St. Mary's Law Journal

Volume 30 | Number 2 Article 5

1-1-1999

Resolving the Mult-Fractional Deed Dilemma - Conc.ord Oil Co. v. Pennzoil Exploration & (and) Production Co. Recent Development

Noelle C. Letteri

RECENT DEVELOPMENT

RESOLVING THE MULTI-FRACTIONAL DEED DILEMMA— *CONCORD OIL CO. V. PENNZOIL EXPLORATION & PRODUCTION CO.*

NOELLE C. LETTERI

I. INTRODUCTION

In a 1998 case, *Concord Oil Co. v. Pennzoil Exploration & Production Co.*,[1] the Supreme Court of Texas interpreted a mineral deed that contained conflicting fractional interests in its various clauses.[2] Specifically, although the deed's granting clause purported to convey "one-ninety sixth (1/96) interest in and to all of the oil, gas and other minerals," another clause stated that the deed "covers and includes one-twelfth (1/12) of all rentals and royalty."[3] This deed, thus, raised the issue of whether the grantor intended to convey a 1/96 interest or a 1/12 interest in the mineral estate.

Historically, interpreting a deed with conflicting fractional interests is an issue that has perplexed both the oil and gas industry and Texas courts.[4] In fact, *Concord* presents the common scenario of deeding a mineral interest and a royalty reservation that are both subject to a pre-

1. 966 S.W.2d 451 (Tex. 1998).

2. *See* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 453 (Tex. 1998).

3. *Id.*

4. *Compare* Hoffman v. Magnolia Petroleum Co., 273 S.W. 828, 830 (Tex. Comm'n App. 1925, holding approved) (holding that the deed created two grants: a 1/2 mineral interest in 90 acres and a 1/2 royalty interest in 320 acres under the existing lease), *and* Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co., 340 S.W.2d 548, 557 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.) (determining that two grants were conveyed because the deed did not contain a future lease clause), *and* Schubert v. Miller, 119 S.W.2d 139, 140-41 (Tex. Civ. App.—Texarkana 1938, no writ) (construing the deed as granting two interests, one existing during the preexisting lease and one following the expiration of said lease), *with* Tipps v. Bodine, 101 S.W.2d 1076, 1079 (Tex. Civ. App.—Texarkana 1936, writ ref'd) (harmonizing the conflicting fractions to create a conveyance of a single estate), *and* Garrett v. Dils Co., 157 Tex. 92, 96-97, 79 S.W.2d 904, 906 (1957) (concluding that the parties intent was to convey a single estate), *and* Jupiter Oil Co. v. Snow, 819 S.W.2d 466, 468-69 (Tex. 1991) (resolving the conflicting fractions as an intention to convey a single estate).

existing lease.[5] In deeds of this nature, conflicting fractions arise as the grantor misconstrues the property interest of the royalty reservation in the lease as personalty rather than realty.[6] Essentially, the grantor mistakenly believes that the fractional reservation, which is normally 1/8,[7] maintains in the grantor a mineral interest in the leased estate rather than just an economic benefit derived from conveying the lease.[8] Thus, when the grantor conveys the mineral estate in a subsequent deed, what is actually conveyed is a fractional interest of that 1/8 reservation; the grantor does not convey an outright fractional interest of the entire estate that the grantor owns as a possibility of reverter.[9] As exemplified in *Concord*, this misunderstanding of the relationship between a lease and a subsequent deed may cause the grantor to insert conflicting fractions within the deed's clauses. Resolving such a situation is at the heart of the opinion in *Concord Oil Co. v. Pennzoil Exploration & Production Co.*

Part II of this Recent Development discusses oil and gas conveyances and the litigious nature of multi-fractional deeds. Part III then examines the *Concord* holding and considers the various methods of interpreting multi-fractional deeds. Next, Part IV contemplates the state of oil and gas conveyances in light of the *Concord* decision. Finally, Part V concludes that the *Concord* holding, which ensures the application of the

---

5. *See, e.g.*, Luckel v. White, 819 S.W.2d 459, 461 (Tex. 1991) (resolving the parties' interests wherein a deed conveys a mineral interest that has been previously leased); *Garrett*, 157 Tex. at 92, 279 S.W.2d at 904 (addressing a deed used to convey mineral interests that have been previously leased); Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 160, 254 S.W. 290, 292 (1923) (establishing the estates created in a lease).

6. *See* Laura H. Burney, *The Interaction of the Division Order and the Lease Royalty Clause*, 28 ST. MARY'S L.J. 353, 426-30 (1993) (discussing in depth the problems that arise when failing to make this distinction); Richard C. Maxwell, *The Mineral Royalty Distinction and the Expense of Production*, 33 TEX. L. REV. 463, 463-78 (1955) (illustrating the conflict through an extensive discussion of applicable case law).

7. *See Garrett*, 157 Tex. at 96, 299 S.W.2d at 907 (taking judicial notice that the "usual royalty provided in mineral leases is one-eighth").

8. *See* Richard C. Maxwell, *The Mineral Royalty Distinction and the Expense of Production*, 33 TEX. L. REV. 463, 463-78 (1955) (expounding extensively on the misconstruction of a mineral interest versus a royalty interest); A.W. Walker Jr., *The Nature of the Property Interests by an Oil and Gas Lease in Texas*, 7 TEX. L. REV. 1, 34 (1928) (discussing the property rights implications when interpreting royalty as a mineral interest in an oil and gas lease).

9. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 496-504 (3d ed. 1991) (discussing the fractional mistake that occurs due to the misunderstanding of the grantor's actual ownership of the mineral estate); 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 340.2, at 242-43 (1998) (explaining the confusion that arises in the subsequent deed conveyance when the grantor misunderstands his ownership of the mineral estate); Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 88-89 (1993) (explaining the implications of the landowners confusion of his ownership in the mineral estate).

four corners doctrine when determining the estate conveyed through the use of multi-fractional deeds, casts greater certainty upon the interpretation of oil and gas conveyances.

II. THE HISTORY OF INTERPRETING MULTI-FRACTIONAL DEEDS

A. *History of the Oil Conveyance and Multi-Fractional Deeds*

On the morning of January 10, 1891, in Beaumont, Texas, the oil well Spindletop gushed to life.[10] During the following nine days, more than 800,000 barrels of oil flowed over everything in sight.[11] This enormous discovery sparked the spectacular growth of the oil industry in Texas.[12]

Because of the novelty of the growing oil industry, oil developers borrowed ideas and technology from the salt-mining industry.[13] Oil developers also turned to the salt industry for the concept of leasing mineral rights in order to further exploration and production.[14] Specifically, mineral owners utilized the lease concept to sever the oil and gas rights from other rights in the land, thereby allowing development of mineral estates.[15] Moreover, a landowner could sever the mineral interest from the

---

10. *See* EUGENE O. KUNTZ ET AL., OIL AND GAS LAW: CASES AND MATERIALS 60-61 (2d ed. 1993) (citing W. RUNDELL, JR., EARLY TEXAS OIL: A PHOTOGRAPHIC HISTORY 1866-1936, 35-36 (1977) and explaining the background of the Spindletop discovery).

11. *See id.*

12. *See* 1994-95 TEXAS ALMANAC 608-09 (Mike Kingston ed., 1993) (discussing the dramatic increase in the number of oil wells drilled in Texas subsequent to the discovery of the famous Spindletop well).

13. *See* EUGENE O. KUNTZ ET AL., OIL AND GAS LAW: CASES AND MATERIALS 14 (2d ed. 1993) (discussing the influence of the salt boring industry on the oil and gas industry).

14. *See id.* at 63 (noting that the huge volumes of oil at Spindletop moved the "locus" of production from Pennsylvania to the Southwest); *see also* LAWRENCE MILLS & J.C. WILLINGHAM, THE LAW OF OIL AND GAS 35 (1926) (describing the adaptation of the salt industry drilling and lease concepts to the oil industry); Leslie Moses, *The Evolution and Development of the Oil and Gas Lease,* 2 INST. ON OIL & GAS L. & TAX'N, 1, 10 (1951) (explaining how the oil industry adapted both the drilling technology and the lease from the Pennsylvania salt industry).

15. *Cf.* Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 255, 254 S.W. 296, 299 (1923) (explaining that "it is elementary that minerals may be severed from the remainder of the land by appropriate conveyances"); 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 3.1, at 83 (1987) (commenting on the landowner's ability to sever his mineral estate from his surface estate); LAWRENCE MILLS & J.C. WILLINGHAM, THE LAW OF OIL AND GAS 23 (1926) (supporting the idea that "oil and gas may be severed from the balance of the land by grant or reservation"); 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 301, at 431 (1997) (asserting that the owner of land in fee simple absolute may sever the minerals from the surface).

surface interest in order to create two distinct estates, both of which were treated as real property.[16]

Subsequently, Texas courts determined that the estate created in a mineral lease was a fee simple determinable; this interpretation was derived from the fact that a mineral lease was normally contingent upon exploration and production.[17] Texas courts also construed the mineral lease to be a conveyance of realty, similar to deed.[18] Thus, when a lessor conveys

---

16. Because Texas is an ownership-in-place jurisdiction, Texas law regards the oil and gas conveyance as creating a separate estate and ownership of the minerals in place. *See* Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 168, 254 S.W. 290, 292 (1923) (emphasizing that the opinion in *Texas Co. v. Daugherty* left no doubt "as to the soundness of the conclusion that gas and oil in place are objects of distinct ownership and sale as a part of the land"); Texas Co. v. Daugherty, 107 Tex. 226, 235, 176 S.W. 717, 719 (1915) (reasoning that oil and gas are within a strata of the earth and thus are part of the realty; therefore, when they are conveyed while in place, "a conveyance of an interest in the realty" occurs); RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 1.3, at 27 (3d ed. 1991) (explaining that in the ownership-in-place jurisdictions, the mineral estate is considered a corporeal estate in real property and subject to the same real property laws and rules); LAWRENCE MILLS & J.C. WILLINGHAM, THE LAW OF OIL AND GAS at 20 (1926) (noting that the owner of the oil estate is the absolute owner of oil in place in a manner similar to ownership of the solid minerals).

17. *See* Norris v. Vaughan, 152 Tex. 491, 495, 260 S.W.2d 676, 678 (1953) (holding that a lessee's interest was a fee simple determinable in the oil and gas in place); *Humphreys*, 113 Tex. at 256, 254 S.W. at 299 (holding that a mineral severance creates a fee simple in both the mineral estate and in the remainder of the land); *Stephens County*, 113 Tex. at 172-73, 254 S.W. at 294-95 (holding that because there is no real difference in the title conveyed due to the conveying instrument, a determinable fee is created at the severance of the mineral estate); 1A W.L. SUMMERS, THE LAW OF OIL AND GAS § 165, at 439 (1954) (explaining that an oil and gas lease conveys to the lessee a determinable fee in the oil and gas of the land); A.W. Walker Jr., *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEX. L. REV. 125, 128 (1928) (explaining that in Texas the "lease" is a *grant* of a determinable fee in the oil and gas).

18. Much of the confusion regarding oil and gas conveyances revolves around the issue of whether the conveyance is a deed or a lease. This issue arises from the fact that Texas is an ownership-in-place jurisdiction, and the property interest conveyed in the deed and the lease is virtually the same in both. In fact, the Texas Supreme Court in *Stephens County v. Mid-Kansas Oil & Gas Co.* went so far as to say that it was not important to determine if the conveyance was a lease or a deed. *See Stephens County*, 113 Tex. at 172, 254 S.W. at 294. The supreme court stated that regardless of the type of conveyance used, the results are substantially the same because "each divests the grantor, his heirs or assigns" and "invests the grantee, his heirs or assigns" similarly. *Id.* Richard Hemingway asserts that the proper way to resolve this question is found in the nature of the motivation for the particular conveyance. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 6.1, at 256-57 (3d ed. 1991). Accordingly, if the expectation is "prompt, if not immediate, exploration of the premises for oil," the conveyance is likely to be termed a lease. *Id.* Conversely, if the primary expectation is "the monetary payments for the property with a possibility of production constituting a secondary consideration, the conveyance is likely a deed." *Id.*

a mineral interest, the lessee actually "owns" that portion of the mineral estate.[19]

In addition to creating a mineral estate, leasing permits landowners to retain a reservation known as royalty.[20] Ordinarily, an owner reserves the royalty as an economic benefit for leasing the mineral estate.[21] Additionally, a lessor in Texas retains a possibility of reverter in the entire estate, as the lease creates a fee simple determinable in the lessee.[22] Accordingly, when a landowner leases his mineral estates, the lessee receives an 8/8 determinable fee to the oil gas and other minerals, and the

---

19. *See Stephens County*, 113 Tex. at 174, 254 S.W. at 295 (holding that a lease creates for the lessee ownership of the minerals in a fee simple determinable); A.W. Walker Jr., *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEX. L. REV. 125, 128 (1928) (noting that the lease creates a determinable fee ownership in the lessee). This approach, known as the ownership-in-place theory, recognizes that the ownership of oil and gas is one of the rights that makes up the "bundle of sticks" in property ownership. See Dorothy J. Glancy, *Breaking Up Can Be Hard to Do: Partitioning Jointly Owned Oil and Gas and Other Minteral Interests in Texas*, 33 TULSA L.J. 705, 713 (1998) (stating that under Texas' ownership-in-place doctrine, "[m]inerals on and under the surface, as well as the oil and gas temporarily 'in place' under the surface are treated as separate possessory subparts of a unitary fee simple title"); *cf.* 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 2.4, at 66 (1987) (recognizing Texas as a state that adopted the ownership-in-place theory for oil and gas).

20. *See* 1 EARL A. BROWN, THE LAW OF OIL AND GAS LEASES § 6.00, at 6-2 (2d ed. 1998) (defining the landowner's reservation, which allows for another to develop the land for oil and gas, as a royalty); RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 2.5, at 36 (3d ed. 1991) (stating that the landowner's reservation serves as compensation when the land is developed by someone other than the owner); Richard T. Brady, *Modernizing the Printed Form Royalty Clause* (stating the reservation of the royalty guarantees the landowner will be compensated for the oil that is produced from leases on his land), *in* STATE BAR OF TEXAS, ADVANCED OIL, GAS & MINERAL LAW COURSE B1, B-1 (1981). Traditionally, the landowner usually reserves a 1/8 royalty interest in the mineral estate conveyance. *See* Garrett v. Dils Co., 157 Tex. 92, 96, 299 S.W.2d 904, 907 (1957) (taking judicial notice that the "usual royalty provided in mineral leases is one-eighth"); Laura H. Burney, *The Interaction of the Division Order and the Lease Royalty Clause*, 28 ST. MARY'S L.J. 353, 425 (1997) (noting that the lessor's fractional reservation historically has been 1/8).

21. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 2.5, at 36 (3d ed. 1991) (describing the landowner's royalty interest as compensation for allowing another to develop the mineral estate); 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 301, at 437 (1997) (explaining, "[t]he term 'royalty' in the strict sense is a share of the product or the proceeds reserved to the owner for permitting another to use the property").

22. *See* Jupiter Oil Co. v. Snow, 819 S.W.2d 466, 468 (Tex. 1991) (averring that the grantor retains a possibility of reverter after the grant is made); 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 301, at 437 (1997) (explaining that "the reversionary interest is usually called a possibility of reverter"); Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction,* 34 S. TEX. L. REV. 73, 87-88 (1993) (explaining that the lessor retains the possibility of reverter in the whole estate).

landowner retains an 8/8 possibility of reverter.[23] Moreover, the landowner retains a 1/8 royalty interest reserving the right of a fractional payment of production, and the lessee maintains a right to 7/8 of the production after costs.[24] However, due to cases decided in the 1920s and 30s regarding taxation issues, Texas courts have established that the 1/8 reservation actually retained by the lessor constitutes title to the mineral interests.[25] Yet, defining the reservation of an economic benefit as a royalty or mineral interest has led to confusion fractional variances in deeds subject to preexisting leases.

Compounding the mineral-royalty dispute is the ability to separate the surface estate from the mineral estate through a conveyance of the mineral interests[26] that gives rise to lease privileges and economic benefits known as the estate attributes.[27] Estate attributes include "(1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to

---

23. *See* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction,* 34 S. TEX. L. REV. 73, 88 (1993) (reiterating the property interests in the lessor/lessee relationship created by the lease).

24. *See id.*

25. *See* Hager v. Stakes, 116 Tex. 453, 468, 294 S.W. 835, 841 (1927) (concluding that the reservation of in-kind royalty resulted in the lessor retaining title to the mineral interest but only to the extent of the stated fractional reservation); Laura H. Burney, *The Interaction of the Division Order and the Lease Royalty Clause*, 28 ST. MARY'S L.J. 353, 426-28 (1997) (discussing the Texas courts' opinions in determining the property interest of the lessor's fractional reservation).

26. *See* Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 255, 254 S.W. 296, 299 (1923) (pointing out that "it is elementary that minerals may be severed from the remainder of the land by appropriate conveyances"); EUGENE O. KUNTZ ET AL., OIL AND GAS LAW: CASES AND MATERIALS 52 (2d ed. 1993) (asserting that mineral interests may be severed from the land ownership); LAWRENCE MILLS & J.C. WILLINGHAM, THE LAW OF OIL AND GAS 23 (1926) (noting that "oil and gas may be severed from the balance of the land by grant or reservation"); 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 301, at 431 (1997) (explaining that the owner of land in fee simple absolute may sever the minerals from the surface).

27. *See* Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986) (delineating the lease attributes); RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS §§ 2.2-.5, at 21-44 (3d ed. 1991) (describing the lease attributes); Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction,* 34 S. TEX. L. REV. 73, 86 (1993) (listing the lease attributes); Joseph W. Morris, *Mineral Interests or Royalty Interests? Problems Created by Separation of Bonus, Delay Rental, Power to Lease and Right of Ingress and Egress,* 10 INST. ON OIL & GAS L. & TAX'N, 259, 263-64 (1959) (describing the estate attributes as inherent qualities of a severed mineral interest). Professor Kuntz, in his oil and gas treatise, describes the attributes as "separately alienable incidents of ownership." 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 15.1, at 427-28 (1987). Additionally, Professor Kuntz provides an extensive list of articles discussing these "incidents of ownership." *See id.* at n.1.

receive delay rentals, and (5) the right to receive royalty payments."[28] The inclusion or reservation of these attributes in a conveyance help determine ownership and rights to the mineral interests and the subsequent mineral production.[29] Moreover, these estate attributes were considered initially to be the "bundle of sticks" that passed with the conveyance.[30] However, an early Texas Supreme Court decision undermined that assumption and contributed to the confusion regarding the relationship between a preexisting lease and a subsequent conveyance.

B. *Texas Case Law on Muli-Fractional Deeds*

1. *Caruthers v. Leonard*: The Problem of the Three-Grant Deed

In a 1923 case, *Caruthers v. Leonard*,[31] the Supreme Court of Texas determined that the economic attributes did not pass implicitly with a conveyed mineral estate.[32] According to the court, the estate attributes passed with the mineral interest only if the conveying document stated such an intent.[33]

---

28. *Altman*, 712 S.W.2d at 118.

29. *See* Harris v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943) (holding that when the mineral estate is severed from the surface, all incidents and attributes pass with that severance); *see also Altman*, 712 S.W.2d at 118-20 (determining rights to, as well as the interest in, the mineral estate based on the attributes conveyed); Richard C. Maxwell, Essay, *Mineral or Royalty—The French Percentage*, 49 SMU L. REV. 543, 547 (1996) (discussing the division of the attributes utilizing an analogy to the "mineral bug").

30. *See* Terry I. Cross, *Conveyancing—From Repugnance to Harmony—The Demise of* Alford v. Krum *and the Effect of Accepting a Conveyance "Subject To" a Prior Instrument* (referring to the lease benefits as "the 'bundle of sticks'"), *in* STATE BAR OF TEXAS, ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-1 (1992). The "bundle of sticks" theory, representing the interests passed in a mineral interest conveyance, is adopted from general property law. *See* David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical Foundation*, 47 INST. ON OIL & GAS L. & TAX'N § 1.04[1] (1996) (construing Texas' adoption of the lease attributes as "keeping with American property law"). Pierce provides an extensive discussion of the Texas Supreme Court's interpretation of the conveyance or reservation of these "sticks." *See id.* § 1.04[1]-[3].

31. 254 S.W. 779 (Tex. 1923).

32. *See* Caruthers v. Leonard, 254 S.W. 779, 782-83 (Tex. 1923) (determining that Leonard received only a possibility of reverter through his lease and, thus, was not entitled to receive delay rentals); Thomas H. Lee, *Ambiguity and the "Subject To" Clause in Texas Mineral Conveyancing*, 5 S. TEX. L.J. 313, 313 (1961) (explaining that after *Caruthers*, the lessor had to state expressly in the lease that the lessee received a share of the attributes); Howard R. Williams, Hoffman v. Magnolia Petroleum Co.*: The "Subject To" Clause in Mineral and Royalty Deeds*, 30 TEX. L. REV. 395, 397 (1952) (discussing the *Caruthers* decision, which determined that the attributes did not pass with the conveyance).

33. *See Caruthers*, 254 S.W. at 783 (determining that from the language of the deed, Leonard was only entitled to the possibility of reverter and not delay rentals); Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34

In *Caruthers*, land conveyed to two parties at separate times was burdened by a preexisting lease that provided for delay rental payments.[34] In addition, these parties received their mineral interests from the landowner, C.H. Evans.[35] In 1918, Evans leased land for oil production to James A. Weir.[36] In 1918, Evans also conveyed to Leonard a 1/2 mineral interest that was subject to the Weir lease.[37] Caruthers then acquired an interest in the mineral estate by purchasing a portion of Evans' land.[38] However, Weir paid the delay rentals only to Caruthers,[39] and Leonard ultimately sued for his half of those delay rentals.[40] Ultimately, the court held that the estate attributes of a preexisting lease could not pass to the mineral estate owner in a subsequent deed unless such an intent was specifically expressed in the deed.[41] Thus, according to the court, because the deed at issue did not express such an intent, Leonard was not entitled to the delay rentals.[42]

S. TEX. L. REV. 73, 86 (1993) (stating that the *Caruthers* decision suggests the attributes would pass only if expressly stated).

34. *See Caruthers*, 254 S.W. at 780-81 (explaining that Leonard received his interest after Evans had already conveyed the interest to which Caruthers eventually succeeded in title). Delay rentals are the payment a lessee makes during the lease's primary term to the mineral estate owner in lieu of production. *See* 3 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 34.1, at 106 (1989) (explaining that the primary purpose of delay rental payments is to eliminate the drilling requirement during the primary term); Frank J. Scurlock, *Practical and Legal Problems in Delay Rental and Shut-In Royalty Payments,* 4 INST. ON OIL & GAS L. & TAX'N 17, 18 (1953) (defining delay rentals as payments that the lessee makes in order to delay "the necessity of commencing drilling operations"). The delay rentals extend the life of the lease until the lessee is able to complete drilling operations and begin oil production. *See* Humble Oil & Ref. Co. v. Harrison, 146 Tex. 216, 225, 205 S.W. 2d 355, 360 (1947) (holding that if the lessee fails to make delay rental payments or drill, the lease will terminate); 3 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS LAW § 34.1, at 106 (1989) (stating that the lease will not terminate if delay rentals are paid or drilling has commenced); Frank J. Scurlock, *Practical and Legal Problems in Delay Rental and Shut-In Royalty Payments,* 4 INST. ON OIL & GAS L. & TAX'N 17, 19 (1953) (noting that the lessee either pays delay rentals or drills; if neither occurs, the lease is terminated). The date of payment is specified within the lease. 3 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS LAW § 34.6, at 153 (1989) (explaining that the lease will specify the delay rental payment date and it must be strictly complied with in order to maintain the lease).

35. *See Caruthers*, 254 S.W. at 780.

36. *See id.*

37. *See id.*

38. *See id.* at 782 (explaining the interests of the two parties).

39. *See id.* at 780.

40. *See id.* (noting that Leonard brought suit to recover half of the payments that Weir made to Caruthers).

41. *See id.* at 782-83 (explaining the property conveyances in the deeds and their consequences).

42. *See id.* at 782.

Following *Caruthers*, in order to ensure that the grantee received his share of the lease attributes and proper payments from the lessee, form drafters created a document with three distinct clauses: (1) the granting clause, (2) the subject-to clause, and (3) the future lease clause.[43] With this document, each clause contained a space for indicating the fractional estate interest conveyed. As a result, such deeds were referred to as "three-grant" deeds.[44]

Subject-to clauses were included within three-grant deeds in order to reflect that the conveyance was subject to existing oil and gas leases at the time of the conveyance.[45] This clause was designed to protect the grantor from a breach of warranty arising out of any existing leases, to guarantee that the economic benefits of preexisting leases passed in proportion to the grantee's conveyance, and to clarify the exact interest the grantee received through the conveyance.[46] Likewise, future lease clauses were included in order to clarify that the interest conveyed in the granting clause continued under any future leases after the expiration of the preexisting lease.[47]

---

43. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 408 (3d ed. 1991) (stating that the main effect of *Caruthers* was the creation of the three-grant deed); Terry I. Cross, *Conveyancing—From Repugnance to Harmony—The Demise of* Alford v. Krum *and the Effect of Accepting a Conveyance "Subject To" a Prior Instrument* (explaining that following *Caruthers*, deeds contained three clauses), *in* STATE BAR OF TEXAS, ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-1 (1992).

44. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 498 (3d ed. 1991) (discussing the three clauses of a deed).

45. *See* 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 16.4, at 502 (1987) (stating that including a subject-to clause in the deed that refers to outstanding oil and gas leases is customary); 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 340, at 226.3 (1998) (explaining that the subject-to clause is used when "the mineral transfer is subject to a valid, subsisting lease").

46. *See* Avery v. Grande, Inc., 686 S.W.2d 632, 634 (Tex. App.—Texarkana 1984) (holding that the subject-to clause protects the warranty and limits the grant), *aff'd,* 717 S.W.2d 891 (Tex. 1986); 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 16.4, at 502 (1987) (explaining the effects of the subject-to clause in an oil lease); 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 340, at 226.3-226.4 (1998) (listing the subject-to clause's three-fold purpose).

47. *See* Richardson v. Hart, 185 S.W.2d 563, 564-65 (Tex. 1945) (holding that the first paragraph, the granting clause, and the fourth paragraph, the future lease clause, created a permanent estate under existing or future leases); Tipps v. Bodine, 101 S.W.2d 1076, 1078 (Tex. Civ. App.—Texarkana 1936, writ ref'd) (interpreting the future lease clause as clarifying what the whole of the preceding terms of the instrument conveyed to the grantee); RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 498-99 (3d ed. 1991) (explaining that drafters included the future lease clause to restate the conveyed mineral interest in the event subsisting leases terminated and future leases were executed); *see also* Terry I. Cross, *Conveyancing—From Repugnance to Harmony—The Demise of* Alford v. Krum *and the Effect of Accepting a Conveyance "Subject To" a Prior Instrument* (explaining that the future lease clause is superfluous, simply adding symmetry to the instrument),

In essence, because of the *Caruthers* decision and the subsequent use of subject-to and future lease clauses, conveyances regularly included several spaces to indicate the mineral estate's size.[48] However, as a result, the fraction in the granting clause often differed from those in the two other clauses.[49] Furthermore, complications regarding different parties' interests in the mineral interests arose because of conveyances that were made subsequent to preexisting leases.[50]

Typically, in the preexisting lease, the landowner would reserve a 1/8 royalty, that is, a 1/8 interest in the potential oil production.[51] Unfortunately, in drafting a subsequent deed, the landowner-lessor may have misunderstood the size of his mineral interest, believing that he merely held the 1/8 royalty,[52] where in fact he retained the full mineral interest in

---

in STATE BAR OF TEXAS, ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-1 (1992).

48. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 498 (3d ed. 1991) (noting the main effect of the *Caruthers* decision was the development of a deed with granting, subject-to, and future lease clauses); Terry I. Cross, *Conveyancing—From Repugnance to Harmony—The Demise of* Alford v. Krum *and the Effect of Accepting a Conveyance "Subject To" a Prior Instrument* (explaining that after *Caruthers*, deeds now contained three blanks, each requiring a fraction), *in* STATE BAR OF TEXAS, ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-1 (1992); Robert Bledsoe, *The Ten Most Regrettable Oil and Gas Decisions Ever Issued by the Texas Supreme Court—And the "Winner"—Based on a Survey* (noting that in *Alford v. Krum,* the supreme court considered a typical "three-grant" mineral deed, one that contained granting, subject-to, and future lease clauses), *in* STATE BAR OF TEXAS ADVANCED OIL, GAS, AND MINERAL LAW COURSE H, H-25 (1990).

49. *See* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 89 (1993) (explaining the development of conflicting fractions in the multi-clause deed).

50. These complications are evident in the case history interpreting conveyances burdened by preexisting leases, as Texas courts have reached varying results dependent on the conveyance before them. *See, e.g.*, Bass v. Harper, 441 S.W.2d 825, 828 (Tex. 1969) (holding that the grantee's royalty interest was reduced because it was burdened by a preexisting lease that also gave third parties a royalty interest); *Richardson*, 143 Tex. at 396, 185 S.W.2d at 565 (determining that the conveyance created two separate estates of different sizes, with the royalty estate payable under the preexisting lease); *Tipps*, 101 S.W.2d at 1079 (declaring that the mineral interest conveyed was actually larger than indicated because the landowner made a mistake due in part to the preexisting lease). *See generally* Howard R. Williams, Hoffman v. Magnolia Petroleum Co.: *The "Subject To" Clause in Mineral and Royalty Deeds,* 30 TEX. L. REV. 395 (1952) (discussing the problems that arise when conveyances are made subject to an existing lease).

51. *See* Garrett v. Dils Co., 157 Tex. 92, 96, 299 S.W.2d 904, 907 (1957) (taking judicial notice that the "usual royalty in mineral leases is one-eighth"); Ernest Smith, *Conveyancing Problems* (explaining that 1/8 was typically the landowner's royalty for fifty years or more), *in* STATE BAR OF TEXAS ADVANCED OIL, GAS, AND MINERAL LAW COURSE G, G-1 (1991).

52. *See Tipps*, 101 S.W.2d at 1078 (recognizing the mistake Tipps made regarding the size of the interest she could convey due to the 1/8 reservation she made in a preexisting lease); *see also* 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW

the possibility of reverter.[53] Thus, by not taking into account his true interest, the owner would convey only a fractional interest of the 1/8 reservation.[54] In other words, if the owner wanted to convey 1/2 of his royalty interest, he would incorrectly use a 1/16 fraction in the granting clause, which represents 1/2 of 1/8; however, in the subject-to and future lease clauses, he would use the 1/2 fraction.[55] Obviously, the use of such disparate fractions led successors in title, who were trying to determine

---

§ 340.2, at 243 (1997) (explaining the typical landowners' misunderstanding regarding their true interest in their estate when they have previously leased a mineral interest and are now making a conveyance); Terry I. Cross, *Conveyancing—From Repugnance to Harmony—The Demise of* Alford v. Krum *and the Effect of Accepting a Conveyance "Subject To" a Prior Instrument* (asserting that laymen and lawyers misunderstood the nature of landowner's interest to be only 1/8 because of an outstanding lease, instead of 1/8 plus the full possibility of reverter), *in* STATE BAR OF TEXAS, ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-1 (1992); Tevis Herd, *Conveyancing—The Implications of* Alford v. Krum *on the Two-Grant Theory and a Review of the* Duhig *Rule* (expressing that with a three-grant deed burdened by an outstanding lease, landowners and "sometimes even their lawyers" would mistakenly believe they owned only 1/8 of the minerals, having conveyed away a 7/8 interest), *in* STATE BAR OF TEXAS ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-2 (1989).

53. *See Tipps*, 101 S.W.2d at 1078 (explaining that Tipps had her interest in the possibility of reverter in mind when she made the conveyance as evidenced by the subject-to clause); *see also* 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 340.2, at 243 (1997) (stating the landowner retains ownership of the entire mineral interest in the possibility of reverter, as he did before the lease existed); Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction,* 34 S. TEX. L. REV. 73, 87 (1993) (discussing the landowner's property interest in the mineral estate prior to and after the lease).

54. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 499 (3d. ed. 1991) (presenting a hypothetical to illustrate the fractional result due to the misunderstanding of the landowner's mineral interest); 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 340.2, at 243 (1997) (concluding that due to the misunderstanding of the landowner's true property interest in the minerals, landowners would only convey a fraction of their 1/8 reservation); Tevis Herd, *Conveyancing—The Implications of* Alford v. Krum *on the Two-Grant Theory and a Review of the* Duhig *Rule* (setting out a hypothetical illustrating that the mistaken landowner would use a fraction of his 1/8 reservation to make a subsequent conveyance of his mineral interest), *in* STATE BAR OF TEXAS ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-2, 3 (1989).

55. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 499 (3d ed. 1991) (elaborating on the hypothetical regarding the fractions the landowner would use based on his misconception of his ownership interests); Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction,* 34 S. TEX. L. REV. 73, 89 (1993) (illustrating the fractions the landowner would use in the granting clause based on his misconception of his ownership in the minerals); Tevis Herd, *Conveyancing—The Implications of* Alford v. Krum *on the Two-Grant Theory and a Review of the* Duhig *Rule* (demonstrating what fraction the landowner would use due to his misunderstanding of his true ownership interests), *in* STATE BAR OF TEXAS ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-2, 3 (1989).

the exact quantum of estate conveyed, to much confusion.[56] Despite this confusion, three-grant deeds dominated oil and gas conveyances until 1943.[57] Even though Texas courts viewed the three-grant deed favorably in the intervening years, decisions from this era nonetheless have contributed to the contemporary understanding of multi-clause deeds.

2. *Hoffman v. Magnolia Petroleum Co.*: The Two-Grant Doctrine

In *Hoffman v. Magnolia Petroleum Co.*,[58] the Texas Supreme Court considered whether one deed could convey two distinct estates in the mineral and royalty interests that were different in size.[59] In *Hoffman*, the *granting* clause conveyed the mineral interest of 90 acres of a 320 acre tract.[60] Yet, the *subject-to* clause expressed a 1/2 interest to royalty and

---

56. *See, e.g.*, Hawkins v. Texas Oil & Gas Corp., 724 S.W.2d 878, 886 (Tex. App.—Waco 1987, writ ref'd n.r.e.) (determining the size of the interest conveyed when the granting clause used a 1/32 fraction and when the subject-to and future lease clauses contained the fraction 1/4); Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co., 340 S.W.2d 548, 557 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.) (determining the size and number of estates conveyed when the granting clause contained a 1/32 fraction, the subject-to clause contained a 1/4 fraction, and the deed did not have a future lease clause); Schubert v. Miller, 119 S.W.2d 139, 140-41 (Tex. Civ. App.—Texarkana 1938, no writ) (determining the interest conveyed when the original deed used a 1/32 fraction in the granting and future lease clauses and a 1/4 fraction in the subject-to clause). Numerous articles and treatises discuss the problem of differing fractions in an oil and gas conveyance. *See, e.g.*, RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 496-99 (3d ed. 1991) (discussing the confusion created when mineral interests are conveyed after entering an oil and gas lease); 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 16.3, at 491-502 (1987) (explaining the fraction problems presented with oil and gas leases); 3A W.L. SUMMERS, THE LAW OF OIL AND GAS § 606, at 376-78 (1958) (noting the confusion associated with interests such as rents and royalties granted in lease conveyances); 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 340, at 226.3 (1997) (identifying the confusion created by fractional interests and oil and gas leases); Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 86-89 (1993) (evaluating the evolution of the multi-clause deed that may have lead to estate misconceptions by using conflicting fractions).

57. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1, at 498 (3d ed. 1991) (expressing that the use of the three grant deed was widespread); *see also* Terry I. Cross, *Conveyancing—From Repugnance to Harmony—The Demise of* Alford v. Krum *and the Effect of Accepting a Conveyance "Subject To" a Prior Instrument* (stating that following the *Harris* decision, the use of the three-grant deed was no longer necessary), *in* STATE BAR OF TEXAS, ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-1 (1992).

58. 273 S.W. 828 (Tex. 1925).

59. *See* Hoffman v. Magnolia Petroleum Co., 273 S.W 828, 830 (Tex. Comm'n App. 1925, holding approved) (holding that the language of the deed indicated that two estates of different sizes were created).

60. *See id.* at 829 (reproducing the language of the granting clause that conveyed "[o]ne-half (1/2) interest in and to all of the oil, gas and other minerals in and under and that may be produced from . . . [a] certain 90 acres").

payments under the terms of the "said lease."[61] The issue, therefore, was whether the 1/2 royalty interest corresponded to the 90-acre conveyance or to the original lease conveying 320 acres.[62]

Using the four corners doctrine, the court interpreted the differing estate sizes as an intent to convey two separate estates.[63] That is, the granting clause gave a smaller mineral estate in only the designated 90 acres, whereas the subject-to clause gave a larger royalty interest in the entire 320 acres.[64] Looking to the plain language of the deed, the court explained that the parties intention indicated two estates.[65] The court focused on the words "said lease" in the subject-to clause to make such a determination.[66] Reasoning that the "said lease" could only refer to the lease existing on the entire 320-acre tract, the court held that the parties intended for the conveyed royalty interest in the subject-to clause to correspond to that lease.[67] In this respect, the language could only be interpreted as conveying two estates in one deed.[68]

Basically, the *Hoffman* decision created the possibility that courts could interpret the subject-to clause as no longer merely clarifying the interest in the granting clause, but rather as conveying a separate estate in a royalty interest. Consequently, application of the four corners doctrine could result in an estate that the grantor may not have specifically intended to create. Nonetheless, eleven years later, an appellate court would again rely on this same doctrine to interpret a deed with *three* disparate fractions.

---

61. *See id.* (reciting the language of the subject-to clause that stated the grantee was entitled to "one-half of all the oil royalty and gas rental or royalty").

62. *See id.* (noting that the plaintiff contended the conveyance entitled him to royalties on the entire 320-acre tract, whereas the defendant contended that the court should construe the deed as having referenced only the 90 acres).

63. *See id.* at 830 (holding that the deed's language did not create two leases; rather, the deed created two separate interests).

64. *See id.* (confirming that a mineral interest in 90 acres was conveyed and the language "said lease" indicated a royalty estate covering the entire 320 acres of the prior lease).

65. *See id.* (construing the language of the deed to create two separate estates).

66. *See id.* (holding that the conveyance of a part of the acreage did not split the lease covering the entire 320 acres).

67. *See id.* (explaining that because one lease existed that covered the entire 320 acres, the express language "said lease" indicated that the royalty interest pertained to the entire 320 acres rather than just the 90 acres conveyed in the granting clause).

68. *See id.* (stating that the words of the instrument convey the "real intention of the parties").

3. *Tipps v. Bodine*: Misunderstanding the Estate

The deed in *Tipps v. Bodine*,[69] a 1936 case, presented the Texarkana court of civil appeals with an opportunity to interpret a three-grant deed containing fractional variances within its clauses.[70] The issue before the court was the determination of the size of a mineral estate conveyed in the deed that contained a fraction in the granting clause that was different from the fraction used in the subject-to and future lease clauses.[71] Under the facts of the case, Tipps conveyed a mineral interest to Bodine using a 1/16 fraction in the granting clause and a 1/2 fraction in the two subsequent clauses.[72] Moreover, at the time of the conveyance, the deed was subject to an existing lease,[73] which expired shortly thereafter.[74] Tipps and Bodine then entered into a lease with Octo Oil Company (Octo).[75] Bodine expected half of the payments on this lease, but instead, relying on the granting clause, Octo paid Bodine only 1/16.[76] Bodine then sued to establish her interest under the lease and to remove the cloud from her mineral title.[77]

The Texarkana court, in interpreting the deed, focused on the intentions of the parties as derived from the whole conveying instrument.[78] In particular, to glean this intent, the court had to look to the preexisting lease.[79] The court noted that Tipps retained a 1/8 interest in all the minerals, with a possibility of reverter in the 7/8 interest that was conveyed in the preexisting lease.[80] According to the court, it was this possibility of reverter that Tipps had in mind when she used the 1/2 fraction in the future lease clause when granting the estate to Bodine; therefore Tipps

---

69. 101 S.W.2d 1076 (Tex. Civ. App.—Texarkana 1936, writ ref'd).

70. Tipps v. Bodine, 101 S.W.2d 1076, 1076 (Tex. Civ. App.—Texarkana 1936, writ ref'd) (detailing the pertinent parts of the deed in question, which contained the granting, subject-to, and future lease clauses).

71. *See id.* at 1076-77 (reproducing the pertinent parts of the deed in question that illustrate the differing fractions in the deed's clauses).

72. *See id.* (reciting the language of the deed that conveyed to the grantee "an undivided one-sixteenth interest in and to all of the oil, gas, and other minerals"). The deed also stated that the grantee was entitled to "[o]ne-half of all the oil royalty and gas rental or royalty" and would own "[o]ne-half of the lease interests and all future rentals" in the event the lease was cancelled or forfeited. *Id.*

73. *See id.* (stating that the deed, executed in July 1930, was subject to a commercial lease executed by Tipps in April 1930).

74. *See id.* at 1077.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.* at 1078.

79. *See id.*

80. *See id.*

intended only for Bodine to share in 1/2 of the possibility of reverter interest in case the preexisting lease terminated.

The *Tipps* court further held that the future lease clause neither reserved nor conveyed anything to Bodine; in the court's opinion, the future lease clause was "merely a condensed expression of the intended effect of all the preceding terms of the [instrument]."[81] Basically, the Texarkana court considered the future lease clause as clarifying the intent of the conveyance. The court recognized the possibility of reverter interest and the implications of that interest with the use of fractions in the deed.[82] Yet, the significance of this recognition was not realized until 1957 in *Garrett v. Dils Co.*[83] and 1998 in *Concord Oil Co. v. Pennzoil Exploration & Production Co.*[84]

4. *Harris v. Currie*: Three-Grant Deed Rendered Unnecessary

Following *Tipps*, practitioners in oil and gas law continued to utilize the three-grant deed until the supreme court's 1943 decision in *Harris v. Currie*.[85] The issue in *Harris*, reminiscent of that in *Caruthers*, was the correct payment of delay rentals to several parties with fractional interests in the underlying mineral estate.[86] In 1928, Hurns and Harris exchanged deeds to two separate pieces of property that they held as co-tenants, with each deed containing a reservation in the mineral interest and the rights to royalty payments.[87] In 1941, the surviving parties leased the mineral estate to Humble Oil and Refining Company for exploration and production of oil.[88] Harris then deeded a portion of the mineral interest—which he had previously reserved in the deed to Hurns—to Wahlenmaier and Currie.[89] However, Humble Oil and Refining Company paid delay rentals, as obligated by their leases, only to Harris.[90] As a result,

81. *Id.* at 1079.

82. *See id.* (addressing the impact of a possibility of reverter as a future event).

83. 157 Tex. 92, 299 S.W.2d 904 (1957).

84. 966 S.W.2d 451 (Tex. 1998).

85. 142 Tex. 93, 176 S.W.2d 302 (1943).

86. *See* Harris v. Currie, 142 Tex. 93, 95-97, 176 S.W.2d 302, 302-03 (1943) (discussing each of the parties' interests in their respective conveyances, the payments each party received from the lessee, and the parties' contentions).

87. *See id.* at 95, 176 S.W.2d at 302 (including the pertinent parts of the deeds which expressed both the mineral reservation and the right to royalty payments).

88. *See id.* (explaining the circumstances in which Humble Oil and Refining Company received its mineral leases to the land in question).

89. *See id.* at 96, 176 S.W.2d at 303 (explaining how Currie received his mineral interest from Harris).

90. *See id.* (stating that Humble Oil and Refining Company paid the delay rentals to Harris).

Currie and Wahlenmaier brought suit, claiming their right to the delay rental payments.[91]

In *Harris*, the court held that the lease benefits passed as an operation of law in proportion to the conveyance.[92] Thus, when Harris deeded his 1/2 mineral interest to Currie, he divested himself of all interest to that estate.[93] Accordingly, Harris could not claim ownership to the delay rentals, which, as an appurtenance of the estate,[94] passed proportionately with the deeded mineral interest. In crafting such a holding, the *Harris* court overruled *Caruthers* and eliminated the necessity for the three-grant deed.[95]

Following *Harris*, deeds needed to include only one clause, rather than three, to convey a fractional interest in minerals. However, in the eighteen-year time span between the *Caruthers* and *Harris* decisions, deeds had continually been drafted with three blanks.[96] In addition, even after the *Harris* decision, drafters continued to employ the three-grant doctrine in order to ensure clarity and avoid the possibility of breach of warranty.[97] Yet, because many deeds contained those three clauses, litigation ensued.[98]

---

91. *See id.* (explaining Currie and Wahlenmaier's claims to the delay rentals).

92. *See id.* at 100, 176 S.W.2d at 305 (discussing the interest the documents conveyed and the parties' rights to their respective portions of the payments).

93. *See id.* (espousing how the property interests passed with the conveyance to Currie).

94. *See id.* (explaining that once an owner divests himself of his mineral interest, nothing remains).

95. *See id.* at 101, 176 S.W.2d at 306 (stating that in the court's opinion, *Caruthers v. Leonard*, 254 S.W. 779 (Tex. 1923), was overruled in *Hager v. Stakes*, 116 Tex. 453, 294 S.W. 835 (1927)). Although the court expresses that *Hager* overruled *Caruthers*, *Harris* is indeed the decision that overruled *Caruthers*. *See* EUGENE O. KUNTZ ET AL., OIL AND GAS LAW: CASES AND MATERIALS 509 (2d ed. 1993) (stating that "the *Caruthers* case was overruled twenty years later by *Harris*").

96. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 9.1 at 498 (3d ed. 1991) (explaining that the *Caruthers'* decision created deeds with three clauses); Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 86-87 (1993) (opining that the legacy of *Caruthers* has been the use of three grant deeds); Tevis Herd, *Deed Construction and the "Repugnant to the Grant,"* 21 TEX. TECH. L. REV. 635, 637 n.9 (1990) (stating that the three grant deed was created due to the *Caruthers* decision).

97. *See* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 86-87 (1993) (noting that the three-grant deed form was created to clearly express intent); Thomas H. Lee, *Ambiguity and the "Subject To" Clause in Texas Mineral Conveyancing*, 5 S. TEX. L. REV. 313, 313 (1961) (explaining that after *Caruthers*, the deed had to explicitly state the rights of the grantee).

98. *See* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 87 (1993).

5. *Garrett v. Dils Co.*: Harmonizing the Fractions

In *Garrett v. Dils Co.*,[99] the supreme court revisited its method of interpreting deeds containing fractional variances among their granting, subject-to, and future lease clauses.[100] The issue in *Garrett* was similar to that in *Tipps*, and focused on how to determine the size of the mineral estate conveyed in a three-grant deed when the fraction in the granting clause varied from the fraction used in the subject-to and future lease clauses.[101] Specifically, the granting clause in *Garrett* contained a 1/64 fraction, whereas the subject-to and future lease clauses contained a 1/8 fraction.[102] The conveyance in question was a deed of the mineral estate from Garrett to Caldwell.[103] In the subject-to and future lease clauses, the 1/8 fraction was used to guarantee payment to Caldwell under preexisting leases and in all future leases.[104]

In deciding which fractional interest controlled, the court in *Garrett* applied the four corners doctrine approach, thus giving effect to each provision, and found that the grantor intended to convey a 1/8 mineral interest.[105] The court reasoned that when harmonizing the deed, effect must be given to each clause to ascertain the grantor's intent.[106] Therefore, as the two subsequent clauses contained the 1/8 fraction, the court found the intent of the granting clause was to convey a 1/8 mineral interest, not 1/64.[107] Had the two subsequent clauses not been present, the court would have given the fraction in the granting clause its expressed meaning, and the grantee would have had merely a 1/64 mineral interest.[108] In addition, the court took judicial notice that the common reser-

---

99. 157 Tex. 92, 299 S.W.2d 904 (1957).

100. *See* Garrett v. Dils Co., 157 Tex. 92, 92, 299 S.W.2d 904, 904 (1957).

101. *See id.* at 94, 299 S.W.2d at 905 (including the deed's three clauses to illustrate the fractional variance that existed between the granting clause and the two subsequent clauses).

102. *See id.* at 93-94, 299 S.W.2d at 905 (reciting the deed's terms and indicating the fractional interests in each of the deed's clauses).

103. *See id.* (reproducing the deed that clearly showed the conveyance from the Garretts to Caldwell).

104. *See id.*

105. *See id.* at 95-96, 299 S.W.2d at 906-07 (reasoning that in utilizing the four corners doctrine, the intent of the grantor was to convey a 1/8 mineral interest and not a 1/64 interest).

106. *See id.* at 94-95, 299 S.W.2d at 906 (asserting that the parties' intentions should be given effect when possible).

107. *See id.* at 96-97, 299 S.W.2d at 906-07 (concluding that the parties intended to convey a 1/8 mineral interest).

108. *See id.* at 95, 299 S.W.2d at 906 (explaining that using the 1/8 language evidenced an intent to convey 1/8 of the mineral estate).

vation in oil and gas leases was that of a 1/8 interest.[109] As a result, the court concluded that the deed conveyed a 1/8 interest.[110]

Thus, by the late 1950s, the Texas Supreme Court had established two possible interpretations for deeds containing fractional variances: (1) the two-grant doctrine established in *Hoffman*,[111] and (2) harmonization of the clauses as in *Garrett*.[112] Although both cases played an important role in the development of this area of oil and gas law, *Garrett* ultimately provided the greater precedential weight for the plurality in *Concord* because *Garrett* attempted to resolve the size of the mineral estate actually conveyed.[113]

6. *Alford v. Krum*: The Granting Clause Prevails

In 1984, the Texas Supreme Court attempted to create certainty in the interpretation of multi-fractional deeds in *Alford v. Krum*.[114] In *Alford*, the supreme court rejected the notion that the future lease clause conveyed a second estate when the court confronted a three-grant deed containing a fractional variance within its clauses.[115] In the original 1929 deed, the Koncahas conveyed to Mang 1/2 of the 1/8 mineral interest they owned.[116] However, their deed's future lease clause purported to convey a 1/2 interest in all future leases.[117] Moreover, the subject-to clause contained the fraction 1/16 when describing the interest pertaining to preexisting leases.[118]

---

109. *See id.* at 96, 299 S.W.2d at 907 (taking judicial notice that the standard royalty interest reserved is 1/8).

110. *See id.* at 96-97, 299 S.W.2d at 906-07 (holding that the deed conveyed 1/8 of the minerals).

111. *See* Hoffman v. Magnolia Petroleum Co., 273 S.W. 828, 830 (Tex. Comm'n App. 1925, holding approved) (establishing that two estates may be created by a deed, depending on the deed's express language).

112. *See Garrett*, 157 Tex. at 96-97, 299 S.W.2d at 907 (construing the deed as a whole to establish the grantor's intent and harmonizing the fractions in the deed's three clauses).

113. *See* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 460-61 (Tex. 1998) (rejecting arbitrary constructions of deed clauses in preference of the harmonization favored in *Garrett*).

114. 671 S.W.2d 870 (Tex. 1984).

115. *See* Alford v. Krum, 671 S.W.2d 870, 871-72 (Tex. 1984) (highlighting the deed's clauses that contained the fractional variance by reproducing the original deed).

116. *See id.* at 871 (expressing in the granting clause that Mang would receive "one-half of the one-eighth interest in and to all of the oil, gas and other minerals").

117. *See id.* at 872 (stating in the future lease clause that "all future rentals on said land . . . shall be jointly owned by Walter A. Mang . . . and Frank Koncaba . . . each owning a one-half interest in all oil . . . together with one-half interest in all future rents").

118. *See id.* (explaining that the present deed is subject to a lease already held on the land, but the present conveyance "covers and includes 1/16 of all the oil royalty . . . or royalty due").

After rejecting the two-grant doctrine established in *Hoffman*, the court utilized the four corners doctrine in *Garrett* and declared that the granting clause prevailed.[119] Because the court determined that it was impossible to harmonize the inconsistent expressions found in the three clauses, the court gave effect to the "controlling language" of the deed and refused to allow ambiguities to "destroy the key expression of intent" within the deed's terms.[120] Thus, in the court's view, the granting clause was the key expression of intent.[121] In this regard, the court stated that the future lease clause "provided nothing more than a restatement or confirmation of the interest deeded in the previous portion of the instrument."[122]

Unfortunately, the granting-clause-prevails doctrine established in *Alford* considered only the granting clause and simply ignored the subject-to and future lease clauses.[123] As a result, this opinion was sharply criticized for misapplying the four corners doctrine and ignoring the parties' expressed intent.[124] Later decisions, however, would restore the important role of the four corners doctrine in oil and gas deed interpretation.

---

119. *See id.* (stating, "[i]t logically follows that when there is an irreconcilable conflict between clauses of a deed, the granting clause prevails over all other provisions").

120. *Id.* (quoting Texas Pac. Coal & Oil Co. v. Masterson, 160 Tex. 548, 553, 334 S.W.2d 436, 439 (1960)).

121. *See id.* (asserting that the granting clause defines the nature of the conveyance).

122. *See id.* at 873 (noting that Texas courts have generally treated the fractional interests in a future lease clause as a restatement of the interest deeded). Interestingly, the *Alford* court would not take into consideration the possibility of a drafting mistake, that is, by inserting a 1/16 fraction instead of a 1/2 fraction. *See id.* The court stated that it would not consider this argument because the suit was not for recission or reformation. *See id.* As such, the court would only look to what was expressed by the language in the deed. *See id.*

123. *See id.* at 872 (stating that the intent of the granting clause is definitive in the resolution of conflicts between clauses).

124. *See, e.g.*, Luckel v. White, 819 S.W.2d 459, 465 (Tex. 1991) (Mauzy, J., concurring) (calling the *Alford* decision "regrettable"); Robert Bledsoe, *The Ten Most Regrettable Oil and Gas Decisions Ever Issued by the Texas Supreme Court—And the "Winner"—Based on a Survey* (including the *Alford* decision as one of the ten worst decisions, emphasizing that this case seriously restricts the four corners doctrine and its expansion knows no bounds), *in* STATE BAR OF TEXAS, ADVANCED OIL, GAS, AND MINERAL LAW COURSE H, H-25 to 27 (1990); Tevis Herd, *Conveyancing—The Implications of* Alford v. Krum *on the Two-Grant Theory and a Review of the* Duhig *Rule* (noting that the *Alford* decision gutted the four corners doctrine), *in* STATE BAR OF TEXAS ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-3 (1989).

7. *Luckel v. White*: Returning to the Four Corners Doctrine

In *Luckel v. White*,[125] a 1991 decision, the Texas Supreme Court expressly overruled *Alford*.[126] As in the preceding cases, the deed in question contained varying fractions in the clauses.[127] Specifically, in *Luckel*, Mays conveyed to Luckel a 1/32 interest in the mineral estate described in the deed.[128] The subject-to clause included a 1/4 royalty interest in the lease existing at the time of the grant.[129] The same 1/4 fraction was also used in the future lease clause, guaranteeing payment of a royalty under any additional leases.[130] The original leases, however, expired, and several additional leases were executed.[131] Later, the parties of the subsequent leases and Luckel disagreed as to the size of the royalty interest to which Luckel was entitled under the new leases.[132]

In deciding how to determine the size of the royalty interest that Luckel would receive under the leases, the supreme court was presented with conflicting precedent: (1) the four corners rule[133] and (2) *Alford's* granting-clause-prevails doctrine.[134] The court decided to reject *Alford* as precedent, explaining that *Alford* was a misapplication of harmonization, and instead chose to reaffirm *Garrett* and the four corners doctrine.[135] According to the court in *Luckel,* the different lease clauses must be harmonized to ascertain the grantor's intent.[136] The *Luckel* court stated that "even if different parts of the deed appear contradictory or inconsistent, the court must strive to harmonize all of the parts, construing the instrument to give effect to all of its provisions."[137] Hence, in

---

125. 819 S.W.2d 459 (Tex. 1991).

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

127. *See id.* at 460 (determining the construction of a deed that had a 1/32 fraction in the granting clause and a 1/4 fraction in both the subject-to and future lease clauses).

128. *See id.* at 461.

129. *See id.* (citing the terms of the royalty interest providing for 1/4 interest in royalty under the existing lease but excluding any rental payments).

130. *See id.* (reproducing the future lease clause that indicated the grantee would be bound by the terms of any additional leases and would receive a 1/4 interest in royalties from such leases).

131. *See id.* (explaining the subsequent events following the expiration of the original lease).

132. *See id.* (noting the parties' disparate views regarding Luckel's royalty interest).

133. *See id.* at 462.

134. *See id* (reasoning that the court of appeals had proffered these two rationales and the supreme court now addressed each in its decision).

135. *See id.* at 464 (overruling *Alford* while reconciling the deed provisions with the methods introduced in *Garrett*).

136. *See id.* at 461 (noting that the duty of the court is to discover the parties' intent).

137. *Id.*

Luckel, the court determined that a single 1/4 royalty was conveyed to Luckel.[138]

Following the *Luckel* decision, the supreme court was still left with two models for multi-fractional deeds: (1) the *Hoffman* two-grant doctrine and (2) the *Luckel* four corners approach. In 1998, the court had the opportunity to decide which mode of interpretation to adopt. In *Concord*, the court chose the four corners approach from *Luckel* over the *Hoffman* two-grant doctrine.

III. THE *CONCORD* DILEMMA

A. *Background*

1. Facts and Issues

The dilemma in *Concord* began with a conveyance in 1937. On August 4, 1937, de Garza granted Crosby a 1/12 mineral interest in oil producing land.[139] The following day, Crosby used a multi-fractional deed to grant interest in the same land to Southland Lease & Royalty Corporation (Southland).[140] The deed provided in relevant part:

> That I, A.B. Crosby . . . Grant, Sell, and Convey unto Southland . . . an undivided *one-ninety sixth (1/96)* interest in and to all of the oil, gas and other minerals in and under, and that may be produced from survey sixty-four . . . together with the right . . . of ingress and egress at all times for the purposes of prospecting, drilling, mining and exploring said land for oil, gas and other minerals . . . together with all rights of every kind and character necessary and convenient to the full use and enjoyment of such estate herein conveyed . . .
>
> While the estate hereby conveyed does not depend upon the validity thereof, neither shall it be affected by the termination thereof, this conveyance is made subject to the terms of any valid subsisting oil, gas and/or *mineral lease or leases* on above described land or any part thereof, but covers and includes *one-twelfth (1/12)* of all rentals and royalty of every kind and character that may be payable by the terms of such lease or leases insofar as the same pertain to the above described land, or any part thereof.[141]

The fractional variance between the granting clause and the subject-to clause created the central controversy in *Concord*: How many estates

---

138. *See id.*

139. *Cf.* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 453 (Tex. 1998) (noting that Crosby acquired his interest the day before August 5, 1937).

140. *See id.* (stating that the deed at issue was conveyed to Southland Lease and Royalty Corporation).

141. *Id.* (emphasis added).

were actually created and what size estate did Crosby intend to convey?[142]

Later, in 1961, Crosby purported to convey a 7/96 interest to John M. Robinson; ultimately, that interest was held by Pennzoil Exploration & Production Company, Pennzoil Producing Company, and Sanchez-O'Brien Oil & Gas Corporation, in addition to Robinson.[143] Subsequently, Concord Oil and Company and Crenshaw Royalty Corporation (Concord) succeeded in title to the Southland conveyance.[144] Eventually, Pennzoil completed a producing well on its interest from the 1961 deed.[145] Concord then brought suit to determine its interests and rights to the production.[146] In response, Pennzoil countersued in order to determine its rights to the mineral estate as well.[147]

2. Interpreting the Multi-Fractional Deed

The trial court addressed two central issues: (1) the size of the estate Crosby deeded to Southland, and (2) whether the conveying instrument contained a future lease clause.[148] Resolving these issues would determine whether Pennzoil retained a continued interest in the oil production on the property. The trial court had at least two options in construing the multi-fractional deed conveyed to Concord: (1) that the deed created two grants as evidenced by the use of two different fractions, or (2) that the harmonization of the conflicting fractions conveyed one estate. Consistent with *Hoffman,* the court could have interpreted the differing fractions as creating two separate estates.[149] In other words, the original deed could have been interpreted as deeding a 1/96 mineral estate in the granting clause,[150] meaning that the second estate would then consist of

142. *See id.* at 452 (deeming the issue to be the interest conveyed in the deed when differing fractions appeared in the conveyance document).

143. *See id.* at 453 (relating that in 1961, Crosby conveyed to Robinson a 7/96 interest in the minerals).

144. *See id.* (explaining that Crenshaw acquired the Southland interest and subsequently leased this interest to Concord).

145. *See id.* (stating that Pennzoil completed producing wells and the dispute ensued).

146. *See id.*

147. *See id.*

148. *See id.* at 453-54, 457 (outlining the parties' contentions).

149. This conclusion was also the trial court's result, which was affirmed by the court of appeals. *See id.* at 454; *see also* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 878 S.W.2d 191, 196 (Tex. App.—San Antonio 1994) (agreeing that the *Concord* deed created two grants, yet relying not on *Hoffman* but instead *Pan American Petroleum Corp. v. Texas Pacific Coal & Oil Co.*, 340 S.W.2d 548 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.)), *rev'd,* 966 S.W.2d 451 (Tex. 1998).

150. *See Concord*, 966 S.W.2d at 454 (echoing Pennzoil's assertion regarding the Concord deed).

the 1/12 interest in royalty and payments as created in the subject-to clause.[151] This second estate would have expired when the leases under the subject-to clause also expired.[152] Moreover, if the original deed granted a 1/96 in the mineral estate, then Crosby would be left with 7/96 of his original 1/12 interest.[153] As such, Crosby's 1961 conveyance to Robinson would have been valid,[154] meaning that Pennzoil would continue to have an interest in the production of oil.

Alternatively, the court could have relied on the four corners doctrine to harmonize the fractional variance, giving effect to each clause and ascertaining the parties' intent in the original deed.[155] Such an interpretation would have necessarily involved the court relying on the subject-to clause's fraction to explain the intent of the granting clause's fraction.[156] Under this theory, because the subject-to clause contained a 1/12 interest, the overall intent would have been to convey a 1/12 interest, not the 1/96 interest as indicated in the granting clause. This interpretation would have resulted in Crosby having deeded his entire estate in the original conveyance.[157] Thus, Crosby would have had nothing to convey in 1961, therefore voiding Pennzoil's interest.[158]

The trial court adopted Pennzoil's view that the deed created two separate estates.[159] The San Antonio court of appeals affirmed this decision.[160] Concord then submitted an application for writ of error to the

---

151. *See Concord*, 878 S.W.2d at 192 (indicating that the original deed's granting clause conveyed a 1/96 mineral interest).

152. *See id.* (relating that the subject-to clause indicated a 1/12 interest in rentals and royalties of every type).

153. *See id.* (explaining the consequences of the fractional conveyances).

154. *See id.* (recognizing that if the deed conveyed 1/96 of the mineral interest, "Crosby still owned the other 7/96 and ultimately it passed to the Pennzoil parties beginning with the 1961 conveyance to Robinson").

155. *See Concord*, 966 S.W.2d at 454 (rejecting the court of appeals' two-grant interpretation and applying the four corners doctrine).

156. *See id.* (relying on past decisions that reasoned "when conveyances contained apparent inconsistencies between the fraction in the granting clause and fractions in other provisions, it was evident from the instrument as a whole that the grantor had conveyed a larger interest than the granting clause otherwise indicated"). The purpose of the four corners doctrine is to harmonize the conflicting clauses and ascertain the parties' intent. *See id.* (referring to the holding in *Luckel*, which harmonized inconsistencies in the conveying instrument).

157. *See Concord*, 878 S.W.2d at 192 (explaining the consequence of interpreting the fractional interest in the granting clause as an intended 1/12 interest rather than the expressed 1/96 interest).

158. *See id.*

159. *See Concord*, 966 S.W.2d at 454 (stating that the trial court ruled in favor of Pennzoil).

160. *See Concord*, 878 S.W.2d at 192 (affirming the trial court's holding).

Texas Supreme Court seeking to overturn the trial court's and court of appeals' decisions.

B. *The Parties' Arguments*

1. Concord[161]

Concord, the successor to Southland's interest, raised three arguments in claiming its 1/12 mineral interest.[162] The first argument focused on the four corners doctrine as used in *Luckel* and *Garrett*.[163] Applying the four corners doctrine, Concord argued that the court should harmonize all aspects of the deed—giving effect to each clause—to determine what interest Crosby intended to convey in the original 1937 deed.[164]

Second, coupled with the four corners doctrine, Concord contended that the application of the "estate misconception theory"[165] would allow the court to ascertain the intent of the original deed. Estate misconception refers to the lessor's apparent misunderstanding of the property estates created by the oil and gas lease.[166] Under this theory, the lessor, believing that his ownership in the minerals is a 1/8 interest as represented by the reservation in the lease, deeds a fractional interest of that reservation rather than a fractional interest of the entire estate he maintains in the possibility of reverter.[167]

Using this latter theory, Concord argued that the intent of the 1937 deed was to grant a 1/12 interest in the mineral estate, as the use of the fraction 1/96 in the granting clause represents a 1/12 interest of the 1/8 reservation.[168] In other words, by applying the four corners doctrine and the estate misconception theory, Concord asserted that Crosby intended

---

161. In addition to Concord, the other petitioner was Crenshaw Royalty Corporation. Consistent with the Texas Supreme Court's opinion, this Recent Development refers to the petitioners collectively as "Concord." *See Concord*, 966 S.W.2d at 453.

162. *See* Petitioners' Joint Application for Writ of Error at 13-24, Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451 (Tex. 1998) (on file with the *St. Mary's Law Journal*).

163. *See id.* at 8-9, 15-18.

164. *See id.* at 9, 18-19.

165. *See id.* at 12-15.

166. *See id.* at 13-15. As discussed earlier, the lessor may misunderstand the size of his estate, believing he only has a 1/8 reservation in the lease, when in fact he also possesses a 7/8 interest in the possibility of reverter. *See id.* at 14. The lessor's misunderstanding of his property interest manifests itself when he conveys a fractional mineral interest of the estate that is already burdened with a preexisting lease. *See id.* When the lessor wanted to convey one half of his mineral estate that was burdened with a preexisting lease, believing he only reserved a 1/8 interest after the preexisting lease, he would use the fraction 1/16 in the granting clause, which represented 1/2 of 1/8. *See infra* Part I.

167. *See id.* at 14.

168. *See id.*

to convey an undivided 1/12 mineral interest to Southland in spite of a 1/96 interest as indicated in the granting clause.[169] Concord supported this argument by referring to the 1/12 fraction in the subject-to clause.[170] In essence, if Crosby had intended to convey a 1/96 interest in the minerals as stated in the granting clause, this subsequent clause would have reflected such an intent. Because the owner of a 1/12 mineral interest is entitled to 1/12 of rents and royalties, as stated in the subject-to clause, Concord though contended that the deed conveyed a 1/12 mineral interest.[171]

Finally, Concord also argued that the use of "estate" in the singular throughout the deed indicated clearly that only one estate was deeded.[172] To support this assertion, Concord relied upon the four corners doctrine, further arguing that the word estate, rather than "estates," was indicative of only one estate being conveyed.[173] As a corollary to this argument, Concord also contended that the lease *did* contain a future lease clause.[174] Concord argued that the use of the phrase "and leases," when read against the entirety of the deed, indicated that the 1/12 interest expressed in the subject-to clause pertained to future leases.[175]

2. Pennzoil[176]

In contrast, Pennzoil contended that the Crosby deed created two grants.[177] To make this argument, Pennzoil also utilized a four corners interpretation to illustrate that Crosby deeded two separate estates: (1) an undivided 1/96 interest in the mineral estate, and (2) a 1/12 interest in all lease benefits under the subsisting leases at the time the deed was granted.[178] Pennzoil further argued that Crosby understood his interest in the mineral estate at the time of the deed because he was granted the estate only the day before.[179] Accordingly, under Pennzoil's argument, Crosby intended to convey the estate as he did, thus creating two estates.

---

169. *See id.* at 21-24.

170. *See id.* at 23.

171. *See id.* at 24.

172. *See id.* at 22-24.

173. *See id.*

174. *See id.* at 23.

175. *See id.* at 23-24.

176. The respondents were Pennzoil Exploration & Production Company, Pennzoil Producing Company, Sanchez O'Brien Oil & Gas Corporation, and John M. Robinson. *See* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 453 (Tex. 1998).

177. *See* Brief of Respondents at 17-19, Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451 (Tex. 1998) (on file with the *St. Mary's Law Journal*).

178. *See id.* at 19.

179. *See id.* at 7-10, 24, 32-34.

Additionally, Pennzoil maintained that if the court adopted Concord's interpretation, the court would be reforming the deed rather than interpreting it.[180] Pennzoil argued that to read the deed as having been created under a misunderstanding would acknowledge a mutual mistake.[181] Under such a circumstance, reformation of the deed would be more appropriate than interpretation.[182] Yet, Pennzoil contended that a mutual mistake did not exist.[183] According to Pennzoil, the deed was unambiguous and the terms should be interpreted as written.[184]

Pennzoil further asserted that the deed did not contain a future lease clause, as evidenced by the language in the deed's subject-to clause.[185] Pennzoil stated that, in reading the deed, effect should be given to the term "subsisting." The lease contained the word "subsisting" prior to the phrase "lease . . . or leases."[186] Pennzoil argued that "subsisting" meant "in present existence," and that the term actually modified the phrase "lease . . . or leases."[187] As a result, Pennzoil believed this term indicated that the 1/12 interest in the subject-to clause only pertained to any lease or leases in existence at the time the deed was written;[188] therefore, when those leases expired the interest did as well. In this respect, Pennzoil argued that the case law relating to deeds that contained no future lease clauses, such as *Pan American Petroleum Corp. v. Texas Pacific Coal & Oil Co.*,[189] must be applied.[190] Under *Pan American*, when the deed contains differing fractions and no future lease clause, the deed actually creates two separate estates.[191]

C. *The Texas Supreme Court's Holding:* Concord Oil Co. v. Pennzoil Exploration & Production Co.

In a 4-1-4 judgment,[192] Justice Owen, writing for the plurality, concluded that the 1937 Crosby deed conveyed a 1/12 interest in any preex-

---

180. *See id.* at 12-13, 32-34.
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.* at 30.
186. *See id.* at 30-31.
187. *See id.*
188. *See id.*
189. 340 S.W.2d 548, 557-58 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.).
190. *See* Brief of Respondents at 22, *Concord*, No. 94-0504.
191. *See* Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co., 340 S.W.2d 548, 553 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.)
192. *See* Concord Oil Co. v. Pennzoil Exploration Co., 966 S.W.2d 451, 452, 463, 465 (Tex. 1998). The history of the Texas Supreme Court's decision in *Concord* is almost as confusing as the contested issue. The court initially granted a writ from the San Antonio

isting leases at the time of the conveyance and a possibility of reverter in a 1/12 mineral estate.[193] In essence, the plurality disagreed with the lower courts' interpretation that the deed conveyed two estates.[194] For reasons discussed below, the supreme court plurality stated that such an interpretation "did violence to the express provisions" of the deed.[195]

1. Modes of Interpretation

a. Four Corners Precedent

The plurality, in determining the size of the mineral interest conveyed in the Crosby deed, relied on the four corners doctrine, which was also utilized in *Garrett v. Dils*,[196] *Tipps v. Bodine*,[197] and *Luckel v. White*.[198] The plurality reiterated the "unifying principle" of oil and gas deed interpretation that "the entire document must be examined to glean the parties' intent."[199] The plurality indicated that each earlier decision in this area of oil and gas law was based on determining the intent of the parties from the four corners of the document.[200] Furthermore, in those cases in which fractional variances existed, except for the *Alford* decision, the Texas Supreme Court had ascertained the parties' intent by looking to the entirety of the document and harmonizing the clauses.[201] The plurality also recognized that the four corners doctrine was the key element of the *Luckel* decision.[202]

---

court of appeals, but following the court's original decision on October 18, 1996 in favor of Concord, the court granted Pennzoil's motion for rehearing. *See id.* at 452. The case was reargued on January 8, 1998. *See id.* at 451. The court issued a new opinion, again in Concord's favor, decided on February 26, 1998. *See id.* At the same time, the dissenting justices withdrew their original dissent dated October 18, 1996 and substituted a new one dated February 26, 1998. *See id.* In addition, Justice Enoch submitted a new concurrence dated June 5, 1998. *See id.* at 463 (Enoch, J., concurring). The court's decision, dated February 26, 1998, was then reissued, including the new dissent, the rewritten concurrence, and an overruling of the Concord's second motion for rehearing. *See id.* at 451-52. Thereafter, Justice Enoch's concurrence was issued separately with a syllabus stating the case was argued on January 8, 1998 and decided on June 5, 1998. *See id.* at 451-52.

193. *See id.* at 452.

194. *See id.* at 458.

195. *Id.*

196. 157 Tex. 92, 299 S.W.2d 904 (1957).

197. 101 S.W.2d 1076 (Tex. Civ. App.—Texarkana 1936, writ ref'd).

198. 819 S.W.2d 459 (Tex. 1991).

199. *Concord*, 966 S.W.2d at 454.

200. *See id.*

201. *See id.* at 454, 457 (emphasizing throughout the decision that the court was applying the four corners doctrine in cases interpreting multi-fractional deeds).

202. *See id.* at 457 (reiterating the court's holding in *Luckel*, where the court asserted that the document should be read as a whole to determine what was conveyed)).

The plurality further noted that in the previous cases where fractional inconsistencies existed between the granting clause and the two other clauses, the court found that, by looking to the whole document, the grantor had intended to convey a larger interest than what was apparent in the granting clause.[203] Furthermore, in each of these decisions, the fractional interest of lease benefits in the subsequent clauses actually evidenced the intended size of the mineral estate conveyance.[204]

b. Distinguishing the Two-Grant Doctrine

In arriving at its holding, the plurality also distinguished three cases that had supported the two-grant doctrine and purportedly addressed the interpretation of deeds with conflicting fractions. First, the plurality addressed *Richardson v. Hart*.[205] The plurality explained that the *Richardson* decision actually did not concern a deed with conflicting fractions;[206] rather, the mineral deed in question conveyed two separate royalty estates of equal size.[207] The question for the *Richardson* court was the interpretation of the word "of" in a royalty conveyance.[208] The *Concord* plurality explained that the issue in *Richardson* was determining the royalty interest to be paid, not what interest the grantee owned after the lease expired.[209] Thus, *Richardson* was inapplicable to the facts of *Concord*.

Second, the plurality distinguished *Benge v. Scharbauer*,[210] another case applying the two-grant doctrine.[211] *Benge* "turned on the application of the *Duhig* doctrine," an estoppel doctrine that prevents a grantor from claiming that a conveyance was for less than the grantor owned after the grantor has represented and warranted that he owns a particular interest.[212] The *Duhig* doctrine treats the over-conveyance as a deliber-

---

203. *See id.* at 455-56 (reviewing the court's precedent and explaining the holding of each case).

204. *See id.* (emphasizing that relying on the entire document rather than specific labels is a more reliable indicator of the parties' intentions).

205. 143 Tex. 392, 185 S.W.2d 563 (1945).

206. *See Concord*, 966 S.W.2d at 456 (explaining that the court in *Richardson* was not concerned with conflicting fractions; rather, it focused on a dispute over how to construe the word "of" in a royalty conveyance).

207. *See* Richardson v. Hart, 143 Tex. 392, 396, 185 S.W.2d 563, 564 (1945) (addressing the assertion of an ambiguity in the deed).

208. *See id.*

209. *See Concord*, 966 S.W.2d at 456.

210. 152 Tex. 447, 259 S.W.2d 166 (1953).

211. *See* Benge v. Scharbauer, 152 Tex. 447, 451, 259 S.W.2d 166, 168 (1953) (stating that "[a] grantor may reserve unto himself mineral rights, and he may also reserve royalties, bonuses, and rentals—either one, more or all").

212. *See id.* (outlining the *Duhig* doctrine).

ate misrepresentation[213] and allows the court to use the equitable doctrine of estoppel to prevent the owner from receiving a larger interest.[214] Because it was not plead that Crosby deliberately misrepresented his interests to Pennzoil, the *Concord* plurality found *Benge* and the *Duhig* doctrine inapplicable.[215]

Third, the plurality explained that *Woods v. Sims*[216] was not applicable to *Concord*.[217] In *Woods*, the dispute centered on the fact that the acreage amounts in the three deeds in question were, in fact, smaller than the actual interest owned.[218] The land that the deed covered contained 266.68 acres.[219] The deed, by contrast, stated that the acreage conveyed in the mineral interest was only 200 acres.[220] Both the granting clause and the subsequent clauses discussing preexisting leases contained the same fractional conveyance of 25/200.[221] As a result, the deed contained a conveyance that only covered 200 acres and not the entire 266.68 acres.[222] Therefore, the dispute in *Woods* was not over a fractional inconsistency inherent in the deed; rather, the dispute centered on an inconsistency between the total realty held and what was consistently conveyed in the deed.[223] In this regard, *Woods* could not apply to the *Concord* facts because *Woods* did not pertain to an analogous fractional interests dispute.[224]

---

213. *See* Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 507-08, 144 S.W.2d 878, 880-81 (1940) (explaining that the grantor knew the size of his holding when he made the error in the conveyance); Benge v. Scharbauer, 152 Tex. 447, 450-51, 259 S.W.2d 166, 167 (1953) (determining that the owner purported to convey a larger conveyance than he actually owned).

214. *See Benge*, 152 Tex. at 454 259 S.W.2d at 169.

215. *See* Concord Oil Co. v. Pennzoil Exploration Co., 966 S.W.2d 451, 454 (Tex. 1998).

216. 154 Tex. 59, 273 S.W.2d 617 (1954).

217. *See Concord*, 966 S.W.2d at 456 (stating that the *Woods* court was not deciding the interest in the minerals because such was "acquiesced in the holdings" of the trial court).

218. *See* Woods v. Sims, 154 Tex. 59, 63, 273 S.W.2d 617, 619 (1954) (outlining the dispute between the parties).

219. *See id.* at 66, 273 S.W.2d at 621 (explaining that the land owned was 266.68 acres).

220. *See id.* at 63, 273 S.W.2d at 620 (noting that the deed cited the acres only as 200 in number).

221. *See id.* at 61, 273 S.W.2d at 619.

222. *See id.* at 66, 273 S.W.2d at 622 (stating that the tract at issue was found to be 226.88 acres).

223. *See id.* at 59, 273 S.W.2d at 618 (describing the dispute).

224. *Compare* Concord Oil Co. v. Pennzoil Exploration Co., 966 S.W.2d 451, 453 (Tex. 1998) (interpreting a deed with a 1/96 fraction in the granting clause and a 1/12 fraction in the subsequent clause and deciding which fractional interest was intended to be conveyed by the grantor), *with Woods*, 154 Tex. at 64, 273 S.W.2d at 620 (addressing a deed

2. Application of the Four Corners Doctrine

a. Estate v. Estates

To glean the intent of the original Crosby deed, the plurality applied the four corners doctrine to establish that a single estate was granted.[225] The focus of the court's interpretation centered on the use of the word "estate."[226] The plurality established that the use of "estate" in the singular within the deed's first two paragraphs evidenced a clear intent by the parties to convey a single estate.[227]

The plurality also supported its conclusion that the Crosby deed conveyed a single estate by looking to the terms "cover" and "include."[228] Essentially, with a single estate, a deed cannot convey a mineral estate of a smaller size (1/96) to cover and include a larger rental and royalty estate (1/12).[229] The plurality, however, recognized that estates and lease attributes of varying sizes can be deeded in a single conveyance.[230] Yet, when fractional inconsistencies exist in a deed, the interpretative principles of *Luckel* must be applied.[231] Thus, the plurality concluded that the language, such as "cover" and "include," used in the deed evidenced the intent to convey a single estate.[232] The plurality further noted that had the parties used language such as "in addition to" or "separate from," their intent to convey two separate estates would be clear.[233]

Moreover, the language in the deed indicated that a single estate was conveyed based on the language "does not depend upon the validity . . . [nor] shall it be affected by the termination" of leases.[234] The plurality

---

conflict wherein the actual acreage owned was larger than the fractional interest stated in the deed).

225. *See Concord*, 966 S.W.2d at 459 (espousing that the first question was to determine from the deed's four corners whether two differing interests were intended to be conveyed).

226. *See id.* (reasoning that the use of the word "estate" is evidence that only one interest was intended to be conveyed).

227. *See id.* at 457 (illustrating that a single estate was established through the use of the word "estate" in both the first paragraph of the deed and again in the second paragraph stating "the estate hereby conveyed").

228. *See id.*

229. *See id.*

230. *See id.* (acknowledging that a mineral owner can convey more than one attribute of the mineral estate in a single conveyance).

231. *See id.* (stating that the intent of the parties is determined from the four corners of the document when multiple fractions exist).

232. *See id.* at 456 (concluding from the deed's language a single estate was conveyed).

233. *See id.* (suggesting that the use of such language would indicate that two estates were intended to be granted).

234. *Id.*

reasoned that if the deed created two estates, and one estate terminated with the expiration of the then-existing leases and became a 1/96 royalty interest, "rather than a one-half royalty the interest estate hereby conveyed," the original grant would certainly be "affected by that termination."[235] The payments the respective parties would receive would be altered by the change in the resulting fractional interest, which would result in a contradiction of the express direction of the deed and mean that the deed could not have created two estates.[236]

b. Over-Conveyance: Recognition of Two Estates Results in Landowner Conveying More Than Is Owned

In addition, the supreme court plurality reasoned that the interpretation of the granting and subject-to clauses as two grants would result in an over-conveyance; in essence, the sum of the two grants would result in a 9/96 conveyance, which would exceed the 8/96 (1/12) interest the grantor actually owned.[237] In other words, if the court interpreted the deed as creating two separate grants, the grantor would have been conveying more than he owned.[238] The plurality explained that no language existed in the deed that would support such a construction.[239] Therefore, in order to harmonize and give effect to every clause in the deed, recognizing the fractional inconsistency in a two grant deed was not plausible.[240]

Justice Enoch, in his concurrence, also agreed with the plurality that if the Crosby deed were interpreted to convey two estates, an over-conveyance would result.[241] As such, Justice Enoch stated he had little choice but to agree with the plurality that a single estate was conveyed.[242] Specifically, Justice Enoch concluded that not only would the over convey-

---

235. *Id.* at 458.

236. *See id.* (noting that the court of appeals and dissent ignored "the express direction of the deed").

237. *See id.*

238. *See id.* The over-conveyance would result if two estates were recognized because the grantee would receive both a royalty payment under the existing lease and a payment under the deed's conveyance. Thus, the grantee would receive a 1/96 payment from the royalty interest and a 1/768 (1/196 x 1/8) payment from the mineral interest. However, this production is more than the grantor was entitled to receive. *See id.* at 458; *see also* Petitioner's Joint Application for Writ of Error at 24, Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451 (Tex. 1998) (on file with the *St. Mary's Law Journal*).

239. *See Concord*, 966 S.W.2d at 458 (stressing that "nothing in the conveyance indicates that the parties intended to convey a 9/96 interest under the then-existing lease").

240. *See id.* (stating that the party did not intentionally attempt to convey more than he had).

241. See *id.* at 464 (Enoch, J., concurring) (acknowledging that if the deed contained more than one grant, it would convey more than what Crosby owned).

242. *See id.* at 464 (Enoch, J., concurring).

ance be an unreasonable construction, but the dissent's conclusion that the grants would operate at separate times, thus making the two grants plausible, would be contrary to the deed's clear language.[243]

c. Future Lease Clause

In *Concord*, the plurality also utilized the four corners doctrine to address the issue of future lease clauses.[244] Previously, the court of appeals had determined that the Crosby deed did not contain a future lease clause; as such, it determined that two grants were conveyed in the 1937 document.[245] The supreme court plurality, however, disagreed and determined that the deed contained a future lease clause.[246] Interestingly, whether a future lease clause existed in the Crosby deed appeared to represent the interpretative difference between the plurality and the dissent.

In making its determination that a future lease clause existed in the deed, the supreme court plurality again relied on the express language of the instrument.[247] The plurality noted that the subject-to clause held the conveyance to "the terms of any valid subsisting oil, gas and/or mineral lease or leases."[248] The plurality explained that the lower court applied the term subsisting to mean only those leases existing at the time of the conveyance.[249] The plurality believed that such an interpretation ignored the phrase "or mineral lease or leases."[250] Basically, the plurality held

---

243. *See id.* at 464-65 (Enoch, J., concurring) (concluding that reading the deed as granting two separate estates will not resolve the conflicting fractions).

244. *See id.* at 458-59 (holding "that the decision does not depend on the presence or absence of a 'future lease' clause").

245. *See* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 878 S.W.2d 191, 194-95 (Tex. App.—San Antonio 1994) (holding that there was no future lease clause, and consequently two grants were created), *rev'd*, 966 S.W.2d 451 (Tex. 1998).

246. *See Concord*, 966 S.W.2d at 459 (construing the deed to include a future lease clause). Regardless, the plurality further explained that the existence of a future lease clause was not dispositive of what interest had been conveyed. *See id.* at 457 (rejecting the need to consider the existence of a future lease clause because it does not necessarily determine what interest has been conveyed). Instead, the substance of the conveyance, which was determined by the application of the four corners doctrine, looking at the document as a whole, and harmonizing any inconsistency while giving effect to each clause, were all determinative. *See id.* (declaring that the intent of the parties is to be determined through examination of the whole document rather than by the inclusion or exclusion of a particular provision).

247. *See id.* (explaining that the language "or mineral lease or leases" indicates that the provision extended to existing and future leases).

248. *Id.* at 459.

249. *See id.*

250. *See id.*

that giving effect to the language "or mineral lease or leases" clearly indicated that the estate conveyed *would* continue under future leases.[251]

Although the plurality asserted that the existence of the future lease clause was not dispositive, the clause's existence was indeed the underlying reason for the 4-1-4 decision. Justice Gonzalez, writing for the dissent, reasoned that the 1937 deed clearly created two estates.[252] The dissent applied the four corners doctrine as set forth in *Luckel* and determined that the deed was unambiguous.[253] Specifically, the dissent viewed the granting clause as conveying a perpetual 1/96 mineral interest and the subject-to clause as conveying a separate 1/12 royalty in existing leases.[254] Under this interpretation, as the dissent explained, there was no need to resort to rules of construction to rewrite the fractions.[255]

Furthermore, the dissent reasoned that precedent allowed for two estates to be granted in one deed.[256] In particular, the dissent referred to *Pan American Petroleum Corp v. Texas Pacific Coal & Oil Co.*[257] In *Pan American*, the supreme court determined that two estates were conveyed when a deed with disparate fractions did not contain a future lease clause.[258] Because a future lease clause did not exist in the *Pan American* deed, the dissent explained that the Crosby deed was more akin to the *Pan American* precedent.[259] Thus, similar to the result in *Pan American*, the Crosby deed should be read as granting two estates.[260] Moreover, the dissent believed that the plurality created a future lease clause that was not intended by taking the phrase "lease or leases" out of context.[261] According to the dissent, in harmonizing non-conflicting clauses, the plurality created more confusion than it resolved.[262]

---

251. *See id.*

252. *See id.* at 465 (Gonzalez, J., dissenting).

253. *See id.* (Gonzalez, J., dissenting).

254. *See id.* (Gonzalez, J., dissenting).

255. *See id.* (Gonzalez, J., dissenting) (explaining Justice Gonzalez's view that the fractions should not be rewritten by the court).

256. *See id.* at 466 (Gonzalez, J., dissenting).

257. *See id.* (Gonzalez, J., dissenting) (asserting that the deed at issue in *Concord* was similar to the deed at issue in *Pan American Petroleum Corp. v. Texas Pacific Coal & Oil Co.*, 340 S.W.2d 548 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.)).

258. *See* Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co., 340 S.W.2d 548, 557 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.) (noting the lack of a future lease clause).

259. *See Concord*, 966 S.W.2d at 466 (Gonzalez, J., dissenting) (recognizing the lack of a future lease clause in both deeds).

260. *See id.* (Gonzalez, J., dissenting).

261. *See id.* (Gonzalez, J., dissenting) (criticizing the plurality for taking the "lease or leases" provision out of context, thereby creating unintended consequences).

262. *See id.* (Gonzalez, J., dissenting) (opining that the plurality promotes an ad hoc analysis of deeds).

d. The Weight of Historical Arguments

Following its conclusion that the deed conveyed a single 1/12 mineral interest with a 1/12 interest in rentals and royalties,[263] the plurality of the court also took note of the discussion by the parties and *amici* regarding the historical significance of multiple-grant deeds.[264] First, the plurality of the court acknowledged that it had taken judicial notice of the prevailing use of a 1/8 royalty interest reserved at the time the Concord deed was granted.[265] Next, the court recognized that the *Caruthers* decision was the origin of the multiple-grant deed,[266] and that its decision in *Tipps* helped foster the "estate misconception" doctrine that numerous commentators have observed when discussing the problems encountered with multi-fractional deeds.[267] The court also emphasized that the *Tipps* court had approved the use of differing fractions in the various clauses in the deed.[268] Accordingly, the court reasoned that because *Tipps* was decided in 1936 and Crosby executed the deed in 1937, Crosby's use of varying fractions in his deed would have been appropriate.[269] However, the plurality noted that these circumstances were helpful, but not dispositive, to its decision.[270]

Unfortunately, in *Concord* the plurality did not adopt a bright-line rule for interpreting multi-fractional deeds.[271] In fact, the plurality went as far as to state that such bright-line rules were necessarily arbitrary as such

---

263. The court also held that the estate conveyed was a mineral estate as opposed to a royalty interest. *See id.* at 459. The court again looked to the deed's express language to make its determination. *See id.* (noting that the deed expressed the intent to convey a single estate that included a 1/12 rental and royalty interest). In reading the deed, the court stated, "The granting clause contains classic language used in granting an interest in minerals." *Id.*

264. *See id.* (discussing the history of mineral deeds that contained multiple fractions).

265. *See id.* (recognizing the prevailing use of the 1/8 royalty interest used in private oil and gas leases during the era in which the Concord deed was created).

266. *See id.* at 460 (noting that the use of the multiple grant deed form arose in *Caruthers*).

267. *See id.* (acknowledging that the decision in *Tipps* aided the "estate misconception").

268. *See id.* (stating that "[t]he *Tipps* court thus blessed the use of '1/16' in the granting clause and '1/2' in subsequent clauses when the grantor owned the possibility of reverter in the entire estate and wished to convey 1/2 of that interest at a time when the property was subject to a mineral lease providing for a 1/8 royalty").

269. *See id.* (noting the fact that the Concord deed was executed one year after the decision in *Tipps*).

270. *See id.* (refusing to base its decision on the theory of "estate misconception").

271. *See id.* (asserting that applying a bright-line test to construe mineral conveyances that contain multiple fractions would be arbitrary and would not "always give effect to what the conveyance provides as a whole").

rules do not give effect to the conveyance as a whole.[272] Therefore, the "principles set out in *Luckel* and the approach taken in *Garrett*" could be applied to ascertain the intent of the parties by utilizing the four corners doctrine and harmonizing the provisions that appear to conflict.[273]

IV. THE IMPACT OF *CONCORD*

Having analyzed the case law interpreting multi-fractional oil conveyances, examining the current status of the law in this area is necessary. In light of the plurality status of the *Concord* decision, a discussion on the current state of the law with regard to interpretation of the multi-fractional deeds is particularly instructive.

First, *Concord* affirms the use of the four corners doctrine as mandated in *Luckel*.[274] The use of this doctrine in oil and gas conveyances comports with the court's interpretation of other documents such as contracts,[275] wills,[276] and realty deeds.[277] The *Concord* plurality also repeatedly expressed that the language of the deed will be harmonized to

---

272. *See id.*

273. *Id.* at 460-61.

274. *See id.* (recalling, from *Luckel*, the guidance to turn to the four corners of the deed).

275. *See* Monsanto v. Owens-Corning, 764 S.W.2d 293, 294 (Tex. App.—Houston [1st Dist.] 1988, no writ) (noting that "the intent of the contract must be expressly stated within the four corners of the contract"); Texas Utilities Elec. Co. v. Babcock & Wilcox Co., Inc., 893 S.W.2d 739, 740 (Tex. App.—Texarkana 1995, no writ) (stating that "the intent of the parties must be specifically stated within the four corners of the contract"); Stalcup v. Eastham, 330 S.W.2d 237, 239 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.) (noting that "the well-settled principle of law that a contract entered into between the parties must be construed from its four corners").

276. *See* West Tex. Rehabilitation Ctr. v. Allen, 810 S.W.2d 870, 873 (Tex. App.—Austin 1991, no writ) (discussing that the intent of the testator governs and that such interest is to be determined by the four corners of the will); Unitarian Universalist v. Lebrecht, 670 S.W.2d 402, 404 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (stating that "in the absence of ambiguity, a will is construed within the four corners of the document"); Chambers v. Warren, 657 S.W.2d 3, 5 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (concluding that "the interest of the testator must be ascertained from the language used within the four corners of the instrument"); Vogt v. Meyer, 169 S.W.2d 745, 747 (Tex. Civ. App.—Amarillo 1943, no writ) (stating, "A will must be construed as a whole—from its four corners").

277. *See* Templeton v. Dreiss, 961 S.W.2d 645, 657 (Tex. App.—San Antonio 1998, pet. denied) (stating that "[t]he court's primary duty when construing an unambiguous deed is to ascertain the intent of the parties from the 'four corners' of the deed"); White v. White, 830 S.W.2d 767, 769 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (stating that "the primary duty of a court is to ascertain the intent of the parties by a fundamental rule of construction known as the 'four corners' rule"); Neel v. Alpar Resources, 797 S.W.2d 361, 363 (Tex. App.—Amarillo 1990, no writ) (expressing that in order to interpret a deed, one must look at the four corners of the instrument to determine the intent of the parties).

ascertain the intent of the conveyance.[278] The result, thus, suggests that courts should not apply arbitrary rules, such as "the granting clause prevails," to interpret deeds.

Moreover, in establishing the use of the four corners doctrine, the *Concord* plurality diminished the importance of labeling the clauses.[279] Instead of an interpretation based on the categorization of the clauses, courts must now look to the language of the deed to determine the interests and size conveyed.[280] This approach rejects the reasoning in *Hoffman* and *Pan American*, both of which relied on the existence of the future lease clause to establish that two estates were conveyed in their respective deeds.[281] As such, interpreting deeds will no longer merely involve simply looking to what clauses the deed contains to decide the estate or estates conveyed; instead, the courts must analyze the document's language to ascertain the intent of the parties.

Although the plurality explained that it would not adopt a bright-line rule[282] such as estate misconception to construe deeds with fractional variances, *Concord* may be read as proposing a theory wherein the subject-to clause prevails. The plurality stated that the grantor knows the size of the lease attributes that he wants to pass through the conveyance.[283] Thus, when the deed contains disparate fractions, the intent of the conveyance's size will likely be best expressed in the clauses conveying the lease attributes. Therefore, although the plurality couched its argument in four corners reasoning, *Concord* may in fact stand for the proposition that the subject-to clause prevails.

However, because *Concord* was a 4-1-4 decision, the title stability the plurality hoped to establish will probably not be realized. For instance, the concurrence relied on the size of the conveyance to determine whether the instrument conveyed two estates and concluded that the potential for over-conveyance required interpreting this deed as making a single grant.[284] Conversely, the dissent relied heavily on the argument that two estates are conveyed if a future lease clause does not exist.[285]

---

278. *See Concord*, 966 S.W.2d at 457 (declaring that the future lease clause is not dispositive). Of course, application of the four corners doctrine necessarily involves a semantical analysis of the deed.

279. *See id.* at 454.

280. *See id.* at 454-55.

281. *See id.* at 457 (declaring that the future lease clause is not dispositive).

282. *See id.* at 460-61.

283. *See id.* at 458.

284. *See id.* at 464 (Enoch, J., concurring) (asserting that if interpreting the instrument as a conveyance of two estates would create an over-conveyance, then the grant could not have been made).

285. *See id.* at 466-67 (Gonzalez, J., dissenting) (arguing that a deed without a future lease clause "conveyed two independent interests" (citing Pan Am. Petroleum Corp. v.

Although the touchstone of the two-grant doctrine is the lack of a future lease clause, the plurality did not expressly overrule the two-grant doctrine.[286] Rather, the plurality recognized that a grantor may create two estates in one deed.

Although the existence of a future lease clause is no longer determinative of what estates are granted, *Concord* will have strong precedential value with respect to deeds that contain clearly expressed future lease clauses.[287] Parties can assume that the court will uphold the size of the interest conveying the lease attributes as the parties' true intent in the mineral estate grant. However, for a deed without a clearly expressed future lease clause, the predictability of the court's decision is, as before the *Concord* decision, uncertain.

Ultimately, the *Concord* decision appears to eliminate the need for multi-fractional deeds. The court stated that in interpreting deeds, the types of clauses found in the deed will not be dispositive.[288] Accordingly, the need for three distinct clauses no longer exists; rather, the actual language used to convey mineral estates will be important, coupled with the need for precise language in the deed conveyance. With regard to existing deeds, examining the entire instrument is necessary to determine whether the deed conveys a single estate or multiple estates.

V. CONCLUSION

As a plurality opinion, *Concord* cannot be regarded as a definitive answer for title stability in oil and gas conveyances. However, because both the plurality and dissent adopt the four corners doctrine, this doctrine certainly will govern the interpretation of deeds containing conflicting fractions. Nonetheless, the result in a particular case could be difficult to predict. In particular, if the presence of a future lease clause is debatable, whether the Texas Supreme Court will use the harmonizing precedent of *Tipps* and *Garrett* or apply the two-grant doctrine to such deeds is unclear. Yet, one important aspect of the plurality decision is the emphasis placed on *Tipps* and *Garrett.* These cases highlight the original significance of the three-grant deed and the rationale of harmonizing the fractions to ascertain the parties' intent. These cases, coupled with the authoritative weight of the *Concord* plurality, will create a strong argu-

---

Texas Pac. Coal & Oil Co., 340 S.W.2d 548, 556 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.))).

286. *See id.* at 457.

287. *See id.* But for adhering to the argument that the absence of a future lease clause creates two grants in a deed, the dissent would agree with the plurality regarding estate misconception. *See id.* at 465-66 (Gonzalez, J., dissenting).

288. *See id.* at 457.

ment *against* the application of the two-grant doctrine irrespective of the existence of a future lease clause in the deed.

Furthermore, the plurality has given credence to the fact that when a grantor reserves the normal 1/8 royalty in the lease conveyance, the grantor is entitled merely to payment from the potential oil production, rather than retaining a fractional title interest in the mineral estate. By focusing on the conveyance stated in the subject-to clause in the subsequent deed of the mineral estate, the plurality recognizes that the intent is to convey a fractional interest of the grantor's entire estate in the possibility of reverter rather than a fractional interest of the royalty reservation in the pre-existing lease. Ultimately, the *Concord* plurality reemphasizes the significance of the deed's plain language. *Concord's* legacy, thus, is the affirmation of the four corners rule and making the semantical expression within a deed dispositive.