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# MINERAL OR ROYALTY—THE *FRENCH PERCENTAGE*

Richard C. Maxwell\*

I have examined the mineral/royalty distinction a number of times over the years. When one's name is linked with a topic in an index entry, it is easy to surmise that one may have said enough on the subject. In John Lowe's *Oil and Gas Law*, the index entry, "MAXWELL, RICHARD Mineral/royalty distinction, 129"<sup>1</sup> refers to the statement: "Richard Maxwell suggests that the real distinction between a mineral interest and a royalty is that a royalty is free of costs of production while a mineral interest is subject to expenses."<sup>2</sup> I first published this modest proposition in 1955,<sup>3</sup> and my latest comments on some of the implications of the idea were published in 1994.<sup>4</sup> Related studies appeared in the intervening years, some of which will be cited when appropriate. Whether my perennial concern with this topic is analogous to deep mining or seasonal plowing is for others to judge.

My long connection with this niche of oil and gas law brings to mind a conversation some years ago with Kenneth Pye (then Chancellor of Duke University) during which Kenneth mentioned that certain appointments in our School of Medicine were structured so as not to encourage further research in gross anatomy. Ken was an expert on many things, one of which was the management and conservation of academic resources which he pursued without fear or favor; but I do not think he would have found a problem in time spent by a retired professor in making a few more comments on a favorite topic. This essay<sup>5</sup> was inspired in part by *French v. Chevron U.S.A.*<sup>6</sup> The case, and reactions to it different from mine, has led me to think again about my analysis of the mineral-royalty

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1. JOHN S. LOWE, *OIL AND GAS LAW* 460 (3d ed. 1995).

2. *Id.* at 129.

3. Richard C. Maxwell, *The Mineral-Royalty Distinction and the Expense of Production*, 33 *TEX. L. REV.* 463 (1955).

4. Richard C. Maxwell, *Oil and Gas Conveyancing—Is There Truth in Labeling?* 33 *WASHBURN L.J.* 569 (1994).

5. *THE AMERICAN HERITAGE DICTIONARY* 448 (Standard ed. 1969) defines "essay" as "[a] short literary composition on a single subject, usually presenting the personal views of the author." Literary quality is hard to achieve with a subject such as this but the remainder of the definition describes my objective. I make a point of the word "essay" because I have no exhaustive law review style examination of cases in view.

6. 896 S.W.2d 795 (Tex. 1995).

distinction.<sup>7</sup>

Some introductory material is necessary to place the problems involved in context. The rights to oil and gas in the ground can be conveyed by a landowner giving the grantee all development rights together with the necessary easements to carry out that development. A landowner can also create interests which have no development rights but which give their owner a chance to participate in potential oil and gas production. The first sentence above describes a mineral conveyance, and the second describes a royalty conveyance. The first conveyance could rationally cover one hundred percent of the minerals in the land involved. The second must, as a practical matter, be a relatively small fraction of the land's minerals since it does not share in the expenses of mineral production and exists as a charge to be satisfied from the totality of that production when and if it occurs.

If the owner of the entire mineral estate conveys fifty percent of that ownership to another, the two become tenants in common and must resolve the difficulties of that relationship.<sup>8</sup> The interest of both parties is subject to the expense of production,<sup>9</sup> and an agreement for development setting out the rights and responsibilities of each cotenant can probably be reached with a minimum of difficulty.

On the other hand, if the owner of all the minerals in a tract of land conveys fifty percent of the potential production from that land as a royalty, a situation has been created where development may flounder on the unwieldy rights of the royalty owner if the language creating the interest is taken literally. Such an interest is a charge on the production from the land after it reaches the surface and after the expenses of procuring that production have been borne by the owner of the right to develop. It will take an unusually cheap and unusually productive well to make oil and gas operations on a tract so burdened economically feasible.<sup>10</sup>

A royalty, then, is less than a full mineral interest in conceptual terms since it encompasses only one attribute of such an interest; but it can be more than a mineral interest in economic terms when its share is stated as

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7. Martha Wach, Duke Law 1994, sent the case to me with a short note: "mineral bug." The reference was to a teaching device from my oil and gas class in which she was a student. I will explain the contribution to legal analysis of this excursion into entomology as my essay develops.

8. Lowe, *supra* note 1, at 84-88.

9. *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566, 573-74 (8th Cir. 1924).

10. Some courts have just not believed that the parties intended to create such giant royalties and have found them to be something else: an expense-bearing mineral interest carrying the same fraction. Thus, in *Simson v. Langholz*, 293 P.2d 302 (Colo. 1956), a conveyance of "49% of the oil and gas that may be produced" was read as "49% of all oil and gas . . . in place." *Id.* at 306. For this result the court cited Lord Coke's dictum: "For what is the land but the profits thereof?" *Id.* A less creative approach, but one which holds conveyancers to a decent standard of precision, is found in *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690 (Tex. 1986), where a conveyance of a "one-half non-participating royalty interest" was held to create just that, leaving the title examiner who construed the language as creating a "1/16th royalty as a defendant in a malpractice action." *Id.* at 691.

a share of gross production rather than as a percentage of royalty. Since a royalty is not expense-bearing, an interest that confers a right to a large share of potential production is likely to smother the economic value of the land it burdens unless a compromise can be reached which reduces such a royalty in exchange for development.

Investors' interests which are carved out of the underlying mineral estate do not usually involve large fractions of production. The speculative possibility of oil and gas being found in a particular tract may counsel a reservation of some sort of interest, royalty or mineral in nature, by the grantor when land is sold. A landowner may also sell an interest in a tract that is already producing oil and gas, turning future, speculative prospects into present cash. These are the transactions that typically generate the instruments that raise the questions with which this essay is concerned.<sup>11</sup> The interests created by these instruments can range from a tenancy in common in the mineral estate to a share of production with no executive powers, appropriately called "the stand alone royalty interest."<sup>12</sup>

A helpful example of one of these situations is found in *Barker v. Levy*,<sup>13</sup> where an interest in producing oil land was conveyed to a lawyer in payment for professional services. The fraction used in describing the interest was 1/160. A fractional full mineral interest of this size makes little sense. The owner would be a nuisance factor in negotiations for future leases since the interest would share the leasing power. The usual reason for creating a fractional interest of this size is to invest its owner with a share of production from the underlying mineral estate, not to convey a share of the management or development rights.

If the interest created is classified as royalty, it will entitle the grantee to 1/160 of the oil produced. If, on the other hand, a mineral interest has been created, it will be subject to the expense of production. At the time of the conveyance in *Barker v. Levy*, the land had been leased with a 1/8 royalty reserved. A 1/160 mineral interest would be entitled to 1/160 of that 1/8 landowner's royalty. The expense of production was borne by the mineral estate when the land was leased in a fashion that allocated 7/8 of the minerals to the lessee in return for a 1/8 landowner's royalty unburdened by production expenses. A 1/160 mineral interest conveyed subject to such a lease is entitled to 1/160 of the 1/8 royalty, or 1/1280 of the minerals produced. The larger the royalty reserved in the lease, the more oil and gas the fractional mineral owner will receive. A 1/160 royalty,

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11. The usual contract under which land is developed for oil and gas, the oil and gas lease, creates a "landowner's royalty or lessor's royalty" in the leasing party. *LOWE, supra* note 1, at 43 (emphasis in original). This interest, typically one-eighth or one-sixth of the oil "produced and saved" has raised problems different from those raised by interests carved out of the underlying mineral rights. The questions subsumed under the heading "mineral-royalty distinction" are found in the latter type of transactions.

12. See Bruce M. Kramer, *Royalty Interest in the United States: Not Cut from the Same Cloth*, 29 *TULSA L.J.* 449, 450 (1994).

13. 507 S.W.2d 613 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

however, will receive 1/160 of the production without regard to the size of the landowner's royalty that may be in place.<sup>14</sup> It will increase only as the gross amount of production increases.

The actual intent of the grantor in *Barker* is unknown.<sup>15</sup> The lawyer/grantee may have been overpaid by virtue of the royalty classification given to the language of the conveyance. The language used, however, is the classic royalty formula: "a 1/160th part of all the oil, gas, sulphur and all other minerals *that may be produced and saved*."<sup>16</sup> In Texas, such an interest could be conveyed by the straight-forward designation of a "1/160 royalty interest," but nuances of language can create problems that even so simple a solution as calling a royalty a royalty does not overcome.<sup>17</sup>

The *Barker* royalty is the royalty usually referred to when one speaks of the mineral/royalty distinction. It stands alone.<sup>18</sup> It is not a landowner's royalty, nor is it dependent on any landowner's royalty that may have been reserved in a lease on the land involved. The terminology "mineral/royalty distinction" suggests an equality of minerals and royalties, obscuring the fact that a royalty is always dependent on an underlying mineral interest. A sense of symmetry in the terminology may also be attributable to the fact that the owner of a mineral estate can create fractional interests, with identical fractions, some of them mineral in nature and some of them royalty in nature. Such an owner can convey a 1/16 mineral interest and a 1/16 royalty interest. The mineral estate from which the interests were carved<sup>19</sup> is, of course, now subject to both of these interests, and they must be taken into account when the land is to be leased. The impact of each of these interests on the returns to the owner of the remaining 15/16 mineral estate who leases the oil and gas

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14. If the owner of a mineral estate were to create a royalty interest carrying a fraction greater than a landowner's royalty in place, a breach of the warranty contained in the conveyancing instrument would occur.

15. See *LOWE*, *supra* note 1, at 127 ("The major reason that the mineral/royalty distinction is so hard to deal with is that the courts turn themselves inside out trying to ascertain the intent of the parties.").

16. *Barker*, 507 S.W.2d at 615 (emphasis added); see also 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, *OIL AND GAS LAW* § 304.7 (1995).

17. In *Caraway v. Owens*, 254 S.W.2d 425 (Tex. Civ. App.—Texarkana 1953, writ ref'd), the court found that a "fee royalty of 1/32 of the oil and gas" clearly reserved 1/32 of the oil and gas "received from said property." *Id.* at 426. Compare, however, *Acklin v. Fuqua*, 193 S.W.2d 297, 299 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.), where the addition of words of mineral significance, such as "the right to enter," made the interest mineral in spite of the interest being described as "royalty." In Oklahoma, the varying impact of the word "royalty" has been a factor in creating a body of law aptly characterized as a "labyrinth." See 1 WILLIAMS & MEYERS, *supra* note 16, § 307.1.

18. *Kramer*, *supra* note 12.

19. The distinction drawn here between interest and estate when discussing minerals is a matter of relative size. The word "estate" fits best the description of the rights held by one who is the grantee in a deed by the owner of the fee simple absolute severing all the minerals in the land from the surface. If the 1/160 interest in *Barker* had been characterized as "mineral," it would have appropriately been called a mineral "interest" even though it had all of the attributes of a mineral "estate" except the economic importance and negotiating power of full or nearly full ownership of the severed minerals.

reserving a 1/8 landowner's royalty is quite different, however. The owner of the outstanding 1/16 mineral interest has the leasing power and should be joined in the lease.<sup>20</sup> The 1/16 mineral interest will be entitled to a share of bonus and rentals, if the lease provides for them, and will receive 1/16 of the 1/8 landowner's royalty if the land is productive. The owner of the 1/16 royalty, on the other hand, need not be joined in the lease and will not share in bonus and rentals, unless they have been specifically conveyed.<sup>21</sup> The royalty owner is entitled to 1/16 of gross production. Its share does not depend on the size of the landowner's royalty. It will take 1/2 of the 1/8 royalty in this case but will take the same 1/16 of gross production if the landowner's royalty is 1/6 or any other fraction.

*French v. Chevron U.S.A.*<sup>22</sup> has a familiar statement of the attributes of mineral ownership. A "mineral estate" is said to consist "of five interests: 1) the right to develop, 2) the right to lease, 3) the right to receive bonus payments, 4) the right to receive delay rentals, and 5) the right to receive royalty payments."<sup>23</sup> Just as total ownership of land is "divided or fragmented,"<sup>24</sup> when the mineral estate is severed from the surface estate, the mineral estate too can be divided into various interests and combinations of interests.

It is apparent that the classic image of the "bundle of sticks"<sup>25</sup> is as useful in describing the content of a mineral estate as it is with the total ownership of land in fee simple absolute. However, the rather special nature of oil and gas conveyancing has inspired variations on this theme. Professor Edwin Horner<sup>26</sup> has used the image of a basket of fruit, and I have used a less succulent teaching tool, the "mineral bug." The various appendages of this creature, representing aspects of the mineral estate (or interest), can be removed from the four-legged bug on a chalk board, one by one, leaving the body of the bug to represent something that may, on analysis, be the essence of that estate.<sup>27</sup>

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20. The owner of the fractional mineral interest and its grantor are tenants in common. Under the majority rule, a tenant in common can remove minerals without liability for waste, accounting to a passive or non-joining tenant in common for its share of production minus the "proportionate share of the costs of operating, after all drilling and completion costs [have] been recovered." *LowE, supra* note 1, at 86-87. The uncertainties of the standards for the accounting make joinder in the lease highly preferable, whatever the law of waste may be in a particular jurisdiction.

21. See *Ritter v. Harriss*, 267 S.W.2d 241, 242 (Tex. Civ. App.—Eastland 1954), *aff'd*, 279 S.W.2d 845 (Tex. 1955), where an instrument reserved "one-half of one-eighth of the oil, gas and other mineral royalty that may be produced from said land," and also reserved "one-half of any bonuses or rentals that may be paid under the terms of any mineral lease."

22. 896 S.W.2d 795 (Tex. 1995).

23. *Id.* at 797 (citing *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986)).

24. LAWRENCE W. WAGGONER, *ESTATES IN LAND AND FUTURE INTERESTS* 12 (2d ed. 1993).

25. John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1.

26. Letter from Edwin P. Horner, Professor Emeritus, Baylor University, to the author (Nov. 20, 1995) (on file with author).

27. Maxwell, *supra* note 4, at 570.

The mineral bug can be given a development head, a leasing power leg, a royalty leg, a rental leg, and a bonus leg, all attached to an expense-bearing body. The device works well in analyzing the common practice of first conveying a full mineral interest and then verbally stripping away some of the mineral attributes, to leave something less than a full mineral interest in the grantee. For example, our mineral bug may have been divested of its development head and its leasing leg. Is a headless, three-legged mineral bug still a mineral bug?

*French v. Chevron U.S.A.* illustrates and, to a degree, answers this and related questions but leaves room for discussion and, for me, mild criticism. Paragraph I of the deed granted a "1/656.17th interest in and to all of the oil, gas and other minerals, in, under and that may be produced" from the described land.<sup>28</sup> Although there are few, if any, universal truths to be found in the cases dealing with oil and gas conveyancing, the above language from *French* represents a "common method of creating a mineral interest."<sup>29</sup>

Assuming for the moment the mineral nature of the interest created in the absence of additional language, if this interest joins in a lease in which a 1/8 royalty is reserved, it will be entitled to 1/656.17 of the 1/8 royalty and will take the same percentage of delay rentals and any bonus that is paid for the lease. As has been noted, to leave in so small an interest the capacity of exercising the leasing power and enjoying its associated rights complicates future transactions and is not usually desired by either party to the transaction.

Thus, in *French*, the creation of paragraph I is cut down in the next. Paragraph II specifies that "this conveyance is a royalty interest only" and then states that the interest shall have no right to rentals nor any control over leasing and development.<sup>30</sup> The grantee's suit claims a royalty; both parties eschew ambiguity and move for summary judgment.<sup>31</sup>

The dispute is framed in terms of mineral or royalty, but there is no question of the location of the leasing or development power or of the right to receive a share of bonus or rentals. These attributes of mineral ownership have been specifically stated to be absent from the interest under judicial scrutiny. The grantee's claim of royalty status for its interest is a claim for a greater allocation of production than would accrue to an expense-bearing mineral interest. Unlike a 1/656.17 mineral interest, a 1/656.17 royalty interest will not take that fraction of a 1/8 landowner's royalty but will, instead, take 1/656.17 of total production since it is free of expense of production and thus not tied to what the holder of the leasing power has been able to bargain for in percentage of landowner's royalty.<sup>32</sup> The *French* court, in traditional fashion, states that its "primary

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

29. See 1 WILLIAMS & MEYERS, *supra* note 16, § 304.5.

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

31. *Id.* See 1 WILLIAMS & MEYERS, *supra* note 16, § 304.14, on the reluctance of courts "to designate oil and gas instruments as ambiguous."

32. Kramer, *supra* note 12, at 450.

duty is to ascertain the intent of the parties from the language of the deed by using the 'four corners' rule."<sup>33</sup>

The conflict to be resolved is the reconciliation of "paragraph one, which appears to convey a mineral estate," with "paragraph two, which explicitly states that only a royalty interest is being conveyed."<sup>34</sup> The negotiations of various mineral attributes in paragraph two are explained as stating "the consequences of the 'royalty only' description."<sup>35</sup>

The court concludes that the interest created by the conveyance in dispute is a "1/656.17 mineral interest with reservation of all developmental rights, leasing rights, bonuses, and delay rentals."<sup>36</sup> This interest is, says the court, "in essence, only a royalty interest" as is stated in paragraph II of the conveyance.<sup>37</sup>

As this essay has argued, if the "essence" of the interest is royalty, the basic question is "how much" is resolved in favor of the grantee who will take its fractional interest of the *total* production. The court's analysis in *French* meets this problem by noting that "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."<sup>38</sup>

Judicial intervention thus seems to supply the "*of*" that makes the interest expense-bearing in the sense that it shares in production only to the extent of its percentage of the royalty obtained when the land is leased. Such an interest does exist. It is sometimes called a *Corpus Christi* royalty, after the well-known case *State National Bank of Corpus Christi v. Morgan*,<sup>39</sup> which dealt with a conveyance of "1/2 . . . of the royalty in oil, gas . . . and in all other minerals . . . produced . . . from the above described land."<sup>40</sup> When the land was leased with a 1/8 landowner's royalty and an oil payment of \$48,000 out of 1/8 of 7/8 of production, the grantee unsuccessfully claimed 1/2 of the oil payment. The court did not see the issue as calling for a mineral/royalty determination, although the issue could have been so phrased in a conveyancing structure such as that of Oklahoma, where the word "royalty" can sometimes mean "mineral."<sup>41</sup> Classifying the interest as mineral, with no limitations, would entitle its

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33. 896 S.W.2d at 796 (citing *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991)); see also Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH. L. REV. 1, 65 (1993) (discussing the four corners canon).

34. *French*, 896 S.W.2d at 797.

35. *Id.* at 798.

36. *Id.* at 797.

37. *Id.*

38. *Id.* at 798 (emphasis in original).

39. 143 S.W.2d 757 (Tex. 1940).

40. *Id.* at 758. The question for decision was the right of the owner of this royalty interest to participate in an oil payment of \$48,000 payable out of 1/8 of 7/8 of production that was reserved as a part of a leasing transaction in which a 1/8 royalty was also reserved. The court held that there was no right in the royalty owner to participate in the oil payment.

41. See *supra* note 17.



owner to share in the oil payment without regard to whether that payment is classified as bonus or royalty. In *Morgan*, however, the Texas court adopted the plain meaning of the words "1/2 . . . of the royalty" as creating a royalty interest and went on to find that the oil payment as written was bonus and thus not part of a royalty owner's entitlement.<sup>42</sup>

A fractional share "of" royalty carries the same percentage of a landowner's royalty as does the same fractional share of minerals. The entitlement of a full mineral interest to whatever benefits (bonus, rentals, or royalty) are reserved in the lease it executes has been pointed out. The omission of the word "of" in the *Morgan* conveyance would have presented the situation of the giant royalty which some courts have cut down to a workable size by, in effect, adding an "of" to the conveyancing language.<sup>43</sup>

The *French* opinion can be read as a case in which the court has added a judicial "of" to a conveyance devoid of that word. The court makes the standard obeisance to the "intent of the parties [which] must be looked to and must govern."<sup>44</sup> Adding "of" to mitigate a giant royalty and create a workable transaction might be a rational result of a search for "the purpose or intent of the parties as expressed in the entire instrument,"<sup>45</sup> but no such royalty is involved in *French*. An allocation of 1/656.17 will not impede development, whether it measures a percentage of gross production or a fraction of landowner's royalty.

The court seems to have found the former, a percentage of gross production, when it notes that "the conveyance grants, in essence, only a royalty."<sup>46</sup> Paragraph I of *French*, which purports to grant "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,"<sup>47</sup> seems, at that point in the opinion, to be surplusage. The opinion goes on, however, to describe the subject of its consideration as "an interest in the nature of a royalty—a mineral interest stripped of appurtenant rights other than the right to receive royalties."<sup>48</sup> Finally, the opinion concludes: "[W]hen 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."<sup>49</sup>

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42. *Morgan*, 143 S.W.2d at 758. Cf. *Griffith v. Taylor*, 291 S.W.2d 673 (Tex. 1956), where a 1/8 landowner's royalty plus an additional 1/16 share of production was all to be shared with the owner of an interest described as 1/2 of royalty.

43. See cases discussed *supra* at note 10, especially the *Gavenda* case, where the Texas Supreme Court refused curative judicial intervention, leaving the parties to take the consequences of the 1/2 royalty that careless drafting had produced.

44. *French*, 896 S.W.2d at 797.

45. See *Kramer*, *supra* note 33, at 44.

46. *French*, 896 S.W.2d at 797.

47. *Id.* at 796.

48. *Id.* at 798.

49. *Id.* (emphasis in original).

This judicial analysis can be added to the earlier explanation of the reservation in the grantor as the "right to receive delay or other rentals, or any revenues from . . . leasing" which the court considered to be a redundant reservation if "the interests in minerals being conveyed was a 1/656.17 royalty interest, that is, 1/656.17 of all production."<sup>50</sup> Since a royalty does not include those benefits, the court appears to have pursued the intent of the parties through the nuances of the wording before it with minimum reliance on conveyancing formulas and their concomitant labels. It is not fanciful to argue, on this view of the case, that the court needed the word "of" to round out its conclusion as to the parties' intent, drawn from the "four corners," so it added the word.<sup>51</sup>

My reading of *French* differs from the above analysis. I believe that *French* is an example of a process described by Professor Patrick Martin: "[T]he court has norms of expression by which it measures the language used by the parties. Use of certain words will be presumed to have certain meaning and to have intended certain consequences. Those who wish other consequences will not choose those words."<sup>52</sup> The *French* court states that the language in Paragraph I of the deed under consideration "appears to convey a mineral estate."<sup>53</sup> Indeed, the language "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"<sup>54</sup> is "the most common method of creating a mineral interest."<sup>55</sup> Since an undivided mineral interest bears its share of the expense of producing minerals, it automatically takes that percentage of royalty equivalent to its undivided share of the expense-bearing ownership. The word "of" is not necessary to bring about this result. Thus, if language is used that creates a 1/4 mineral interest, and that interest is subjected to a lease reserving a 1/8 landowner's royalty, its owner will share in 1/4 of 1/8 of the production from the land involved.

A problem arises, of course, when the mineral language is followed by other language stripping away some of the mineral elements. To revert to my classroom example, the question may be asked whether a mineral bug divested of its development head, and its leasing, bonus, and rental legs is still a mineral bug, or whether the body takes on the name and characteristics of its remaining appendage, the royalty leg. With a small fractional interest involved, the difference may not be crucial, though worth arguing

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50. *Id.*

51. Professor Edwin Horner (*see supra* note 26), in an able amicus brief supporting "the motion for rehearing applied for by Petitioner [the grantee] in *French*," argues "that the court is in error in inserting the word 'OF' in stating that the grantee received 1/656.17 OF the royalty, unless it is the intent of and purpose to overrule *Watkins v. Slaughter* [144 Tex. 179, 189 S.W.2d 699 (1945)]." Amicus Curiae Brief at 8, *French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795 (Tex. 1995) (No. 94-0377). *See infra* note 72 and accompanying text for a discussion of *Watkins*.

52. Patrick H. Martin, *Recent Developments in Nonregulatory Oil and Gas Law*, 37 INST. ON OIL & GAS L. & TAX'N 1-1, 1-8 (1986).

53. 896 S.W.2d at 797.

54. *Id.* at 796.

55. 1 WILLIAMS & MEYERS, *supra* note 16, § 304.5.

about. If the fraction is large, however, perhaps 1/4 or 1/2, the land may become unmarketable for mineral development purposes if a royalty classification is reached.

For example, in the often noted Mississippi case of *Harris v. Griffith*,<sup>56</sup> a deed form was utilized which, unaltered, would have created "a fractional interest in the minerals in place."<sup>57</sup> The parties made changes that left bonus, rentals, and the leasing power in the grantors. The court held that this instrument conveyed "a non-participating royalty" but recognized that it might be called a "non participating mineral interest."<sup>58</sup> Whatever it was called, however, it was "in substance a royalty interest" to be distinguished from a "non executive mineral interest."<sup>59</sup> The latter was defined "as the right to royalty and to either bonus or rental, or both, under existing or future leases, the owner of which has no development right and no executive right."<sup>60</sup>

The problem presented to the *Harris* court by the litigants was the location of the power to lease. After determining that the power remained in the grantor,<sup>61</sup> the court commented that "the amount of royalty due" had not been adjudicated and was open "in the event of a disagreement concerning it."<sup>62</sup> There is no report of any such disagreement, but if the interest described in *Harris* is indeed a 1/4 royalty, it should be entitled to 1/4 of the gross production. The share of its owner, the grantee, will be free of the expense of production. There is no "of" in the instrument to justify speaking of a share of landowner's royalty. A portion of the deed with which the parties started their drafting process in *Harris* had a clause providing for participation in lease benefits, including landowner's royalties, to the extent of the percentage of undivided interest conveyed. That clause was stricken. If such a clause is present, there is no purpose in classifying a "non-participating mineral interest" as mineral or royalty. The interest will take its percentage of landowner's royalties under the clause without regard to the mineral/royalty distinction.

56. 210 So. 2d 629 (Miss. 1968). *Harris* was overruled in *Thornhill v. System Fuels, Inc.*, 523 So. 2d 983 (Miss. 1988), on the matter of the location of the leasing power. For a detailed critique of *Thornhill*, see Maxwell, *supra* note 4.

57. 210 So. 2d at 633. The printed portion of the instrument described its subject as an "undivided One-quarter (1/4) interest in and to all of the oil, gas and other minerals of every kind and character in, on or under" the described land. *Id.* at 631.

58. *Id.* at 633-34.

59. *Id.* at 634.

60. *Id.* at 634 (citing 1 WILLIAMS & MEYERS, *supra* note 16, § 301). The passage in the treatise goes on to state the "contention that a nonexecutive mineral interest is nothing more than a royalty interest that also shares in bonus and rental." *Id.* Obviously, a "non participating mineral interest," although not mentioned, should, on this theory, also be "nothing more than a royalty interest." Whether the interest takes its fraction of gross production or its fraction of the royalty reserved in a lease is finessed when the treatise notes that its "description of royalty and nonexecutive interests has proceeded on the assumption that at the time of transfer an oil and gas lease existed . . . and that the transfer created a right to share in benefits under the existing lease or under it and future leases." *Id.*

61. Note that *Harris* has been overruled on this point. See *supra* note 56.

62. 210 So. 2d at 636.

Thus, in *Hasty v. McKnight*,<sup>63</sup> the grantor of an "undivided *One half* interest in and to all of the oil, gas and other minerals in and under, and that may be produced from" described land<sup>64</sup> reserved "the right . . . to lease the minerals . . . and to receive all bonus money and delay rentals accruing therefrom after termination of the existing lease."<sup>65</sup> The court found that this language reduced "the mineral grant to a perpetual grant of a non-participating royalty interest in the tract's minerals."<sup>66</sup>

In *Hasty*, however, the instrument provided that the grantee should share "*one half interest* of all of the oil royalty and gas rental or royalty due and to be paid under the terms of [the present and any future lease]."<sup>67</sup> The "of" is written into the transaction by the parties; it need not be supplied by an analysis of the instrument as creating a 1/2 mineral interest which, by its expense-bearing nature, would take its percentage of a landowner's royalty and not of gross production.

I submit that an analysis leading to a mineral classification with an inherent "of" is appropriate in *French*, although the fraction 1/656.17 is certainly not destructive of the land's development possibilities. In any event, if the language before the court calls for the fixation of a particular label to the interest created by virtue of the "norm of expression" used,<sup>68</sup> the size of the fraction should be irrelevant. *Gavenda v. Strata Energy, Inc.*<sup>69</sup> is certainly authority for the proposition that, if the court finds language that constitutes "a norm of expression,"<sup>70</sup> the language will be given an appropriate meaning unless "a contrary intent is expressed."<sup>71</sup> *Watkins v. Slaughter*<sup>72</sup> was a key case in the argument made by the grantees in favor of a royalty classification in *French*. Professor Horner argues that *French* has overruled *Watkins* sub silentio.<sup>73</sup> This is indeed a close question. The cases are much alike. A distinction must turn on the *Watkins* language that the grantor shall "receive the royalty retained herein

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63. 460 S.W.2d 949 (Tex. Civ. App.—Texarkana 1970, writ ref'd n.r.e.).

64. *Id.* at 950.

65. *Id.* at 953.

66. *Id.*

67. *Id.* at 950.

68. See Martin, *supra* note 52, at 1-8.

69. 705 S.W.2d 690 (Tex. 1986); see *supra* note 10.

70. See *supra* note 52. The "norm of expression" in *Gavenda* was "one-half (1/2) non-participating royalty." 705 S.W.2d at 690. The interest created took 1/2 of the gross production.

71. *French*, 896 S.W.2d at 797 (citing *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669 n.1 (Tex. 1990), for the proposition that "[w]hen an undivided mineral interest is conveyed, reserved, or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intent is expressed." *Day* dealt with the question whether the executive power had to be specifically mentioned to be transferred.)

72. 189 S.W.2d 699 (Tex. 1945).

73. Horner, *supra* note 51, at 2. Another able scholar suggested long ago that the decision in *Watkins* could turn on the idea that, with the right to lease and to receive bonus and rentals separated from the interest to be classified, the only thing left is royalty. See Charles J. Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests*, 32 TEX. L. REV. 369, 390 (1954).

only from actual production."<sup>74</sup> This language can be read as an expression of "contrary intent" which overcomes the language of "normative" mineral significance which precedes it.<sup>75</sup> It arguably expresses an intent that the interest in question is to receive its share of production only after the expense of production has been incurred.

My mild criticism of the *French* opinion is directed toward process, not result. Paragraph I of the *French* conveyance, standing alone, should create a 1/656.17 mineral interest.<sup>76</sup> Paragraph II removes from the interest described in paragraph I all attributes of a mineral interest which the court has listed but a right to receive royalty:<sup>77</sup> "[i]t is understood and agreed that this conveyance is a royalty interest only."<sup>78</sup> Nothing is said specifically of the expense-bearing characteristic of a mineral estate. The court does point out that the words of paragraph II stating that the "grantee has no control over 'the making of any lease contract to develop or prospect'" should be read "as reserving the right to develop in the grantor."<sup>79</sup> Has the classic mineral language of paragraph I been obliterated by the statement in paragraph II "that this conveyance is a royalty interest only?"<sup>80</sup> The court comes close to saying so in its statement that "[t]he conveyance grants, in essence, only a royalty interest, as stated in the second paragraph."<sup>81</sup> That this is not what is meant to be communicated is clarified by the court's statement that the mineral interest created in paragraph I survives the removal of mineral elements in paragraph II and becomes "a mineral interest stripped of appurtenant rights other than the right to receive royalties."<sup>82</sup>

The use of such a teaching aid as the mineral bug is somewhat fraudulent unless it can be tied to reality. Thus, one can effectively argue that, if all mineral elements have been removed in the *French* conveyance, then what is left is royalty. A reference to the mineral bug can, in my experience, help in visualizing the full implications of a conveyance such as that in *French*. When the various appendages (or appurtenances) of this creature are removed, usually leaving a body with a royalty leg, the body (mineral by virtue of the verbal formula used and bearing the expense of production) remains and is still mineral, unless the essence of such an estate has itself been eliminated by other language in the instrument.

74. 189 S.W.2d at 699. The opinion of the court of appeals in *French* made much of this "direct language of royalty" in distinguishing the cases. *French v. Chevron USA, Inc.*, 871 S.W.2d 276, 278 (Tex. App.—El Paso 1994), *aff'd*, 896 S.W.2d 795 (Tex. 1995).

75. The mineral language is a "1/16 interest in and to all the oil, gas and other minerals in and under and that may be produced from said land." 189 S.W.2d at 699.

76. See 1 WILLIAMS AND MEYERS, *supra* note 16, § 304.5.

77. See *supra* note 23 and accompanying text.

78. *French*, 896 S.W.2d at 796 (emphasis in original).

79. *Id.* at 796, 797 n.1.

80. *Id.* at 796.

81. *Id.* at 797. Such an interest is characterized by Professor Kuntz as a "non-participating mineral interest." See 1 EUGENE KUNTZ, OIL AND GAS § 15.3 (1962 & Supp. 1994).

82. 896 S.W.2d at 798.

It is confusing to note that what remains in *French* is indeed royalty of a sort, but a royalty that is best described as an interest "in the nature of a royalty,"<sup>83</sup> the essence of which is still mineral, bearing the expense of production and participating in production as "a fraction of [landowner's] royalty, not a fixed fraction of total production royalty."<sup>84</sup> It is, however, comforting to note that, if the fraction of minerals set out in paragraph I of the *French* conveyance had been 1/2, the *French* analysis would not result in the stripped mineral interest metastasizing into a catastrophic *Gavenda*<sup>85</sup> royalty of 1/2 the total production. The grantee would be entitled only to 1/2 of the royalty reserved by the holder of the executive rights with the "of" supplied by the intrinsic expense-bearing mineral character of the interest, not the court.

To seriously analyze conveyances such as these is not to approve of them as models of the conveyancer's art. Many of them, of course, are not the result of a level of skill that can be characterized as art. We have not, however, chosen a system in which only officially approved documents are admitted to the property records. For the most part, we have the freedom to draft in whatever form we wish documents that will have a permanent place in the land records and take the consequences. The consequences are frequently litigation, which often adds a complexity to our legal system that can undermine "the ability of the profession to give a high level of professional service at a price that the public will be willing to pay."<sup>86</sup> In my opinion *French* adds clarity to the law of oil and gas, but it is clear that judges, lawyers and scholars can and do differ on the distinction between minerals and royalties.

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83. *Id.*

84. *Id.*

85. See *supra* note 10.

86. Richard C. Maxwell, *Some Recent Mineral-Royalty Cases—Micro-Law in a Macro-World*, 28 OKLA. L. REV. 545, 553 (1975).

