St. Mary's Law Journal

Volume 33 | Number 1 Article 1

1-1-2001

Interpreting Mineral and Royalty Deeds: The Legacy of the One-Eighth Royalty and Other Stories.

Laura H. Burney

ST. MARY'S LAW JOURNAL

VOLUME 33 2001 NUMBER 1

ARTICLES

INTERPRETING MINERAL AND ROYALTY DEEDS: THE LEGACY OF THE ONE-EIGHTH ROYALTY AND OTHER STORIES

LAURA H. BURNEY*

* Laura Burney is the Albert and Helen Herrmann Professor of Natural Resources Law at St. Mary's University School of Law.

I. INTRODUCTION

In his Pulitzer Prize-winning book, "The Prize," Daniel Yergin vividly describes the birth of the oil and gas industry and recounts the colorful stories surrounding the first commercially productive oil well in Titusville, Pennsylvania. There, in 1859, "Colonel" Edwin Drake oversaw the drilling of the sixty-nine foot well that launched the "first boom."[1] Yergin recounts tale after tale of prolific discoveries, both at home and abroad, illustrating the politics and personalities that affected the development of oil and gas resources worldwide.

Throughout the larger tapestry Yergin weaves, runs a subtle thread of particular interest to land title professionals. That thread involves the initial step producers must take before developing land resources: securing title to the property. For example, in describing the events preceding the drilling of the Titusville well, Yergin notes that, "Drake's first job was simply to perfect the title to the prospective oil land, which was on a farm."[2]

Unfortunately, interpreting mineral titles is often far from simple. Stated differently, mineral and royalty deeds are notoriously difficult to interpret. While experts might debate the specific causes for the problems plaguing mineral titles, many agree the list

1. DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER 26 (1991) (explaining that E.L. Drake assumed the title "Colonel" to impress the locals).
2. *Id.*

is long.[3] For that reason, countless court decisions, law review articles, and educational papers have addressed a variety of title problems in detail.

This Article examines certain frequently-encountered title problems sharing a common trait: the influence of the one-eighth (1/8) royalty provision typically used for decades in oil and gas leases.[4] Those faced with interpreting these deeds must determine whether the influence of the "usual 1/8 royalty" can be incorporated into the interpretative process. This Article examines that broad question in the context of analyzing specific title issues. Part II examines the "conflicting fraction" problem, which arises when a deed contains at least two different fractions in various clauses. These fractions are invariably multiples of 1/8. Commentators refer to this issue as the "two-grant" problem. Because Texas has produced the longest line of cases addressing this problem, those cases are highlighted, particularly the Texas Supreme Court's most recent opinions on the issue in *Concord Oil Co. v. Pennzoil Exploration & Production Co.*[5]

Part III analyzes the "double fraction" and "restated fraction" problems. Specifically, if a deed purports to convey a "one-half of a one-eighth royalty," should it be interpreted as conveying a one-sixteenth (1/16) royalty, or a one-half (1/2) of the usual 1/8 royalty? The question posed by these "double" recitations becomes particularly crucial when a later lease provides for a different royalty. For example, if a lease provides for a one-fourth (1/4) royalty, the grantees will argue they are entitled to 1/8 of production. Unlike the other issues discussed in this Article, this question is rarely addressed by the courts. Instead, many decisions conclude, without analysis, that it is appropriate to convey a 1/16 mineral or royalty interest by using the double fraction 1/2 of 1/8. This approach appears to rest on the following mistaken assumptions: (1) the word

---

3. The drafters of these deeds do not bear sole responsibility for the problem. Courts also complicate the interpretative process in at least two ways. First, they produce opinions that fail to appreciate and explain unique oil and gas concepts. Second, they render deed records unreliable by embracing rules dependent upon outside evidence, an approach which jeopardizes a goal courts purport to value—ensuring title stability.

4. *See* Leslie Moses, *The Evolution and Development of the Oil and Gas Lease*, 2 INST. ON OIL & GAS. L. & TAX'N 1, 10 (1951) (stating the "1/8th royalty" was borrowed from salt leases used in the Pennsylvania salt industry from which the developers of the oil and gas industry adopted their lease form).

5. 966 S.W.2d 451 (Tex. 1998).

"of" is the same as the word "times," requiring multiplication;[6] and (2) there is no significance in the use of a double fraction to express a single fraction, even when one of those fractions is the same as the typical 1/8 royalty.

Part III also examines a variation of the "double fraction" problem that occurs when a deed restates the size of the interest conveyed, often in a parenthetical. For example, in a Texas case a deed conveyed "*an undivided one-half non-participating royalty," but then stated in a parenthetical, "([b]eing equal to, not less than an undivided 1/16th) of all the oil, gas and minerals . . . .*"[7] While the deed did not contain an express reference to the usual 1/8 royalty, its effect is apparent since the owner of a 1/2 nonparticipating royalty is entitled to 1/16 of production. However, courts have interpreted deeds similar to the above example as conveying a 1/16 nonparticipating royalty, entitling the owner to only 1/128 of production under a lease with a 1/8 royalty. Therefore, deeds which "restate" the fractional size of the interest created, like deeds using "double fractions" to express the intended share, raise questions about the proper role of the 1/8 royalty in the deed interpretation process.[8]

Finally, Part IV addresses the "royalty/mineral" problem - a perennial problem for courts when determining whether a deed conveys, or reserves, a mineral interest or a royalty interest, or both. Because deeds invariably contain both mineral and royalty "indicators," courts must sift through the conflicting terms to determine the parties' intent. The use of mixed terminology is explained, at least in part, by the parties' preoccupation with the oil and gas lease. Because that document creates the financial incentive for the landowner, the royalty, parties frequently focus on that interest when drafting mineral conveyances. Part IV also reviews two recent Texas Supreme Court opinions that highlight this issue.[9]

---

6. 6 W.D. MASTERSON, JR., OIL & GAS REPORTER 1372 (1956) (discussing the mistakes made when defining an interest as royalty or mineral).

7. Brown v. Havard, 593 S.W.2d 939, 940 (Tex. 1980).

8. *See id.* at 942 (explaining the different interpretative processes and results created by the ambiguous phrasing); Harriss v. Ritter, 154 Tex. 474, 478, 279 S.W.2d 845, 847 (1955) (determining the deed's ambiguous phrasing results in a grant of 1/16th "of" royalty and a 1/2 bonus and rental reservation); 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 327.2, at 93 (2000) (stating such phrasing raises ambiguity in the instrument, thus allowing parol evidence to resolve the conflict).

9. *See* Appendix for the mineral-royalty distinction in other jurisdictions.

II. THE "CONFLICTING FRACTION" PROBLEM

A. *The Texas Saga*

For decades, courts, particularly in Texas, have been plagued with interpreting deeds containing conflicting fractions in various clauses.[10] Invariably, these conflicting fractions consist of multiples of 1/8, suggesting the influence of the typical 1/8 royalty in oil and gas leases. In fact, some courts have taken judicial notice of the 1/8 royalty in the interpretative process.[11]

In addition to containing differing fractions which are multiples of 1/8, these cases share another trait: the deeds at issue were "three-grant" or multiclause deed forms, a form with a notorious history in Texas. As numerous writers have explained,[12] that form was developed in response to a 1923 case, which was later overruled, *Caruthers v. Leonard*.[13] *Caruthers* created confusion in Texas about the estate owned by a mineral owner who had leased his lands. According to *Caruthers*, if that mineral owner sought to convey a fractional interest in his leased lands, only his reversionary interest in the land would pass to the grantee, thereby precluding the transfer of delay rentals, and presumably, the royalties.[14]

---

10. *See* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 454 & n.1 (recognizing the litany of cases, treatises and articles considering the issue of mineral interest conveyances that contain conflicting fractions). As these deeds were used "primarily from the late 1920's to the mid-1940's," and are still in use today, "[i]t is virtually impossible to find a producing oil or gas property in which such deeds are not found in the chain of title." Tevis Herd, *Conveyancing — The Implications of* Alford v. Krum *on the Two-Grant Theory and a Review of the* Duhig *Rule, in* STATE BAR OF TEXAS ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-3 (1989).

11. *See* Luckel v. White, 819 S.W.2d 459, 462 (Tex. 1991) (stating the "[o]ne-eighth was the 'usual' royalty so standard in the 1920s and 1930s that all Texas courts took judicial notice of it"); Garrett v. Dils Co., 157 Tex. 92, 299 S.W.2d 904, 907 (1957) (taking judicial notice that the "usual royalty provided in mineral leases is one-eighth"); *see also Concord*, 966 S.W.2d at 459-60 (expressly addressing the effect of the 1/8th royalty on drafting).

12. *See Concord*, 966 S.W.2d at 454 n.1 (listing numerous articles addressing this issue); *see also* Noelle C. Letteri, Recent Development, *Resolving the Multi-Fractional Deed Dilemma*—Concord Oil Co. v. Pennzoil Exploration & Production Co., 30 ST. MARY'S L.J. 615, 622 (1999) (discussing the *Caruthers* decision and the deed form resulting from the decision).

13. 254 S.W. 779 (Tex. Comm'n App. 1923, judgm't adopted).

14. *See* Caruthers v. Leonard, 254 S.W. 779, 782 (Tex. Comm'n App. 1923, judgm't adopted) (holding that the mineral owner conveyed to the plaintiff a 1/2 "possibility of reverter" interest); *see also* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 86 (1993) (discussing the *Caruthers* case and the rise of the two-grant doctrine).

In response to this holding, a deed form developed to insure that the grantee receives a proportionate share of rents and royalties from the preexisting lease. This form, which is still found in form books, has three distinct clauses: (1) a granting clause, a clause typically included in real property deeds; (2) a "subject to . . . covers and includes" clause, which informs that the conveyance is made subject to an existing lease and covers and includes the benefits of that lease; and (3) a "future lease" clause, wherein the drafter restates the rights conveyed in the deed by clarifying what the grantee receives from future leases.[15]

While this form has been labeled a "three-grant" deed, the title is a misnomer since multiple conveyances were not the goal. In a previous article, the author expanded upon this point as follows:

> Instead, this deed form was developed to clearly express the intent to make a single conveyance of a fractional mineral interest and the rights appurtenant thereto. . . . [t]hus, the three-grant deed came into vogue, not to provide parties with a mode for making separate conveyances in one deed, but to insure that a single grant of a fractional mineral interest included a proportionate interest in benefits under existing and future leases.[16]

Despite an apparent consensus regarding a single-estate purpose behind the so-called "three-grant" deed form, some post-*Caruthers* cases in Texas view these deeds as making multiple or "separate" grants.[17] As discussed below, however, other cases ignore or contradict the "separate estates" approach to interpreting these deed forms. For that reason, in 1952 Professor Howard Williams concluded that the "separate estates" doctrine "has several times been

---

15. 6 JOHN S. LOWE, WEST'S TEXAS FORMS: MINERALS, OIL & GAS § 1.4, at 35 (3d ed. 1997).

16. *See* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 TEX. L. REV. 73, 86 (1993) (expressing a preference for the label "multiclause" deed form).

17. *See, e.g.*, Woods v. Sims, 154 Tex. 59, 273 S.W.2d 617, 621 (1954) (declaring that different, separate royalty and mineral estates may be conveyed in one instrument); Benge v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166, 169 (1953) (allowing parties to provide for disproportionate conveyances in one instrument); Richardson v. Hart, 143 Tex. 392, 185 S.W.2d 563, 564 (1945) (determining that "the instrument conveyed two separate and distinct estates in the land"); *see also Concord*, 966 S.W.2d at 456-57 (discussing previous Texas Supreme Court cases promoting the multiple grant view but deciding that these cases ultimately relied on a four corners approach).

disregarded by Texas courts and has had little or no influence outside of Texas."[18]

One of the cases Professor Williams notes as having disregarded the "separate estates" or "two-grant" doctrine is a 1951 Texas Supreme Court case, *Garrett v. Dils Co.*[19] In *Garrett*, the court interpreted a multiclause deed with the conflicting fractions one-sixty-fourth (1/64) and 1/8 as conveying a 1/8 mineral interest.[20] In that case, the smaller fraction, 1/64, appeared in the granting clause and the larger fraction, 1/8, appeared in the subject-to and future-lease clauses.[21] In addressing the interpretative problem presented by the two fractions, the court opined as follows:

> Had other language in the deed not disclosed what the parties understood "one sixty-fourth" to mean, it would be our duty to give those words their usual meaning and construe the deed as a mineral deed to an undivided one sixty-fourth of the minerals in place. But there follows the granting clause language which clearly defines what the parties understood "one sixty-fourth" of the minerals to mean.[22]

Yet after *Garrett*, controversy continued over the approach to interpreting deeds with conflicting fractions. Specifically, courts and commentators debated the role of a "future lease" clause in the *Garrett* court's conclusion that a 1/8 mineral interest was conveyed, despite the presence of the fraction 1/64 in the granting

---

18. Howard R. Williams, Hoffman v. Magnolia Petroleum Co.: *The "Subject-To" Clause in Mineral and Royalty Deeds*, 30 TEX. L. REV. 395, 398 (1952). The *Hoffman v. Magnolia Petroleum Co.* case referenced in the title of Professor Williams' article is a 1925 case that is credited with spawning the multiple grant, or "two-grant" approach to deed interpretation in Texas. Hoffman v. Magnolia Petroleum Co., 273 S.W.2d 828 (Tex. Comm'n App. 1925, judgm't adopted). While that case involved a three-grant deed form, it did not involve conflicting fractions. *Id.* at 829. Instead, the controversy arose because the granting clause conveyed an undivided one-half interest in 90 acres out of a 320 acre tract, while the subject-to clause stated that the grantee was to receive one-half of royalties from an existing lease. *Id.* Because the "existing lease" covered the entire 320 acres, not just the 90 acres conveyed, the grantee claimed that the "subject to" clause conveyed the right to one-half of royalties from the larger tract. *Id.* The Texas Commission of Appeals agreed, holding that the deed made two-grants: one of the one-half interest in the 90 acres, as expressed in the granting clause, and another of a one-half interest in royalties from the existing lease, as expressed in the subject-to clause. *Id.* at 830. While the court's opinion did not mention the phrase "two-grant doctrine," commentators subsequently dubbed the case as the progenitor of that approach to interpreting multiclause deeds.

19. 157 Tex. 92, 299 S.W.2d 904 (1957).

20. Garrett v. Dils Co., 157 Tex. 92, 299 S.W.2d 904, 905, 907 (1957).

21. *Id.* at 905.

22. *Id.* at 906.

clause. According to some writers, the future lease clause should be viewed as making a separate grant.[23] According to others, that clause should be viewed, not as a separate grant, but as evidence of intent regarding the size of the interest conveyed.[24] Decisions produced in an infamous case, *Alford v. Krum*,[25] demonstrate these conflicting views.

The deed in *Alford*, which was a multiclause deed, contained the following fractions: granting clause: 1/2 of 1/8; subject to clause: 1/16; and future lease clause: 1/2.[26] The court of appeals held the deed conveyed an undivided 1/16 mineral interest under an existing lease, which expanded to a 1/2 interest, because that fraction was used in the future lease clause.[27] The dissent, on the other hand, espoused the doctrine of the "granting clause prevails" when a repugnance between clauses exists in the conveyance.[28]

In 1984, on appeal to the Texas Supreme Court in 1984, the case again produced two differing opinions. A dissenting opinion promoted the view of the future lease clause as making a separate grant.[29] In that opinion, Chief Justice Pope viewed the future lease clause as "the ridgepole that divides the rights conveyed before reverter from those conveyed after the reversion."[30] Ironically, in support of his conclusion Justice Pope cited *Garrett v. Dils Co.*[31]

---

23. *See* Julie A. Herzog, *Resolving Fractional Interest Problems in Oil and Gas Deeds: A Framework for Analysis*, 47 BAYLOR L. REV. 1, 32 (1995) (stating that after *Luckel* and *Jupiter* courts determined that a future lease clause conveying an interest distinguishable from a granting clause is viewed as a separate grant).

24. *Compare* Alford v. Krum, 671 S.W.2d 870, 872 (Tex. 1984) (opining that when a mineral deed contains multiple fractions, the granting clause is key in determining the parties' intent), *with Alford*, 671 S.W.2d at 877 (Pope, C.J., dissenting) (asserting that the deed, which contained multiple clauses, with conflicting fractions, conveyed different estates).

25. 671 S.W.2d 870 (Tex. 1984).

26. *Alford*, 671 S.W.2d at 871-72.

27. Krum v. Alford, 653 S.W.2d 464, 465-66 (Tex. App.—Corpus Christi 1983), *rev'd*, 671 S.W.2d 870 (Tex. 1984) (concluding without analysis, that the double fractions in the granting clause, 1/2 of 1/8, conveyed a 1/16 interest). The *Alford* deed was unusual in another respect. In most of the "two-grant" cases, the fractions in the subject-to and future-lease clauses equal the fraction in the granting clause, times 1/8. In the *Alford* cases, however, the fraction in the subject to clause was 1/16, rather than 1/2, the fraction found in the future-lease clause. *Id.* at 465.

28. *Id.* at 467 (Young, J., dissenting).

29. *See Alford*, 671 S.W.2d at 877 (Pope, C.J., dissenting) (arguing that the grantors intended to convey different estates in the deed).

30. *Id.* at 874.

31. *Id.* at 876.

Most commentators, however, have viewed *Garrett* as rejecting the "separate estates" or "two-grant" approach to interpreting multiclause deeds with conflicting fractions.[32]

The majority in *Alford*, however, endorsed a new, and controversial, approach to the interpretative problems posed by the conflicting fractions and multiple clauses. In that opinion, the justices applied a common law canon of construction—"the granting clause prevails."[33] According to the opinion, that canon should govern when the deed contains irreconcilable provisions.[34] Because the future lease clause, indicating that a 1/2 interest was conveyed, conflicted with the 1/16 fraction in the granting clause, the court held the deed conveyed a 1/16 mineral interest.[35]

Seven years after *Alford,* however, the supreme court reconsidered the appropriate approach to interpreting multiclause deeds with conflicting fractions. In *Luckel v. White*,[36] the court accomplished one task with finality: it overruled *Alford* and rejected the "granting clause prevails" approach.[37] According to the *Luckel* opinion, "the majority in *Alford* incorrectly failed to harmonize the provisions under the four corners rule."[38] For that reason, the majority in *Luckel* refused to interpret the deed as conveying a one-thirty-second (1/32) royalty interest, even though that fraction appeared in the granting clause.[39] Instead, the court viewed the deed as conveying a 1/4 royalty under existing and future leases, which appeared in the "subject to" and "future lease" clauses.[40]

While *Luckel* clearly rejected the "granting clause prevails" approach to interpreting multiclause deeds with conflicting fractions, the court did not clearly articulate the approach it was adopting.

---

32. Tevis Herd, *Deed Construction and the "Repugnant to the Grant" Doctrine*, 21 TEX. TECH L. REV. 635, 654 (1990) (stating that the *Garrett* decision used the four corners doctrine in interpreting the deed).

33. *Alford*, 671 S.W.2d at 872 (holding that "when there is an irreconcilable conflict between clauses of a deed, the granting clause prevails over all other provisions").

34. *Id.*

35. *Id.* at 873-84.

36. 819 S.W.2d 459 (Tex. 1991).

37. *See* Luckel v. White, 819 S.W.2d 459, 461 (Tex. 1991) (holding the future lease clause "conveyed . . . one-fourth of the royalties reserved under the existing and all future leases").

38. *Id.* at 464.

39. *Id.* at 462-63.

40. *Id.* at 461, 465.

Instead, as in *Garrett* and *Alford*, the court issued multiple opinions. For example, while the majority embraced a four corners approach, it also created confusion about the role of a future lease clause by framing the issue as, "what effect the one-fourth language of the 'future lease' clause should have" in interpreting the deed.[41] However, the facts, rather than legal theory, may explain the court's focus on the future lease clause: the controversy arose after the existing lease expired and was replaced by a new, or "future," lease providing for a royalty greater than one-eighth. Regardless, three years after *Luckel*, an appellate court would conclude that the presence of a future lease clause was essential to the *Luckel* holding.[42]

In addition to the confusion created by the mixed messages of the majority opinion, concurring and dissenting opinions raised further questions about the court's approach. A concurring judge in *Luckel* agreed that "the granting clause prevails" approach should be rejected and that the deed conveyed 1/4 of the royalties reserved under the existing and all future leases.[43] Yet the concurrence also stated the dissenting opinion in *Alford* should be adopted.[44] Recall, however, that that opinion viewed *Garrett* as adopting the two-grant approach.

Contradicting the concurring opinion's implicit endorsement of the two-grant approach, the dissenting opinion expressed disdain for that interpretative view.[45] Adding to the confusion regarding the majority's approach, the dissent chastised the majority for having applied the two-grant doctrine.[46] In the process, the dissent cited a well-respected oil and gas law treatise for the proposition that most grantors do not "'intend to convey interests of different magnitude.'"[47]

---

41. *Id.* at 462.

42. *See* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 878 S.W.2d 191, 195 (Tex. App.—San Antonio 1994), *rev'd* by 966 S.W.2d 451 (Tex. 1998) (concluding that the court's interpretation of the Concord deed was wholly consistent with the *Luckel* opinion, which construed a deed containing a future lease clause).

43. *Luckel*, 819 S.W.2d at 465 (Mauzy, J., concurring).

44. *Id.*

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

46. *Id.* at 465-66.

47. *Id.* at 466 (quoting 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 340.2, at 242 (2000)).

The mixed messages sent by these multiple opinions caused commentators to reach different conclusions about *Luckel*'s implications for the multiple-fraction problem.[48] Specifically, some commentators argued that *Luckel* rejected the two-grant approach and viewed a future lease clause, not as making a separate grant or as creating an irreconcilable conflict, but as evidence of the parties' intent.[49] Other writers, however, believed that *Luckel* resurrected the two-grant approach.[50]

Three years after *Luckel*, a court of appeals applied the two-grant doctrine to a deed that, in the court's opinion, did not contain a future-lease clause. Ultimately, this case, *Concord Oil Co. v. Pennzoil Exploration & Production Co.*,[51] provided the Texas Supreme Court with its most recent attempt to clarify the law regarding the interpretation of multiclause deeds with conflicting fractions. As described below, however, because the court again produced multiple opinions, the law in Texas remains unsettled.

---

48. In addition to the internal conflicts of the *Luckel* decision, the court also created confusion with another opinion it issued the same day. Jupiter Oil Co. v. Snow, 819 S.W.2d 466 (Tex. 1991). The *Jupiter* case also involved the interpretation of a multiclause deed with conflicting fractions, 1/16 and 1/2. *Id.* at 467-68. Contradicting the *Luckel* opinion, the *Jupiter* court stated *Alford v. Krum* was inapplicable. *Id.* at 467. The court's conclusion also differed from *Luckel*'s by adopting an "expansion" approach to multiclause deeds with conflicting fractions by stating that "[t]he effect of th[e] grant is when the [existing] lease ended, Jupiter's [1/16th] interest in the mineral estate simultaneously expanded into a full one-half by operation of law." *Id.* at 469.

49. *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, in* STATE BAR OF TEXAS ADVANCED OIL, GAS, AND MINERAL LAW COURSE F, F-1 (1992) (expressing the potential for conflict when interpreting the intent of the parties); Phillip E. Norvell, *Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating the Royalty Share and Coexisting with the Duty Owed to the Non-Participating Royalty Owner by the Executive Interest*, 48 ARK. L. REV. 933, 964 (1995) (explaining that the application of the four corners rule mandates the intent of the parties to be found within the instrument itself); Joseph Shade, *Petroleum Land Titles: Title Examination and Title Opinions*, 46 BAYLOR L. REV. 1007, 1038 (1994) (interpreting the four corners rule as the current standard for "construing inconsistent fractions").

50. *See, e.g.*, Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 36-37 (1993) (expressing the court's ability to harmonize conflicting clauses by following a multi-grant approach).

51. 966 S.W.2d 451 (Tex. 1998).

B. Concord Oil Co. v. Pennzoil Exploration & Production Co.

In *Concord*, the plaintiff, Concord Oil, claimed its interest under a deed executed August 5, 1937 by A.B. Crosby to Southland Lease and Royalty Corporation.[52] 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. . . .
>
> 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 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.[53]

The day before executing this deed to Southland, the grantor, Crosby received "an undivided 1/12th interest in the minerals under a deed identical to" the above deed, except the granting clause in the deed to Crosby provided for a 1/12 mineral interest, rather than the 1/96 interest.[54] In other words, the prior deed contained identical fractions.[55] It was undisputed that, at the time both deeds were executed, an oil and gas lease existed providing a 1/8 royalty.[56] That lease expired before the parties entered into leases covering the property.[57]

Concord was the successor in interest to the grantee in the 1937 deed containing two different fractions, and Pennzoil was the successor in interest to the grantor in the subsequent 1961 deed.[58] Concord claimed that the 1937 deed had conveyed the grantor's entire 1/12 interest, and therefore the grantor had nothing to con-

---

52. *Concord*, 966 S.W.2d at 453. The author of this Article served as appellate counsel in *Concord* and argued the case twice before the Texas Supreme Court.

53. *Id.* (emphasis added).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Concord*, 966 S.W.2d at 453.

58. *Id.*

vey to Pennzoil's predecessor in title.[59] Pennzoil claimed the 1937 deed had conveyed two interests, a 1/96 interest in the minerals and a separate 1/12 of royalties in the existing lease.[60] Because the existing lease had terminated, Pennzoil argued Concord owned only the 1/96 mineral interest.[61]

The trial court and the appellate court agreed with Pennzoil's interpretation of the 1937 deed, finding that Pennzoil made two grants, one of the mineral interest and one of the royalty interest in the existing lease.[62] Concord filed application for writ of error with the Supreme Court of Texas, arguing that the court of appeals misinterpreted the language of the deed and improperly relied on the "two-grant" doctrine in the process.[63] The court initially denied the writ in November 1994.[64] But in May 1995, after receiving over twenty amicus briefs, the court granted the writ and set oral arguments for September 7, 1995.[65] Over a year after hearing arguments, the supreme court issued a five to four opinion on October 18, 1996, reversing the court of appeals and holding that the 1937 deed conveyed a single 1/12 mineral interest.[66] This opinion, however, was withdrawn after the court granted Pennzoil's motion for rehearing and heard oral arguments again on January 8, 1998.[67] By June 5, 1998, the case was put to rest when all justices filed their final opinions and the court overruled all motions for rehearing.[68]

---

59. *Id.* (inferring that Pennzoil's predecessor had received a quitclaim deed of the grantor's interest in 1961).

60. *Id.* at 454.

61. *Id.*

62. *See* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 878 S.W.2d 191, 195-96 (Tex. App.—San Antonio 1994), *rev'd* by 966 S.W.2d 451 (Tex. 1998) (applying the two-grant doctrine and holding that regardless of the parties' intent both fractions in the deed shall be given effect).

63. *See* Petitioners' Joint Application for Writ of Error at 6-7, Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451 (Tex. 1998) (on file with the *St. Mary's Law Journal*) (criticizing the Fourth Court's opinion that the 1937 deed conveyed two separate interests despite its recognition that the form used typically conveys one single estate).

64. Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 38 Tex. Sup. Ct. J. 92 (Nov. 22, 1994).

65. *Id.* at 651-52 (May 25, 1995).

66. Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 40 Tex. Sup. Ct. J. 33, *available at* 1996 WL 596657 (Oct. 18, 1996).

67. *Concord*, 966 S.W.2d at 452.

68. *See generally* Robert H. Pemberton, *A Guide to Recent Changes and New Challenges in Texas Prejudgment Interest Law*, 30 TEX. TECH L. REV. 71, 103 (1999) (relating *Concord*'s complicated procedural history).

After this lengthy and complicated procedural history, *Concord Oil Co. v. Pennzoil Exploration & Production Co.* now stands as a four-one-four decision. The opinions are described below.

The plurality opinion, written by Justice Owen and signed by three other justices, conducted a lengthy review of prior Texas cases, including *Luckel v. White*.[69] According to the plurality, these cases endorsed a "harmonizing" or "four corners" approach, not the two-grant doctrine.[70] This opinion did recognize, however, that a grantor may convey different interests in the "sticks" comprising a mineral interest, but noted that in reality most grantors do not intend to convey interests of different magnitudes.[71] Additionally, the plurality emphasized that the mere presence of differing fractions in a deed alone does not work to convey two separate interests, one in the mineral estate and another in royalty from an existing lease, particularly when no language in the deed evidences such intent.[72]

Focusing on the language of the 1937 deed, the plurality noted that the deed twice referred to the "estate" conveyed, evidencing the grantor's intent to convey a single estate rather than two separate estates.[73] This opinion also noted that the deed effectively conveyed all attributes of a 1/12 mineral interest by conveying 1/12 of all royalties under the existing lease and under any other "mineral lease or leases."[74] Contrary to the decision of the court of appeals, Justice Owen viewed the *Concord* deed as containing a future lease clause.[75] She acknowledged, however, that whether a deed contained a future lease clause was not dispositive.[76] Recognizing that the granting clause contained classic mineral deed lan-

69. *See Concord*, 966 S.W.2d at 454 (discussing a line of cases where the court considered instruments conveying mineral interests and containing multiple, conflicting fractions).

70. *Id.* at 457.

71. *See id.* (commenting that a mineral interest owner is allowed to convey any mineral estate attribute, or any fraction thereof, including "a fraction of the mineral interest, a fraction of royalties, the right to receive delay rentals, and the executive rights").

72. *See id.* at 458 (finding no language that indicated "the 1/12 interest in rents and royalties was meant to be *in addition to* or *separate from* the estate granted in the opening clause").

73. *Id.* at 457-58.

74. *See Concord*, 966 S.W.2d at 459 (noting that any other interpretation of the deed would effectively ignore the language regarding the mineral lease or leases).

75. *Id.*

76. *Id.* at 458-59.

guage, the plurality opinion ultimately concluded that the deed conveyed a single 1/12 interest in the minerals.[77]

In reaching this conclusion, the plurality also addressed the role of the 1/8 royalty in the interpretation process. Specifically, the court noted the role of the "estate misconception" in causing drafters to use two different fractions.[78] The "estate misconception" stems from a misunderstanding about the estates created in an oil and gas lease.[79] Because the typical lease provides for a 1/8 landowner's royalty, many lessors assume that after leasing they only owned 1/8 of the minerals. As the court in *Concord* explained, "[i]n actuality, [the] lease conveys a fee simple determinable [to the lessee] with the possibility of reverter" in 8/8 remaining in the lessor/landowner.[80] Under the estate misconception, however, a landowner who wants to convey 1/2 of her mineral estate assumes she should multiply her 1/8 interest by 1/2, which explains why she would insert the fraction 1/16 in the granting clause.[81] In explaining this "estate misconception," the plurality noted that court decisions had perpetuated this view and sanctioned the use of conflicting fractions to convey a single interest.[82] However, the plurality did not base its decision in *Concord* on the "estate misconception," but considered an understanding of that theory "instructive, but not dispositive."[83]

In summary, the plurality opinion endorsed a four corners approach and limited its opinion to the precise language in the 1937

---

77. *Id.* at 459.

78. *Id.* at 460.

79. *See Concord*, 966 S.W.2d at 460 (stating that the estate misconception occurs when a lessor believes he retains a 1/8 royalty *and* mineral interest under a lease providing for a 1/8 royalty). In reality the court asserts that the lessor actually conveys the entire mineral estate with a possibility of reverter in that estate. *Id.*; *see also* 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 this misunderstanding derives from failing to differentiate between the right of the owner of the value given to that right under the lease).

80. *Concord*, 966 S.W.2d at 460.

81. *See id.* (pointing out that in *Tipps v. Bodine*, 101 S.W.2d 1076 (Tex. Civ. App.—Texarkana 1936, writ ref'd) the court allowed a grantor, who owned the "possibility of reverter in the entire mineral estate," to use the fraction 1/16 in the granting clause when the lease provided for a 1/8 royalty and the grantor intended to convey 1/2 of his interest).

82. *Id.* (citing *Tipps*, 101 S.W.2d at 1079).

83. *Id.*

deed.[84] In the process, the court did not adopt any "bright line" rules.[85] For example, the court did not resurrect an approach reminiscent of *Alford* and determine that the "subject to" clause or the "larger fraction" automatically prevails. Nor did the court state that deeds with multiple fractions should never be interpreted as making multiple grants.

While this opinion did not rely on "bright line" rules, it does provide useful guidance to title examiners. First, according to the opinion, a deed with multiple fractions should not be interpreted as making two grants unless express language to that effect appears in the deed.[86] Such language would include the phrases "separate from" or "in addition to," phrases which were absent from the *Concord* deed.[87] Notably, typical "subject to" and "future lease" clauses do not contain such granting language. Therefore, multiclause deed forms should rarely, if ever, be interpreted as making separate grants.

Second, while the "subject to" and "future lease" clauses are typically not granting clauses, the plurality notes that they provide strong evidence of the parties' intent.[88] In particular, language regarding the grantee's rights to other attributes of the mineral estate, such as royalty, bonus and delay rentals, reflects the parties' intent regarding the size of the single estate conveyed.[89] In light of this directive, the fraction in the "subject to" and/or "future lease" clause likely represents the size of the estate conveyed.[90]

---

84. *See Concord*, 966 S.W.2d at 457-58 (promulgating that when a conveyance contains different fractions the court determines the parties' intent from the four corners of the instrument).

85. *See id.* at 460-61 (rejecting Concord's recommendation that the court issue a "bright-line" test for interpreting conveyances that contain conflicting fractions). The court reasoned such firm rules would be arbitrary and would not allow the court to construe the conveyance as a whole. *Id.*

86. *See id.* at 458 (expressing that the court of appeals erred in concluding the deed conveyed two separate estates when there was no language that supported such an interpretation).

87. *Id.*

88. *See Concord*, 966 S.W.2d at 459 (contending that the parties' intent is supported by the deed's other clauses, which indicate that a single mineral estate is conveyed).

89. *See id.* (reasoning that the deed showed the parties' intent to convey one estate, which included 1/12 of the rents and royalties under any and all leases).

90. *See* Noelle C. Letteri, Recent Development, *Resolving the Multi-Fractional Deed Dilemma*—Concord Oil Co. v. Pennzoil Exploration & Production Co., 30 ST. MARY'S L.J. 615, 651 (1999) (concluding that "*Concord* may in fact stand for the proposition that the subject-to clause prevails").

Finally, the plurality provides further guidance by specifically addressing the role of the future lease clause, an issue commentators and courts have debated for decades. The plurality stated that their "decision in this case does not depend on the presence or absence of a 'future lease' clause, which the court of appeals found dispositive."[91] Instead, as noted above, the plurality stressed the language found within the four corners of the 1937 deed and held that it conveyed a single 1/12 mineral interest.[92]

Unfortunately, the guidance provided by the plurality opinion in *Concord* has limited value in light of the concurring and dissenting opinions. The concurrence, by Justice Enoch, begins by criticizing the plurality as an opinion "anchored" on the conclusion that the 1937 deed contained a "future lease" clause.[93] Yet the plurality carefully states that its decision did not consider the presence or absence of a future lease clause as "determinative."[94] The concurring opinion continues by emphasizing a point that was, according to the concurring justice, "overlooked by [the court and] [e]ven the parties failed to focus on it until oral argument on rehearing."[95] That point is the overconveyance which would have occurred had the 1937 deed been interpreted as making two grants.[96]

In discussing the overconveyance issue, Justice Enoch explains that a two-grant interpretation of the deed, adopted by the court of appeals and the dissent, means the grantor conveyed more than he owned.[97] That grantor, Crosby, owned a 1/12, or eight-ninety-sixth (8/96) mineral interest.[98] Under a two-grant interpretation, however, Crosby conveyed two interests, (1) a 1/96 mineral interest, which entitles the owner to 1/96 of royalties, and (2) a 1/12, or 8/96, interest in royalties in an existing lease.[99] These two-grants give the grantee "a total of nine-ninety-sixth (9/96) interest in the royal-

91. *Concord*, 966 S.W.2d at 458.

92. *Id.* at 459.

93. *Id.* at 463 (Enoch, J., concurring).

94. *Id.* at 457.

95. *See id.* at 462 (Enoch, J., concurring) (stating that the overconveyance issue was raised by Concord in all of the briefs it filed throughout the appeal).

96. *Concord*, 966 S.W.2d at 464.

97. *Id.*

98. *Id.*

99. *Id.*

ties, a larger interest than Crosby owned."[100] According to Justice Enoch, such a construction is unreasonable.[101]

In an apparent search for a more reasonable interpretation, Justice Enoch turned to a case decided a year before the 1937 deed was drafted, *Tipps v. Bodine*.[102] That case, according to Justice Enoch, "blessed the use of differing fractions in granting and 'subject to' clauses as the proper way to make a single conveyance when the conveyed interest is subject to an existing lease."[103] For that reason, Justice Enoch concluded that the 1937 deed conveyed a single 1/12 mineral interest.[104]

In summary, the concurring opinion adopted an approach that can fairly be reconstructed as follows: a multiclause deed with conflicting fractions should be interpreted as making separate grants; therefore, a future lease clause is necessary to determine the size of the grantee's interest in future leases. If the deed does not contain a future lease clause, it should be interpreted as making two grants, one of the mineral estate and one limited to royalties in existing leases as provided in the "subject to" clause. However, if these two grants result in an overconveyance, the two-grant interpretation does not apply; instead, *Tipps v. Bodine*, a case also cited by the plurality as sanctioning a single-estate interpretation, controls.

Justice Enoch's approach is troubling for several reasons. First, it perpetuates the mistaken view regarding the role of a future lease clause. Second, it ignores the four corners rule by focusing not on the language of the deed, but on whether the grantor has conveyed more than he owns. Stated differently, either a deed makes two grants or it does not. The plurality read the deed as making a single grant while the dissent read the deed as making two grants. The concurring opinion, on the other hand, determined that the deed did *not* make two grants only because an overconveyance would have occurred. For title examiners, this conclusion means that deeds with identical language should be interpreted differently, depending upon the size of the interest owned by the grantor. Finally, the concurring Justice's reliance on *Tipps v. Bo-*

100. *Id.*

101. *Concord*, 966 S.W.2d at 464.

102. *See id.* (citing Tipps v. Bodine, 101 S.W.2d 1076 (Tex. Civ. App.—Texarkana 1936, writ ref'd)).

103. *Id.*

104. *Id.* at 465.

dine is illogical. If, as the concurrence concludes, that opinion did "bless" the use of differing fractions to convey a single interest, that principle should control, regardless of the overconveying problem.[105]

While the plurality and concurring opinions view *Tipps* as endorsing the use of conflicting fractions to convey a single estate, the dissenting opinion in *Concord*, joined by four justices, expressed a different view of that case. The dissenters concluded that the 1937 deed "unambiguously makes two grants."[106] Like the concurring opinion, this opinion insisted on a particularly-worded future lease clause and stated it "never before read a future-lease clause into a mineral deed when the parties did not clearly express their intent about future events."[107] In support of this statement, the dissenters cited *Tipps v. Bodine*.[108] Unlike the concurrence, however, the dissenters did not believe that the two grants resulted in an overconveyance because the "subject to" clause said "'subject to,' not 'added to'" and that "[t]he right to royalty from subsisting leases and the possibility of reverter are two different interests which should not be added together."[109]

The dissenters, however, erred in at least three respects. First, they viewed a "subject to" clause as a separate granting clause, even though those clauses lack the traditional words of convey-

105. *Compare Concord*, 966 S.W.2d at 464 (Enoch, J., concurring) (echoing the plurality's view in his description of *Tipps*, and stating that interpreting the deed as making two conveyances is unreasonable because it creates an over-conveyance), *with Concord*, 966 S.W.2d at 460 (discussing *Tipps* where the deed evidenced an intent to convey a single estate although there were conflicting fractions in different clauses of the deed). Concord raised the overconveying problem several times in its briefs, but only to demonstrate the "absurdity" of the two-grant approach. In so doing, Concord pointed to an article written by Professor David E. Pierce, in which he criticized a Texas court of appeals holding for allowing grantors to convey more than they own. *See* David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical Foundations*, 47 INST. ON OIL & GAS L. & TAX'N 1-1, 1-15-16 (1996) (discussing *French v. Chevron U.S.A., Inc.*, 871 S.W.2d 276 (Tex. App.—El Paso 1994, writ granted), *aff'd* 896 S.W.2d 795 (Tex. 1995) in which the court held the deed conveyed the right to develop with the right to lease, although the deed was silent as to development rights). As a practical matter, if a grantor does in fact convey more than he owns, he could be liable for breaching his warranty of title.

106. *Concord*, 966 S.W.2d at 465.

107. *Id.* at 466.

108. *See id.* at 466-67 (citing Tipps v. Bodine, 101 S.W.2d 1076, 1077 (Tex. Civ. App.—Texarkana 1936, writ ref'd)).

109. *Id.* at 467 (Gonzalez, J., dissenting).

ance, such as "grant" and "convey." Moreover, as the plurality notes, the "subject to" clause in the *Concord* deed does not state that it conveys an interest "separate from" or "in addition to" a single grant of the mineral "estate." For that reason, the plurality interpreted the "subject to" clause as evidence of the size of the single estate conveyed, not as making a separate grant. Significantly the plurality's conclusion, unlike the dissent's, reflects the original purpose behind the development of the multiclause deed form[110] and the conclusion of respected commentators.[111]

Second, the dissenters ignored the overconveyance effect of their own two-grant holding. If the grantee did indeed receive two interests, a 1/96 interest in the minerals and a separate grant of 1/12 of royalties under an existing lease, the grantee is entitled to payment for both interests, which leads to a overconveyance problem. As a matter of law, the owner of a 1/96 mineral interest is entitled to 1/96 of royalty, and the owner of a 1/12 royalty interest is entitled to 1/12 of royalty. When an "existing" lease provides for a 1/8 royalty, as in this case, the owner of the mineral interest is entitled to 1/96 times 1/8 or 1/768 of production. Similarly, the owner of the 1/12 royalty is entitled to 1/12 of 1/8, or 1/96 of production. Thus, if a grantee owns both interests, as the dissenters conclude, he is entitled to 1/96 *plus* 1/768 of production. Yet in *Concord* the grantor owned a 1/12 mineral interest and was entitled to only 1/12 times 1/8 or 1/96 of production. Therefore, if the grantee in the 1937 deed did receive two interests, the grantor conveyed more than he owned.

The dissenters attempt to avoid the "overconveyance" effect of their own two-grant holding by stating the deed conveyed "a 1/96 interest in all of his rights, except for the rentals and royalties in subsisting leases, of which he conveyed a 1/12 interest."[112] The deed, however, does not contain this limiting language. Moreover,

---

110. *Id.* at 460.

111. *See id.* (discussing that commentators have stated that most grantors generally have no intention of conveying interests of different sizes); Ernest E. Smith, *The "Subject To" Clause*, 30 ROCKY MTN. MIN. L. INST. 15-1, 15-3 (1985) (discussing the court's decision in *Caruthers v. Leonard*, 254 S.W. 779 (Tex. Comm'n App. 1923), which led to the continuing use of the "subject to" clause); Howard R. Williams, Hoffman v. Magnolia Petroleum Co.: *The "Subject-To" Clause in Mineral and Royalty Deeds*, 30 TEX. L. REV. 395, 397 (1952) (commenting on the impact of the *Caruthers* decision on Texas oil and gas jurisprudence).

112. *Concord*, 966 S.W.2d at 467 (Gonzalez, J., dissenting).

reading such language into the deed violates the four corners rule.[113]

Finally, the dissenters erred by refusing to apply the harmonizing approach adopted by *Luckel* and applied by the plurality. In the dissenter's view, "the only way to justify the harmonizing approach is to create a conflict between the fractions where none exists."[114] Yet a conflict does exist on the face of the 1937 deed because the owner of a 1/96 mineral interest is not entitled to 1/12 of rents and royalties, as expressed in the "subject to" clause. Under the approach applied by the plurality, these fractions can be harmonized because the owner of a single 1/12 mineral interest is entitled to 1/96 of production, an approach consistent with previous Texas Supreme Court decisions, including *Luckel* and *Garrett.*[115]

Unlike the concurring and dissenting opinions, the *Concord* plurality opinion correctly follows precedent and adopts an approach which reflects the parties' intent. Additionally, while that opinion did not adopt "bright line" rules, it supplied the valuable guidance noted above, which aids title examiners and ensures title stability. The dissenting and concurring opinions, on the other hand, perpetuated erroneous views about the role of the "future-lease" and "subject-to" clauses. They also violated the four corners rule by finding language of two grants where none existed and by ignoring references to the single "estate" conveyed in the deed.

---

113. In effect, to avoid the overconveyance problems, the dissenters apparently read the deed as conveying a 1/96 mineral interest plus a 7/96, rather than an 8/96 or 1/12, interest in the existing lease. *Concord*, 966 S.W.2d at 467 (Gonzalez, J., dissenting). Again, such language does not appear in the deed. *Id.* at 453 (plurality opinion).

114. *Id.* at 467 (Gonzalez, J., dissenting). The dissent followed the opinion of the appellate court in *Concord* and relied upon a 1960 court of appeals decision, *Pan American Petroleum Corp. v. Tex. Pac. Coal & Oil Co.*, 340 S.W.2d 548 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.) instead of relying on *Luckel. Id.* at 466. The deed in *Pan American* contained the fraction 1/32 in the granting clause and 1/4 in the subject to clause. *Pan American*, 340 S.W.2d at 557. The deed did not contain a typical future lease clause, and unlike the *Concord* deed, it did not refer to "other leases." *Id.* In deciding the case, the court determined that *Garrett* was distinguishable because the deed in that case had a future lease clause. *Id.* Therefore, the *Pan American* court applied the two-grant approach. *Id.* at 558. That deed, however, contained several unique phrases not typically found in multiclause deed forms. For example, it had references to two estates, by purporting to convey "the mineral rights and estate hereby conveyed." *Id.* at 556. It also had express language of termination and reversion to the grantor. *Pan American*, 340 S.W.2d at 555-56. The *Concord* plurality declined to address the *Pan American* deed. *Concord*, 966 S.W.2d at 458.

115. *See Luckel*, 819 S.W.2d at 464-65; *see also Garrett*, 299 S.W.2d at 906.

As a practical matter, however, these differing opinions may not have a significant effect on the interpretation of most multiclause deeds. Fortunately, most multiclause deeds contain a clearly-worded "future lease" clause. When that is the case, the contrasting legal theories espoused by the *Concord* opinions become moot because, according to all three opinions, such deeds should be interpreted as conveying the fractional estate as expressed in that "future lease" clause. Viewed in this light, *Concord* stands as a classic example of difficult facts creating disappointing law.

C. *The Interpretation of Multiclause Deeds in Other Jurisdictions*

As Professor Howard Williams noted in 1952, the two-grant approach to interpreting multiclause deeds with conflicting fractions "has had little or no influence outside of Texas."[116] In fact, relatively few cases from other jurisdictions address the problem. However, in one of those jurisdictions, Kansas, courts view multiclause deeds as conveying single estates. Moreover, those cases expressly incorporate an understanding of the "estate misconception" into their interpretive approach.

In *Heyen v. Hartnett*,[117] the Kansas Supreme Court construed a multiclause deed form, similar to those at issue in *Alford*, *Luckel* and *Garrett*, with the conflicting fractions 1/16 and 1/2.[118] In interpreting the deed, the court observed:

> In conveying minerals subject to an existing lease and also assigning a corresponding fractional interest in the royalties received, [a] mistake is often made in the fraction of the minerals conveyed by multiplying the intended fraction by one-eighth. Thus, if a conveyance of an undivided one-half of the minerals is intended, the parties will multiply one-half by one-eighth and the instrument will erroneously specify a conveyance of one-sixteenth of the minerals upon the assumption that one-sixteenth is one-half of what the grantor owns. An ambiguity is created because the instrument will also show that the conveyance of one-sixteenth of the minerals is meant to entitle the grantor to one-half of the royalty.[119]

---

116. Howard R. Williams, Hoffman v. Magnolia Petroleum Co.: *The "Subject-To" Clause in Mineral and Royalty Deeds*, 30 TEX. L. REV. 395, 396, 398 (1952).

117. 679 P.2d 1152 (Kan. 1984).

118. Heyen v. Hartnett, 679 P.2d 1152, 1154 (Kan. 1984).

119. *See id.* at 1158 (quoting Magnusson v. Colo. Oil & Gas Corp., 331 P.2d 577 (Kan. 1958)).

On the basis of this reasoning, the *Heyen* court held that the deed "should be construed to convey to the grantees an undivided 1/2 interest in the oil and gas and other minerals" to carry out the parties' intentions and to "give the grantees and their successors in title an undivided 1/2 interest in the royalties produced under the [existing] lease."[120]

By overtly interpreting this deed in light of the "estate misconception," the Kansas Supreme Court, unlike the Texas Supreme Court, found that misconception "dispositive."[121] Moreover, unlike earlier Texas cases, the Kansas court never considered the "subject to" or "future lease" clauses as separate granting clauses. Similarly, the Supreme Court of Arkansas, in *Anadarko Petroleum Co. v. Venable*,[122] used a four corners approach, rather than a two-grant approach, to harmonize conflicting fractions, which were multiples of 1/8, in a multiclause deed.[123] In commenting on this case, Professor Owen Anderson opined that "the Arkansas Supreme Court considered the issue that led the Texas courts down the path to the creative two-grants rule . . . and then to the infamous derogation of the grant rule of *Alford v. Krum*.[124] Fortunately, the Arkansas court did not follow the path of the Texas courts."[125]

III. THE "DOUBLE" FRACTION AND "RESTATED" FRACTION PROBLEMS

A. *Double Fractions*

Two-grant cases focus on the interpretative problem raised when different fractions appear in different clauses of a deed. Many of those deeds, however, raised another issue which the courts ad-

120. *Id.* at 1159.

121. *See id.* at 1158-59 (stating that the "estate misconception" problem should be recognized when interpreting a deed with conflicting fractions).

122. 850 S.W.2d 302 (Ark. 1993).

123. *See* Anadarko Petroleum Co. v. Venable, 850 S.W.2d 302, 306 (Ark. 1993) (establishing that it is the court's duty to harmonize all parts of a deed to determine the parties' intent).

124. Owen L. Anderson, *Recent Developments in Nonregulatory Oil and Gas Law*, 45 INST. ON OIL & GAS L. & TAX'N §§ 1.01, 1.03[4], at 1-14 (1994).

125. *Id.*; *see also* Phillip E. Norvell, *Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating the Royalty Share and Coexisting with the Duty Owed to the Non-Participating Royalty Owner by the Executive Interest*, 48 ARK. L. REV. 933, 970 (1995) (concluding that *Anadarko* did not follow the "two-grant" theory).

dressed only in passing, or not at all. For example, in the notorious *Alford v. Krum* opinions the court of appeals and the Texas Supreme Court interpreted the granting clause as conveying a 1/16 mineral interest, even though that clause expressed the interest as 1/2 of 1/8.[126]

Significantly, the *Alford* opinions did not attach any significance to the use of the double fraction to convey a 1/16 mineral interest. Instead, the supreme court simply multiplied 1/2 times 1/8 to arrive at 1/16, and did not discuss the question.[127] The court of appeals followed the same formula, with only one justice noting that the "[u]se of a double fraction in a deed is not ambiguous; the reader may calculate the interest very simply."[128]

Contradicting this simplistic approach, some writers have argued that the double fraction provides evidence of the parties' intent, which should be incorporated into the interpretative process. Writing in 1981, Professor Ernest Smith observed the following:

> In all probability, then, most deeds which make reference to "1/2 of 1/8th" or "1/4 or 1/8th" do so only because 1/8th was virtually a synonym for "landowner's royalty." Given the likelihood that the parties to the deed did not actively consider the possibility that a lease might provide for some other fraction, it seems more consistent with their overall intent to construe the deed, if possible, as passing a right to one-half or one-fourth of whatever royalty might subsequently be reserved in an oil and gas lease, and not as being a right to only 1/16th or 1/32nd.[129]

Similarly, this author has argued that the appearance of 1/8 in the double fraction "should be considered patent evidence that the parties were functioning under the estate misconception."[130] Therefore, instead of multiplying the two fractions in Professor Smith's examples, the second fraction, 1/2 or 1/4, represents the

---

126. *Compare* Krum v. Alford, 653 S.W.2d 464, 466 (Tex. App.—Corpus Christi 1983), *rev'd*, 671 S.W.2d 870 (Tex. 1984) (determining that the deed conveyed a 1/16 mineral interest which expanded to a 1/2 interest according to the terms of the future lease clause), *with* Alford v. Krum, 671 S.W.2d 870, 872-73 (Tex. 1984) (adopting the "granting clause prevails" rule, and holding the deed conveyed a 1/16th mineral interest).

127. *Alford*, 671 S.W.2d at 873.

128. *Krum*, 653 S.W.2d at 467 (Young, J., dissenting).

129. Ernest E. Smith, *Conveyancing Problems*, *in* STATE BAR OF TEX., ADVANCED OIL, GAS, & MINERAL LAW COURSE G, G-2 (1981).

130. Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 90 (1993).

size of the interest the parties intended to create.[131] Stated differently, the "double fraction" should not be multiplied, but analyzed to determine the parties' intent.

Interpreting "double fractions" according to this "analysis" approach is appropriate under accepted rules of document interpretation. For example, some cases take judicial notice of the 1/8 royalty or incorporate the "estate misconception" into the interpretative process.[132] Through these methods, courts acknowledge the explanation for the consistent presence of 1/8 as one of the two double fractions. This explanation, in turn, justifies adopting the second fraction as representing the size of the interest created. Following such an approach complies with the dictates of the four corners rule, which requires giving weight to all expressions of intent in a document. Multiplying the fractions, on the other hand, ignores the plain language of the deed by implicitly adopting the following mistaken assumptions: (1) the word "of," when it appears in a double fraction such as "1/2 of 1/8," is the same as the word "times," requiring multiplication without analysis; and (2) there is no significance to using a double fraction to express a single fraction, even when one of those fractions is the same as the typical 1/8 royalty.

Not all commentators, however, agree that the "analysis" approach, proposed above, accords with the four corners rule. On the contrary, while the Williams & Meyers treatise acknowledges the effect of the estate misconception on drafting, its authors argue that double fractions are "unambiguous" and should be multiplied:

---

131. Ernest E. Smith, *Conveyancing Problems*, *in* STATE BAR OF TEX., ADVANCED OIL, GAS, & MINERAL LAW COURSE G, G-2 (1981). A separate interpretative problem, addressed in section IV of this paper, is whether the interests are mineral or royalty. Assuming the double fraction appears in a royalty deed, the problem is frequently stated as whether the deed created a "fractional share" royalty, which gives the owner the right to a fixed share of production, or a "fraction of" royalty, which gives the owner the right to a fraction "of" the royalty reserved in any lease. 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 3.7, at 119-3 (1997).

132. *See, e.g.*, Heyen v. Hartnett, 679 P.2d 1152, 1158 (Kan. 1984) (incorporating estate misconception in the interpretative process); Luckel v. White, 819 S.W.2d 459, 462 (Tex. 1991) (stating that "[o]ne-eighth was the 'usual' royalty so standard in the 1920s and 1930s that all Texas courts took judicial notice of it"); Garrett v. Dils Co., 157 Tex. 92, 299 S.W.2d 904, 907 (1957) (taking judicial notice that the "usual royalty provided in mineral leases is one-eighth"); *see also* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 459 (Tex. 1998) (addressing the effect of the 1/8th royalty on drafting).

> We are reluctant to reach this conclusion because we suspect that use of the double fraction is a mistake, especially when there is conveyed a fraction of 1/8 of royalty. . . . [w]e can see little explanation for the use of double fractions absent this mistake on the part of the parties. Nevertheless, as a matter of construction, the deed is unambiguous, and if a mistake was made the proper remedy is reformation.[133]

In light of this view, the authors approve of the conclusion reached by a Texas court interpreting a deed with the double fraction "1/16 of 1/8" as conveying a 1/128, rather than a 1/16, mineral interest.[134] Indeed, most courts follow the multiplication approach when interpreting deeds with double fractions.[135] For that reason, most title examiners likely rely on that approach when dissecting deed records. In the future, however, advocates could point to *Heyen* and the plurality in *Concord*, opinions which acknowledge the effects of the "estate misconception" on drafting, to convince courts to adopt the "analysis" approach to double fractions.

B. *The "Restated Fraction" Problem*

The role of the "estate misconception" could also impact another interpretative problem related to the "double fraction" problem. For the purposes of discussion, this problem is referred to as the

---

133. 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 327.3, at 94.1 (2000); Phillip E. Norvell, *Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating the Royalty Share and Coexisting with the Duty Owed to the Non-Participating Royalty Owner by the Executive Interest*, 48 ARK. L. REV. 933, 938 (1995) (stating it is accepted that "of" is the same as "times").

134. 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 327.3, at 93-94.1 (2000) (discussing Richardson v. Hart, 143 Tex. 392, 185 S.W.2d 563 (1945)). Williams and Meyers, also noted that although the use of the double fraction in *Richardson* was probably a mistake, the deed was still unambiguous. *Id.* at 94.1.

135. *See, e.g.*, Palmer v. Lide, 567 S.W.2d 295, 296 (Ark. 1978) (multiplying a 1/8 "of the royalty" that was a 1/64 of production share that resulted in a 1/512th interest); Tiller v. Tiller, 685 S.W.2d 456, 458 (Tex. App.—Austin 1985, no writ) (holding that a deed with the double fraction, 1/9 of 1/8, conveyed a 1/72 interest); Helms v. Guthrie, 573 S.W.2d 855, 857 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.) (opining that a deed, which recited an interest as 1/2 of a 1/8 royalty, is the same as 1/16 of the total production)); Harriss v. Ritter, 154 Tex. 474, 279 S.W.2d 845, 847 (1955) (holding that a reservation of 1/2 of 1/8 reserved a 1/16 "of the royalty," rather than a 1/2 "of royalty"); Allen v. Creighton, 131 S.W.2d 47, 50 (Tex. Civ. App.—Beaumont 1939, error ref'd) (announcing that a conveyance of 1/8 of the usual 1/8 royalty conveyed a right to 1/64 of production). *But see* Rudman v. Dupuis, 20 So. 2d 363, 364 (La. 1944) (establishing that a deed conveying 2/8 of 1/8 conveyed 2/8 of 1/8 royalty, rather than 2/8 of 1/8 of 1/8). This case avoided the multiplication approach by admitting extrinsic evidence after concluding the deed was ambiguous. *Id.*

"restated fraction" problem. This label covers deeds which describe an interest with one fraction and then restate the fraction with a different fraction, usually in a parenthetical.[136] Once again, a Texas Supreme Court case provides a mode for exploring this issue, not only because of its facts, but because of the contradictory views adopted by the majority and the dissent.

In *Brown v. Havard*,[137] the grantors, the Browns, reserved the following interest in a deed conveying a tract of land: "Grantors reserve unto themselves, their heirs and assigns in perpetuity an undivided *one-half non-participating royalty (Being equal to, not less than an undivided 1/16th*) of all the oil, gas and other minerals, in, to and under or that may be produced from said land. . . ."[138] This tract of land was eventually conveyed to Havard, and others, who executed an oil and gas lease providing for a three-eighths (3/8) royalty, rather than 1/8.[139] After production commenced, the Browns claimed "1/2 of the 3/8 royalty, or 3/16," and refused to sign division orders describing their interest as a 1/16 royalty.[140]

At the trial court, a jury returned a verdict in favor of Havard; however, the court set aside this verdict and ruled in favor of the Browns, determining that the deed unambiguously reserved a "1/2 of" the royalty reserved in any lease.[141] On appeal, the intermediate court reversed and agreed with the trial court's view of the deed as ambiguous, which permitted consideration of outside evidence regarding the parties' intent.[142] The Texas Supreme Court affirmed the judgment of the court of appeals, but three justices dissented.[143]

---

136. In light of the far-reaching effects of the estate misconception on drafting, it is not surprising that many deeds contain all of the interpretative problems discussed herein. *See, e.g.*, Farmers Canal Co. v. Potthast, 587 S.W.2d 805, 807 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (involving a multiclause deed with conflicting fractions in which one of those fractions was stated as a double fraction); *see also* Helms v. Guthrie, 573 S.W.2d 855, 857 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.) (pertaining to a deed with both the "double fraction" and "restated fraction" problems).

137. 593 S.W.2d 939 (Tex. 1980).

138. Brown v. Havard, 593 S.W.2d 939, 940 (Tex. 1980).

139. *Id.* at 940-41.

140. *Id.* at 941.

141. *Id.* at 940-41.

142. *Id.*

143. *Brown*, 593 S.W.2d at 944-45.

According to the majority opinion, an "ambiguity arises from the inclusion of the parenthetical phrase, [b]eing equal to, not less than an undivided 1/16th," because this phrase is "subject to more than one interpretation."[144] In discussing the varying interpretations, the court acknowledged the traditional 1/8 royalty but could not determine if the language created a fixed 1/16 royalty or a "1/2 of" royalty reserved in any leases.[145] The dissenting justices, however, believed the deed unambiguously reserved the right to "1/2 of the 3/8" royalty in the lease.[146] In their view,

> The inclusion of the additional words, "not less than an undivided 1/16th," indicates that the Browns contemplated future leases on the property after the 1950 lease expired. In the event that a future lease called for less than a 1/8 royalty, the Browns thereby ensured that their interest would be "not less than" a 1/16 royalty. If a subsequent lease again called for a 1/8 royalty, the Browns' interest in 1/2 of royalties, or 1/16, would continue to be "not less than" 1/16. If a future lease called for more than 1/8 royalty, their interest in 1/2 of that royalty would continue to be consistent with the parenthetical language.[147]

The dissent's approach is preferable for at least two reasons. First, by labeling the deed "unambiguous" it promotes title stability by confining the interpretative process to the four corners of the document.[148] Second, it complies with the dictates of the four corners rule by giving weight to the larger fraction, 1/2; the majority's conclusion, on the other hand, largely ignores the presence of that fraction by concluding that the smaller fraction, 1/16, represents the size of the interest conveyed.

Unfortunately, the majority and dissenting opinions in *Brown* demonstrate that even when judges acknowledge the legacy of the 1/8 royalty, they still reach different conclusions about the correct interpretation of deeds that "restate" the interest conveyed. A logical interpretation is that the larger fraction should control absent

---

144. *Id.* at 942.

145. *See id.* (asserting that there are two possible interpretations of the language).

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

147. *Id.* at 946.

148. *See* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 86 (1993) (urging courts to favor "unambiguous" determinations and adopt interpretative rules which permit title examiners to rely on the four corners of deeds).

compelling language to the contrary. But even the *Brown* dissent detracted from this caveat by emphasizing the "not less than" language in the reservation, rather than the 1/2 fraction,[149] when reviewing another case, *Helms v. Guthrie*.[150]

Helms involved both the "double fraction" problem and the "restated fraction" problem. In that case, the grantors had reserved "*1/2 of the 1/8th royalty (same being a 1/16th of the total production*) of oil, gas and minerals, same being a non-participating royalty interest here retained by grantors."[151] Ignoring the double fraction, the *Helms* court focused on the parenthetical to determine that the deed reserved a 1/16 interest in the total production.[152] Approving of this conclusion, the dissenting justices in *Brown* viewed the *Helms* deed as containing "no indication that future leases with royalties differing from 1/8 were anticipated," whereas in the dissent's view, the *Brown* deed apparently contemplated future leases through the "not less than" language.[153]

In light of *Helms* and *Brown*, title examiners should scrutinize the particular language of the parenthetical when interpreting deeds which "restate" the interest created. However, because those decisions rely on technical and questionable distinctions in the language used in the deeds, they provide little guidance. For drafting purposes, parties should strive for single and simple statements and avoid "restating" the interest with differing fractions.

IV. THE "MINERAL/ROYALTY" PROBLEM[154]

Historically, one of the most vexing oil and gas title questions for practitioners and courts is determining whether a deed creates a mineral or a royalty interest. The Texas Supreme Court has issued two opinions addressing this question. The first case, decided in 1995, is *French v. Chevron*.[155] In that case, the deed referred to the

149. *Brown*, 593 S.W.2d at 947.

150. 573 S.W.2d 855 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

151. Helms v. Guthrie, 573 S.W.2d 855, 856 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.) (emphasis added).

152. *Id.* at 857.

153. *Brown*, 593 S.W.2d at 947.

154. This section of the paper previously appeared in the STATE BAR OF TEXAS OIL, GAS AND MINERAL LAW SECTION REPORT 3 (1998).

155. 896 S.W.2d 795 (Tex. 1995).

disputed interest as "a royalty interest only,"[156] but the court held the deed conveyed a mineral interest stripped of all attributes of a mineral estate, except the right to receive royalty.[157] Two years later, in *Temple-Inland Forest Products Corp. v. Henderson Family Partnership*,[158] the court determined that the deeds, which labeled the reserved interest a "royalty" at least six times, had indeed created royalty interests.[159] This section analyzes *French* and *Temple-Inland* to determine their implications for the role of the royalty label in resolving the mineral/royalty problem. In the process, this section also assesses the effect of these cases on the dual goals of deed interpretation: (1) ascertaining intent and (2) promoting title stability.[160]

A. *Mineral/Royalty Cases Prior to* French

In answering the "mineral or royalty" question, previous Texas Supreme Court cases suggest two main inquiries: first, determine ownership of the five attributes incidental to the mineral estate,[161] and second, identify phrases used to label an interest as mineral or royalty.[162] Regarding the first issue, in *Altman v. Blake*[163] the Texas Supreme Court clarified earlier case law by establishing that a conveyance using mineral interest language is not contradicted by subsequent language stripping that interest of some of the mineral estate attributes.[164]

The deed in *Altman* conveyed a 1/16 interest "in and to all of the oil, gas and other minerals in and under" the property.[165] In Texas,

156. French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 796 (Tex. 1995).

157. *Id.* at 798.

158. 958 S.W.2d 183 (Tex. 1997).

159. Temple-Inland Forest Prods. Corp. v. Henderson Family P'ship, 958 S.W.2d 183, 186 (Tex. 1997).

160. *See* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 81-82 (1993) (describing dual goals of deed interpretation).

161. *See* Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986) (listing the five attributes as: "(1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, [and] (5) the right to receive royalty payments").

162. *See* Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699, 700 (1945) (indicating that use of the word "royalty" demonstrates intent to create such an interest).

163. 712 S.W.2d 117 (Tex. 1986).

164. Altman v. Blake, 712 S.W.2d 117, 118-19 (Tex. 1986).

165. *Id.* at 117.

the phrase "in and under" is viewed as indicating a mineral interest.[166] However, the *Altman* deed also provided that the grantee "*does not participate in any rentals or leases.*"[167] The grantee's heirs argued that stripping the interest of these attributes created a royalty interest, entitling them to 1/16 of production rather than 1/16 of royalty.[168] The court distinguished *Watkins v. Slaughter*,[169] discussed below, which emphasized "the parties' designation of the grantor's retained interest as a royalty interest."[170] The *Altman* court also relied on earlier cases and held that removing these attributes is consistent with the grant of mineral interest.[171]

Regarding the second issue, identifying mineral or royalty labels, the supreme court in *Watkins v. Slaughter* determined that labeling the interest as "royalty" trumped contradictory mineral estate indicators, such as "in and under" language.[172] Significantly, the *Watkins* deed stated that "the grantor . . . shall receive the *royalty* retained herein only from actual production. . . ."[173] In discussing *Watkins* 40 years later, the supreme court in *Altman* recognized the amount of emphasis it placed on "the parties' designation of [the grantor's] retained interest as a royalty interest."[174] However, that label was missing from the *Altman* deed.[175]

Although *Altman* viewed *Watkins* as emphasizing the "royalty" label, cases decided after *Watkins* sent mixed messages about the significance of that word. For example, in *Miller v. Speed*,[176] the appellate court held a royalty interest was created with the words

166. *See* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.4, at 475-77 (2000) (stating that Texas courts view the phrase "in and under" as denoting a mineral estate). *See, e.g.*, Barker v. Levy, 507 S.W.2d 613, 617 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (recognizing that the phrase "in and under" refers to a mineral interest); Miller v. Speed, 259 S.W.2d 235, 239 (Tex. Civ. App.—Eastland 1952, no writ) (acknowledging that the language "in and under" is held to reserve a mineral interest in the grantor).

167. *Altman*, 712 S.W.2d at 117.

168. *Id.* at 118.

169. 144 Tex. 179, 189 S.W.2d 699 (1945).

170. *Altman*, 712 S.W.2d at 119.

171. *Id.* at 120.

172. *See Watkins*, 189 S.W.2d at 700-01 (holding a royalty was created despite "in and under" phrase).

173. *Id.* at 700 (emphasis added).

174. *Altman*, 712 S.W.2d at 119.

175. *Id.*

176. 259 S.W.2d 235 (Tex. Civ. App.—Eastland 1952, no writ).

"produced, saved and made available for market," but added, if the reservation included the word "royalty" "it would have added nothing to its effect."[177] In *Arnold v. Ashbel Smith Land Co.*,[178] the court cited *Watkins* in determining a royalty was created and noted that the instrument contained the word "royalty" seven times.[179] However, in *Grissom v. Guetersloh*,[180] the court distinguished *Watkins* stressing that the absence of the words "actual production" and "royalty" from the reservation clause created a mineral interest and not a royalty.[181] In 1990, an appellate court rejected the view that *Watkins* required the phrase "from actual production" to constitute a royalty interest.[182]

French v. Chevron provided the Texas Supreme Court with an opportunity to clarify the weight of the royalty label in the interpretation process. The deed in *French* labeled the interest a "royalty" and expressly stripped it of mineral estate attributes.[183] However, rather than determining that reserving the attributes reinforced the royalty label, the court held that reserving the attributes is "redundant" if a royalty was intended.[184] Therefore, the court held a mineral interest, stripped of all mineral estate attributes, was conveyed.[185]

B. *The* French *Decision*

In *French v. Chevron*, the court was faced with interpreting a deed with the royalty label, but without the phrase "from actual production." Additionally, as in *Altman*, the deed specifically stripped the "royalty" interest of mineral estate attributes.[186] The

177. Miller v. Speed, 259 S.W.2d 235, 241 (Tex. Civ. App.—Eastland 1952, no writ).

178. 307 S.W.2d 818 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.).

179. *See* Arnold v. Ashbel Smith Land Co., 307 S.W.2d 818, 826, 828 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.) (citing *Watkins* in deciding that a royalty was created when the word "royalty" was used seven times).

180. 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).

181. Grissom v. Guetersloh, 391 S.W.2d 167, 168 (Tex. Civ. App.— Amarillo 1965, writ ref'd n.r.e.) (distinguishing *Watkins* where the grantor placed express language in the deed to manifest his intent to reserve a royalty rather than a mineral interest).

182. *See* Neel v. Alpar Res., Inc., 797 S.W.2d 361, 364 (Tex. App.—Amarillo 1990, no writ) (rejecting the view that *Watkins* required phrase "from actual production" to interpret deed as a royalty interest).

183. French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 796 (Tex. 1995).

184. *Id.* at 798.

185. *Id.*

186. *Id.* at 796-97.

deed in *French*, which was entitled "mineral deed," provided as follows:

> [Paragraph I.]
> That I, George Calvert [Grantor], . . . do grant, bargain, sell, convey, set over, assign and deliver unto Capton M. Paul, an *undivided Fifty (50) acre interest, being an undivided 1/656.17th interest* in and to all of the oil, gas and other minerals, in, under and that may be produced from the following described lands. . . .
> [Paragraph II.]
> *It is understood and agreed that this conveyance is a royalty interest only*, and that neither the Grantee, nor his heirs or assigns shall ever have any interest in the delay or other rentals or any revenues or monies received or derived from the leasing of said lands present or future or any part thereof, or the renewal or extension of any lease or leases now on said lands or any part thereof. Neither the Grantee herein nor his heirs or assigns shall ever have any control over the leasing of said lands or any part thereof or the renewal or extending of any lease thereon or for the making of any lease contract to develop or prospect the same for oil, gas or other minerals, which is hereby specifically reserved in the Grantor.[187]

The grantee's successor-in-interest claimed to own a 1/656.17 royalty interest, while the grantor's successors claimed the deed conveyed only a 1/656.17 mineral interest.[188] In holding the deed conveyed a mineral interest, the court of appeals considered *Altman* dispositive and distinguished *Watkins* as requiring the phrase "from actual production."[189]

The Texas Supreme Court agreed with the appellate court's interpretation of *Watkins* and its reliance on *Altman*.[190] In fact, the supreme court disagreed with the court of appeals on only one issue. The appellate court in *French* had held the deed did convey the right to develop, but the supreme court held all of the mineral estate attributes were reserved.[191] In explaining this conclusion, the supreme court offered two explanations:

---

187. *Id.* at 796 (first emphasis added).

188. *French*, 896 S.W.2d at 796.

189. French v. Chevron U.S.A., Inc., 871 S.W.2d 276, 278 (Tex. App.—El Paso 1994, writ granted), *aff'd*, 896 S.W.2d 795 (Tex. 1995).

190. *French*, 896 S.W.2d at 797-98.

191. *Compare* French v. Chevron U.S.A., Inc., 871 S.W.2d 276, 278 (Tex. App.—El Paso 1994, writ granted), *aff'd*, 896 S.W.2d 795 (Tex. 1995) (holding that right to develop

> The court of appeals held that the deed was silent as to the conveyance of the right to develop and therefore, that right was impliedly transferred to the grantee. This conclusion is incorrect for two reasons. First, the right to develop is a correlative right and passes with the executive rights. (citation omitted) Second, we read the reservations clause in this conveyance as reserving the right to develop in the grantor. It states that the grantee has no control over "the making of any lease contract to develop or prospect." Consequently, we also conclude that the right to develop was reserved in the grantor.[192]

By linking the right to develop with the executive right, the supreme court seems to conclude, as other commentators have, that the right to develop cannot be separated from the executive right. For example, Williams & Meyers have opined that, "[i]t would be an odd and impractical rule that allowed a separation of these two rights, whereby *A* would own the exclusive leasing power but *B* would own a right to enter and develop."[193]

Having determined that the grantor reserved all mineral estate attributes, including the right to develop, the supreme court addressed the effect of these reservations:

> This reservation would be redundant and would serve no purpose whatsoever if the interests in minerals being conveyed was a 1/656.17 royalty interest, that is, 1/656.17 of all production. . . . The meaning of this grant is to convey an interest in the nature of a royalty-a mineral interest stripped of appurtenant rights other than the right to receive royalties.[194]

In short, the court implicitly rejected the notion that the extensive reservations of mineral estate attributes reinforced the royalty label.[195] For future drafting, the *French* court's conclusions sent the

---

was impliedly transferred to grantee), *with* French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 797 n.1 (Tex. 1995) (holding that the deed reserved the right to develop in grantor).

192. *French*, 896 S.W.2d at 797 n.1.

193. 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 303.4, at 458.1 (2000).

194. *French*, 896 S.W.2d at 798; *see* David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical Foundations*, 47 INST. ON OIL & GAS L. & TAX'N 1-1, 1-18 (1996) (criticizing the *French* approach for adopting a "redundant language analysis").

195. *See French*, 896 S.W.2d at 797 (contending that when a grantor conveys or reserves a mineral interest, the mineral estate attributes remain with that interest unless otherwised expressed).

message that if a royalty interest is intended then a party should use that label *and* the phrase "from actual production," but not mention the mineral estate attributes.

1. *French* and the Goal of Ascertaining Intent

Admittedly, the *French* deed contains a schizophrenic mix of royalty and mineral language. Therefore, one can only speculate as to the actual intent of the parties in this deed. But contrary to the court's conclusion, interpreting the deed as conveying a royalty interest is more consistent with the language, precedent, and appropriate canons of construction.

Under the four corners rule, a title examiner begins with the deed's language. The deed in *French* has conflicting mineral and royalty indicators. The deed's reference to a "fifty acre interest" suggests a mineral interest, particularly since that interest equals 1/656.17 of the acreage in the tract owned by the grantor.[196] The deed also contains the phrase "in, under and that may be produced from the described lands," which typically denotes a mineral interest.[197] Furthermore, the deed is entitled a "mineral deed." However, the titles of documents generally accord little weight in the interpretation process.[198] Contradicting the title, the deed clearly states, "*[i]t is understood and agreed that this conveyance is a royalty interest only*" and then proceeds to clarify that the grantee receives none of the mineral estate attributes, including the right to develop the property.[199]

---

196. *Id.*

197. *Id.* at 798; *see, e.g.*, Barker v. Levy, 507 S.W.2d 613, 617 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (asserting that many cases support the proposition that the words "in and under" name a mineral interest); Miller v. Speed, 259 S.W.2d 235, 239 (Tex. Civ. App.—Eastland 1952, no writ) (stating the weight of authority supports the assertion that the language "in and under" creates a mineral interest). *See generally* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.4, at 475 (2000) (stating "[a]n instrument that grants or reserves 'the oil, gas and other minerals *in, on and under*' or '*in and under*' described land, without further provisions relating to the minerals, creates a mineral interest.").

198. *See* Etter v. Texaco, Inc., 371 S.W.2d 702, 705 (Tex. Civ. App.—Corpus Christi 1963, writ ref. n.r.e.) (declaring that a form's name does not control or change the terms of a grant); 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.1, at 467 (2000) (opining that an instrument's title is "never given conclusive effect in the construction process and rarely, if ever, has paramount importance.")

199. *French*, 896 S.W.2d at 796.

According to many commentators, this express language regarding the right to develop is determinative. For example, Professor Bruce Kramer has noted that the development right language is key in determining whether an instrument creates a mineral or royalty interest because such language indicates the parties' real intent.[200] The right to develop indicates a cost-bearing interest, not a royalty.[201] Conversely, an interest with no right to explore or develop suggests a royalty interest.[202]

Rather than view the language as stripping all attributes, including the right to develop, as evidence of intent to reinforce the royalty label, the court in *French* concluded, "when a deed conveys a royalty interest by the mechanism of granting a fractional mineral estate followed by reservations, what is conveyed is a *fraction of* royalty, not a fixed fraction of total production royalty."[203] This mineral interest interpretation not only gives the grantee a smaller interest in the production, but it also confusingly equates a mineral interest with "a fraction of royalty."

In light of the contradictory language, the court should have taken another step in the interpretative process and applied canons of construction. Specifically, the court should have construed the deed "against the grantor" and assumed the deed passed the greatest estate possible.[204] Guided by those canons, the court should have concluded that the deed conveyed a royalty interest.[205]

---

200. *See* Bruce M. Kramer, *Conveying Mineral Interests-Mastering the Problem Areas*, 26 TULSA L.J. 175, 197 (1990) (concluding courts should look at the development right language rather than deed inconsistencies when interpreting a deed).

201. *See* El Paso Natural Gas Co. v. Am. Petrofina Co. of Tex., 733 S.W.2d 541, 549 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (stating that a reasonable prudent operator considers a multitude of costs when deciding whether to develop an oil and gas lease).

202. *See* ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.4, at 51 (1997) (defining royalty as an interest that is "free of production and operating expenses").

203. *French*, 896 S.W.2d at 798.

204. *See generally*, Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 108-16 (1993) (advancing the proposition that if the deed's language is ambiguous, the court will interpret the deed to grant the largest estate).

205. *See* Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667, 668-69 (Tex. 1990) (applying the greatest estate canon to find that severed executive rights passed to grantee); Hudgins v. Lincoln Nat'l Life Ins. Co., 144 F. Supp. 192, 196 (E.D. Tex. 1956) (applying the greatest estate canon to find a royalty interest). *But see* Etter v. Texaco, Inc., 371 S.W.2d 702, 705 (Tex. Civ. App.—Corpus Christi 1963, writ ref. n.r.e.) (rejecting application of

In addition to ignoring language in the deed and canons of construction, the *French* opinion also misinterpreted precedent, particularly the holding in *Watkins v. Slaughter*. The *French* court read *Watkins* as requiring the phrase "from actual production," in addition to the royalty label to transfer a royalty interest.[206] Yet the *Watkins* opinion stressed the "royalty" label rather than the phrase "from actual production."[207] That opinion begins by noting that the word "royalty" has a well understood meaning in the oil and gas industry and refuses to disregard the clause "which designates the reservation as royalty."[208] Subsequently, the Texas Supreme Court reiterated the emphasis on the royalty label. As noted above, the *Altman* court stated that the *Watkins* court greatly emphasized the designation of the grantor's retained interest as a royalty.[209] Notably, the *Altman* opinion, unlike the *French* opinion, did not require the additional language, "from actual production."

2. *French* and the Goal of Title Stability

As described above, after *Watkins*, Texas courts created uncertainty about the role of the word "royalty" in mineral and royalty deed interpretation. However, many commentators, including the author, consider the label as strong evidence that a royalty was intended, and view the express limitation of mineral estate attributes as reinforcing that label.[210] By holding that the deed created a mineral interest, the *French* opinion discounted the value of labels

---

greatest canon to find royalty interest). *See generally* Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 119 (1993) (explaining that courts consider "harmonizing as a condition precedent to the use of the greatest estate canon"). For example, the *French* court invoked the "four corners" canon of construction, requiring a court to examine "the entire instrument to ascertain the intent of the parties." *French*, 896 S.W.2d at 797.

206. *French*, 896 S.W.2d at 797-98.

207. Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699, 700 (1945).

208. *See id.* (stating additionally that if the word "royalty" had appeared in the deed's first clause "by which the 1/16 was reserved—that is, had that clause read 'the grantor retains title to a 1/16 royalty interest'—then there could be no contention that the interest reserved was only a mineral fee interest").

209. Altman v. Blake, 712 S.W.2d 117, 119 (Tex. 1986).

210. *See, e.g.*, Samuel A. Denny, *The Mineral-Royalty Distinction and Fractional Interests*, *in* STATE BAR OF TEX. ADVANCED OIL, GAS & MIN. L. COURSE, G, G-9 (1989) (restating the *Watkins* court's view that the "denomination of an interest in the body of an instrument as a royalty or a mineral interest is given great weight"). Denny also cites *Buffalo Ranch Co. v. Thomason*, 727 S.W.2d 331, 334 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), which places great weight on the label "mineral interest." *Id.*

in providing predictability in the interpretation process.[211] Williams & Meyers acknowledge the value of labels in oil and gas conveyancing:

> As the terminology of oil and gas conveyancing becomes more precise, and the law governing each class of interests more definite, the ease of doing business is promoted and the volume of litigation reduced. Recognizing the dangers of mechanical application of rules based on a label, we nevertheless believe such labels are useful to the public in entering into oil and gas transactions and to courts in determining their effect.[212]

These authors focus on the phrase "in and under" as a mineral label. However, this theme can be expanded to argue that a deed, which overtly names an interest as "royalty," as in *Watkins* and *French*, and then reinforces that label by removing all mineral estate attributes, creates a royalty interest. Instead, in *French* the Texas Supreme Court reduced, if not destroyed, the reliability of the "royalty" label for interpreting and creating royalty interests. In so doing, the court also created questions about *Watkins*' viability as precedent. Fortunately, two years later, in *Temple-Inland Forest Products Corp. v. Henderson Family Partnership, LTD.*,[213] the court revisited *French*, clarified the status of *Watkins*, and reaffirmed the value of the royalty label.[214]

C. *Post* - French *Cases*: Bank One, Texas, National Ass'n v. Alexander

Before *Temple-Inland* reached the Texas Supreme Court, another court of appeals case relied on *French*. In *Bank One v. Alexander*,[215] the deed in question provided as follows:

---

211. *See* Richard C. Maxwell, *Oil & Gas Conveyancing—Is There Truth in Labeling?*, 33 WASHBURN L.J. 569, 590 (1994) (advocating reference to labels in determining state of title to avoid "resorting" to extrinsic evidence).

212. 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 302, at 448 (2000); *see also*, Richard C. Maxwell, *Oil & Gas Conveyancing—Is There Truth in Labeling?*, 33 WASHBURN L.J. 569, 589 (1994) (quoting Williams and concluding that labels "are very helpful in maintaining the integrity of the land records").

213. 958 S.W.2d 183 (Tex. 1997).

214. Temple-Inland Forest Prods. Corp. v. Henderson Family P'ship, 958 S.W.2d 183, 186 (Tex. 1997).

215. 910 S.W.2d 530 (Tex. App.—Austin 1995, writ denied).

> [1] Grantors herein reserve for themselves, their heirs, assigns and legal representatives an undivided 1/16 interest in and to all minerals of every kind and description, including oil and gas, in, upon and under said land;
>
> [2] but the right to control and manage and make any and all gas and oil leases or other mineral leases upon said land is hereby granted exclusively to grantees herein, their heirs, assigns and legal representatives, and they shall be entitled to any and all cash bonus or bonuses paid on any and all oil and gas leases on said land together with all cash rentals under such leases;
>
> [3] but an undivided 1/16 of any and all oil and gas and other minerals developed from said land shall be owned by grantors herein, their heirs, assigns and legal representatives.[216]

Bank One claimed that the deed provision reserved in the grantors a 1/16 royalty interest.[217] In holding that the deed reserved a mineral interest, the court of appeals relied on *French* and its view that language stripping the reserved interest of mineral estate attributes is "redundant" if a royalty interest is intended.[218] The court also focused on the phrase "developed from," found in the deed's third paragraph.[219] Bank One asked the court to equate this phrase with "produced from," a phrase that is considered a "royalty" indicator.[220] But the court, relying on *Williams & Meyers' Oil and Gas Law*, concluded that the term "develop" describes a mineral interest.[221] Additionally, the court considered *Watkins* and addressed the role of the royalty label noting that the deed's reservation clause did not expressly refer to the term "royalty."[222] The Texas Supreme Court subsequently denied writ in this case.[223]

---

216. Bank One, Texas, Nat'l Ass'n v. Alexander, 910 S.W.2d 530, 531 (Tex. App.—Austin 1995, writ denied).

217. *Id.*

218. *Id.* at 535.

219. *Id.* at 533.

220. *Id.* at 534.

221. *Bank One*, 910 S.W.2d at 534 (citing 8 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW 272 (1994) and relying on its definition of develop).

222. *Id.* at 533.

223. Bank One, Texas, Nat'l Ass'n v. Alexander, 39 Tex. Sup. Ct. J. 183 (Jan. 11, 1996).

D. *Temple-Inland Forest Products Corp. v. Henderson Family Partnership, LTD.*

1. Court of Appeals

Unlike the *Bank One* deed, the *Temple-Inland* deed did use the royalty label.[224] Therefore, *Temple-Inland* provides an example of the consequences of the *French* court's failure to honor that label in the interpretation process. In *Temple-Inland*, a deed granted "an undivided fifteen-sixteenths (15/16ths) interest in, to and of all oil, gas and other minerals,"[225] but the deed reserved in the grantor an "undivided one-sixteenth (1/16th) part of and interest in the oil, gas and other minerals."[226] Significantly, that reservation was further described as follows:

> "[I]t is understood and agreed that *said one-sixteenth (1/16th)* [reserved] interest *is and shall always be a royalty interest*, and *shall not be charged with any of the costs* which the Grantee may incur in exploring, drilling, mining, developing and operating wells or mines for the production of oil, gas and other minerals."[227]

Relying on *French*, the appellate court held the deed reserved a 1/16 mineral interest, despite the consistent use of the "royalty" label.[228] As in *French*, the court stressed the language stripping the grantor's interest of mineral estate attributes. The court of appeals also assumed that a 1/16 mineral interest was reserved since the deeds conveyed only a 15/16 mineral interest to the grantees, stating: "[i]f the Grantors actually intended to grant 100 percent of the mineral interest and retain a 1/16th royalty, then they would have done just that: the granting clause would have granted *all* minerals (16/16ths), and separately reserved a 1/16th royalty."[229]

But the *Temple-Inland* deed had language absent in the *French* deed—an express description of the reserved interest as non-cost

---

224. *See* Temple-Inland Forest Prods. Corp. v. Henderson Family P'ship, 958 S.W.2d 183, 186 (Tex. 1997) (stating that the deeds at issue left no room to question the reserved interest because the deed used the word "royalty" six times).

225. *Id.* at 184.

226. *Id.*

227. *Id.* The deed continued with language stripping the reserved interest of mineral estate attributes and referring to it as "royalty" four more times. *Id.*

228. Temple-Inland Forest Prods. Corp. v. Henderson Family P'ship, 911 S.W.2d 531, 535 (Tex. App.—Beaumont 1995), *rev'd*, 958 S.W.2d 183 (Tex. 1997).

229. *Id.* at 534.

bearing.[230] Since the classic definition of a royalty interest is that "it is free of production and operating expenses,"[231] the court of appeals ignored the very definition of a royalty interest, in addition to ignoring the "royalty" label, by concluding the deed reserved a mineral interest.[232] As described below, however, the Texas Supreme Court corrected these errors.

2. The Texas Supreme Court's Opinion in *Temple-Inland*

On appeal, the Texas Supreme Court reversed the court of appeals and held that the deeds reserved a 1/16 royalty interest, not a 1/16 mineral interest. In a relatively short per curiam opinion, issued without hearing oral arguments, the court accomplished the following: first, it effectively limited *French* to its facts; second, it clarified that *French* did not overrule *Watkins*; and finally, it emphasized the particular language in the *Temple-Inland* deeds, specifically the six references to the retained interest as "royalty," and the designation of that interest as "cost-free."[233]

In discussing *French*, the court stressed the description of the conveyed interest in that case as "'an undivided Fifty (50) acre interest, being an undivided 1/656.17th interest in and to all of the oil, gas and other minerals' under a 32,808.5-acre tract."[234] Continuing, the court recognized that, "[t]he fraction 1/656.17 was equal to 50/32,808.5."[235] Distinguishing *Watkins*, the court again emphasized the 50-acre interest specified in the *French* deed, noting the *Watkins* deed contained no such reference.[236]

The court also addressed the status of *Watkins* as precedent, proclaiming that "*French v. Chevron* did not overrule *Watkins v.*

230. *See id.* at 532 (conveying that the deed's language expressly stated the interest "shall not be charged with any of the costs" incurred by the grantee in exploration, development, or operation).

231. 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.4(A) (1997).

232. *See Temple-Inland*, 911 S.W.2d at 535 (Walker, C.J., dissenting) (criticizing the majority's holding and emphasizing that the six references to "royalty" created a royalty rather than a mineral interest). The dissent interpreted *Watkins* differently than the *French* court, and adhered to the definition of a royalty as a cost-free interest. *Id.*

233. *Temple-Inland*, 958 S.W.2d at 185-86.

234. *Id.* at 185 (quoting *French*, 896 S.W.2d at 796).

235. *Id.*

236. *Id.*

Slaughter."[237] Instead, the court opined that the court of appeals in *Temple-Inland* misconstrued both *French* and *Watkins* by requiring a reference to "royalty from actual production" to create a royalty interest.[238] Clarifying the correct view of those decisions, the court held that it has "never required that any particular word or phrase be used" and stated that "[t]he interest conveyed or reserved is to be determined from all the provisions of the instrument."[239] These quotes are consistent with a venerable rule of document interpretation: the four corners rule.[240]

Having revived *Watkins* as viable precedent, the court then turned to the deeds at issue and concluded they undoubtedly reserved a royalty interest.[241] In reaching that conclusion, the court stressed that the royalty label appears "no less than six times," and the interest is deemed to be "free of the costs of drilling and production," which is by definition a royalty interest.[242] The court also compared these deeds to those in *Watkins* and *Altman*. The *Watkins* deed, the court noted, referred to "the royalty retained herein," while the *Altman* deed did not use the word royalty.[243] Through these comparisons, the court affirmed that the "royalty" label—without the phrase "from actual production"—is a reliable indicator of intent when interpreting and drafting deeds.[244]

3. The Missing One-Sixteenth Mineral Interest

The issue in *Temple-Inland* was whether interests were reserved in the deeds. Therefore, the Texas Supreme Court did not address the other obvious question: if the deeds expressly granted a 15/16 mineral interest, and the grantor retained a 1/16 royalty, who owns the other 1/16 mineral interest? Recall that the court of appeals emphasized the express grant of a 15/16 mineral interest in deciding the deeds reserved a 1/16 mineral interest. But as the supreme

237. *Id.*

238. *Temple-Inland*, 958 S.W.2d at 186.

239. *Id.*

240. *See* Luckel v. White, 819 S.W.2d 459, 461 (Tex. 1991) (promulgating the four corners doctrine in deed construction).

241. *Temple-Inland*, 958 S.W.2d at 186.

242. *Id.*

243. *Id.* at 185.

244. *See id.* at 186 (disagreeing with the appellate court's assertion that the phrase "royalty from actual production" is necessary to convey a royalty interest).

court determined, that conclusion ignores express language in the deeds, demonstrating that the parties intend to reserve a royalty interest. Of course, determining ownership of the missing 1/16 mineral interest is necessary to answer several other questions, such as from whom can a lessee obtain a 100% lease, and to whom must the producer account for the production? In making that determination, the four corners rule will, again, control. The language in the *Temple-Inland* deeds demonstrates that the grantee is to bear the full cost of mineral development, which in turn suggests the grantee owns all rights to develop 16/16 of the mineral estate. The same conclusion is also justified by applying canons of construction requiring a court to interpret a deed as conveying the greatest estate possible to the grantee.[245]

V. CONCLUSION

The traditional 1/8 royalty has left a legacy of interpretative problems for land title professionals. Unfortunately, courts have either ignored this legacy or adopted ad hoc approaches to title issues that fail to effectively acknowledge the influence of the 1/8 royalty on drafting mineral and royalty deeds. For that reason, the particular title problems addressed in this paper will continue to plague title examiners. For land title professionals, the answer is generally to seek stipulations and curative measures. For owners and operators, however, title litigation will continue to loom as the legacy of the 1/8 royalty.

245. Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667 (Tex. 1990).

APPENDIX

The Mineral — Royalty Distinction in Other Jurisdictions[246]

ARKANSAS

Description of interest with the language "mineral acres" is one factor Arkansas courts consider when construing the creation of mineral interests.[247] Furthermore, courts have held that the use of the language, "in, on and under" creates a mineral interest when no other provisions concerning minerals are present.[248] In contrast, the use of the language "produced and saved"[249] or the term "royalty"[250] is construed to create a royalty when other indications of a royalty interest exist.

In addition, Arkansas courts follow the four corners approach with respect to interpreting and construing deeds and contracts.[251] In other words, a court will first look to the instrument in its entirety as well as the surrounding circumstances at the time of execution to determine the intent of the parties.[252] If the instrument is deemed ambiguous, then the court will entertain outside evidence

---

246. Many thanks to Susan Maldonado, a graduate from St. Mary's School of Law, for her work on this Appendix.

247. *See* Wynn v. Sklar & Phillips Oil Co., 493 S.W.2d 439, 442 n.1 (Ark. 1973) (considering an instrument that utilized the term, "mineral acres" as creating a mineral interest).

248. *See id.* at 444-46 (noting the use of "in, on and under" language in various instruments); Smiley v. Thomas, 246 S.W.2d 419, 419, 421 (Ark. 1952) (finding that the grantee owned a mineral interest where the deed contained the language "in, under and upon").

249. *See* Tyler v. Boucher, 285 S.W.2d 524, 526 (Ark. 1956) (acknowledging the presence of the language "produced and saved" in a royalty deed); Hanson v. Ware, 274 S.W.2d 359, 361 (Ark. 1955) (correlating the language "produced and saved" with an intent to convey a perpetual royalty interest).

250. *See Tyler*, 285 S.W.2d at 526 (interpreting a deed that in part, conveyed "oil, gas and other minerals royalty acres" and also used the language "produced and saved" as transferring a royalty interest).

251. *See Wynn*, 493 S.W.2d at 444 (explaining that courts look to the four corners of an instrument when interpreting ambiguous language).

252. *See* Sturgis v. Skokos, 977 S.W.2d 217, 223 (Ark. 1998) (citing RAD-Razorback Ltd. P'ship v. B.G. Coney Co., 713 S.W.2d 462, 465 (Ark. 1986), *and Wynn*, 493 S.W.2d at 444); Opaline King Hill v. Gilliam, 682 S.W.2d 737, 739 (Ark. 1985) (stating the court determines the parties' intent by looking at the deed and the "context in which it was made"); Bennett v. Henderson, 663 S.W.2d 180, 182 (Ark. 1984) (discussing that a grantor's intention is derived from the deed's language); *Wynn*, 493 S.W.2d at 444 (emphasizing the importance of using the four corner's doctrine to construe ambiguous contracts).

by the parties regarding statements, acts or conduct occurring after the document is execution.[253]

CALIFORNIA

Courts determine the creation of a mineral interest from the language, "minerals in, under and/or *which may be hereafter produced and save[d]* from."[254] However, it is not clear what interests are construed by the use of the language "produced and saved" alone.[255] In contrast with a majority of states, terms such as "royalty" are construed as creating a mineral interest.[256] As a result, uncertainty remains regarding royalty interests.[257]

The four corners approach is prevalent within this jurisdiction. Specifically, outside evidence is not considered to assist in interpreting of an unambiguous instrument.[258]

---

253. *See* Rockefeller v. Rockefeller, 980 S.W.2d 255, 260 (Ark. 1998) (citing *Wynn*, 493 S.W.2d at 445 for the proposition that courts may determine the parties intentions in an ambiguous contract by considering extrinsic evidence); *Sturgis*, 977 S.W.2d at 233 (indicting that a court resolves ambiguity by giving considerable weight to the statements, actions and conduct of the parties subsequent to their agreement).

254. *See* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.5, at 479 (2000) (citing Little v. Mountain View Dairies, 217 P.2d 416, 419 (Cal. 1950), *and* Robinson v. Southwestern Dev. Co., 277 P.2d 825, 827 (1954)). Specifically, in *Little*, the court considered the grant to create a mineral interest based on case law from Texas, Oklahoma and Kansas, which recognize the language "in and under and *that may be produced*" as establishing a mineral interest. *See Little*, 217 P.2d at 418 (referencing among other cases, Watkins v. Slaughter, 189 S.W.2d 699, 700 (Tex. 1945), Hinkle v. Gauntt, 206 P.2d 1001, 1005 (Okla. 1949), *and* Brooks v. Mull, 78 P.2d 879, 883 (Kan. 1938)).

255. *See* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.7, at 485-86 (2000) (noting only one case exists where the words "produced and saved" created a mineral interest without additional language).

256. *See generally id.* § 305, at 543 (attributing the source of initial confusion over the differences between mineral and royalty interests to the supreme court decision in *Callahan v. Martin*, 43 P.2d 788 (Cal. 1935) in which a royalty holder was characterized as a cotenant); *see also* Dabney-Johnston Oil Corp. v. Walden, 52 P.2d 237, 241 (Cal. 1935) (perpetuating the confusion by construing a grant employing the terms "produced, saved and sold" as a mineral interest given the conveyance's unlimited duration).

257. *See* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 305, at 542-43 (2000). *But see id.* § 305, at 551-52 (predicting that California may follow the majority view based on the opinion in *Little*). However, since *Little* successfully associates the burden of expenses with a mineral interest, at least one treatise suspects that the converse argument may be sufficient; namely, a non-costbearing interest constitutes a royalty interest. *See id.* § 305, at 542-43.

258. *See id.* § 304.14, at 532-33 (citing Nourse v. Kovacevich, 109 P.2d 999, 1000 (Cal. 1941)).

COLORADO

The language "that may be produced"[259] and "produced and saved"[260] creates mineral interests absent other provisions related to minerals. In addition, terms such as "royalty" are likely to be construed as creating a mineral interest.[261] Furthermore, whether a lease is in existence prior to the execution of an instrument conveying a royalty interest may affect how the interest is construed.[262]

Moreover, a Colorado statute mandates that

> any conveyance, reservation or devise of a royalty interest, whether of perpetual or limited duration, contained in an instrument executed on or after July 1, 1991, creates a real property interest which vests in the holder or holders of such interest the right to receive the designated royalty share of the specified minerals or the proceeds thereof in accordance with the terms of the instrument.[263]

Colorado has adopted the four corners approach that views the instrument as a whole to determine the intentions of the parties.[264]

---

259. *See* Corlett v. Cox, 333 P.2d 619, 620, 622 (Colo. 1958) (considering the language of the deed which reserved "6 1/4% of all gas, oil and minerals that may be produced," in addition to the lack of a present lease and the perpetual nature of the reservation, to indicate an estate in fee).

260. *See* Simson v. Langholf, 293 P.2d 302, 304, 306 (Colo. 1956) (holding that a forty-nine percent (49%) mineral interest is granted by the language "49% of all oil and/or gas that may be produced, saved and marketed"). Additionally, the opinion concentrates more on the absence of any language to limit the type of interest, Lord Coke's rule or a grant in profits constitutes a grant in fee, and the perpetual duration of the interest given no present lease existed. *Id.* at 306-07.

261. *See* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.8, at 488 (2000) (predicting that Colorado will likely follow the minority position, exemplified by West Virginia, on the use of the term "royalty" given the state's interpretation of "produced and saved"). *But see id.* § 304.9, at 498 (acknowledging that the supreme court in *Simson* intimated that royalty interests could be created, but did not specify the manner of such creation). *See also* Patrick M. Westfeldt, *Recent Developments in Oil and Gas Law in the Rocky Mountain Area*, 5 ROCKY MTN. MIN. L. INST. 491, 493 (1960) (recommending that a drafter must use express language to create a "perpetual non-participating royalty interest"). Westfeldt alludes that absent specific language courts may interpret the instrument as conveying a mineral interest. *Id.*

262. *See* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.8, at 488-881 & n.13.1 (2000) (citing *Corlett v. Cox*, 333 P.2d 619, 622 (Colo. 1958) and contending that Colorado appears to have adopted Oklahoma's former position that a lease must be present for a royalty interest to exist).

263. *See id.* (referring to COLO. REV. STAT. § 38-30-107.5 (2000)).

264. *See Corlett*, 333 P.2d at 622 (recognizing that the intent of the parties is determined from the instrument as a whole); *Simson*, 293 P.2d at 306 (looking to the four corners of the document to determine whether the deed is ambiguous). Previously, the trial court allowed extrinsic evidence to be presented after finding the language of the deed

ILLINOIS

In Illinois, the language, "in and under and that may be produced from," creates a mineral interest absent other provisions relating to minerals.[265] However, the language "that may be produced" or "minerals produced" does not create a mineral interest.[266] According to *Logue v. Marsh*,[267] Illinois courts follow the rule "that a perpetual reservation of the royalties in the mineral estate or part thereof" creates a mineral interest, whereas, "a finite or limited in time reservation of the royalties to the mineral estate or part thereof" creates a royalty interest.[268]

With respect to extrinsic evidence, the four corners approach is also employed within this jurisdiction. Specifically, the parties' intentions are gathered from the language of the document viewed as a whole.[269] Outside evidence is not allowed to assist in interpreting an unambiguous instrument.[270]

---

ambiguous. *Id.* at 304. The supreme court found the document unambiguous. *Id.* at 306. However, the supreme court did note that even though the instrument was clear, the trial court acted properly when it considered evidence regarding whether a lease existed at the time of the instrument's execution for the purpose of ascertaining the intention of the parties. *Id.* at 308.

265. *See* Triger v. Carter Oil Co., 23 N.E.2d 55, 56-57 (Ill. 1939) (determining a mineral interest from the language of the deed that included the right to ingress and egress for the purpose of exploration and development, purports to be a transfer of the interest in fee, and had an indefinite duration).

266. *See* Hardy v. Greathouse, 94 N.E.2d 134, 138 (Ill. 1950) (relying on the use of the language "produced" to construe the creation of a royalty interest based on its clear and plain meaning).

267. 365 N.E.2d 1159 (Ill. App. Ct. 1977).

268. Logue v. Marsh, 365 N.E.2d 1159, 1161 (Ill. App. Ct. 1977).

269. *See Hardy*, 94 N.E.2d at 138-39 (determining the parties' intent by interpreting the writing as a whole); *Logue*, 365 N.E.2d at 1161 (stating that the deed must be construed as a whole to determine the parties' intent, and consequently the grantor's interest).

270. *See Hardy*, 94 N.E.2d at 138-39 (stating the presumption that a writing expresses the parties' intent is rebuttable if there is strong and convincing evidence of a factual mistake).

KANSAS

Use of the language "in, on and under"[271] and/or "that may be produced"[272] creates a mineral interest when no other provisions concerning minerals are present. Terms that indicate an interest in oil and gas production, but not bonus, delay rental, development or executive rights, such as "royalty," "royalty interest," and "royalty acres," create a royalty interest.[273] Note that a statutory provision deems mineral interests void if not recorded within ninety (90) days of execution or listed for taxation.[274] However, royalty interests are not subject to this requirement.[275]

In addition, Kansas courts often find that the "four corners" of the instrument guide its interpretation.[276] Specifically, the parties' intentions are gathered from the language of the document viewed as a whole.[277] When courts attempt to interpret ambiguous instruments, extrinsic evidence is allowed to assist in determining the parties' intentions.[278]

---

271. *See* Shepard v. John Hancock Mut. Life Ins. Co., 368 P.2d 19, 24 (Kan. 1962) (describing the plain meaning of the language "in and under" as contrary to the definition of royalty); Rutland Sav. Bank v. Steele, 127 P.2d 471, 474 (Kan. 1942) (considering the use of the language "in and under"); *see also* Drach v. Ely, 703 P.2d 746, 749-50 (Kan. 1985) (viewing the language, "in and under and that may be produced from" as unambiguous and creating a mineral interest).

272. *See Drach*, 703 P.2d at 749-50 (holding the language "that may be produced from" creates a mineral interest); Cosgrove v. Young, 642 P.2d 75, 81-82 (Kan. 1982); Brooks v. Mull, 78 P.2d 879, 883-84 (Kan. 1938) (considering the language used in the grant as well as the size of the grant as an undivided 1/2 interest).

273. *See* Skelly Oil Co. v. Cities Serv. Oil Co., 160 P.2d 246, 249 (Kan. 1945) (finding from the four corners of the document that a royalty interest is intended).

274. KAN. STAT. ANN. § 79-420 (1984).

275. *Id.*; *see* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 306, at 552 (2000); *see also* Becker v. Rolle, 508 P.2d 509, 513 (Kan. 1973) (holding that failing to comply with the Kansas Statute effectively voids the instrument).

276. *See, e.g.*, Amoco Prod. Co. v. Wilson, 976 P.2d 941, 945 (Kan. 1999) (reaffirming that the proper construction of a lease should be determined from its four corners considered in its entirety); Taliaferro v. Taliaferro, 921 P.2d 803, 811-12 (Kan. 1996) (employing the four corners approach on an unambiguous trust instrument); Heyen v. Hartnett, 679 P.2d 1152, 1156 (Kan. 1984) (asserting that the fundamental rule for interpreting written instruments is to examine the entire instrument); *see also* Shepard v. John Hancock Mut. Life Ins. Co., 368 P.2d 19, 23 (Kan. 1962) (promulgating the fundamental rule that the parties' intent is determined from the document's four corners).

277. *Id.*

278. *See Taliaferro*, 921 P.2d at 812 (asserting that a court may look to evidence of a party's subsequent actions to resolve an ambiguous instrument).

LOUISIANA

Mineral servitudes or interests are found to exist based on language "in and under," "mineral interest" and on parol evidence despite a grant of executive rights, bonus and rentals.[279] Servitudes are subject to the doctrine of liberative prescription; in other words, they expire in 10 years if no exercise of the right conveyed is undertaken.[280]

In contrast, terms that indicate an interest in oil and gas production, but not bonus, delay rental, development or executive rights, such as "royalty," "royalty interest," and "royalty acres," have been construed as creating a royalty interest.[281] Leases are not subject to prescription or nonuse, but may only last ten (10) years without drilling or production.[282]

Louisiana also employs the four corners approach.[283] Specifically, the parties' intentions are gathered from the language of the document viewed as a whole, and outside evidence is only considered when interpreting an ambiguous instrument.[284]

MISSISSIPPI

As a general rule, a conveyancing instrument's title is not determinative of a court's interpretation.[285] However, in 1990, the Mis-

279. *See* Plaquemines Parish Gov't v. Getty Oil Co., 94-1634 (La. App. 1 Cir. 5/5/95) (quoting *Horn v. Skelly Oil Co.*, 70 So. 2d 657, 660 (La. 1954) for the proposition that a reservation using the terms "in and under" conveys a mineral servitude); *see also* Ledoux v. Voorhies, 62 So. 2d 273, 275 (La. 1952), *overruled on other grounds by* Andrus v. Kahao, 414 So. 2d 1199 (La. 1981) (stating the language, "in and under and that may be produced from" has been recognized as reserving a mineral interest).

280. *See* Horton v. Mobley, 578 So. 2d 977, 985 (La. Ct. App. 1991) (indicating that if a reservation of minerals is not exercised within ten years it is extinguished); *Horn*, 70 So. 2d at 661 (contending a mineral owner can not execute a lease that lasts longer than the prescriptive 10 year period, unless production occurred).

281. *See* Gulf Ref. Co. v. Goode, 32 So. 2d 904, 906 (La. 1947) (noticing the use of the word "royalty" to indicate the intent of a royalty interest).

282. *See* Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil and Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 825-26 (1992) (commenting that while liberative prescription does not apply, royalty interests expire in 10 years unless production occurs).

283. *See* Andrus v. Kahao, 414 So. 2d 1199, 1201 (La. 1981) (applying the four corners approach to instrument interpretation).

284. *See id.* at 1201-02 (holding that the trial court erred when determining the parties' intent by precluding extrinsic evidence).

285. *See generally* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.1, at 467-68 (2000) (discussing the importance of an instrument's title to various jurisdictions).

sissippi Supreme Court viewed the Hedermann Brothers Form R-101, entitled "Mineral Right and Royalty Transfer," as generally conveying mineral rather than royalty interests.[286]

Use of language, such as "in, on or under"[287] or "which may be produced"[288] creates a mineral interest when no other provisions concerning minerals are present. Courts have also construed terms such as "royalty" as creating a royalty interest when other indications of a royalty exist.[289]

In this jurisdiction, courts also find that the four corners of an instrument should guide interpretation in which the parties' intentions are gathered from the language of the document viewed as a whole.[290] When courts attempt to interpret ambiguous instruments, extrinsic evidence may be considered to assist in the determination of the intentions of the parties.[291]

---

286. *See* Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 350 n.1 (Miss. 1990) (upholding a chancery court's ruling that the form deed conveyed a mineral interest). The court cited *Harris v. Griffith*, 210 So. 2d 629, 633 (Miss. 1968), *overruled in part by Thornhill v. Systems Fuel, Inc.*, 523 So. 2d 983 (Miss. 1988) in which the court held that Form R-101 conveyed a mineral interest. *Harris*, 210 So. 2d at 633; *see also* Ford v. Jones, 85 So. 2d 215, 216 (Miss. 1956) (conveying a 1/4th mineral interest with the Form R-101 despite a typewritten provision expressing the grantor's intention to convey royalty acres). *But see* Neil v. Jones, 497 So. 2d 797, 798 (Miss. 1986) (remarking that an instrument's title does not invalidate the instrument determine its character).

287. *See Ford*, 85 So. 2d at 216-17 (finding the language "in, on or under" creates a mineral interest in the face of other provisions indicating either a mineral interest or a royalty interest); Westbrook v. Ball, 77 So. 2d 274, 275 (Miss. 1955) (contending the language, "in, on, and underlying, and as may be mined and produced from" creates a mineral interest). *But see Pursue Energy*, 558 So. 2d at 352 (reiterating the *Mounger* court's observation that "[p]articular words . . . should not control"); *Thornhill*, 523 So. 2d at 988 (reminding that in *Mounger v. Pittman*, 108 So. 2d 565 (Miss. 1959), the court recognized that no particular words should control, but rather the document should be reviewed as a whole).

288. *See Mounger*, 108 So. 2d at 567 (concluding, after reviewing *Westbrook*, *Texas Gulf Producing Co.*, and *Ford*, that no particular words should control, that the document should be read as a whole, and that the phrase "which may be produced" is not sufficient to infer a cost free interest). Therefore, the court held that the deed reserved a 1/8th mineral interest. *Id.*

289. Armstrong v. Bell, 24 So. 2d 10, 12 (Miss. 1945) (in banc).

290. *See* Peoples Bank and Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235, 1237 (Miss. 1996) (discussing the four corners doctrine as a general rule of construction); *Pursue Energy*, 558 So. 2d at 352 (defining the four corners doctrine in which a court examines the entire instrument to interpret an unambiguous document).

291. *See Pursue Energy*, 558 So. 2d at 352-53 (delineating a three-tiered process a court may employ to interpret an ambiguous instrument, including consideration of outside evidence).

MONTANA

Use of the language "in, under and beneath" creates a mineral interest when no other provisions concerning minerals are present.[292] In contrast, the use of the language "produced and saved" creates a royalty interest when other indications of a royalty interest are found.[293] Under certain circumstances, terms such as "royalty" may be construed as creating a mineral interest.[294]

In the construction and interpretation of instruments, Montana courts consistently apply the four corners rule.[295] Specifically, the parties' intentions are gathered from the language of the document viewed as a whole.[296] When courts attempt to interpret ambiguous instruments, extrinsic evidence is allowed to assist in determining the intentions of the parties.[297]

---

292. *See* Smith v. County of Musselshell, 472 P.2d 878, 880 (Mont. 1970) (recalling earlier case law that recognized the language "in and under and upon" as creating a mineral interest). Specifically, in *Smith*, the court considered the language, "in and under and that may be produced from" and determined that according to its decision in *Marias River Syndicate v. Big West Oil Co.*, 38 P.2d 599, 600 (Mont. 1934), the language indicated a mineral interest. *Id.* at 880-81; *see also* Stokes v. Tutvet, 328 P.2d 1096, 1101 (Mont. 1958) (associating the phrase "in and under and upon" with the creation of a mineral interest).

293. *See, e.g.*, *Smith*, 472 P.2d at 880 (associating the language "produced and saved" with royalty interests); *Stokes*, 328 P.2d at 1101 (considering the language "produced and saved" as indicating a royalty interest); Mitchell v. Hannah, 208 P.2d 812, 814 (Mont. 1949) (construing a royalty from a description as a "royalty of all the oil and gas produced and saved").

294. *See Smith*, 472 P.2d at 881 (admonishing that a mineral interest was established in *Marias River Syndicate* despite the presence of the word "royalty," because there was no express clause providing for a royalty, no indication that the interest was free of costs, and no clear obligation to discover or produce oil and gas); *Stokes*, 328 P.2d at 1103 (discussing the manner in which "royalty" is construed and opining that the word has largely been ignored despite various court statements about strict construction). *But see* Hinerman v. Baldwin, 215 P. 1103, 1108 (Mont. 1923) (construing the word "royalty" strictly as a share of "the produce or profits paid" to the property owner).

295. *See* MONT. CODE ANN. § 70-1-513 (1990) (providing that grants of real property are interpreted in the same manner as contracts and along the same principles); *id.* § 28-3-401 (stipulating that if the instruments language is explicit and clear, such language governs interpretation); *see, e.g.*, Ferriter v. Bartmess, 931 P.2d 709, 711 (Mont. 1997) (affirming the trial court's recitation that an unambiguous instrument is construed by looking at its language); Proctor v. Werk, 714 P.2d 171, 172 (Mont. 1985) (upholding the Montana statutory provisions that govern deed interpretation); Peterson v. Hopkins, 684 P.2d 1061, 1063 (Mont. 1984) (promulgating the rule that "[w]here the language of a written contract is clear and unambiguous, there is nothing to construe and the duty of the court is to apply the language, as written, to the facts of the case").

296. *Id.*

297. *See* MONT. CODE ANN. §§ 28-2-905, 70-20-202 (1999) (permitting the consideration of outside evidence when the deed's language is ambiguous); *Proctor*, 714 P.2d at 172

NEW MEXICO

The language "in, on and under" generally creates a mineral interest.[298] However, deeds that indicate a retained "royalty" or "royalty interest" create a royalty interest.[299]

In the construction and interpretation of instruments, New Mexico courts follow the minority view, which no longer recognize the four corners approach.[300] In other words, outside evidence is entertained to determine the true intentions of parties regardless of whether the instrument is ambiguous.[301]

OKLAHOMA

In Oklahoma, the phrase "in and under" creates a mineral interest when no other provisions concerning minerals are present.[302] Under certain circumstances, terms such as "royalty" and "royalty interest" are construed as creating a mineral interest.[303] However,

---

(following Montana statutory law that extrinsic evidence is admissible to construe an ambiguous instrument); *Stokes*, 328 P.2d at 1103-04 (finding that when ambiguity is present in the instrument, parol evidence with respect to the parties' intentions should be considered by the court); Amundson v. Gordon, 328 P.2d 630, 633 (Mont. 1958) (stating that because the deed is unambiguous, no outside evidence should be considered).

298. *See* Atlantic Ref. Co. v. Beach, 436 P.2d 107, 111 (N.M. 1968) (recognizing that terms such as "in and under" and "thereunder" are ordinarily construed to convey a mineral interest, but holding a royalty interest is created because a great number of indicators show the parties intend to transfer a royalty interest).

299. *See* Duvall v. Stone, 213 P.2d 212, 215-16 (N.M. 1949) (acknowledging that an instrument that reserves minerals includes royalties).

300. *See* C.R. Anthony Co. v. Loretto Mall Partners, 817 P.2d 238, 242-43 (N.M. 1991) (reaffirming an earlier decision, which rejected the four corners standard); HNG Fossil Fuels Co. v. Roach, 656 P.2d 879, 882 (N.M. 1982) (recognizing that when ambiguities arise within a document, extrinsic evidence may be considered).

301. *See C.R. Anthony Co.*, 817 P.2d at 242-43 (holding that extrinsic evidence is allowed to construe the parties' intended agreement, including the content in which the contract was made, trade usage, and the parties' dealings and performance).

302. *See* Jolly v. Wilson, 478 P.2d 886, 887 (Okla. 1970) (interpreting the use of the language "in and under" to create a mineral interest, but noting that even though the word "royalty" is also used, the fact that no lease existed allows the interpretation as a mineral interest); Coker v. Hudspeth, 308 P.2d 291, 293-94 (Okla. 1957) (holding that the language, "in and under and that may be produced from" created a mineral interest); *see also* McNeill v. Shaw, 295 P.2d 276, 277-78 (Okla. 1956) (construing a mineral interest on the basis of the language "in or under"); 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 307.2, at 567 (2000) (finding mineral interests where no express easements for development and exploration are created).

303. *See Jolly*, 478 P.2d at 888 (implying a mineral interest where no lease existed and despite use of the word "royalty"); Cook v. McClellan, 311 P.2d 244, 246 (Okla. 1957) ("[T]he tendency of the court [is] to construe the term 'royalty' as used in its broad sense when there was no oil and gas lease upon the property, and to use it in its restricted sense

the existence of a lease on the land prior to the execution of the instrument allows a construction of terms such as "royalty" to reflect their plain meaning and create a royalty interest.[304] Moreover, use of the language "produced and saved" creates a royalty interest when other indications of a royalty interest are found[305] as well as when no other provisions concerning minerals are present.[306]

In other words, a mineral interest is created when a deed conveys or reserves "an undivided interest in minerals that may be produced."[307] However, when the holder of the interest has no rights to leasing, bonus, or rentals, a royalty interest is created.[308]

In the construction and interpretation of instruments, Oklahoma courts consistently apply the four corners rule.[309] When courts interpret ambiguous instruments, extrinsic evidence may be considered to assist in the determination of the intentions of the parties.[310]

---

when it appeared that the property was leased . . . . ") (quoting Purcell v. Thaxton, 216 P.2d 574, 576 (Okla. 1950)). *But see* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.12, at 525-26 (2000) (qualifying that there is no law that forbids the creation of royalties prior to a lease as in Kansas). Moreover, a royalty interest may be created by a conveyance of a fraction of a specified royalty such as 1/2 of 1/8 royalty regardless of the prior existence of a lease. *See id.* § 307.1, at 561 (referencing Sykes v. Austin, 77 P.2d 719, 720 (Okla. 1938), *and* Carroll v. Bowen, 68 P.2d 773, 776 (Okla. 1937)).

304. *See Jolly*, 478 P.2d at 887-88 (referencing George H. Bowen, *Pitfalls in Mineral Conveyancing in Oklahoma*, 9 OKLA L. REV. 133, 139 (1956) which states that absent a lease, the term "royalty" may be construed as a mineral interest).

305. *See* Fry v. Smith, 236 P.2d 699, 701 (Okla. 1951) (finding a royalty when the language "produced" was present).

306. *See* Casteel v. Crigler, 266 P.2d 643, 644, 646 (Okla. 1953) (relying expressly on the words "produced and saved" as an indicator of the creation of a royalty).

307. 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 307.3, at 569-70 (2000).

308. *Id.* at 570.

309. *See* Crockett v. McKenzie, 867 P.2d 463, 465 n.2 (Okla. 1994) (citing Oklahoma statutory law that the parties' intentions are construed by viewing the document as a whole); Messner v. Moorehead, 787 P.2d 1270, 1272 (Okla. 1990) (stating that when a court construes a conveyance it will view the four corners of the instrument in the context of the circumstances at the time of and preceding execution); Alpine Constr. Corp. v. Fenton, 764 P.2d 1340, 1342 (Okla. 1988) (citing *McNeil v. Shaw*, 295 P.2d 276 (Okla. 1956) for the proposition that an ambiguous contract's language is "the only legitimate evidence of what the parties intended").

310. *See Crockett*, 867 P.2d at 465 (reaffirming *Messner*'s holding that a "court has a duty to resolve" ambiguous instruments through consideration of extrinsic evidence); *Messner*, 787 P.2d at 1272-73 (opining that parol evidence is admissible to construe an ambiguous deed); *Alpine*, 764 P.2d at 1342 (stating that ambiguity in a document dictates

WEST VIRGINIA

West Virginia courts have found a mineral interest with a reservation containing the following description: "gas, oil and mineral rights."[311] Similarly, use of the language "in, on and under" creates a mineral interest when no other provisions concerning minerals are present.[312]

In contrast with the majority of states, terms such as "royalty" may create a mineral interest.[313] On the other hand, the language "that may be produced" or "minerals produced" does not create a mineral interest.[314]

In the construction and interpretation of instruments, Oklahoma courts have consistently applied the four corners rule.[315] However, West Virginia and Kentucky distinguish between patent or appar-

---

the use of extrinsic evidence); *see also* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.8, at 487 (2000) (recognizing the Oklahoma jurisdictional practice of allowing extrinsic evidence to determine the parties' intended meaning of ambiguous terms); Earl A. Brown, *Recent Developments in the Law of Oil and Gas—Acquisitions and Transfers*, 4 ROCKY MTN. MIN. L. INST. 1, 7-8 (1958) (citing *Lawson v. Earp*, 309 P.2d 721, 722 (Okla. 1956) in which the trial court's decision to admit parol evidence was overturned when the document was found unambiguous).

311. *See* Weekley v. Weekley, 27 S.E.2d 591, 594 (W. Va. 1943) (discussing in dicta the creation of a mineral interest through the use of such language).

312. *See* South Penn Oil Co. v. Haught, 78 S.E. 759, 760 (W. Va. 1913) (considering the language "in and under" as creating a mineral interest).

313. *See, e.g.*, Mfrs' Light & Heat Co. v. Knapp, 135 S.E. 1, 1 (W. Va. 1926) (construing the term "oil royalty" as transferring the minerals in place); Snodgrass v. Koen, 96 S.E. 606, 608 (W. Va. 1918) (holding that the grantors, which possessed royalties, conveyed all "their rights in the oil and gas"); Paxton v. Benedum-Trees Oil Co., 94 S.E. 472, 475 (W. Va. 1917) (holding that a reservation of royalties along with rentals and income, which are incidents of ownership, constitutes ownership of the oil and gas in place); *see generally* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.9, at 488, 492.1-497 (2000) (advancing one rationale for this construction as Lord Coke's rule, which states that "a reservation of the profits of the land is a reservation" of the land itself). *But see* McIntosh v. Vail, 28 S.E.2d 95, 98 (W. Va. 1943) (stating that the deed conveyed 1/16 of the marketed oil and the net proceeds of the gas sold); McDonald v. Bennett, 164 S.E. 298, 299 (W. Va. 1932) (interpreting a royalty interest from a reservation of "1/8 of all the oil and gas in and underlying . . . that may be produced therefrom, and the right of ingress and egress for the purpose of utilizing the same" because the right related to the ability of the grantor to enter the land to collect oil after production).

314. *See McIntosh*, 28 S.E.2d at 96-97 (describing a royalty interest as presupposing production or development); *McDonald*, 164 S.E. at 299 (interpreting a 1/8th oil and gas reservation coupled with the language "that may be produced therefrom" as a royalty interest).

315. *See Weekley*, 27 S.E.2d at 595 (employing the four corners approach with language accorded its common and accepted meaning when an instrument is unambiguous).

ent, and latent or hidden until enactment, ambiguities.[316] West Virginia courts only permit the consideration of extrinsic evidence when a latent ambiguity exists.[317] In contrast, courts reviewing documents with apparent ambiguities may not consider outside evidence and such instruments may be invalidated on the basis of their uncertainty.[318]

316. *See* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.14, at 533-34 & n.4-5 (2000) (citing Texas Co. v. Bowen, 167 S.W.2d 822 (Ky. 1943), *and* Paxton v. Benedum-Trees Oil Co., 94 S.E. 472 (W. Va. 1917)).

317. *See Paxton*, 94 S.E. at 476-77 (asserting that if an instrument is ambiguous, parol evidence is not considered). The *Paxton* court further stated that a writing is void if uncertainty persists when reviewing the writing. *Id.*

318. *See id.* (expressing that parol evidence is only admissible when a writing is unclear due to collateral matters other than the writing itself).