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## The Legacy of the 1/8th Landowner's Royalty and the Texas Supreme Court: Has Hysaw v. Dawkins Resolved the Double Fraction Dilemma

Laura H. Burney

*St. Mary's University School of Law*, [lburney@stmarytx.edu](mailto:lburney@stmarytx.edu)

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# THE LEGACY OF THE 1/8TH LANDOWNER’S ROYALTY AND THE TEXAS SUPREME COURT: HAS *HYSAW V. DAWKINS* RESOLVED THE “DOUBLE FRACTION” DILEMMA?

LAURA BURNEY<sup>†</sup>

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<sup>†</sup> Professor, St. Mary’s University School of Law, San Antonio, Texas

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## I. INTRODUCTION

“Blood may be thicker than water, but oil is thicker than both.”<sup>1</sup>

Lawyers, landmen, landowners, and producers face a long list of perennial problems when interpreting or drafting documents that affect mineral estates. I have written extensively about these problems, including the “fixed or floating” non-participating royalty issue addressed in a recent Texas Supreme Court case, *Hysaw v. Dawkins*.<sup>2</sup> In that case, three siblings, who were beneficiaries of their mother’s will, disputed the appellate court’s holding that the double fraction  $\frac{1}{3}$  of  $\frac{1}{8}$  created a “fixed”  $\frac{1}{24}$ th non-participating royalty interest (NPRi), rather than a “floating”  $\frac{1}{3}$  NPRi.<sup>3</sup> The dispute arose when one sibling leased her land and negotiated a  $\frac{1}{5}$ th landowner’s lease royalty, rather than the once-common  $\frac{1}{8}$ th.<sup>4</sup> The case presented the Texas Supreme Court with the opportunity to clarify mixed results from appellate court cases. This Article reviews cases prior to *Hysaw* and discusses the lessons that opinion provides regarding the “fixed or floating” NPRi issue. The Article concludes that *Hysaw* has clarified the law by confirming a holistic approach that eschews bright-line rules, such as merely multiplying fractions in deeds with double or restated fractions. Instead, the opinion endorses an analysis approach that turns to the “estate misconception” and the legacy of the once-common  $\frac{1}{8}$ th landowner’s royalty when interpreting such deeds. *Hysaw* also provides direction for drafting and should create predictability for owners and producers that will improve title stability in the shale era.

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1. *Hysaw v. Dawkins*, 483 S.W.3d 1, 6 n.4 (Tex. 2016) (citing Dallas Television Show, J.R. Ewing, perf. by Larry Hagman).

2. 483 S.W.3d 1 (Tex. 2016). The author worked on this case in the Texas Supreme Court jointly with Mary Keeney, Boyce Cabaniss, and John McFarland, the lawyers who represented the *Hysaw* parties in the trial court and court of appeals.

3. *Id.* at 4, 6–7.

4. *Id.* at 6.

## II. BACKGROUND: WHY DRAFTERS USE DOUBLE, RESTATED, OR CONFLICTING FRACTIONS

Property owners face two key decisions when creating, by grant or reservation, interests in their subsurface estates: first, whether to create a mineral interest or a royalty interest; and second, what the fractional size of that interest should be.<sup>5</sup> This section examines courts' interpretations of deeds affecting the second decision and the lessons those decisions teach regarding drafting in the shale era.

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

Assume Owner has decided to convey to Grantee an undivided 1/2 fractional mineral interest, rather than a royalty interest. Assume also that Owner has previously leased his land to Oil Company with a familiar lease form, which is commonly viewed as creating a fee simple determinable estate in the lessee. That lease is an older version requiring the lessee to pay the owner-lessor the traditional, but no longer common, 1/8 landowner's royalty.<sup>6</sup> This form lease conveys a fee simple determinable estate in all, or 8/8, of the mineral estate to Oil Company, leaving Owner with a non-possessory future interest, called a possibility of reverter, in all, or 8/8, of the mineral estate.<sup>7</sup> Note that only in the oil patch will one find "the whole" defined as 8/8. As described below, this phenomenon and others stem from the legacy of the 1/8 royalty in older form leases.

Today it is clear that Owner's pre-existing lease has not converted Owner's interest in the mineral estate from an interest in all (8/8) to only 1/8.<sup>8</sup> The lease's royalty clause entitles Owner to a share of the proceeds

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5. Part II of this Article is an excerpt from Laura H. Burney, *Oil, Gas, and Mineral Titles: Resolving Perennial Problems in the Shale Era*, 62 U. KAN. L. REV. 97, 103–22 (2013) [hereinafter Burney, *Oil, Gas, and Mineral Titles*]. This Article includes a discussion of the first question I mention: whether the parties intend to create a mineral or a royalty interest.

6. See Laura H. Burney, *Interpreting Mineral and Royalty Deeds: The Legacy of the One-Eighth Royalty and Other Stories*, 33 ST. MARY'S L.J. 1, 28 (2001) [hereinafter Burney, *Interpreting Mineral and Royalty Deeds*] (acknowledging leases traditionally convey a 1/8 royalty).

7. See *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 966 S.W.2d 451, 460 (Tex. 1998); PATRICK H. MARTIN & BRUCE M. KRAMER, *WILLIAMS & MEYERS MANUAL OF OIL AND GAS TERMS* 818 (11th ed. 2000) [hereinafter MARTIN & KRAMER, *OIL AND GAS TERMS*] (describing a possibility of reverter as the "interest left in a grantor or lessor after a grant of land or minerals subject to a special limitation"); 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, *TEXAS LAW OF OIL AND GAS* § 3.9(E), at 3-78 (2d ed. 2014) (noting possibility of reverter is vested interest lessor retains after granting a lease).

8. Laura H. Burney, *The Interaction of the Division Order and the Lease Royalty Clause*, 28 ST. MARY'S L.J. 353, 429 (1997) [hereinafter Burney, *Interaction of the Division Order*] ("[I]t

from the sale of the production, but does not reduce the size of his possibility of reverter.<sup>9</sup> Owner owns a non-possessory interest in all (8/8) of the minerals, but he can convey a fractional interest *subject to* the pre-existing lease. To convey the desired undivided 1/2 mineral interest, the Owner should use “mineral” language and insert the fraction 1/2 in the form’s designated space for the fractional interest Owner intends to convey.<sup>10</sup>

1. *Why Multiclaude Deed Forms Were Used and Why They Are Not Necessary*

Another fact is clear today: as a matter of law, Grantee’s 1/2 undivided ownership in Owner’s mineral estate entitles her to a proportionate share of the rents and royalties payable under the terms of the pre-existing lease between Owner and Oil Company.<sup>11</sup> Therefore, after the conveyance, Oil Company owes 1/2 of the 1/8 landowner’s lease royalty to Owner and the other 1/2 to Grantee.<sup>12</sup> That fact, however, eluded early courts.

For example, in *Caruthers v. Leonard*,<sup>13</sup> the court held that a conveyance subject to an existing lease did not entitle the grantee to a proportionate share of the rents and royalties payable under that existing lease.<sup>14</sup> In response to that decision, which was later overruled,<sup>15</sup> a notorious deed form with multiple clauses and spaces for fractions developed to insure that Grantee received rents and royalties in proportion to the

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should be considered well-settled in Texas that the oil and gas lease vests 8/8ths of the oil and gas in the lessee, not 7/8ths, with the lessor retaining a possibility of reverter in 8/8ths.”)

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

10. For examples of deed forms for accomplishing these goals, see 6 WILLIAM B. BURFORD, WEST’S TEXAS FORMS: MINERALS, OIL & GAS § 1:3, at 33–35 (4th ed. 2008) and 4 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE SERIES: LAND TITLES AND TITLE EXAMINATION § 23.70, at 529 (3d ed. 2005).

11. *See, e.g., Concord Oil*, 966 S.W.2d at 464 (finding grantor’s possibility of reverter of 1/12 of the mineral interests included a right to royalties under the lease terms); *see also* Burney, *Interpreting Mineral and Royalty Deeds*, *supra* note 6, at 14 (noting “the deed effectively conveyed all attributes” of the mineral lease, including the right to share royalties).

12. The proportionate reduction clause in typical lease forms allows the lessee to reduce these payments proportionately to Owner and Grantee if they have leased 100%. *See* MARTIN & KRAMER, OIL AND GAS Terms, *supra* note 7, at 871–72 (defining “proportionate reduction clause” and noting that the purpose of such a clause is to reduce the payments to a lessor to be in proportion to the lessor’s interest).

13. 254 S.W. 779 (Tex. 1923), *abrogated by* *Hager v. Stakes*, 294 S.W. 835 (Tex. 1927).

14. *Id.* at 782–83; *see* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 87–89 (1993) [hereinafter Burney, *Regrettable Rebirth of the Two-Grant Doctrine*] (discussing the legacy of the *Caruthers* decision).

15. *See generally Hager*, 294 S.W. 835 (overruling *Caruthers*); *Harris v. Currie*, 176 S.W.2d 302, 306 (Tex. 1943) (noting *Hager*’s overruling of *Caruthers*).

fractional mineral interest conveyed.<sup>16</sup> Specifically, in addition to the granting clause, this deed form recited that the conveyance is made “subject to” the existing lease and “covers and includes” the specified fractional interest of rents and royalties in the existing lease.<sup>17</sup> Another clause provided that the grantee would receive the stated fractional interest in rents and royalties payable under future leases.<sup>18</sup> Notably, these additional “subject to” and “future lease” clauses lacked granting clause language.<sup>19</sup> The reason for this omission is simple: these clauses were inserted not to make additional grants, but to clarify that the grantee receives a proportionate amount of rents and royalties under any lease, whether existing or future.<sup>20</sup>

Courts eventually corrected the errors of *Caruthers*.<sup>21</sup> But the form, which should be avoided, exists in formbooks today.<sup>22</sup> If filled out properly, with the same fraction in every clause, the form presents no problems for title examiners or courts. Unfortunately, misconceptions among laypersons and legal minds have complicated drafting and interpreting these deeds. The primary offender is the “estate misconception.”<sup>23</sup>

## 2. *Role of the “Estate Misconception” and “The Legacy of the 1/8th Landowner’s Royalty”*

The estate misconception—a legacy of the “usual 1/8th landowner’s royalty”—describes the confusion regarding estate ownership after leasing property.<sup>24</sup> In the example above, Owner, under the influence of the estate misconception, assumed the lease converted his ownership to 1/8 in the mineral estate. Therefore, if Owner intended to convey an undivided 1/2

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16. See generally Burney, *Regrettable Rebirth of the Two-Grant Doctrine*, *supra* note 14, at 86–90 (outlining the development of the multiclaused deed form).

17. *Id.* at 86.

18. *Id.*

19. See *id.*

20. *Id.* (“The . . . multiclaused deed was created in response to an early Texas case, *Caruthers v. Leonard*, which held that when a grantee received an interest in a mineral estate that was already under lease, only a reversionary interest passed . . .” (footnote omitted)).

21. *Harris v. Currie*, 176 S.W.2d 302, 306 (Tex. 1943) (noting the court in *Hager* overruled *Caruthers*).

22. See, e.g., BURFORD, *supra* note 10, § 1.2, at 3–7 (outlining the various clauses included in a mineral deed form and cautioning against “coupling with a grant of the minerals the words ‘royalty,’ ‘royalty interest,’ or minerals ‘produced and saved’ from the land” to avoid conveying a royalty interest).

23. See *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 966 S.W.2d 451, 460 (Tex. 1998) (defining “estate misconception” and describing its effect on drafting); Burney, *Regrettable Rebirth of the Two-Grant Doctrine*, *supra* note 14, at 87–89 (reviewing the estate misconception).

24. See Burney, *Interpreting Mineral and Royalty Deeds*, *supra* note 6, at 15 (explaining lessors sometimes believe they only own 1/8 interest in the minerals after the lease when in actuality they have a possibility of reverter in all, 8/8).

interest, he multiplied that fraction by 1/8 and inserted the fraction 1/16 in the deed's granting clause. Because of the wording of the other post-*Caruthers* clauses—the “subject to” and “future lease” clauses—Owner inserted the fraction 1/2 in those spaces, creating a deed with conflicting fractions.<sup>25</sup>

*B. Interpreting Multiclauses Deeds with Conflicting Fractions: The Birth and Demise of the “Two-Grant” Doctrine*

These multiple fractions created uncertainty for title examiners. Which fraction represented the size of the interest Owner intended to convey? Or, did the deed make multiple grants? Early cases provided an answer: deeds with multiple and conflicting fractions conveyed more than one interest.<sup>26</sup> Writers labeled this interpretative approach the “two-grant” doctrine.<sup>27</sup> In this section, I review the development and demise of the two-grant approach to interpreting deeds with conflicting fractions. The next section updates a related issue: deed forms with double or restated fractions.

*I. Concord Oil Co. v. Pennzoil Exploration & Production Co.*

The two-grant doctrine arose in Texas, where the multiclauses deed form originated. Texas courts adopted this interpretative approach for multiclauses deed forms with conflicting fractions beginning in the 1940s.<sup>28</sup> The last supreme court case to address the two-grant doctrine is a 1998 opinion, *Concord Oil Co. v. Pennzoil Exploration & Production Co.*<sup>29</sup>

In *Concord Oil*, courts were confronted with this deed: a 1937 conveyance of a mineral interest with the fraction 1/96 in the granting

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25. See Burney, *Regrettable Rebirth of the Two-Grant Doctrine*, *supra* note 14, at 86–87 (emphasizing the effect of the *Caruthers* decision on deed forms and noting that grantors wishing to convey a one-half mineral interest “can do so by simply conveying a 1/2 mineral interest, regardless of an existing lease”).

26. Some cases viewed these deeds as granting one fraction at delivery of the deed that expanded upon expiration of the existing lease. See, e.g., *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466, 469 (Tex. 1991) (noting that upon termination of the lease, the grantee’s interest “expanded into a full one-half [mineral interest] by operation of law”); see also Burney, *Regrettable Rebirth of the Two-Grant Doctrine*, *supra* note 14, at 92–94 (discussing the “expansion facet” and related decisions, including *Jupiter Oil*).

27. See *Concord Oil*, 966 S.W.2d at 454 (discussing the trial court’s reliance on the two-grant doctrine in its decision and defining the doctrine); 2 PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS OIL AND GAS LAW § 327.2, at 90–91 (2012) [hereinafter MARTIN & KRAMER, OIL AND GAS LAW]; Tevis Herd, *Deed Construction and the “Repugnant to the Grant” Doctrine*, 21 TEX. TECH L. REV. 635, 651–52 (1990).

28. Burney, *Regrettable Rebirth of the Two-Grant Doctrine*, *supra* note 14, at 90.

29. 966 S.W.2d 451 (Tex. 1998).

clause and the fraction 1/12 in a subsequent clause.<sup>30</sup> At the time, the grantor owned a 1/12 mineral interest in the property, which was burdened by a preexisting lease providing for a 1/8 landowner's royalty.<sup>31</sup> Notably, the deed through which the grantor had received his 1/12 mineral interest a year earlier, was the same as the 1937 deed form, but the fraction 1/12 appeared in both clauses.<sup>32</sup>

By the 1960s, Pennzoil owned the grantor's interest, if any, under the 1937 deed, and Concord Oil owned the grantee's interest.<sup>33</sup> Just as today's shale plays are spawning lawsuits over mineral deeds delivered decades ago, renewed production on property covered by the 1937 deed prompted Pennzoil to sue Concord Oil in 1993.<sup>34</sup>

Pennzoil relied on precedent establishing the two-grant approach for interpreting multiclaused deeds with conflicting fractions.<sup>35</sup> Under that approach, Pennzoil argued that the 1937 deed had conveyed a 1/96 mineral interest and a 1/12 interest in rents and royalties under an existing lease, which had terminated.<sup>36</sup> Therefore, Pennzoil claimed that Concord Oil, as successor to the grantee, owned only a 1/96 interest in the mineral estate, meaning Pennzoil owned the grantor's remaining interest.<sup>37</sup> Concord Oil, on the other hand, argued that the 1937 deed conveyed the grantor's entire 1/12 interest and Pennzoil received nothing through its chain of title.<sup>38</sup>

The trial court and court of appeals agreed with Pennzoil.<sup>39</sup> Eventually, however, the Texas Supreme Court ruled in favor of Concord Oil, holding that the conflicting fractions could be harmonized from the four-corners of the document.<sup>40</sup> In light of the particular language of the 1937 deed, the court held it conveyed a single 1/12 mineral interest.<sup>41</sup>

However, because the opinion was a plurality, with concurring and dissenting opinions, the fate of the two-grant doctrine remained unclear.<sup>42</sup>

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30. *Id.* at 453.

31. *Id.*

32. *Id.*

33. *Id.* (noting Concord Oil Company's claim was brought through the grantee of the 1937 deed and that the 1937 grantor conveyed another mineral deed in 1961 which was subsequently conveyed to Pennzoil Exploration and Production Company).

34. *See id.*

35. *See id.* at 454.

36. *Id.*

37. *Id.*

38. *Id.* at 453-54.

39. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 878 S.W.2d 191, 197 (Tex. App.—San Antonio 1994) (rejecting Concord's reading of the deed to convey two separate estates), *rev'd*, 966 S.W.2d 451 (Tex. 1998).

40. *Concord Oil*, 966 S.W.2d at 457-61, 463.

41. *Id.* at 459.

42. The opinion breaks down to a 4-1-4 decision. *Id.* at 451. The plurality found that the deed conveyed a single 1/12 mineral interest and harmonized the conflicting fractions within the



Concord Oil had urged the court to reject the two-grant doctrine and embrace the estate misconception as the explanation for conflicting fractions in multiclause deed forms.<sup>43</sup> As explained above, that misconception, which emanates from the typical 1/8 landowner's royalty, explains why the conflicting fractions follow a pattern: they are multiples of 1/8, even though the fraction 1/8 does not appear in the deed. Typically, drafters multiplied the intended fraction by 1/8 and inserted that number in the granting clause. Indeed, early case law sanctioned that approach.<sup>44</sup> The 1937 *Concord Oil* deed followed the pattern: 1/96 in the granting clause = 1/8 times 1/12 (the fraction in the subsequent clause).<sup>45</sup> As noted in *Concord Oil*, in light of the language appearing in the subsequent clauses, that 1/12 fraction, rather than the smaller 1/96 fraction in the granting clause, reflects the drafter's intent about the size of the interest the grantor intended to convey.<sup>46</sup>

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

To convince the Texas court to incorporate the estate misconception into the interpretative process, Concord Oil pointed to Kansas decisions. Specifically, in *Shepard v. John Hancock Mutual Life Insurance Co.*,<sup>47</sup> the Kansas Supreme Court construed a reservation in a deed that described the size of the interest as "an undivided 1/4 of the landowners [sic] 1/8 royalty, or, 1/32 of the interest in and to all oil, gas or other minerals . . ." <sup>48</sup> The court held the grantor had reserved a 1/4 mineral interest.<sup>49</sup> In reaching this conclusion, the court incorporated into its interpretative process the

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deed. *Id.* at 459. The concurring opinion by Justice Enoch agreed that only a single estate was created but wrote separately to emphasize the overconveyance that would occur if the dissent's interpretations were used. *Id.* at 463–64 (Enoch, J., concurring). The dissent argued for the "two-grant" doctrine to determine that two estates were created, "a 1/96 perpetual interest in the minerals, and a 1/12 interest in rentals and royalties . . ." *Id.* at 465 (Gonzalez, J., dissenting).

43. See *id.* at 460 (plurality opinion).

44. *Tipps v. Bodine*, 101 S.W.2d 1076, 1079 (Tex. Civ. App.—Texarkana 1936, writ. ref'd); see *Concord Oil*, 966 S.W.2d at 464–65 (Enoch, J., concurring) (blessing the use of different fractions to convey a single interest); see also Burney, *Regrettable Rebirth of the Two-Grant Doctrine*, *supra* note 14, at 102 (noting the reliance on *Tipps* in interpreting multiclause deeds).

45. See *Concord Oil*, 966 S.W.2d at 453 (plurality opinion).

46. See *id.* at 457–59.

47. 368 P.2d 19 (Kan. 1962).

48. *Id.* at 21. The *Shepard* deed was not a multiclause deed form, but it contained multiple fractions. The *Shepard* deed form involved "double and restated" fractions discussed in the next section. See *infra* Part II.C.

49. *Id.* at 27.

pervasive confusion among “not only persons in the petroleum industry” but with courts:

As the most common leasing arrangement provides for a one-eighth royalty reserved to the lessor, the confusion of fractional interests stems primarily from the mistaken premise that all the lessor-landowner owns is a one-eighth royalty. In conveying minerals subject to an existing lease . . . mistake is often made in the fraction of the minerals conveyed by multiplying the intended fraction by one-eighth.<sup>50</sup>

In *Concord Oil*, however, the Texas Supreme Court declined to fully follow the *Shepard* approach. Instead, the court noted the estate misconception, but viewed it as “instructive, but not dispositive.”<sup>51</sup> In fact, the court declined to adopt any bright-line rules for this interpretative issue, focusing instead on the lack of any two-grant language in the 1937 deed.<sup>52</sup>

b. Guidelines from *Concord Oil*'s “Four-Corners” Approach

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

First, according to the opinion, a deed with multiple fractions should not be interpreted as making two grants unless express language to that effect appears in the deed. Such language would include the phrases “separate from” or “in addition to,” phrases which were absent from the *Concord* deed. Notably, [the additional clauses in multiclaude deed forms] do not contain such granting language. Therefore, multiclaude deed forms should rarely, if ever, be interpreted as making separate grants.<sup>53</sup>

Because of the multiple opinions in *Concord Oil*, title examiners remained cautious about interpreting multiclaude deed forms with conflicting fractions. The concurring opinion created particular concern by focusing on the “future lease” clause.<sup>54</sup> In his opinion, Justice Enoch

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50. *Id.* at 26 (citing *Magnusson v. Colo. Oil & Gas Corp.*, 331 P.2d 577, 583–84 (Kan. 1958)). *Shepard* did not involve a multiclaude deed form; rather, the language fits the “restated” or “double fraction” problem. See *Heyen v. Hartnett*, 679 P.2d 1152, 1158–59 (Kan. 1984) (construing deed with fractions 1/16 and 1/2 as conveying an undivided 1/2 mineral interest); see also Burney, *Interpreting Mineral and Royalty Deeds*, *supra* note 6, at 22 (noting the pervasiveness of the 1/8 royalty in other jurisdictions).

51. *Concord Oil*, 966 S.W.2d at 460.

52. See *id.* at 460–61.

53. Burney, *Interpreting Mineral and Royalty Deeds*, *supra* note 6, at 16 (citations omitted).

54. *Concord Oil*, 966 S.W.2d at 464 (Enoch, J., concurring) (“Further, we were wrong to conclude that the ‘subject to’ clause of the Crosby deed includes future leases.”). For a complete analysis of the concurring opinion, see Burney, *Interpreting Mineral and Royalty Deeds*, *supra* note 6, at 17–18. Justice Enoch was also concerned with the “overconveyance” issue. *Id.*

criticized the plurality opinion for having emphasized a “future lease” clause in the deed as the basis for concluding the 1937 deed conveyed a 1/12 interest.<sup>55</sup> However, the plurality opinion adopted a four-corners approach and placed no significance on the presence or absence of any clause, particularly a “future lease” clause.<sup>56</sup> On the contrary, that opinion states that the “decision in this case does not depend on the presence or absence of a ‘future lease’ clause, which the court of appeals found dispositive.”<sup>57</sup>

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

Despite these words from the Texas Supreme Court about the relative insignificance of a “future lease” clause, a post-*Concord Oil* appellate opinion considered it determinative in *Neel v. Killam Oil Co., Ltd.*,<sup>58</sup> which involved a multiclaused deed form that departed from the typical pattern. Specifically, in the 1945 *Neel* deed, the larger fraction 1/2 appeared in the granting clause and “subject to” clause, and the smaller fraction 1/16 appeared in the “future lease” clause.<sup>59</sup> The parties agreed the interest was a royalty interest, rather than a mineral interest.<sup>60</sup> Regarding the size of the interest, grantee’s successor argued the deed conveyed a 1/2 royalty, which would entitle the grantee to 1/2 of the royalty reserved in any existing or future leases.<sup>61</sup> To counter assertions that the granting clause and “future lease” clause made separate grants, the grantee pointed to this sentence in the deed’s granting clause: “This grant shall run forever.”<sup>62</sup> The controversy arose after the existing lease, with the typical 1/8 landowner’s royalty, terminated and new leases were executed providing for a 1/4 royalty.<sup>63</sup> The court of appeals ruled against the grantee, holding the grantee was entitled to a fixed 1/16 interest in production under the new leases as provided in

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(explaining a two-grant interpretation of the deed would result in the grantor conveying more than he owned, which he cannot do).

55. See *Concord Oil*, 966 S.W.2d at 463–64.

56. See *id.* at 457–59 (plurality opinion).

57. *Id.* at 458–59.

58. 88 S.W.3d 334, 340–41 (Tex. App.—San Antonio 2002, pet. denied), *disapproved of by* Hausser v. Cuellar, 345 S.W.3d 462, 470 (Tex. App.—San Antonio 2011, pet. denied).

59. *Id.* at 339.

60. See *id.* The parties disagreed about whether this royalty interest was a fixed 1/16 or a 1/2 royalty that entitled the owner to 1/2 of the royalty reserved in any lease. See *id.* This “fixed” versus “of” royalty issue is common. See *infra* Part II.C (discussing double and restated fractions).

61. *Neel*, 88 S.W.3d at 340.

62. *Id.*

63. *Id.*

the “future lease” clause.<sup>64</sup> In other words, in *Neel* the court reverted to the two-grant doctrine.

In reaching this conclusion, the *Neel* court cited *Concord Oil* and *Luckel*, explaining that those cases required it to seek the parties’ intent from the four corners of the document.<sup>65</sup> However, the *Neel* opinion omits any review of the two-grant saga, or of the specifics from *Concord Oil*, such as the court’s admonition that to create separate grants a deed should contain clear evidence of such intent.<sup>66</sup> Had the *Neel* court followed *Concord Oil*’s guidance, the deed would have been interpreted as conveying the 1/2 “of” royalty forever as set forth in the granting clause. The estate misconception explains the fraction in the “future lease” clause: 1/16 reflects the amount of production owed to the owner of a royalty entitled to 1/2 of the 1/8 royalty reserved in the typical lease royalty clause.<sup>67</sup>

Although the Texas Supreme Court declined to review *Neel*, a recent opinion from the same court of appeals “disapprove[d] of [its] analysis in *Neel*.”<sup>68</sup> *Hausser v. Cuellar*<sup>69</sup> involved a multiclaused deed form that, like the deed in *Neel*, contained conflicting fractions that departed from the *Concord Oil* pattern.<sup>70</sup> In *Hausser*, the clauses provided as follows: granting clause: 1/2; “subject to” clause: 1/2; “future lease” clause: 1/16.<sup>71</sup> After determining that the deed conveyed a royalty interest, the court considered whether it was a fixed 1/16 or a 1/2 royalty interest that entitled the owner to 1/2 of the 1/4 landowner’s royalty in new leases on the property.<sup>72</sup> In adopting the 1/2 royalty option, the court cited its 2006 opinion in *Garza v. Prolithic Energy Co.*,<sup>73</sup> and explained its analysis as follows: “As in *Garza*, our decision is consistent with *Concord Oil Co.* because the [*Hausser*] deed does not contain

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64. *Id.* at 341. *Neel* was heard by the Fourth District Court of Appeals in San Antonio, the same court that decided *Concord Oil* prior to its review by the Supreme Court.

65. *Id.* at 339–40 (citations omitted).

66. *See id.* (citing to *Concord Oil* but failing to mention the court’s rejection of the two-grant doctrine); *see also* *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 966 S.W.2d 451, 454, 457 (Tex. 1998) (rejecting the two-grant doctrine in favor of a clear intent approach).

67. *See supra* Part II.A.2.

68. *Hausser v. Cuellar*, 345 S.W.3d 462, 470 (Tex. App.—San Antonio 2011, pet. denied). In disapproving, the court pointed to the *Neel* opinion’s reliance on a previous deed, which could suggest the court approved of *Neel*’s focus on the “future lease” clause. *Id.* Fortunately, the *Hausser* court embraced *Concord Oil*’s guidance and cited one of its previous opinions, *Garza*, which clearly rejected the two-grant doctrine and incorporated the estate misconception into its analysis. *See id.* at 470–71 (citing *Garza v. Prolithic Energy Co.*, 195 S.W.3d 137, 145 (Tex. App.—San Antonio 2006, pet. denied) (noting the conflicting fractions arise due to the typical 1/8th royalty and confusion about what grantors actually own)).

69. 345 S.W.3d 462 (Tex. App.—San Antonio 2011, pet. denied).

70. *See id.* at 468–69.

71. *Id.* at 465, 468.

72. *See id.* at 470–71.

73. 195 S.W.3d 137 (Tex. App.—San Antonio 2006, pet. denied).

any language suggesting two differing estates were being conveyed. . . . Rather, the [*Hausser*] deed, like the deeds in *Garza*, involves a single conveyance with fixed rights.”<sup>74</sup>

A dissenting opinion in *Hausser* argued that the “future lease” clause should have controlled.<sup>75</sup> However, in light of the majority’s disapproval of *Neel*, its adherence to *Concord Oil*’s guidelines, and other recent appellate court decisions that acknowledge the role of the estate misconception,<sup>76</sup> the two-grant doctrine should disappear in Texas. Fortunately, other jurisdictions have wisely declined to adopt Texas’s approach.<sup>77</sup> Therefore, title examiners may report, without exaggerating, the death of the two-grant doctrine for interpreting multiclaused deeds with conflicting fractions in the shale era. Unfortunately, as described in the next section, court opinions, at least prior to *Hysaw*, had not correctly incorporated the estate misconception or the “legacy of the 1/8th royalty” into the interpretative process for related issues: deeds with double or restated fractions.

C. “Double” or “Restated” Fractions—The Continued Legacy of the “Usual 1/8th Landowner’s Royalty” in the Shale Era: The “Analyze” v. “Multiply” Debate

Writing before the shale era, I addressed these two interpretative issues: how should courts interpret deeds when the fractional interest conveyed or reserved is expressed (1) as a double fraction, such as “1/2 of 1/8,” or (2) as a restated fraction, such as “an undivided 1/2 non-

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74. *Hausser*, 345 S.W.3d at 470 (citing *Garza*, 195 S.W.3d at 146; *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 966 S.W.2d 451, 457 (Tex. 1998)).

75. See *Hausser*, 345 S.W.3d at 472–73 (Marion, J., dissenting). Note the same judge wrote the majority opinion in *Neel v. Killam Oil Co., Ltd.*, 88 S.W.3d 334, 337 (Tex. App.—San Antonio 2002, pet. denied), *disapproved of by Hausser*, 345 S.W.3d at 470.

76. See *Hamilton v. Morris Res., Ltd.*, 225 S.W.3d 336, 343–44 (Tex. App.—San Antonio 2007, pet. denied) (holding although there were differing fractions in the deed, only a single interest was actually conveyed); *Garza*, 195 S.W.3d at 145 (noting the “problematic conflict between the granting of a mineral interest and a future lease provision appearing to convey a smaller royalty interest”); see also *Coates Energy Tr. v. Frost Nat’l Bank*, No. 04-11-00838-CV, 2012 WL 5984693, at \*6–7 (Tex. App.—San Antonio Nov. 28, 2012, pet. denied) (mem. op.) (relying on *Hausser* in determining the fraction conveyed); *Hernandez v. El Paso Prod. Co.*, No. 13-09-184-CV, 2011 WL 1442991, at \*4 (Tex. App.—Corpus Christi Apr. 14, 2011, pet. denied) (mem. op.) (taking notice of the estate misconception).

77. See *Burney, Oil, Gas, and Mineral Titles*, *supra* note 5, at 131 (describing Kansas’s method of dealing with mineral deeds); see also *Burney, Interpreting Mineral and Royalty Deeds*, *supra* note 6, at 23 (“[T]he Arkansas Supreme Court considered the issue that led the Texas courts down the path to the creative two-grants rule . . .” (quoting Owen L. Anderson, *Recent Developments in Nonregulatory Oil and Gas Law*, in 45TH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 1-1, § 1.03[4], at 1–14 (Carol J. Holgren ed., 1994))). *But see Jolly v. Wilson*, 478 P.2d 886, 888–89 (Okla. 1970) (holding reservation created 1/16th mineral interest, entitling owner to 1/128th of production where standard lease royalty was 1/8th).

participating royalty (being equal to, not less than an undivided 1/16).<sup>78</sup> In one article, I note courts' failure to address the "legacy of the usual 1/8th landowner's royalty," which contributes to the estate misconception, and its effect on drafting and interpreting double and restated fractions.<sup>79</sup> Because parties focused on that royalty, they expressed fractions with a double fraction, where one was invariably 1/8, or by restating with a fraction equal to a multiple of 1/8, as in the restated example above.<sup>80</sup> Rather than analyze that legacy in light of other language in the deed, courts tended to ignore it or merely multiply the fractions.

For example, in a 1984 Texas Supreme Court case, *Alford v. Krum*,<sup>81</sup> the multiclause deed contained a double fraction, 1/2 of 1/8, in the granting clause.<sup>82</sup> The court viewed that clause as conveying a 1/16 interest, without noting or analyzing this mode of expressing that single fraction.<sup>83</sup> This phenomenon, like the use of the fraction 8/8 to express the term "all," appears only in the oil patch. And again, the legacy of the usual 1/8 royalty explains the practice, since one of the two fractions is invariably the traditional 1/8 landowner's royalty. Yet, in *Alford* and other cases, court opinions multiply the fractions without analyzing the reason for the formula.<sup>84</sup>

Before *Alford*, proponents of the analysis approach had argued that courts should incorporate the legacy of the 1/8 royalty into the interpretative process for these fractional issues.<sup>85</sup> Under such an approach, the double or restated fractions "should not be multiplied, but analyzed to determine the parties' intent."<sup>86</sup> However, not all commentators agree with this approach. Specifically, the Williams & Meyers Treatise argues that double fractions should be multiplied under a plain meaning approach to document

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78. Burney, *Interpreting Mineral and Royalty Deeds*, *supra* note 6, at 23–29; Burney, *Regrettable Rebirth of the Two-Grant Doctrine*, *supra* note 14, at 89–97. The restated language in the example appeared in *Brown v. Havard*, which held that the phrase "[b]eing equal to, not less than an undivided 1/16th" made the deed ambiguous and subsequently remanded the case to the trial court. *Brown v. Havard*, 593 S.W.2d 939, 942 (Tex. 1980).

79. See generally Burney, *Interpreting Mineral and Royalty Deeds*, *supra* note 6.

80. See *id.* at 15.

81. 671 S.W.2d 870, 873 (Tex. 1984), *overruled by* *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991).

82. *Id.*

83. See *id.* at 874. *Alford* adopted the "granting clause" prevails rule for the multiclause deed problem, but was subsequently overruled by *Luckel. Luckel*, 819 S.W.2d at 461.

84. See, e.g., *Alford*, 671 S.W.2d at 873.

85. Burney, *Interpreting Mineral and Royalty Deeds*, *supra* note 6, at 24 (citing Ernest E. Smith, *Conveyancing Problems*, in STATE BAR OF TEXAS, ADVANCED OIL, GAS, & MINERAL LAW COURSE G, G-2 (1981)).

86. *Id.* at 25. Not all commentators agree with this approach. See MARTIN & KRAMER, OIL AND GAS LAW, *supra* note 27, § 327.3, at 3-96.

interpretation.<sup>87</sup> As described below, recent court opinions also reflect contradictory opinions in resolving these disputes.

### 1. *Shale Era Cases: Conflicting Approaches from Appellate Opinions*

Demonstrating that shale-production surges produce title-litigation surges, Texas courts addressed several disputes involving double and restated fractions. Most of these cases involve the grant or reservation of royalty interests in which the dispute centers on one question: whether the deed created a “fixed” or an “of” royalty interest, also known as a floating interest. A “fixed” royalty entitles the owner to a set share of the proceeds from the sale of production, regardless of the fractional size of the landowner’s royalty in any lease.<sup>88</sup> An “of” royalty interest varies or floats with the size of the landowner’s royalty in leases.<sup>89</sup> As demonstrated in the cases discussed below, these disputes arise when the royalty in a new lease departs from the traditional 1/8 landowner’s royalty.

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87. See, e.g., MARTIN & KRAMER, OIL AND GAS LAW, *supra* note 27, § 327.3, at 3-96; Phillip E. Norvell, *Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating the Royalty Share and Coexisting with the Duty Owed to the Non-Participating Royalty Owner by the Executive Interest*, 48 ARK. L. REV. 933, 951 (1995). The author approves of the “multiply” approach used by the Arkansas Supreme Court in *Palmer v. Lide*, in which the court held:

It will be seen that the deed refers not once but four times either to 1/8th of 1/8th of the royalty or to 1/8th of 1/8th of the royalty to be retained or reserved in any oil, gas, or mineral lease, leases, or contracts. It is not possible to interpret the unmistakably clear language of the deed to mean 1/8th of 1/8th of the total production, as the appellant would have us do.

*Palmer v. Lide*, 567 S.W.2d 295, 296 (Ark. 1978). The author concludes that

[o]ne cannot quarrel with the construction of the “double fraction” formula by the Arkansas Supreme Court in *Lide* . . . . However, one is haunted by the fear that the “horrors of the double fraction” may be the result of an error based simply on the parties’ selection of the wrong royalty deed form.

Norvell, *supra* at 951.

88. SMITH & WEAVER, *supra* note 7, § 3.7, at 3-46 to -47.

89. See *Range Res. Corp. v. Bradshaw*, 266 S.W.3d 490, 493 (Tex. App.—Fort Worth 2008, pet. denied) (comparing a fraction “of” royalty versus a “fractional” royalty and stating that a fraction “of” royalty “floats” in accordance with the size of the landowner’s royalty contained in the lease”); see also MARTIN & KRAMER, OIL AND GAS LAW, *supra* note 27, § 327.3, at 94. There is an additional difference: the effect of the executive’s duty to lease. With an “of” royalty, the executive could potentially breach the duty of “utmost good faith” by negotiating a landowner’s royalty that was too low. See *Bradshaw v. Steadfast Fin., L.L.C.*, 395 S.W.3d 348, 364–65 (Tex. App.—Fort Worth 2013), *aff’d in part, rev’d in part sub nom.* *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70 (Tex. 2015). If the royalty interest is fixed, however, the negotiated royalty cannot affect the “fixed” owner’s share of production. See *id.* (discussing cases in which the executive breached the duty of utmost good faith by entering into a lease depriving the royalty owner of benefits they would have received in a lease to a disinterested party).

*Hudspeth v. Berry*,<sup>90</sup> a 2010 opinion, involved a dispute over a 1943 deed reserving an “undivided 1/40th royalty interest (being 1/5th of 1/8th)” with grantee reserving leasing rights, and the grantor receiving 1/5 of the usual 1/8 royalty.<sup>91</sup> The Berrys owned the reserved interest and claimed their predecessors were each entitled to 1/5 of the 1/5 landowner’s royalty reserved in a new lease, or 1/25 of the proceeds from production.<sup>92</sup> As a result, the Berrys claimed they were entitled to a total of 2/25 of the production proceeds.<sup>93</sup> The trial court agreed with the Berrys’ interpretation.<sup>94</sup> The court of appeals, however, held the deed reserved two fixed 1/40 royalty interests, a ruling the Berrys did not appeal to the Texas Supreme Court.<sup>95</sup>

However, an opinion decided two years before *Berry* addressed a deed with similar language, including an express reference to a royalty the size “of” the usual 1/8 lease royalty. The deed in that case, *Range Resources Corp. v. Bradshaw*,<sup>96</sup> reserved:

[A]n undivided one-half (1/2) Royalty (Being equal to not less than an undivided one-sixteenth[h] (1/16)[h]) of all the oil, gas and/or other minerals . . . to be paid or delivered to said Grantors . . . free of cost Forever . . . . In the event oil, gas or other minerals are produced . . . Grantors . . . shall receive not less than one-sixteenth (1/16) portion (being equal to one-half (1/2) of the customary one-eighth (1/8) Royalty) . . . .<sup>97</sup>

Both the trial court and the court of appeals interpreted the reservation as a fraction “of” royalty rather than as a “fixed” fractional royalty.<sup>98</sup> The appellate court opinion contains an extensive discussion of the difference between the two types of interests and reviews a 1980 Texas Supreme Court case involving a reservation that raised the “restated” fraction problem.<sup>99</sup> In that case, *Brown v. Havard*,<sup>100</sup> the majority concluded that the deed was ambiguous,<sup>101</sup> but the dissent viewed the deed as having

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90. No. 2-09-225-CV, 2010 WL 2813408 (Tex. App.—Fort Worth July 15, 2010, no pet.) (mem. op.). In the interest of full disclosure: I provided an expert opinion in support of Berry’s position.

91. *Id.* at \*2 (emphasis added).

92. *Id.* at \*1.

93. *See id.*

94. *Id.*

95. *See id.* at \*4.

96. 266 S.W.3d 490 (Tex. App.—Fort Worth 2008, pet. denied).

97. *Id.* at 493–94 (alteration in original) (emphasis added and omitted).

98. *See id.* at 497–98.

99. *See id.* at 493–97 (discussing *Brown v. Havard*, 593 S.W.2d 939 (Tex. 1980)).

100. 593 S.W.2d 939 (Tex. 1980).

101. *Id.* at 942.



unambiguously created a fraction “of” royalty.<sup>102</sup> In *Range Resources*, the court addressed differences between the two deeds, but ultimately favored the dissent’s approach in *Brown*.<sup>103</sup> The losing party in *Range Resources* asked the Texas Supreme Court to review the appellate court decision, but the court declined its petition.<sup>104</sup>

A case decided in 2011 appears consistent with *Range Resources* rather than *Berry*. In *Sundance Minerals, L.P. v. Moore*,<sup>105</sup> a deed reserved “an undivided and non-participating *one-half* interest in the oil, gas, and other mineral rights” or “*one half of the usual one eighth* royalty received for such [sic] oil, gas and other minerals produced.”<sup>106</sup> The court held that the deed reserved 1/2 “of” the 1/5 landowner’s royalty in the subsequent lease.<sup>107</sup>

Although the result in *Sundance Minerals* reflects the analysis approach, that opinion, like the *Range Resources* opinion, does not overtly address the estate misconception or the legacy of the 1/8 royalty. However, in reaching their conclusions, both opinions cite extensively to *Luckel v. White* and follow its harmonizing approach.<sup>108</sup> That 1991 Texas Supreme Court opinion, in which the court interpreted a multiclause deed, such as the one at issue in *Concord Oil*, but with the conflicting fractions 1/4 and 1/32,

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102. *Id.* at 945 (McGee, J., dissenting).

103. *See Range Res.*, 266 S.W.3d at 495–96. A post-*Hysaw* appellate opinion failed to address the *Brown* decision, or the view of the *Range Resources* court, even though the deed in the dispute contained language that tracked the reservation in the *Brown* deed. *See infra* note 186 (criticizing *Laborde*). The initial dispute in *Range Resources* was whether the executive had breached its duty to the royalty owner by entering into a lease with only a 1/8 landowner’s royalty. *Id.* at 492. That duty, however, has no application to a “fixed” royalty interest since leasing cannot affect the share owed to those interest owners. *See id.* at 493. The duty applies when the interest is a fraction “of” the lease royalty, since the executive must exercise leasing decisions according to an “utmost good faith” standard. *See Bradshaw v. Steadfast Fin., L.L.C.*, 395 S.W.3d 348, 370 (Tex. App.—Fort Worth 2013) (noting when the interest is a fraction “of” the lease royalty, the executive has more control and, therefore, is under an elevated duty), *aff’d in part, rev’d in part sub nom.* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70 (Tex. 2015). In *Range Resources*, the royalty owner claimed the executive could have negotiated for 1/4 landowner’s royalty in the lease. *See Range Res.*, 266 S.W.3d at 492.

104. Petition for Review of Range Resources Corporation and Range Production I, L.P. at 15, *Range Res.*, 266 S.W.3d 490 (No. 08-0949).

105. 354 S.W.3d 507 (Tex. App.—Fort Worth 2011, pet. denied).

106. *Id.* at 510 (emphasis added).

107. *See id.* at 512–13 (affirming trial court’s grant of summary judgment interpreting that the deed reserved 1/2 of the 1/5 royalty).

108. *Id.* at 511 (“All parts of the deed are to be harmonized, construing the instrument to give effect to all of its provisions.”); *see, e.g., Range Res.*, 266 S.W.3d at 496 (“Construing the deeds as a whole, and harmonizing all parts to give effect to the parties’ intent, we determine that a ‘fraction of royalty’ was conveyed.” (citing *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991))).

expressly acknowledges the effect of the 1/8 royalty on drafting, even though that fraction did not appear in the deed:

We do not quarrel with the assumption that the parties probably contemplated nothing other than the usual one-eighth royalty. But that assumption does *not* lead to the conclusion that the parties intended only a fixed 1/32nd interest. It is just as logical to conclude that the parties intended to convey one-fourth of all reserved royalty, and that the reference to 1/32nd in the first three clauses is “harmonized” because one-fourth of the usual one-eighth royalty is 1/32nd.<sup>109</sup>

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

Practitioners and lower courts dealing with the resurgence of cases need guidance on significant, recurring issues like the deed construction dispute presented in this petition for review. Especially when language in deeds use differing fractions to express the intent of the parties regarding the character and size of the interest reserved, it is vitally important that all of the reviewing courts consistently apply the rules of interpretation and follow established precedent to reach the same results.<sup>110</sup>

Despite this plea for guidance, the Texas Supreme Court declined to review the court of appeal’s decision in *Sundance Minerals*. The court also denied a petition for review in another appellate opinion from 2012, *Coghill v. Griffith*.<sup>111</sup> That opinion relies heavily on *Luckel* and cites *Range Resources* in concluding that a deed with restated and double fractions created an “of” royalty interest.<sup>112</sup>

However, another recent opinion retreats to the “multiply” approach. In *Moore v. Noble Energy, Inc.*,<sup>113</sup> the court viewed the following language as creating a fixed 1/16 royalty interest: “a *one-half non-participating*

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

110. Petition for Review of *Sundance Minerals, L.P.* at vii, *Sundance Minerals*, 354 S.W.3d 507 (No. 02-10-00403-CV), 2012 WL 3233719, at \*vii.

111. See generally *Coghill v. Griffith*, 358 S.W.3d 834 (Tex. App.—Tyler 2012, pet. denied).

112. *Id.* at 838–40 (citing *Range Res.*, 266 S.W.3d at 496) (“The language used in *Range Resources Corp.* and in the instant case establishes that the interest reserved was a fraction of royalty and not a fractional royalty.”). The deed’s language stated, “the Grantor reserves and excepts unto himself . . . an undivided one-eighth (1/8) of all royalties payable under the terms of said lease, as well as an undivided one-eighth (1/8) of the usual one-eighth (1/8) royalties provided for in any future” lease. *Id.* at 836.

113. 374 S.W.3d 644 (Tex. App.—Amarillo 2012, no pet.).

royalty interest (one-half of one-eighth of production).”<sup>114</sup> In that opinion, the court relies heavily on the Williams & Meyers treatise, which approves of multiplying rather than analyzing double fractions, and attempts, unsatisfactorily, to distinguish *Range Resources*.<sup>115</sup>

Another recent appellate court opinion also strains to distinguish *Range Resources* and *Sundance Minerals* and, like the *Moore* opinion, retreats to the multiply approach: *Wynne/Jackson Development, L.P. v. PAC Capital Holdings, Ltd.*,<sup>116</sup> which involves Barnett shale production from property in Denton County, Texas.<sup>117</sup> The relevant language provided that the grantor reserved:

[A] non-participating royalty of one-half (1/2) of the usual one-eighth (1/8) royalty in and to all oil, gas, and other materials produced, saved and sold from the above-described property, provided, however, that although said reserved royalty is non-participating and Grantee shall own and possess all leasing rights in and to all oil, gas and other minerals, Grantor shall, nevertheless, have the right to receive one-half (1/2) of any bonus, overriding royalty interest, or other payments, similar or dissimilar, payable under the terms of any oil, gas and mineral lease covering the above-described property.<sup>118</sup>

The parties framed the issue as whether the deed reserved a fixed or fraction “of” royalty.<sup>119</sup> In reversing the trial court and holding the deed reserved a fixed fractional royalty, the court relied on cases, such as a 1955

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114. *Id.* at 645 (emphasis added).

115. *See id.* at 647–51. The court also relied on *Brown v. Havard*, where a deed reserved an undivided one-half non-participating royalty “[b]eing equal to, not less than an undivided 1/16th.” *Brown v. Havard*, 593 S.W.2d 939, 940 (Tex. 1980). The *Brown* majority opinion determined the deed was ambiguous and returned the case to the trial court. *See id.* at 944. A dissenting opinion, however, argued that the deed was unambiguous and conveyed a 1/2 “of” royalty. *Id.* at 945 (McGee, J., dissenting).

116. No. 13-12-00449-CV, 2013 WL 2470898 (Tex. App.—Corpus Christi June 6, 2013, pet. denied) (mem. op.).

117. *See id.* at \*1.

118. *Id.* at \*4.

119. *Id.* at \*2. The appellate opinion does not suggest that the deed reserved an undivided 1/2 non-executive mineral interest, perhaps in light of the “non-participating royalty” label. *Id.* at \*4–5. The owner of an undivided 1/2 mineral interest is entitled to 1/2 of the royalty, as explained above. However, under the *French* redundancy approach, which focuses on express references to other mineral estate attributes, that may have been a viable argument. *See id.* at \*3 (citing *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 (Tex. 1995)) (comparing the attributes of the mineral estate owned by a mineral fee owner with those of a non-participating royalty owner). Here, the grantor reserved a royalty plus the right to receive bonus payments, a mineral-estate attribute. *Id.* at \*4; *see also* *Altman v. Blake*, 712 S.W.2d 117, 120 (Tex. 1986) (finding the deed, which stripped some mineral-estate attributes, created a non-executive mineral interest rather than royalty interest). The *Altman* deed, however, did not expressly label the interest a “non-participating royalty interest.” *Id.* at 118 (referring instead to a non-participating mineral interest).

Texas Supreme Court decision, that multiplied, rather than analyzed, double fractions.<sup>120</sup> In other words, unlike *Range Resources* and *Sundance Minerals*, the *Wynne/Jackson* decision ignores the legacy of the usual 1/8 landowner's royalty, despite the express reference to that royalty in the deed.

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

The results reached in *Sundance Minerals*, *Range Resources*, and *Coghill* reflect the analysis approach for double and restated fractions.<sup>121</sup> That approach respects the goal of deed interpretation, which is to ascertain the intent of the parties. The analysis approach also promotes title stability by seeking intent from the four corners of the deeds, without resorting to outside evidence. *Sundance Minerals*, *Range Resources*, and *Coghill* reach results consistent with language within the deeds. Specifically, the deeds in each of those cases mention the "usual 1/8 lease royalty" and describe the interest at issue as a fraction "of" that royalty.<sup>122</sup> By noting those provisions and relying on *Luckel's* "harmonizing" approach, those opinions incorporate the legacy of that once-common royalty on drafting into the interpretative process.

The *Berry*, *Moore*, and *Wynne/Jackson* opinions, on the other hand, ignore express references to the "usual 1/8 royalty" and other language, including the reference to a 1/5 interest in *Berry* and a 1/2 interest in *Moore*

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120. The *Wynne/Jackson* court cited *Harriss v. Ritter*, a case which held that the double fractions "'one-half of one-eighth . . . could have but one meaning and that is 1/16th of the royalty . . .'" See *Wynne/Jackson Dev.*, 2013 WL 2470898, at \*4 (quoting *Harriss v. Ritter*, 279 S.W.2d 845, 847 (Tex. 1955)).

121. See *Coghill v. Griffith*, 358 S.W.3d 834, 837–40 (Tex. App.—Tyler 2012, pet. denied) (using the four corners rule to determine that the parties intended to grant a fraction of royalty); *Sundance Minerals, L.P. v. Moore*, 354 S.W.3d 507, 511–13 (Tex. App.—Fort Worth 2011, pet. denied) (employing only "the express language found within the four corners of the [deed]" to determine the interest the parties intended to convey); *Range Res. Corp. v. Bradshaw*, 266 S.W.3d 490, 493, 496–97 (Tex. App.—Fort Worth 2008, pet. denied) (looking exclusively to the "[objective] intent expressed or apparent in the writing" to determine the royalty conveyed). Another recent case expressly endorses the analysis approach and consideration of the "estate misconception." See *Hernandez v. El Paso Prod. Co.*, No. 13-09-184-CV, 2011 WL 1442991, at \*4 (Tex. App.—Corpus Christi Apr. 14, 2011, pet. denied) (mem. op.) (citing *Burney, Regrettable Rebirth of the Two-Grant Doctrine*, *supra* note 14, at 86).

122. See, e.g., *Coghill*, 358 S.W.3d at 838–39 (harmonizing the differing fractions in the deed in light of the usual 1/8 royalty); *Sundance Minerals*, 354 S.W.3d at 511–12 (citation omitted) (finding the grantor meant to reserve "one half of the usual one eighth" royalty); *Range Res.*, 266 S.W.3d at 493–95 (noting the problems the estate misconception played in deed construction).

and *Wynne/Jackson*.<sup>123</sup> Further departing from the four-corners rule, the *Moore* and *Wynne/Jackson* opinions insert language not found in the document—the fraction 1/16.<sup>124</sup> In short, these three decisions merely multiply and fail to analyze the language in the deeds.

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

However, as a Texas court noted in *Barker v. Levy*,<sup>125</sup> when reviewing drafting advice regarding the “mineral or royalty” issue, “[i]t is quite probable that these [parties] now heartily agree with this advice.<sup>126</sup> However, “it was written [decades] too late to have been helpful” in the shale era.<sup>127</sup> Title examiners could view the Texas Supreme Court’s decisions declining petitions for review in *Sundance Minerals, Range*

123. See *Wynne/Jackson Dev.*, 2013 WL 2470898, at \*1–2, \*5 (finding the interest conveyed was a fractional royalty, not a fraction of royalty, and entitled Wynne/Jackson to one sixteenth of production instead of 1/2 of the usual 1/8 royalty); *Moore v. Noble Energy, Inc.*, 374 S.W.3d 644, 651 (Tex. App.—Amarillo 2012, no pet.) (interpreting the deed to “reserve a royalty of one-half of one-eighth of production, or one-sixteenth”); *Hudspeth v. Berry*, No. 2-09-225-CV, 2010 WL 2813408, at \*3 (Tex. App.—Fort Worth July 15, 2010, no pet.) (mem. op.) (interpreting the deed as granting two fixed royalty interest instead of the “1/5th of 1/8th” royalty).

124. See *Moore*, 374 S.W.3d at 647–48 (relying on MARTIN & KRAMER, OIL AND GAS LAW, *supra* note 27, § 327.2, at 83–94 to insert language into the deed). The *Moore* opinion also diverts to another troubled interpretative trail: the court views the lack of a producing well at the time the deed was drafted as relevant to interpreting the deed. See *id.* at 651. However, as I have written in other articles, allowing such extraneous facts to affect the interpretative process detracts from title stability. See Burney, *Interpreting Mineral and Royalty Deeds*, *supra* note 6, at 29, 52–53 (analyzing the Oklahoma approach, which allows the term “royalty” to change depending on existence of lease at time of drafting); see also *Wynne/Jackson Dev.*, 2013 WL 2470898, at \*1–2 (interpreting deed language describing a “one-half (1/2) of the usual one-eighth (1/8) royalty in and to all oil, gas, and other minerals, produced, saved and sold from [such property]” as granting a fixed royalty of 1/16 of the production).

125. 507 S.W.2d 613 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ. ref’d n.r.e.).

126. *Id.* at 618.

127. See *id.* (alteration in original). In addition to the appellate cases discussed above, see also *Leal v. Cuanto Antes Mejor LLC*, No. 04-14-00694-CV, 2015 WL 3999034, at \*4 (Tex. App.—San Antonio July 1, 2015, no pet.) (mem. op.), for a case following the harmonizing approach and concluding the deed conveyed a floating royalty, and *Butler v. Horton*, 447 S.W.3d 514, 517, 519 (Tex. App.—Eastland 2014, no pet.), for a case construing the deed using the harmonizing approach to give effect to all provisions in the instrument. *But see Jolly v. Wilson*, 478 P.2d 886, 887–88 (Okla. 1970) (clinging to estate misconception and choosing to multiply double fractions).

*Resources*, and *Coghill* as approval of those better-reasoned opinions.<sup>128</sup> The Texas Supreme Court's opinions in *Luckel* and *Concord Oil* also support the approach in those three cases by acknowledging the legacy of the 1/8 royalty.<sup>129</sup> Absent firmer endorsement from the state's high court, however, these mixed opinions may motivate parties to file lawsuits over deeds with double and restated fractions in the shale era. The next section addresses whether the recent *Hysaw* opinion has provided that endorsement.

### III. *HYSAW V. DAWKINS*: THE TEXAS SUPREME COURT ADDRESSES THE "DOUBLE FRACTION" DILEMMA

In addition to the appellate cases discussed above, the Fourth Court of Appeals produced two other opinions reflecting different analytical approaches to double and restated fractions. One was *Dawkins v. Hysaw*,<sup>130</sup> the opinion eventually reversed by the Texas Supreme Court, and another was *Graham v. Prochaska*.<sup>131</sup> Handed down only a few months before *Dawkins*, *Graham* held that a grantor reserved a floating 1/2 of the lease royalty in a new lease based on the reservation of "one-half (1/2) of the one-eighth (1/8) royalty . . . same being equal to one-sixteenth (1/16th) of all oil, gas and other minerals . . ." <sup>132</sup> In *Graham*, the court relied on *Concord Oil* and reasoned that the fraction 1/16 could be harmonized in light of the once-standard 1/8 lease royalty.<sup>133</sup> Dissenting justices disagreed, having concluded that the majority opinion had improperly relied on outside deeds in reaching its conclusion.<sup>134</sup> In *Dawkins*, however, the Fourth Court of Appeals does not cite *Concord Oil*, or invoke the effects of the "estate misconception" or the "legacy of the 1/8th lease royalty." Instead, the opinion viewed devises of a 1/3 of 1/8th non-participating royalty as creating a fixed 1/24th in certain lands, even though the fraction 1/24 does

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

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

130. See generally *Dawkins v. Hysaw*, 450 S.W.3d 147 (Tex. App.—San Antonio 2014), *rev'd*, 483 S.W.3d 1 (Tex. 2016) (providing a different analytical approach to double and restated fractions).

131. See generally *Graham v. Prochaska*, 429 S.W. 3d 650 (Tex. App.—San Antonio 2013, *pet. denied*) (providing another example of a case taking a different approach to double and restated fractions).

132. *Id.* at 658–59 (internal quotation marks omitted).

133. See *id.* at 659–60.

134. *Id.* at 666 (Barnard, J., dissenting).

not appear anywhere in the mother's will.<sup>135</sup> The losing parties in *Graham* and *Dawkins* filed petitions for review.<sup>136</sup> Ultimately, the court denied the *Graham* petition and granted the petition in *Dawkins*.<sup>137</sup>

A. *Hysaw Facts*<sup>138</sup>

*The Will.* Ethel Hysaw (Ethel) executed her Will in 1947 and died in 1949.<sup>139</sup> She was survived by her three children, Inez Hysaw Foote (Inez), Howard Caldwell Hysaw, Jr. (Howard) and Dorothy Frances Hysaw Burris (Dorothy).<sup>140</sup> At the time she executed her Will, Ethel owned three non-contiguous tracts of land. Under the Will, she gave each child a specific tract of land—the north 600 acres of a 1065-acre tract went to Inez; the remaining 465 acres of that tract went to Dorothy; and a separate 200-acre tract (her homestead) and a 150-acre tract went to Howard.<sup>141</sup>

The Hysaw/Burris heirs, who lost in the court of appeals, argued that although Ethel gave different surface estates to each child, Ethel gave each child equal royalty interests in all of the tracts, including the surface tract willed to each child.<sup>142</sup> The Will accomplishes this royalty grant in three paragraphs. The first paragraph sets out the basic grant to all three children and then provides a long clarification passage regarding what is granted to Inez.<sup>143</sup> The second two paragraphs set out identical clarifying language with respect to Dorothy and Howard.<sup>144</sup> The three paragraphs are set out below:

That each of my children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced from any of said lands, the same being a non-participating royalty interest; that is to say, that neither of my children, to wit, Inez Hysaw Foote shall not participate in any of the bonus or rentals to keep any lease or leases in force; that it shall not be necessary for the said Inez Hysaw Foote to execute any oil,

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135. See *Dawkins*, 450 S.W.3d at 155–57.

136. See Brief for Appellants, *Graham v. Prochaska*, 429 S.W.3d 650 (Tex. App.—San Antonio 2013, pet. denied) (No. 04-12-00755-CV), 2013 WL 6815120; Brief of Appellants, *Dawkins*, 450 S.W.3d 147 (No. 04-13-00539-CV), 2013 WL 7085831.

137. See *Hysaw v. Dawkins*, 483 S.W.3d 1, 3 (Tex. 2016). See generally *Graham*, 429 S.W.3d 650 (displaying there is no subsequent Supreme Court opinion).

138. The facts provided here appeared in Hysaw's Brief on the Merits in the Texas Supreme Court. Petitioners' Brief on the Merits at 4–6, *Hysaw*, 483 S.W.3d 1 (No. 14-0984), 2015 WL 4162779, at \*1 (citations omitted).

139. *Id.* at \*1, \*16.

140. *Id.* at \*1.

141. *Id.*

142. *Id.* at \*4.

143. *Id.* at \*2–3.

144. *Id.* at \*3–4.

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

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

That Howard Caldwell Hysaw, Jr., shall not participate in any of the bonus or rentals to keep any lease or leases in force; that it shall not be necessary for the said Howard Caldwell Hysaw, Jr., to execute any oil, gas or mineral lease over the lands of Inez Hysaw Foote or over the lands of Dorothy Frances Hysaw Burris, and it shall not be necessary for Howard Caldwell Hysaw, Jr., to obtain the consent either orally or written of the said Inez Hysaw Foote or Dorothy Frances Hysaw Burris to lease any portion of said land so willed to him for oil, gas or other minerals, but that the said Howard Caldwell Hysaw, Jr., shall receive one-third of one-eighth royalty, provided there is no royalty sold or conveyed by me covering the lands so willed to him, and should there be any royalty sold during my lifetime then the said Howard Caldwell Hysaw, Jr., Inez Hysaw Foote and Dorothy Frances Hysaw Burris shall each receive one-third of the remainder of the unsold royalty.<sup>145</sup>

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145. *Id.* at \*2-4.



The Hysaw and amici curiae briefs urged the Court to consider that Ethel's grant to each child of different surface tracts and a grant to each child of an equal share in the royalties in *all* tracts is a common approach in partitioning surface and mineral estates.<sup>146</sup> When partitioning surface and mineral estates by deed or will, owners often grant unequal surface estates to family members but—because mineral estates cannot be easily valued—require equal sharing in the oil and gas production from all tracts.<sup>147</sup>

In 1946, *before* she executed the Will, Ethel gave each child an equal share in some of her royalties in the 200- and 150-acre tracts given to Howard.<sup>148</sup> The six deeds making these conveyances give each child an equal portion of Ethel's royalty in each tract.<sup>149</sup> The Hysaw and Weafer Petitioners (Hysaws) are Howard's descendants.<sup>150</sup> The Burrises, the Burris partnership and the Dziuk Petitioners are Dorothy's descendants or successors.<sup>151</sup> The Burrises and Hysaws are referred to collectively as the "Hysaw/Burrisses." The Dawkins and Oxford Respondents are Inez's descendants and are collectively referred to as the "Dawkins."<sup>152</sup>

*The Dispute.* This dispute arose after production occurred on a 1/5 royalty lease the Dawkins executed on Inez's 600 acres.<sup>153</sup> Under a 1/8 royalty lease that was the standard when Ethel executed her Will, all parties would have agreed that the Will provided each of her three children with equal shares of the royalty.<sup>154</sup> The Dawkins, however, contend[ed] that, under the 1/5 royalty lease they executed, the Will provide[d] them with over three times the royalty provided to Howard and Dorothy's

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146. The Hysaw's Brief on the Merits urged the court to consider this customary approach to partitioning land and minerals, as did Mr. Jeff Akins in an amicus curiae brief he filed. *See id.*; Brief of Amicus Curiae Jeffrey R. Akins, Attorney at Law at 1–3, *Hysaw*, 483 S.W.3d 1 (No. 14-0984), 2015 WL 636734, at \*1–3. Two other amicus curiae briefs were filed. One by two former chairs of the Oil, Gas and Energy Resources Section of the State Bar of Texas, Cottingham Miles and Allen Cummings, and another on behalf of Trinity Minerals, Inc., filed by J. Byron Burton III. *See* Brief of Amicus Curiae at 1–5, *Hysaw*, 483 S.W.3d 1 (No. 14-0984), 2015 WL 751689, at \*1–5; Brief of Amicus Curiae Trinity Mineral Management, Ltd. at 6–15, *Hysaw*, 483 S.W.3d 1 (No. 14-0984), 2015 WL 1884828, at \*6–15.

147. Petitioners' Brief on the Merits, *supra* note 138, at 7 ("Because parties to a voluntary partition are often unwilling to run the risk that only part of the land may contain oil and gas, it is not uncommon for cotenants to partition only the surface and continue to own undivided interests in the minerals estate." (internal quotation marks omitted) (quoting SMITH & WEAVER, *supra* note 7, § 2.3[A][4], at 2-41)).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at \*7–8.

152. *Id.* at \*8.

153. *Id.*

154. *Id.*

descendants.<sup>155</sup> The Hysaw/Burrisses contend[ed] that the Will created equal floating 1/3 of royalty interests, meaning all three children share equally regardless of the size of the lease royalty in all of the lands devised under the Will.<sup>156</sup>

The Dawkins [argued] that Howard's and Dorothy's descendants each received only a fixed 1/24 royalty in Inez's land and that the Dawkins therefore get all royalty in excess of a 2/24 royalty on Inez's lands. At the same time, the Dawkins claim[ed] that equal sharing *is* required on Howard's two tracts because Ethel conveyed some of the royalty on those tracts before she died.<sup>157</sup> For this argument, they rely on the final phrase regarding any 'sale' of royalties before Ethel's death. The parties stipulated to the pertinent facts and filed cross-motions for summary judgment.<sup>158</sup> The district court granted the Hysaw/Burrisses' motion, requiring equal sharing to apply for royalties in all of the lands. The Dawkins appealed.<sup>159</sup>

The court of appeals reversed. In its opinion, the court began by examining the three phrases in the royalty paragraphs "individually" and determining what each one meant.<sup>160</sup> The court first addressed the phrase that "each of my children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced" and held that this language "clearly and unambiguously describes a fractional royalty interest"—a 1/24 royalty.<sup>161</sup> The court stated this phrase was a "reservation" of fixed 1/24 royalties only for Dorothy and Howard. Later in the opinion, the court also calls it a "grant."<sup>162</sup>

The court held that the second phrase, that "[each child] shall receive one-third of one-eighth royalty" also "clearly describes a fractional royalty interest—a fixed fraction of production" and further held that it 'simply restates the first provision's grant.'<sup>163</sup> The court treated this phrase as applying to all three children and stated it did not "limit[] the surface estate owner of any royalty in excess of 1/24 of production," indicating the surface estate owner's ownership of royalty in excess of 1/8 came from "the earlier grant of fee simple title."<sup>164</sup> Finally, the court held that the third

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155. *Id.*

156. *Id.*

157. *Id.* at \*8–9.

158. *Id.* at \*9.

159. *Id.*

160. *Id.*

161. *Id.* (citing *Dawkins v. Hysaw*, 450 S.W.3d 147, 154 (Tex. App.—San Antonio 2014), *rev'd*, 483 S.W.3d 1 (Tex. 2016)).

162. *Id.* (quoting *Dawkins*, 450 S.W.3d at 155).

163. *Id.* at \*10 (quoting *Dawkins*, 450 S.W.3d at 154, 156).

164. *Id.* (quoting *Dawkins*, 450 S.W.3d at 156).

phrase was “clear and unambiguous” and “conditionally conveys a fraction of royalty interest” *i.e.*, a second grant of a floating 1/3 of the royalty in Howard’s lands to each child because Ethel had conveyed some of those royalties to her children before she died. The court refers to this third phrase both as a conveyance and as a “conditional reservation of a fraction of royalty.”<sup>165</sup>

These holdings resulted in Inez’s descendants receiving royalties under the Dawkins’ lease more than three times greater than her siblings’ descendants but sharing equally in royalties from any lease on the tracts given to Howard.<sup>166</sup> In contrast, under the Hysaw/Burrises’ interpretation of Ethel’s Will, the children share equally by owning a floating 1/3 NPRi in all three tracts.<sup>167</sup> In its opinion, the Texas Supreme Court agrees with this equal-sharing interpretation.<sup>168</sup>

*B. The Texas Supreme Court Opinion: Affirming a “Holistic” Analytical Approach Rather Than “Merely Multiplying” Double Fractions*

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

Questions arise about whether double fractions must be multiplied and the royalty interest fixed without regard to the royalty negotiated in a future mineral lease (fractional royalty) or whether 1/8 was intended as a synonym for the landowner’s royalty, meaning the interest conveyed varies depending on the royalty actually obtained in a future mineral lease (fraction of royalty).<sup>169</sup>

In answering these questions, the court reaffirmed its commitment to a “holistic approach” aimed at ascertaining intent from the entire document.<sup>170</sup> For that reason, the court eschewed mechanical or bright-line rules, such as merely multiplying double fractions.<sup>171</sup> In criticizing the court of appeals’ decision, the court opined that the lower court had departed from this holistic approach by viewing the separate clauses in the will in isolation.<sup>172</sup>

Demonstrating its commitment to the “holistic approach,” the opinion carefully and thoroughly addressed all the language in the will.<sup>173</sup> Key

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165. *Id.* (quoting *Dawkins*, 450 S.W.3d at 155).

166. *Id.* at \*10–11.

167. *Id.* at \*11.

168. *See Hysaw v. Dawkins*, 483 S.W.3d 1, 15 (Tex. 2016).

169. *Id.* at 4.

170. *Id.* at 13.

171. *See id.*

172. *Id.* at 13–14.

173. *See id.* at 8, 13–15.

phrases the court emphasized included the deliberate recitation of identical language to affect each child's royalty, and the use of a double fraction in lieu of single fixed fractions—with one suggesting “equality among the three children (1/3) and the other raising the specter of estate misconception or use of the then-standard 1/8 royalty as a synonym for the landowner's royalty.”<sup>174</sup>

By acknowledging the influence of the 1/8 landowner's royalty, the court confirmed its statement in *Concord Oil* that the “estate misconception” remains instructive but not determinative in the deed interpretation process.<sup>175</sup> Yet the opinion's thorough analysis of the estate misconception and the influence of the once-standard 1/8 royalty on drafting signals that title examiners should consistently turn to those explanations when interpreting deeds with different fractions that are multiples of 1/8. For example, citing *Luckel*, the *Hysaw* opinion describes, “The near ubiquitous nature of the 1/8 royalty—dubbed by some as ‘the legacy of the 1/8th royalty’ or ‘historical standardization’—no doubt influenced the language used to describe the quantum of royalty in conveyances of a certain vintage.”<sup>176</sup> Additionally, the opinion criticizes merely multiplying fractions as a “mechanical approach” that “fails to accord any significance to the use of double fractions.”<sup>177</sup> Endorsing the analysis approach this Article describes above, the court describes its previous decisions, including *Luckel* and *Concord Oil*, as “our precedent” for “an analytical approach that emphasizes the four-corners rule and harmonization principles.”<sup>178</sup>

Adhering to the harmonizing principles, the opinion returns to the express language of Ethel's will. The court noted the equal-sharing language in the third and final provision of each royalty clause supported a conclusion that she intended for each of her three children to share equally in the royalties under all the divided tracts.<sup>179</sup> After a review of case law and the language in the will, the court concluded:

The only plausible construction supported by a holistic reading of the will is that Ethel used “one-eighth royalty” as shorthand for the entire royalty interest a lessor could retain under a mineral lease, anticipated the siblings would share that royalty equally, and intended proportional equalization of any royalty remaining following an *inter*

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174. *Id.* at 15.

175. *See id.* at 8, 13.

176. *Id.* at 9–10 (citing *Garrett v. Dils Co.*, 299 S.W.2d 904, 907 (Tex. 1957); *Graham v. Prochaska*, 429 S.W.3d 650, 657 (Tex. App.—San Antonio 2013, pet. denied)).

177. *Id.* at 12.

178. *Id.*

179. *Id.* at 15.

*vivos* transaction. We therefore hold that Ethel's will devised to each child  $\frac{1}{3}$  of any and all royalty interest on all the devised land tracts.<sup>180</sup>

#### IV. CONCLUSIONS: *HYSAW*'S IMPLICATIONS FOR INTERPRETING AND DRAFTING IN THE SHALE ERA

With *Hysaw*, the Texas Supreme Court answered pleas for guidance to resolve the conflicting interpretative approaches among appellate courts. As discussed above, those approaches fall into one of two camps: (1) the mechanical or "merely multiply" approach that failed to incorporate the legacy of the  $\frac{1}{8}$  royalty or the effect of estate misconception on drafting into the interpretative process; and (2) the analysis approach, which harmonized conflicting fractions, which are consistently multiples of the once-common  $\frac{1}{8}$  royalty, by acknowledging the effects of the estate misconception on drafting.<sup>181</sup> Although *Hysaw* reaffirms a "holistic" approach that requires analyzing all language and provisions in documents, it eschewed the mechanical approach and endorsed the analysis approach. *Hysaw* should provide confidence to title examiners who have declined to "merely multiply" double fractions when one of those fractions is the once-common  $\frac{1}{8}$ th landowner's royalty. And for those considering litigation, other courts are likely to view the  $\frac{1}{8}$ th as meaning "landowner's royalty," and the fraction paired with the  $\frac{1}{8}$ th as reflecting the parties' intent regarding the size of the floating non-participating royalty interest conveyed or reserved. Moreover, in light of *Hysaw*'s confirmation of the analysis approach as established in the multiclause deed cases, *Concord Oil* and *Luckel*, the estate misconception should be applied even when the  $\frac{1}{8}$ th fraction does not appear in the deed. Recall that in *Concord Oil*, the court interpreted the conflicting fractions  $\frac{1}{12}$  and  $\frac{1}{96}$  as conveying a single  $\frac{1}{12}$  mineral interest. Similarly, in *Luckel v White*, the court interpreted the fractions  $\frac{1}{32}$  and  $\frac{1}{4}$  as conveying a floating  $\frac{1}{4}$ th non-participating royalty interest. Neither deed contained express references to the once-common  $\frac{1}{8}$ th landowner's royalty, yet both opinions addressed the legacy of that royalty in the interpretative process.<sup>182</sup>

Unfortunately, a post-*Hysaw* opinion from the same court that *Hysaw* reversed has created title uncertainty in an opinion interpreting a deed with

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180. *Id.* at 15–16 (footnotes omitted).

181. *See supra* Part II.C.

182. *See supra* Part II.B.1; *see also supra* note 109 and accompanying text.

“restated fractions.” In *Laborde Properties v. U. S. Shale Energy II*,<sup>183</sup> the court held the following reservation created a fixed 1/16th non-participating royalty rather than a 1/2 floating interest: “There is reserved and excepted from this conveyance unto the grantors herein, . . . an undivided one-half (1/2) interest in and to the Oil Royalty, Gas Royalty and Royalty . . . the same being equal to one-sixteenth (1/16) of the production.”<sup>184</sup> The court’s opinion reversed the trial court’s ruling that this language created a floating 1/2 royalty interest, and contradicted the same conclusion reached by a disinterested operator charged with paying royalties from the land.<sup>185</sup> In reaching its conclusion, the court of appeals opinion departs from *Hysaw*, *Concord Oil*, and *Luckel* by failing to acknowledge that under the estate misconception the fractions 1/16 and 1/2 can be harmonized because 1/16 represents the amount of royalty owed to the owner of a 1/2 floating NPRi under a lease with the once-common 1/8 lease royalty. Contradicting those Texas Supreme Court opinions, the *Laborde* opinion suggests that such a harmonizing approach is not permitted unless the fraction 1/8 appears in the deed.<sup>186</sup> Additionally, the *Laborde* reservation tracks language in a 1980 Texas Supreme Court case discussed above, *Brown v. Havard*, yet *Laborde* never cites or analyzes the *Brown* case.<sup>187</sup>

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183. *Laborde Props., L.P. v. U.S. Shale Energy II, LLC*, No. 04-16-00168-CV, 2016 WL 5922404 (Tex. App.—San Antonio Oct. 12, 2016), *reh’g denied*, No. 04-16-00168-CV, 2016 WL 7445084 (Tex. App.—San Antonio Dec. 28, 2016, pet. filed) (mem. op.).

184. *Id.* at \*1.

185. Appellees’ Motion for Rehearing En Banc at 7, *Laborde*, 2016 WL 7445084 (No. 04-16-00168-CV) (citing the trial court’s ruling finding reservation created a floating NPRi and describing payor EOG’s conclusion that the deed created a floating NPRi after reviewing *Hysaw* and other fourth district court of appeals decisions). The author of this article was hired to contribute to this Motion.

186. Compare *Laborde*, 2016 WL 5922404, at \*9 (“The 1951 deed does not contain any language from which we can objectively find the parties assumed a one-eighth (1/8) royalty in any current or future lease.”), with *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 966 S.W.2d 451, 459–60 (Tex. 1998) (recognizing court has taken judicial notice of usual 1/8 royalty when interpreting fractions that are multiples of 1/8), and *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991) (recognizing parties “contemplated nothing other than the usual one-eighth royalty” and holding deed with fractions 1/32 and 1/4 conveyed a floating 1/4 NPRi). See *supra* Part II.B, for a discussion of the conclusions of *Concord Oil* and *Luckel*. In a footnote, the *Laborde* opinion proclaims, “There is nothing to suggest the [estate misconception] theory applies only to show an intent to create a floating as opposed to a fixed interest.” *Laborde*, 2016 WL 5922404, at \*10 n.3. Although it is correct that the estate misconception does not create a bright-line rule, the *Laborde* opinion fails to properly acknowledge that the fractions here are multiples of 1/8th, which effectively ignores the presence of the 1/2 fraction, an approach that violates *Hysaw*’s holistic approach. Just as *Hysaw* criticized the lower court for reading the fraction 1/24 into that deed, in *Laborde*, the same court fails to give weight to the initial 1/2 fraction.

187. See Appellees’ Motion for Rehearing En Banc, *supra* note 185, at 8–11. See *supra* Part II.C.1, for a discussion of *Brown*. See also Order on Appellees’ Motion for En Banc Reconsideration, *Laborde*, 2016 WL 5922404 (04-16-00168-CV) (dissent to the denial by Chief Judge Marion and Judge Martinez; dissent with opinion by Judge Chapa).

In contrast to *Laborde*, another post-*Hysaw* appellate court opinion, *Greer v. Shook*, emulates the Texas Supreme Court's approach to interpreting a multiclaused deed with the conflicting fractions 1/16 and 1/2.<sup>188</sup> After first determining that the multiclaused deed conveyed a mineral interest, the court engaged in the harmonizing process to determine whether the grantee received a 1/16 or 1/2 interest.<sup>189</sup> In concluding the deed conveyed a 1/2 mineral interest, the court harmonized the presence of the 1/16 fraction by noting that the drafter "used the fraction 1/16 in paragraphs 1 and 6 as shorthand for expressing that he intended to convey 1/2 of what he believed was his remaining 1/8 mineral interest in the land, *i.e.*, 1/2 of that purported 1/8 interest."<sup>190</sup> As part of that process, the court turned to the estate misconception and the effect of the once-common 1/8 royalty on drafting, even though the deed at issue did not contain the 1/8 fraction. For other post-*Hysaw* disputes over deeds with conflicting, double, or restated fractions, courts, producers, lawyers, and other title examiners should heed the lessons of *Hysaw* as reflected in *Greer*.

*Drafting Lessons.* When drafting these interests in the future, parties can avoid the unpredictable results demonstrated in the pre-*Hysaw* (and post-*Hysaw*) opinions by using the "fixed" or "floating" labels.<sup>191</sup> For example: "Grantor hereby conveys to Grantee a fixed 1/16th non-participating royalty interest." If the parties intend to create an NPRi that will "float" with the royalty reserved in any lease on the property, existing or future, the document should make that statement: "Grantor hereby reserves a 1/2 non-participating royalty interest (not a mineral interest) that will float with the size of the landowner's royalty reserved in any lease on the premises conveyed herein." To avoid confusion and litigation, omit a second "restated" fraction reflecting the amount of production the owner will receive as a matter of law. Similarly, in describing the size of the intended floating fraction, which was 1/3 in *Hysaw*, parties should avoid double fractions ("1/3 of 1/8th" from *Hysaw*). In fact, the "legacy of the 1/8th lease royalty" includes the lesson that it has no place in drafting shale era mineral and royalty interests.

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188. *Greer v. Shook*, No. 08-15-00040-CV, 2016 WL 6092963, at \*8 (Tex. App.—El Paso Oct. 19, 2016).

189. *Id.* at \*11.

190. *Id.* at \*14.

191. The Texas Supreme Court has confirmed that labels should be used to clarify whether the parties intend to create a mineral or a royalty interest. Burney, *Oil, Gas, and Mineral Titles*, *supra* note 5, at 126–28 (discussing Texas cases that confirmed the value of the "royalty" label in interpreting and drafting).