Shepard*, the court's analysis was very similar to that used in *Garrett* because the court determined there was no ambiguity since the conflicting fractions could be explained in light of the royalty reserved and the estate misconception. See *Shepard*, 368 P.2d at 26. See generally KUNTZ, *supra* note 179, § 16.3, at 491.

182. *Heyen*, 679 P.2d at 1158. *But see Shepard*, 368 P.2d at 26, in which the court, with analysis very similar to *Garrett*, determined that the conflicting fractions did not create an ambiguity.

### 3. *Preferring the Subject-To or Future-Lease Clause*

Since the three-grant deed was used largely in response to *Caruthers*, it is likely that the subject-to clause or future-lease clause is an accurate expression of the mineral or royalty interest intended to be conveyed under existing and future leases.<sup>183</sup> The estate misconception also does not generally produce errors in those clauses. Preferring one of these clauses, however, would be committing the same error as in *Alford* of failing to determine intent from the entire document. Unlike an approach that prefers one clause over another, the *Garrett* approach is congruous with the primary tenet of deed construction, the four corners rule.

### 4. *The Greatest-Estate-Possible Rule*

The rule that a deed should be construed to pass the greatest-estate-possible is a venerable rule of construction that has been invoked in countless cases, including *Garrett v. Dils Co.*<sup>184</sup> This rule would promote title certainty, because the fraction that conveyed the largest estate would prevail. It suffers from the same malady as *Alford*, however, because it approves disregarding conflicting provisions in the deed, which is incongruous with the four corners rule.

## VI. CONCLUSION

The two-grant doctrine is the progeny of obscure cases and conceptual confusion. There is no basis in precedent or policy for its rebirth in Texas deed construction.<sup>185</sup> It is an arbitrary rule that tends to frustrate rather than elucidate the parties' intent in direct contravention of the consistent mandate that ascertaining intent is the primary goal of deed construction.

*Luckel* should be viewed, in general, as a reaffirmation of the four corners rule and a rejection of arbitrary rules, including the two-grant doctrine. In construction of multiclause deeds,<sup>186</sup> *Luckel* should again be viewed as rejecting the two-grant doctrine and as reaffirming the lib-

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183. See Herd, *supra* note 4, at 647 n.77; Smith, *supra* note 52, § 15.02[2].

184. *Garrett*, 157 Tex. at 94, 299 S.W.2d at 906. See also Herd, *supra* note 4, at 662 (suggesting using the greatest estate possible rule to solve the unique constructional problem presented in *Stag Sales Co. v. Flores*, 697 S.W.2d 493, 494 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.)). As noted in note 168 *supra*, that case is unusual because the fraction in the future-lease clause was 1/16 while the fraction in the granting clause was 1/2.

185. This does not include the use of the grant and regrant fiction, which has been used under the *cy pres* principle to avoid violations of the rule against perpetuities. See Bagby v. Bredthauer, 627 S.W.2d 190, 195 (Tex. App.—Austin 1981, no writ).

186. This would require the rejection of the two-grant doctrine for holding that two different estates were conveyed, as in *Hoffman*, as well as that different sizes of interests were conveyed at different times, as in *Jupiter*, simply because a multiclause deed was used. A deed

eral approach in *Garrett v. Dils Co.* that requires harmonizing conflicting fractions from the four corners of the deed. To further promote title stability, the Texas Supreme Court should be responsive to the unique problems caused by the estate misconception and the history behind the multiclaue deed and adopt specific rules for guidance. The rules suggested in Part IV would refine the approach used in *Garrett* and reaffirmed in *Luckel*. The rules for deed construction in Texas are sufficiently malleable to permit adoption of this approach against charges that it confuses construction with reformation or violates the parol evidence rule. Moreover, unlike the two-grant doctrine, the harmonizing approach will preserve the sanctity of the parties' intent.

After *Luckel*, it is clear the repugnant-to-the-grant doctrine is no longer a definitive rule of deed construction in Texas. Whether the *Garrett* approach or the two-grant doctrine should be hailed as its successor, however, is not clear. *Luckel* simultaneously approves of *Garrett's* harmonizing approach and other cases that used the *Hoffman* facet of the two-grant doctrine. In *Jupiter Oil* the court inanelly distinguishes *Alford* and ignores *Luckel's* harmonizing approach. Instead, the court blatantly uses the expansion facet of the two-grant doctrine that requires accepting conflicting fractions at face value. Therefore, the current state of the law for construing multiclaue deeds with conflicting fractions is unclear. At the earliest opportunity, the Texas Supreme Court should provide clarity by adopting the *Garrett* approach and specific rules for harmonizing these deeds, and by expressly renouncing a rebirth of the two-grant doctrine.

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should not be construed as making two grants unless there is additional evidence of such intent.