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DUHIG TO DATE: PROBLEMS IN THE CONVEYANCING OF FRACTIONAL MINERAL INTERESTS

by

Will G. Barber*

Probably not a day passes without a Texas attorney drafting a deed or lease for execution by the owner of a fractional mineral interest. Hardly a year passes in Texas without one or more of these transactions causing litigation to determine the quantum of mineral interest which passes to the grantee or lessee.¹ Potential in each transaction are two litigious problems. One is that the language used may create an uncertainty, conflict, or ambiguity as to the quantum of mineral interest which the instrument purports to convey or lease. The other is that the fractional mineral interest owned by the grantor or lessor may be insufficient to satisfy both the fractional mineral interest which the deed or lease purports to convey or lease and that which it purports to reserve. For convenience the first problem will be referred to as the "which fraction" problem, the second as the "insufficient fraction" problem.²

The foremost case in this area of oil and gas law is *Dubig v. Peavy-Moore Lumber Co.*,³ which has generated considerable controversy among the members of the bench and the bar. Illustrative of the divergent views regarding the *Dubig* case are the three opinions of the Texas Supreme Court in *McMahon v. Christmann*.⁴ The recent case of *Miles v. Martin*⁵ evidences continuing judicial discomfort, if not dissatisfaction, with results reached in certain instances under the rule in the *Dubig* case.

The primary purpose of this Article is to synthesize in outline form the Texas cases which have sought to solve the "which fraction" and "insufficient fraction" problems in deeds and leases from owners of a fractional mineral interest.⁶

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¹ This Article pertains to both royalty and mineral interests. Regarding the distinction between the two interests and its importance in drafting legal instruments, see generally 3-A Summers, *Oil and Gas* § 599 (perm. ed. 1958); Maxwell, *The Mineral-Royalty Distinction and the Expense of Production*, 33 *Texas L. Rev.* 463 (1955); Stanton, *Recent Developments in the Construction of Mineral and Royalty Grants and Reservations*, Southwestern Legal Foundation Seventh Annual Inst. on Oil & Gas L. & Tax. 301 (1956); Discussion Notes, 8 *Oil & Gas Rep.* 340 (1958); 7 *Oil & Gas Rep.* 330 (1957); 3 *Oil & Gas Rep.* 480 (1954); 1 *Oil & Gas Rep.* 509 (1952).

² Compare the "double fraction" terminology in Masterson, *Double Fraction Problems in Instruments Involving Mineral Interests*, 11 *Sw. L.J.* 281 (1957).

³ 135 *Tex.* 503, 144 *S.W.2d* 878 (1940).

⁴ — *Tex.* —, 303 *S.W.2d* 341, 304 *S.W.2d* 267 (1957), 7 *Oil & Gas Rep.* 610.

⁵ — *Tex.* —, 321 *S.W.2d* 62 (1959).

⁶ No cases from other jurisdictions are cited; one federal case applying Texas law is cited.

I. DEED TRANSACTIONS

A. Posing The "Which Fraction" Problem

Posed in question form, the "which fraction" problem is: Does the disputed deed purport to convey a designated fraction of (a) the *entire* mineral interest in certain land, or (b) the grantor's *fractional* mineral interest in that land.⁷ To illustrate:

Example: O owns an undivided $\frac{1}{2}$ of the entire mineral interest in Blackacre. A deed from O to A designates " $\frac{1}{2}$ " as the fraction to be conveyed. "*Which Fraction*" Problem: Does the designated fraction purport to convey (a) $\frac{1}{2}$ of the entire mineral interest, or (b) $\frac{1}{2}$ of O's $\frac{1}{2}$ mineral interest?

This example exemplifies the type of dispute which may arise as to the proper basis for computing a fraction designated in a deed. The fractional difference when expressed mathematically may often seem slight, but when translated into monetary terms it can be quite significant.

B. Solving The "Which Fraction" Problem

The general principles stated by the courts in resolving the "which fraction" problems and the application of these principles will be discussed below.

1. General Principle: Intention of the Parties

In determining the quantum of mineral interest which a deed purports to convey, the controlling issue is, of course, the intention of the parties. That intention is to be ascertained from the entire instrument,⁸ construed according to established rules for the interpretation and construction of deeds.⁹ One of these rules is especially important. If the deed is classified as "unambiguous," the court will determine the intention of the parties solely from the language of the deed, in the absence of fraud, accident, or mistake;¹⁰ if, however, the

⁷ Other similar statements of the problem are found in Masterson, *supra* note 2, at 281; Masterson, A 1952 Survey of Basic Oil and Gas Law, 6 Sw. L.J. 1, 30 (1952); Case Note, 25 Texas L. Rev. 100 (1947); Discussion Notes, 5 Oil & Gas Rep. 1253 (1956); 1 Oil & Gas Rep. 965, 1878 (1952); Annot., 163 A.L.R. 132 (1946).

⁸ Harris v. Windsor, 156 Tex. 324, 294 S.W.2d 798 (1956), 6 Oil & Gas Rep. 1234; Woods v. Sims, 154 Tex. 59, 273 S.W.2d 617 (1954), 4 Oil & Gas Rep. 193; Bengé v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166 (1953), 2 Oil & Gas Rep. 1350. See also 31-A Tex. Jur., Oil and Gas § 40 (1947).

⁹ Authorities cited note 8 *supra*. See also 14-B Tex. Jur., Deeds §§ 124-50 (1956).

¹⁰ American Republics Corp. v. Houston Oil Co., 173 F.2d 728 (5th Cir. 1949); Bengé v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166 (1953); Young, Parol Evidence and Texas Deeds: Some Current Problems, 34 Texas L. Rev. 351 (1956); Discussion Notes, 1 Oil & Gas Rep. 154 (1952); 31-A Tex. Jur., Oil and Gas § 41 (1947).

deed is classified as "ambiguous," the court will admit and consider certain extrinsic evidence for the purpose of construing, but not varying, the terms of the instrument.¹¹

2. The "Described" Rule versus The "Conveyed" Rule

In applying the above general principle, the courts have distinguished between language referring to land *described* in the deed and language referring to land *conveyed* by the deed.

a. *The "Described" Rule.*—Where a fraction designated in a deed is stated to be a mineral interest in land described in the deed, the fraction is to be calculated upon the entire mineral interest.

(1) *Cases involving a granting clause.*—In *Clemmens v. Kennedy*¹² a granting clause which purported to convey an undivided $\frac{1}{2}$ mineral interest in the "following described land" was held to convey $\frac{1}{2}$ of the entire mineral interest and not $\frac{1}{2}$ of the grantor's $\frac{1}{2}$ mineral interest. In *Spell v. Hanes*¹³ a granting clause which purported to convey an undivided $\frac{1}{4}$ mineral interest in the "following described lands" was given the same effect, notwithstanding a subsequent provision that the "above grant is to apply to our [grantors'] undivided interest in and to above described land." In accord with these holdings is *Humble Oil & Ref. Co. v. Harrison*,¹⁴ in which the supreme court concluded that a clause providing that "one-half ($\frac{1}{2}$) of the money rentals [delay rentals], which may be paid, on the above described land . . . is to be paid to said Grantee" means $\frac{1}{2}$ of the entire rentals and not $\frac{1}{2}$ of the grantor's fractional interest therein.¹⁵

¹¹ *Fantham v. Goodrich*, 150 Tex. 601, 244 S.W.2d 519 (1952), 1 Oil & Gas Rep. 153; Discussion Notes, 1 Oil & Gas Rep. 153 (1952); 31-A Tex. Jur., Oil and Gas § 41 (1947). See also Young, *supra* note 10, at 352. For a statement of the test for determining whether an instrument is "ambiguous," see *McMahon v. Christmann*, — Tex. —, 303 S.W.2d 341 (1957), 7 Oil & Gas Rep. 610. But cf. *Neece v. A.A.A. Realty Co.*, — Tex. —, 332 S.W.2d 597 (1959). To be distinguished is the rule regarding when a deed and separate instruments may be construed together as one transaction and agreement. See *Miles v. Martin*, — Tex. —, 321 S.W.2d 62 (1959); 31-A Tex. Jur., Oil & Gas § 42 (1947).

¹² 68 S.W.2d 321 (Tex. Civ. App. 1934) error ref. "On all fours" with the *Clemmens* case is *King v. Cron*, 285 S.W.2d 833 (Tex. Civ. App. 1955) error ref. n.r.e., 5 Oil & Gas Rep. 1250 (1956).

¹³ 139 S.W.2d 229 (Tex. Civ. App. 1940) error dism. judgment. cor.

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

¹⁵ Also in accord with the cited holdings is *Sims v. Woods*, 267 S.W.2d 571 (Tex. Civ. App. 1954), 3 Oil & Gas Rep. 1528, *aff'd*, 154 Tex. 59, 273 S.W.2d 617 (1954), 4 Oil & Gas Rep. 193. There a deed purported to convey an undivided $\frac{25}{200}$ mineral interest in land described by metes and bounds, and an intention clause defined the quantum to be conveyed as an undivided twenty-five acre mineral interest in the "above described lands." The land actually contained 226.88 acres. The court of civil appeals held that the deed conveyed an undivided $\frac{25}{226.88}$ (rather than $\frac{25}{200}$) mineral interest; there was no appeal from this part of its judgment.

(2) *Cases involving a reservation clause.*—In *McElmurray v. McElmurray*¹⁶ the granting clause purported to convey all of the grantor's undivided interest in "land described here below," and a prior clause purported to reserve an undivided $\frac{1}{2}$ mineral interest in "the land herein described" (also referred to as "the following described land"). The court held that the deed reserved to the grantor an undivided $\frac{1}{2}$ of the entire mineral interest. To the same effect is the earlier case of *King v. First Nat'l Bank*.¹⁷ In the *King* case, a clause reserving an undivided $\frac{1}{8}$ of the usual $\frac{1}{8}$ royalty interest in the "hereinabove described land" was construed to reserve $\frac{1}{8}$ of the entire royalty interest in the land described, even though the granting clause purported to convey only the grantor's undivided $\frac{1}{2}$ mineral interest in the described land.¹⁸

b. *The "Conveyed" Rule.*—Where a fraction designated in a reservation clause is stated to be a mineral interest in land conveyed by the deed, the fraction is to be calculated upon the grantor's fractional mineral interest except where the granting clause purports to convey the entire mineral interest.

(1) *Cases where the granting clause purports to convey the grantor's fractional mineral interest.*—In *Hooks v. Neill*¹⁹ the deed purported to convey all of the grantor's undivided $\frac{1}{2}$ interest in described property and to reserve $\frac{1}{32}$ of all oil in "the said land and premises herein described and conveyed." Relying upon the word "conveyed," the court concluded that the clause reserved $\frac{1}{32}$ of the grantor's undivided $\frac{1}{2}$ oil interest rather than $\frac{1}{32}$ of the entire oil interest. Following the *Hooks* case is *Dowda v. Hayman*,²⁰ where the issue of "which fraction" was reserved in the deed turned upon the word "conveyed."²¹

(2) *Cases where the granting clause purports to convey the entire mineral interest.*—The writer knows of no Texas case in which a deed from the owner of a fractional mineral interest purported to convey the entire mineral interest and to reserve a fraction of the "land conveyed." If the fraction designated in such a reservation

¹⁶ 270 S.W.2d 880 (Tex. Civ. App. 1954) error ref., 3 Oil & Gas Rep. 2108.

¹⁷ 144 Tex. 583, 192 S.W.2d 260 (1946), 163 A.L.R. 1128.

¹⁸ In *Whitaker v. Neal*, 187 S.W.2d 147 (Tex. Civ. App. 1945) error ref., the court did not reach the "which fraction" problem presented.

¹⁹ 21 S.W.2d 532 (Tex. Civ. App. 1929) error ref.

²⁰ 221 S.W.2d 1016 (Tex. Civ. App. 1949) error ref.

²¹ Compare an analogous "which fraction" dispute which arose in *McBride v. Hutson*, — Tex. —, 306 S.W.2d 888 (1957), 8 Oil & Gas Rep. 416, where a granting clause purported to convey an undivided $\frac{1}{3}$ interest in the "mineral estate which may be recovered" in a suit by grantor-lessor against lessee. The court held that the quantum conveyed was $\frac{1}{3}$ of lessee's $\frac{1}{3}$ working interest rather than $\frac{1}{3}$ of the entire mineral interest.

clause were greater than the fraction outstanding in others, then the "which fraction" problem could be very important.²² To illustrate:

Example: O owns an undivided $\frac{3}{4}$ mineral interest in Blackacre. A deed from O to A purports to convey the entire mineral interest in Blackacre and to reserve a $\frac{1}{2}$ mineral interest in the "land herein conveyed."

In the above example the fraction reserved could be computed upon either (a) O's $\frac{3}{4}$ mineral interest which actually *would be conveyed* by the deed but for the reservation clause, or (b) the entire mineral interest which the granting clause *purports to convey*.²³ If the former is the proper basis, then the deed purports to convey an undivided $\frac{5}{8}$ mineral interest (*i.e.*, the *entire* mineral interest less $\frac{1}{2}$ of O's $\frac{3}{4}$ mineral interest). If the latter is the proper basis, then the deed purports to convey an undivided $\frac{1}{2}$ mineral interest. It is submitted that the latter is the proper basis.

(3) *Summary.*—In the *Hooks* and *Dowda* cases the mineral interest which the granting clause *purported to convey* and the mineral interest which *would have been conveyed* but for the reservation clause were exactly the same. In both cases it was soundly concluded that by using the word "conveyed" in the reservation clause the parties manifested an intention that the reserved fraction be computed on the basis of the grantor's fractional mineral interest which was being conveyed. But in the above hypothetical example, the mineral interest which the granting clause *purports to convey* is greater than the mineral interest which *would be conveyed* but for the reservation clause. The writer submits that the preferable rule of construction would be that the parties intended to reserve a fraction of the mineral interest which the granting clause *purports to convey*.²⁴

c. *Appraisal of the "Described" Rule versus the "Conveyed" Rule.*—The rules of construction discussed above are well settled in Texas. Since many instruments doubtlessly have been drafted in reliance on the decisions cited above, it is highly improbable that the

²² If the fraction designated in such a reservation clause were equal to or less than the fraction outstanding in others, then all of the grantor's fractional mineral interest would pass to the grantee under the rule in the *Duhig* case, discussed in text pp. 330-38 *infra*.

²³ Determining the quantum of mineral interest which a deed purports to convey is a prerequisite to determining whether to apply the rule in the *Duhig* case, discussed in text pp. 330-38 *infra*.

²⁴ There is language in the *Dowda* case which seems to stress the interest that the granting clause purports to convey: "[T]he deed . . . showed on its face both that it purported to convey less than the entire interest in the land, and that the mineral interest reserved was one-half of the interest in the land being conveyed by such deed." 221 S.W.2d at 1018. Similar language can be found in the *Hooks* case. 21 S.W.2d at 538.

supreme court would ever overturn these rules. Furthermore, subject to the qualification expressed in the immediately preceding paragraph, these rules of construction seem to effect the probable intention of the parties.²⁵

3. *The "Reference to a Prior Deed" Rule*

A more subtle form of the "which fraction" problem arises where a deed from the owner of a fractional mineral interest refers to a prior deed in the grantor's chain of title which conveyed only a fractional mineral interest.²⁶ The reference usually follows the description clause and often takes the form: "And being the same land described in deed from [the grantor's predecessor] to [the grantor]." The potential issue is whether the reference to the prior deed is (a) to the physical land described in the prior deed only for the purpose of description in the present deed, or (b) to a fractional mineral interest designated in the prior deed for the purpose of limiting the purported conveyance in the present deed.

a. *Reference "For All Purposes."*—Where a reference to a prior deed is stated to be "for all purposes," the reference operates to limit the fractional interest which the deed otherwise purports to convey.

In *Harris v. Windsor*²⁷ a deed from Windsor, who owned an undivided $\frac{1}{2}$ mineral interest, purported to convey a tract of land described by metes and bounds. Following the description was: "And being the same land described in Warranty deed from [Windsor's grantor] . . . reference to which is made for all purposes." The deed next reserved an undivided $\frac{3}{8}$ mineral interest in the "above de-

²⁵ For other discussion and criticism see authorities cited note 7 supra; Discussion Notes, 3 Oil & Gas Rep. 2111 (1954); Niblack, *Cryptesthesia*, 20 Tex. B.J. 115 (1957). Published too late for inclusion in the text of this Article was the case of *Clack v. Garcia*, 323 S.W.2d 468 (Tex. Civ. App. 1959). This case seems to present a companion rule of construction to the "described" and "conveyed" rules discussed in the text. This rule is that where the fraction designated in a deed is stated to be a mineral interest in the grantor's interest in the land described in the deed, the fraction is to be calculated upon the grantor's fractional mineral interest in that land. In the *Clack* case a deed from the owner of an undivided $\frac{1}{16}$ mineral interest purported to reserve as a non-participating royalty "an undivided one-sixteenth ($\frac{1}{16}$ th) interest (same being one-half of the usual one-eighth royalty) in and to all of the oil, gas and other minerals in, to, under and that may be produced from the interest of said grantors in said land . . ." The court held that since the deed reserved a royalty described as $\frac{1}{16}$ of the grantors' interest, it reserved a $\frac{1}{256}$ royalty interest.

²⁶ An analogous problem arises where a deed from the owner of a fractional mineral interest refers to an existing lease. For a comprehensive discussion of this problem see Elliott, *The Fractional Mineral Deed "Subject To" a Lease*, 36 Texas L. Rev. 620 (1958). See also Williams, *Hoffman v. Magnolia Petroleum Co.: The "Subject To" Clause in Mineral and Royalty Deeds*, 30 Texas L. Rev. 395 (1952); Meyers & Williams, *Hoffman v. Magnolia Petroleum Co.: A Further Comment*, 35 Texas L. Rev. 363 (1957); Stanton, supra note 1; 3-A Summers, *Oil & Gas* § 606 (perm. ed. 1958).

²⁷ 156 Tex. 324, 294 S.W.2d 798 (1956), 6 Oil & Gas Rep. 1234.

scribed premises." The court concluded that the "reference to which is made for all purposes" clause was not for the sole purpose of description, but was also for the purpose of disclosing that Windsor's deed was subject to all restrictions and reservations in the prior deed. Hence, Windsor's deed was held to convey an undivided $\frac{1}{8}$ mineral interest (*i.e.*, Windsor's $\frac{1}{2}$ mineral interest less the $\frac{3}{8}$ mineral interest reserved) rather than an undivided $\frac{5}{8}$ mineral interest (*i.e.*, the entire mineral interest less the $\frac{3}{8}$ mineral interest reserved). Cited as authority was *Remuda Oil Co. v. Wilson*,²⁸ in which a royalty deed from the owner of an undivided $\frac{1}{16}$ royalty interest purported to convey an undivided $\frac{1}{4}$ interest in all royalties from Blackacre, and adding ". . . and being the same land described in that certain deed [from grantor to X] . . . reference to which is here made for all purposes." The court in the *Wilson* case construed the reference clause as requiring the grantees to look to the prior deed to determine the extent of their purchase.

b. *Insufficient Description of Land*.—Where a deed does not contain a legally sufficient description of the land involved, reference to a prior deed operates to incorporate the description of the land contained in the prior deed but does not limit the fractional mineral interest which the deed otherwise purports to convey.

Supporting the above rule is *Sharp v. Fowler*.²⁹ In that case a deed from X to O conveyed the surface of Blackacre, reserving the entire mineral interest. Thereafter, O acquired an undivided $\frac{1}{4}$ of the mineral interest in Blackacre. O then executed a deed which purported to convey Blackacre described as: "50 acres of land situated in Panola County, Texas, and being 20.3 acres of the [Y survey] . . . and 29.7 acres of the [Z survey] . . . and being the same land described in [deed from X to O]. . . ." The court concluded that the reference to the prior deed was merely to describe the boundaries of the land conveyed by O's deed and that it did not operate to exclude O's undivided $\frac{1}{4}$ mineral interest.

c. *Sufficient Description of Land*.—Where a deed does contain a legally sufficient description of the land involved, conflicting results have been reached.

In the *Dubig* case, the granting clause of a deed from the owner of an undivided $\frac{1}{2}$ mineral interest purported to convey Blackacre, described by metes and bounds, after which was added "and being

²⁸ 264 S.W.2d 192 (Tex. Civ. App. 1954) error ref. n.r.e., 3 Oil & Gas Rep. 842.

²⁹ 151 Tex. 490, 252 S.W.2d 153 (1952), 1 Oil & Gas Rep. 1835.

the same tract of land formerly owned by [grantor's predecessor] . . . and conveyed [to grantor by his predecessor]. . . ." The court ruled that this reference was not intended to define or qualify the estate or interest conveyed but that it was inserted to identify further the tract described by metes and bounds. However, a contrary result was reached in *Winters v. Slover*.³⁰ There, the granting clause of a deed of trust from the owner of an undivided $\frac{1}{2}$ mineral interest contained a specific description of Blackacre and referred to it as being the "same land conveyed by [the trustor's predecessor] to [the trustor]. . . ." The court decided that as a method of excepting $\frac{1}{2}$ of the entire mineral interest from the deed of trust, the parties had chosen to refer to the prior deed which had excepted this amount.

d. *Appraisal of The "Reference to a Prior Deed" Rule.*—Absent language explicitly indicating otherwise, a reference in a mineral deed to a prior deed would seem to have been intended by the draftsman for the purpose of description and perhaps also for the assistance it might lend some future title examiner. Accordingly, unless a "for all purposes" phrase or its equivalent is included, the reference should not be construed as words of limitation or reservation. This seems to be the better rule of construction, even where the deed contains a legally sufficient description.³¹

4. *The "Of" Rule versus The "Out Of" Rule*

This precept of construction can best be expressed by contrasting the following examples of granting clauses:

a. The "of" type which purports to convey a "1/16 of the grantor's $\frac{1}{4}$ mineral interest in Blackacre."

b. The "out of" type which purports to convey a "1/16 mineral interest out of the grantor's $\frac{1}{4}$ mineral interest in Blackacre."

c. The "hybrid" type which purports to convey a "1/16 mineral interest of the grantor's $\frac{1}{4}$ mineral interest in Blackacre."

The "of" example indisputably purports to convey an undivided $\frac{1}{64}$ of the entire mineral interest in Blackacre. In that example the word "of" means "times"; it is a word symbol for the mathematical symbol of multiplication. The quantum conveyed by such a granting clause can only be the product of multiplying the frac-

³⁰ 151 Tex. 485, 251 S.W.2d 726 (1952), 1 Oil & Gas Rep. 1873.

³¹ For other discussions see Masterson, *supra* note 2; Stanton, *supra* note 1; Discussion Notes, 6 Oil & Gas Rep. 1237 (1956), 3 Oil & Gas Rep. 850 (1954), 1 Oil & Gas Rep. 965, 1838, 1878 (1952).

tion preceding the word "of" by the quantum of mineral interest following that word.³²

The "out of" example, although not entirely free from uncertainty, probably should be construed to convey an undivided 1/16 of the entire mineral interest in Blackacre. The words "out of" in context mean "from"; they designate the source from which something is to be taken. Nevertheless, there remains the determination of the *quantum* of mineral interest to be taken. Hence, the real inquiry in construing the "out of" example is: Do the words "1/16 mineral interest," standing alone, connote a designated fraction of the entire mineral interest? Probably they do. So construed, the "out of" phrase serves only the function of naming the source from which to carve the designated quantum.

The "hybrid" example is the perplexing one. It unites the controlling characteristics of the other two examples. The writer submits that it is ambiguous and therefore explainable by extrinsic evidence; further, in the absence of such evidence, the preferable meaning is a purported conveyance of 1/16 of the entire mineral interest in Blackacre rather than 1/16 of the grantor's 1/4 mineral interest.

The only Texas case known to the writer construing the "out of" and "hybrid" type granting clauses is *Minchen v. Hirsch*.³³ One of the deeds litigated in that case contained the following clauses:

(1) a granting clause which purported to convey "a one-sixteenth (1/16th) fee mineral royalty of [grantor's] . . . one-fourth (1/4th) interest in, on, or under the following described land. . . ."

(2) an habendum clause which referred to "the above described one-sixteenth (1/16th) fee perpetual mineral royalty in, on, or under [grantor's] . . . undivided one-fourth (1/4th) interest. . . ."

(3) a subsequent clause which declared it to be the grantor's intention to convey "a perpetual one-sixteenth (1/16th) fee mineral royalty out of [grantor's] . . . interest therein."

The trial court decreed that the deed conveyed an undivided 1/64 royalty interest. The court of civil appeals reversed and rendered judgment, holding that it conveyed an undivided 1/16 royalty interest. This judgment was given an "n.r.e." sanction by the supreme court.

³² In *Minchen v. Hirsch*, 295 S.W.2d 529 (Tex. Civ. App. 1956) error ref. n.r.e., 6 Oil & Gas Rep. 1364, a correction deed of trust stated that the mineral interest conveyed was an "undivided one-half (1/2) of the [grantor's] holdings of one-fourth (1/4) in [Blackacre]." That part of the court's judgment holding that the deed of trust conveyed an undivided one-eighth (1/8) mineral interest in Blackacre was not appealed. See also Discussion Notes, 6 Oil & Gas Rep. 1372 (1956).

³³ *Ibid.*

The grantor conceded that the granting clause, taken alone, would grant an undivided 1/64 royalty interest. The court of civil appeals, discarding the habendum clause as ambiguous, concluded that the clear meaning of the intention clause was that the grantor conveyed an undivided 1/16 royalty interest in Blackacre. This concession by the grantor and construction by the court brought the granting and intention clauses into irreconcilable conflict. The court determined that the intention clause should prevail, stressing its intentional and holographic attributes.³⁴

Application of the writer's analysis of the above examples to the *Minchen* case would result in the same judgment being entered; however, the result would be reached by the process of classifying both the granting and habendum clauses as ambiguous and reconciling them with the intention clause.

C. Posing The "Insufficient Fraction" Problem

Stated in question form, the "insufficient fraction" problem is: Where the fractional mineral interest which a grantor owns is insufficient to satisfy both the fractional mineral interest which his warranty deed purports to convey and the one which it purports to exclude,³⁵ what quantum of mineral interest passes to the grantee? To illustrate:

Example: O owns an undivided 1/2 mineral interest in Blackacre. A warranty deed from O to A purports to convey to A an undivided 1/2 of the entire mineral interest in Blackacre and to retain in O an undivided 1/2 of the entire mineral interest. "Insufficient Fraction" Problem: What quantum of mineral interest passed to A?

Under these circumstances, the court must either (a) apply O's fractional mineral interest first to satisfy the fractional mineral interest which the deed purports to convey to A, retaining in O only the excess, if any, or (b) apply O's fractional mineral interest first to satisfy the fractional mineral interest which the deed purports to retain in O, conveying to A only the excess, if any.

D. Solving The "Insufficient Fraction" Problem

The courts have chosen to resolve the "insufficient fraction" problem in favor of the grantee by applying the grantor's fractional

³⁴ The word "out" had been interlined by handwriting in a printed mineral deed form.

³⁵ Disputes depending upon the distinction between exclusions by reservation and by exception have been largely allayed by the rule in the *Duhig* case, discussed in text pp. 330-38 infra. Regarding this distinction, see *Pich v. Lankford*, — Tex. —, 302 S.W.2d 645 (1957), 7 Oil & Gas Rep. 628; *Klein v. Humble Oil & Ref. Co.*, 126 Tex. 450, 86 S.W.2d 1077 (1935).

mineral interest first to satisfy the fractional mineral interest which the warranty deed purports to convey. This choice, couched in terms of estoppel, was first announced by the Texas Supreme Court in the *Dubig* case, and is based upon equitable principles. Thus it is frequently referred to as the rule in the *Dubig* case, or simply the *Dubig* rule.

1. *Statement of The Rule in the Dubig Case*

The *Dubig* case holds that where a warranty deed purports to convey a fractional mineral interest, the grantor will be estopped to assert title in the retained fractional mineral interest to the extent that this assertion would conflict with the grantee's title to the fractional mineral interest purportedly conveyed.³⁸

Applying that holding to the facts in the *Dubig* case (stated in the above example), the grantor was estopped to assert any title in the retained $\frac{1}{2}$ mineral interest since any such assertion would conflict with the $\frac{1}{2}$ mineral interest which the deed purported to convey to the grantee. Applying the *Dubig* holding to varying fact situations results in using whatever fractional mineral interest the grantor owns to satisfy first the fractional mineral interest which the deed purports to convey, retaining in the grantor only the excess, if any.

2. *Reason for The Rule in the Dubig Case*

The rule in the *Dubig* case was designed to accord the grantee a more equitable redress for breach of warranty than a suit for damages. An immediate breach of warranty arises whenever the fractional mineral interest owned by a grantor when he executes a warranty deed is less than the fractional mineral interest which his deed purports to convey *and* to retain. Under these circumstances, should the grantor be permitted to assert title to the retained fractional mineral interest and to compel the grantee to seek compensation for this loss by a suit for monetary damages for breach of warranty? In answering this question in the negative, the court reasoned by analogy to the equitable rule of after-acquired title, which estops the grantor of a warranty deed from asserting against his grantee any after-acquired title in the estate which the deed purports to

³⁸ For various statements of the holding in the *Duhig* case, see *Miles v. Martin*, — Tex. —, 321 S.W.2d 62 (1959); *McMahon v. Christmann*, — Tex. —, 303 S.W.2d 341 (1957), 7 Oil & Gas Rep. 610; *Gibson v. Turner*, 156 Tex. 289, 294 S.W.2d 781 (1956), 6 Oil & Gas Rep. 1212; *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (1953), 2 Oil & Gas Rep. 1350; *Masterson*, supra note 2, at 287; *Stanton*, supra note 1, at 332; *Maxwell*, supra note 1, at 464; *Case Note*, 25 Texas L. Rev. 100 (1946).

convey. The reason supporting the rule of after-acquired title, as stated by the court, is:

When one assumes, by his deed, to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title, and turn his grantee over to a suit upon his covenants for redress. The short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance. This is merely refusing him the countenance and assistance of the courts in breaking the assurance which his covenants had given.³⁷

The court in the *Dubig* case concluded that if estoppel to assert title in contradiction or breach of warranty is a fair and effectual remedy in the instance of "after-acquired title," it is also fair, effectual, and appropriate in the case of "retained title."

3. Appraisal of The Rule in the *Dubig* Case

As applied to deed transactions, the rule in the *Dubig* case, whether sound or not, is beyond the judicial point of no return. The majority opinion in *McMahon v. Christmann*³⁸ noted that: "The rule [in the *Dubig* case] having become an established one in the construction of deeds we have no occasion, in this case or at this late hour, to question its validity when it is so used."³⁹ Furthermore, the statement and application of the *Dubig* rule seems sound.⁴⁰ The basic problem is to determine which party should bear the loss of title where the grantor's ownership is inadequate to meet both the claims of conveyed title and retained title.⁴¹ This title problem is of utmost importance due to the nature of oil property, particularly after production, since the remedy afforded by damages for breach of warranty is often nugatory. The reasoning of the court has convinced the writer that the more equitable result is to impose loss of title on the grantor, unless the deed expressly provides otherwise.

4. Application of The Rule in the *Dubig* Case

The rule in the *Dubig* case was applied without modification or amplification in *Fleming v. Miller*,⁴² *Howell v. Liles*⁴³ (a case of

³⁷ 135 Tex. 503, 508, 144 S.W.2d 878, 880 (1940).

³⁸ — Tex. —, 303 S.W.2d 341 (1957), 7 Oil & Gas Rep. 610.

³⁹ Id. at 346. But cf. dissenting opinion, — Tex. —, 304 S.W.2d 267 (1957).

⁴⁰ Express judicial approval of the soundness of the rule in the *Dubig* case may be found in the *McMahon* case, 303 S.W.2d at 346, 348. But see dissenting opinion, 304 S.W.2d at 268.

⁴¹ See Discussion Notes, 2 Oil & Gas Rep. 1359 (1953), 1 Oil & Gas Rep. 509 (1952).

⁴² 228 S.W.2d 355 (Tex. Civ. App. 1950), rev'd on other grounds, 149 Tex. 368, 233 S.W.2d 571 (1950).

⁴³ 246 S.W.2d 260 (Tex. Civ. App. 1951), 1 Oil & Gas Rep. 506.

"after-acquired" title as well as "reserved" title), and *Benge v. Scharbauer*⁴⁴ (as to the fractional mineral interest involved, as distinguished from the fractional royalty-rental interest).

5. *Development of The Rule in the Dubig Case*

As is customary with other legal rules, the *Dubig* rule has been subjected to the processes of legal qualitative analysis—identifying and defining its essential elements to determine its applicability or inapplicability to various fact situations.

a. "Warranty" Element.—The deed in the *Dubig* case contained a formal covenant of general warranty; the result in the *Dubig* case flowed from an immediate breach of that warranty. This, of course, prompted inquiry as to whether the *Dubig* rule applies to any type of deed other than a general warranty deed.⁴⁵

(1) *Special warranty deed*.—*American Republics Corp. v. Houston Oil Co.*⁴⁶ holds that a deed with a special warranty estops a fractional mineral interest owner from making a claim of title which would diminish his grantee's title in the same manner as a deed with general warranty, citing the *Dubig* case as its authority.

(2) *Implied warranty deed*.—Although the writer knows of no Texas case squarely in point, article 1297⁴⁷ and cases involving express warranty deeds point to the proposition that the *Dubig* rule applies to any deed which purports to grant or convey (as distinguished from quitclaim) a definite quantum of mineral interest.

Article 1297 provides that the use of the word "grant" or "convey" raises an implied covenant (a) that previous to the time of execution of the conveyance the grantor has not conveyed the same interest to any person other than the grantee, and (b) that such estate is at the time of the execution of the conveyance free from incumbrances. It further provides that such implied covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance. Thus, article 1297 ascribes the incidents of a special warranty deed to a deed which purports to "convey" or "grant" a definite fractional mineral interest. It would seem to follow that the rule in the *Dubig* case applies to such a deed where

⁴⁴ 152 Tex. 447, 259 S.W.2d 166 (1953), 2 Oil & Gas Rep. 1350.

⁴⁵ The rule in the *Dubig* case obviously does not apply to quitclaim deeds. Discussion Notes, 2 Oil & Gas Rep. 1359 (1953). Nor does the rule of after-acquired title apply to quitclaim deeds. *Halbert v. Green*, 156 Tex. 223, 293 S.W.2d 848 (1956), 6 Oil & Gas Rep. 1056.

⁴⁶ 173 F.2d 728 (5th Cir. 1949). See also *Dean v. Hidalgo County Water Improvement Dist. No. Two*, 320 S.W.2d 29 (Tex. Civ. App. 1959) error ref. n.r.e.

⁴⁷ Tex. Rev. Civ. Stat. Ann. art. 1297 (1945).

the grantor had previously conveyed a fractional mineral interest.⁴⁶

The following case involving express warranty instruments contain language indicating that the controlling feature is a representation in the deed, express or implied, that the grantor owns the fractional mineral interest purportedly conveyed.⁴⁹ In *American Republics Corp. v. Houston Oil Co.* the court stated:

. . . [W]here the grant is based on an affirmation of ownership and is a conveyance of title as opposed to a chance of title, there is an effectual estoppel at once raised to assert title in diminution of the grant, whether the covenant of warranty is general or special, or, indeed there is no covenant of warranty at all.

In Duhig's case, as here, what is important and controlling is not whether grantor actually owned the title to the land it conveyed, but whether, in the deed, it asserted that it did, and undertook to convey it.⁵⁰

In *Clark v. Gauntt*,⁵¹ a case concerned with after-acquired title to a fractional mineral interest, the court stated:

The estoppel in the after-acquired title cases arises from the assertion of ownership made by the grantor in the covenant of warranty, express or implied, or in other recitals in the deed. Such assertion is a representation that the grantor owns the land or the estate or interest to which it relates, and having thus represented the fact of ownership, the grantor is estopped to deny that fact.⁵²

b. "*Quantum*" Element.—If a warranty deed purports to convey only an indefinite quantum of mineral interest (e.g., 1/2 of the grantor's right, title, and interest in Blackacre), the *Duhig* rule does not apply. This follows from the rationale of cases holding that the rule of after-acquired title does not apply to warranty deeds which purport to convey *all* the grantor's right, title, and interest in Blackacre.⁵³ Courts reason that such a deed purports to convey only the interest which the grantor owns on the date of execution and warrants title only to the interest purportedly conveyed.

⁴⁶ It is arguable that the word *incumbrance* in article 1297 embraces an outstanding title which does not result from a prior conveyance by the grantor, and consequently the Duhig rule applies to such a deed. In *Morris v. Short*, 151 S.W. 633 (Tex. Civ. App. 1912) error ref., a case concerned with after-acquired title to the entire fee interest, it was held that a paramount, outstanding title is an "incumbrance" within the meaning of article 1297.

⁴⁹ See also *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (1953), 2 Oil & Gas Rep. 1350; *Talley v. Howsley*, 142 Tex. 81, 176 S.W.2d 158 (1944); *Lindsay v. Freeman*, 83 Tex. 259, 18 S.W. 727 (1892); Annot. 144 A.L.R. 554 (1943); Discussion Notes, 6 Oil & Gas Rep. 1230 (1956).

⁵⁰ 173 F.2d 728, 734 (5th Cir. 1949).

⁵¹ 138 Tex. 558, 161 S.W.2d 270 (1942).

⁵² Id. at 562, 161 S.W.2d at 272.

⁵³ See *Clark v. Gauntt*, 138 Tex. 558, 161 S.W.2d 270 (1942); *Roberts v. Corbett*, 265 S.W.2d 127 (Tex. Civ. App. 1954) error ref.

If, however, such a deed contains a clause which warrants title to a definite quantum of mineral interest (e.g., "in so far as the grantor's warranty herein applies, it is estimated that the interest hereby conveyed is equal to an undivided 9/224 of the entire mineral interest in Blackacre"), the *Dubig* rule is applicable.

The two examples given above comprise the pertinent provisions of a warranty deed from the owner of an undivided 9/160 mineral interest in *Fantham v. Goodrich*.⁵⁴ The court concluded that the *Dubig* rule was controlling and that the deed effected a conveyance to the grantee of an undivided 9/224 rather than 9/320 mineral interest.

c. "*Agreement of the Parties*" Element.—The rule in the *Dubig* case is based upon equitable principles and considerations.⁵⁵ It is elementary, then, that the rule should never be applied where doing so would defeat the manifest intention of the parties. It should be applied only where their intention cannot be fully carried out. It follows that if the language of the deed indicates which party is to bear any loss of title because of an insufficiency in the grantor's ownership, that intention or agreement should be given effect. Assume, for example, that a fractional mineral deed contains the following provision:

It is the agreement and intention of the parties to this instrument that if the grantor does not own mineral interest in the above described land sufficient to satisfy both the mineral interest which this instrument purports to convey to the grantee and the one which it purports to reserve to the grantor, then whatever mineral interest is owned by the grantor in the above described land shall be applied first to satisfy the mineral interest which this instrument purports to reserve to the grantor and only the excess, if any, shall pass to the grantee, notwithstanding the grantor's warranty of title or representation of ownership herein.⁵⁶

Would the rule in the *Dubig* case apply to such a deed? The writer doubts that it would.⁵⁷ Such application would supplant, instead of supplement, the evident intention of the parties.

⁵⁴ 238 S.W.2d 572 (Tex. Civ. App. 1951), 1 Oil & Gas Rep. 153, rev'd on other grounds, 150 Tex. 601, 244 S.W.2d 510 (1952). See also *Humble Oil & Ref. Co. v. Fantham*, 268 S.W.2d 239 (Tex. Civ. App. 1954) error dism. w.o.j.

⁵⁵ See cases cited note 8 supra and accompanying text.

⁵⁶ A clause covering after-acquired title perhaps could be inserted at this point.

⁵⁷ There is language supporting this view in the dissenting opinion in *Benge v. Scharbauer*, 152 Tex. at 457, 259 S.W.2d at 171: "Moreover, in a given case, the deed might be such as to show from its four corners beyond any doubt that even if the grantor's ownership were less than represented in the deed, he was yet to have his stipulated interest in the royalty unimpaired—an unlikely case, to be sure, but theoretically possible . . ." Cf. the following language in the majority opinion in *McMahon v. Christmann*, — Tex.

(1) *The Benge v. Scharbauer Case*.⁵⁸—The dominant reasoning the majority opinion in the *Benge* case seems to be in accord with the above analysis. In this case a general warranty deed from the owner of an undivided $\frac{3}{4}$ mineral interest purported to convey the entire mineral interest in Blackacre with a reservation to the grantor of an undivided $\frac{3}{8}$ mineral interest. It also gave the grantee the sole power to execute all future mineral leases with the limitation that "said leases shall provide for the payment of three-eighths ($\frac{3}{8}$ ths) of all the bonuses, rentals and royalties to the grantors."

Without pause or disagreement the court held that the *Duhig* rule applied to the purported conveyance of mineral interest, with the result being that the grantee acquired an undivided $\frac{5}{8}$ mineral interest and the grantor retained but an undivided $\frac{1}{8}$ mineral interest. With hesitation and dissent the court held that the *Duhig* rule did not apply to the interest in bonuses, rentals, and royalties with the result being that the grantor was entitled to receive $\frac{3}{8}$ of all bonuses, delay rentals, and royalties.

The majority construed the deed provision that all future leases "shall provide for the payment of three-eighths ($\frac{3}{8}$ ths) of all the bonuses, rentals and royalties to the grantors" as a *contractual agreement* that the grantor shall receive such interest rather than his proportionate share. The majority then declared that the *Duhig* rule "should not be extended to change the express agreement as to what interests the grantors shall receive in bonuses, rentals and royalties under leases to be executed by the grantee."⁵⁹ The court in effect construed the quoted provision as manifesting an agreement that regardless of what fractional mineral interest passed to the grantee under the deed, the grantor's share of all future lease incidents should nevertheless be $\frac{3}{8}$, the grantee receiving the excess, if any.⁶⁰

(2) *The McLain v. First Nat'l Bank Case*.⁶¹—The result reached in *McLain v. First Nat'l Bank* seems defensible under the above analysis but vulnerable under the court's approach. There, a deed from the owner of an undivided $\frac{1}{2}$ mineral interest purported to convey the entire mineral interest and contained a reservation clause

—, 303 S.W.2d 341, 345 (1957), 7 Oil & Gas Rep. 610: "The effect of the holding [in the *Duhig* case] was to take from the grantor the one-half of the minerals retained by him, without reference to or regard for the intention of the parties, and give the same to the grantee in order to fulfill the covenant of general warranty."

⁵⁸ 152 Tex. 447, 259 S.W.2d 166 (1953), 2 Oil & Gas Rep. 1350.

⁵⁹ *Id.* at 454, 259 S.W.2d at 169.

⁶⁰ For other explications of the *Benge* case, see Stanton, *supra* note 1, at 333; Case Note, 32 Texas L. Rev. 471 (1954); Discussion Notes, 2 Oil & Gas Rep. 1359 (1953).

⁶¹ 263 S.W.2d 324 (Tex. Civ. App. 1953) error ref. n.r.e., 3 Oil & Gas Rep. 477.

which provided: "There is reserved for the benefit of grantors a one-fourth participating royalty; that is, one-fourth of everything including bonuses and delayed rentals, and one-fourth of one-eighth of the oil produced from the land described herein." At the trial the grantor introduced extrinsic evidence showing that (a) the parties, believing the grantor to be the owner of the entire mineral interest, executed a contract of sale under which the grantee was to acquire an undivided $\frac{3}{4}$ mineral interest and the grantor was to retain the other $\frac{1}{4}$; (b) after discovering that an undivided $\frac{1}{2}$ mineral interest was outstanding, the parties agreed to complete the sale on the basis that the grantee would get only an undivided $\frac{1}{4}$ mineral interest and the grantor would retain the same quantum; and (c) the grantee desired to have the deed remain as originally written since there was some question as to the validity of the outstanding title. The grantor's prayer for reformation of the deed in conformity with the above agreement was granted by the trial court.

The trial court's judgment entitling the grantor to a $\frac{1}{4}$ participating royalty, including rentals and bonuses, was affirmed. The court's affirmation was on the ground that the language of the deed, construed under the dictates of the *Benge* case, effectively withheld the fractional interest purportedly reserved. Extrinsic evidence and reformation seem not to have played an active role in the court's deliberation. To that extent the court's reasoning is amiss. A simple reservation of a designated royalty, rental, and bonus interest is not equivalent to the contractual agreement in the *Benge* case that all future leases shall provide for the payment of a specified interest to the grantor. A reservation—of a mineral interest or of a royalty, rental, and bonus interest—is subject to the disabling effect of the *Dubig* rule, absent language evincing a contrary agreement or intention.⁶² The factor in the *McLain* case which should have countervailed the *Dubig* rule is not the royalty nature of the reservation, but rather the above agreement of the parties, established by extrinsic evidence and inserted by reformation.

d. "*Mutual Mistake*" Element.—Analytically, this element may more properly be discussed in conjunction with the "which fraction" problem,⁶³ but is interposed here because of its overlap and inter-relation with the *Dubig* rule. It concerns the rules and reme-

⁶² See *Miles v. Martin*, — Tex. —, 321 S.W.2d 62 (1959), where a reservation of $\frac{1}{4}$ of all royalty, bonus money, and delay rentals was held to fall squarely within the *Duhig* rule. See also dissenting opinion in *Gibson v. Turner*, 156 Tex. 289, 294 S.W.2d 781, 792 (1956), 6 Oil & Gas Rep. 1212, which stated: "The *Benge* case does not say that the *Duhig* rule applies only to reservations of *mineral interests* as distinguished from royalties."

⁶³ See cases cited note 8 *supra* and accompanying text.

dies, if any, which pertain where the parties to a deed are mutually mistaken as to the legal effect of the deed's provisions. This quandary was presented in *Miles v. Martin*,⁶⁴ the supreme court's recent anatomization of the *Dubig* rule. In the *Miles* case, the grantor owned an undivided $\frac{3}{4}$ mineral interest in Blackacre; the deed purported to convey the entire mineral interest with a reservation of $\frac{1}{4}$ of the royalty, bonus money, and delay rentals. The court concluded that the deed was unambiguous and squarely within the operation of the *Dubig* rule. That conclusion is undoubtedly correct.

As the court pointed out, however, the contract of sale, loan application, deed of trust, and subsequent dealings of the parties revealed that both the grantor and grantee *intended* that the deed reserve a $\frac{1}{4}$ mineral interest in addition to the $\frac{1}{4}$ previously reserved by the grantor's predecessor. The record thus reflected a mutual mistake by the parties as to the legal effect of the deed provisions. The court held that as against such a mutual mistake of law, equity will grant relief to the grantor by way of reformation, if the circumstances warrant the relief. The court also noted authorities indicating that under such circumstances the grantee holds the interest unintentionally conveyed in constructive trust for the grantor.⁶⁵

Although both modes of correcting the situation seem proper, each is subject to exacting limitations. Reformation may be barred by laches or limitations,⁶⁶ while constructive trust rights may be subjugated by the rights of a bona fide purchaser from the grantee.

e. "*Knowledge*" or "*Notice*" Element.—Somewhat akin to the two preceding elements is a consideration of the effect, if any, of a grantee's actual knowledge or constructive notice of the state of title.⁶⁷ The inquiry here is whether the *Dubig* rule applies where the grantee knows, or is charged with knowledge, that the grantor does not own the quantum of mineral interest so represented in the deed.

"Record notice" of the state of title is immaterial to application of the *Dubig* rule. The grantee in the *Dubig* case had record notice

⁶⁴ — Tex. —, 321 S.W.2d 62 (1959).

⁶⁵ See *Biggs v. Poling*, 134 S.W.2d 801 (Tex. Civ. App. 1939) error dism. judgm. cor.

⁶⁶ The four-year statute of limitations governs and commences to run when the actionable mistake was, or in the exercise of reasonable diligence should have been, discovered. *Miles v. Martin*, — Tex. —, 321 S.W.2d 62 (1959).

⁶⁷ A distinct and separate element, not herein discussed, is whether the *Dubig* rule applies where the grantee owns the balance of mineral interest not owned by the grantor. Regarding this element see *McMahon v. Christmann*, — Tex. —, 303 S.W.2d 341 (1957), 7 Oil & Gas Rep. 610; *Gibson v. Turner*, 156 Tex. 289, 294 S.W.2d 781 (1956), 6 Oil & Gas Rep. 1212.

of the outstanding title. "Actual knowledge" of the state of title is likewise immaterial. The *Dubig* rule was applied without comment as to this point in both the *Benge* and *Miles* cases where the respective grantees had "actual knowledge."⁶⁸ In *Frels v. Schuette*,⁶⁹ the court rejected the grantor's contention that there can be no estoppel as to after-acquired title where the grantee has full knowledge of all the facts and conditions of title. The court stated: "[T]he matter of notice, whether actual or constructive, had nothing to do with the right of the [grantee] . . . to recover for the breach of the covenant of general warranty so contained in such deed."⁷⁰

II. LEASE TRANSACTIONS

A. *Posing The "Which Fraction" Problem*

The "which fraction" problem emanating from a lease executed by the owner of a fractional mineral interest analytically is the same as in a deed transaction. In question form the problem is: Does the disputed lease purport to reserve as royalty a designated fraction of (a) the *entire* mineral interest in certain land, or (b) the grantor's *fractional* mineral interest in that land?

The scope of the "which fraction" problem in lease transactions has been considerably narrowed by a draftsman's technique—the proportionate reduction clause. This clause operates where the lessor owns less than the entire mineral interest in the land described; if that is true, the proportionate reduction clause reduces the lessor's royalty interest to the proportion which his fractional interest bears to the entire mineral interest. Thus, in lease transactions, "which fraction" disputes arise only in regard to interests reserved by the lessor which are not covered by a proportionate reduction clause.

B. *Solving The "Which Fraction" Problem*

The "which fraction" problem in lease and deed transactions being the same, the courts' solutions are the same. The general principle of intention of the parties and the resulting rules of construction discussed above⁷¹ apply equally to lease transactions.⁷²

1. *The "Described" Rule*

The courts have distinguished between language referring to land

⁶⁸ See also dissenting opinion in *Gibson v. Turner*, *supra* note 62. But see *Stanton*, *supra* note 1, at 334; Case Note, 32 *Texas L. Rev.* 471, 474 (1956).

⁶⁹ 222 S.W.2d 1006 (Tex. Civ. App. 1949) error ref. n.r.e.

⁷⁰ *Id.* at 1009.

⁷¹ See pp. 321-29 *supra*.

⁷² See *McMahon v. Christmann*, — *Tex.* —, 303 S.W.2d 341 (1957), 7 *Oil & Gas Rep.* 610; *Gibson v. Turner*, 156 *Tex.* 289, 294 S.W.2d 781 (1956), 6 *Oil & Gas Rep.* 1212.

described in a lease and language referring to land leased by the instrument. Thus, where a fraction designated in a lease is stated to be a reserved interest in oil produced from land described in the lease, such fraction is to be calculated upon the entire production from that land (unless reduced by operation of a proportionate reduction clause).

a. *Normal Royalty Reservation.*—Lease forms usually contain a royalty clause which reserves to the lessor $\frac{1}{8}$ of all oil produced from the land described in the lease (e.g., "from said land," "from the above described land," etc.). Absent a proportionate reduction clause, such leases obligate the lessee to pay as royalty $\frac{1}{8}$ of all oil produced from the tract of land described. This proposition is established by the unique case of *Gibson v. Turner*.⁷³

In the *Gibson* case, a lease executed by the owner of an undivided $\frac{9}{40}$ mineral interest purported to lease the entire interest in "the following described land." The royalty clause purported to reserve $\frac{1}{8}$ of all oil produced "from said land." The proportionate reduction clause had been deleted from the printed form by "x-ing" it out. The court held that the lease purported to reserve as royalty $\frac{1}{8}$ of the entire production.

b. *Additional Reservations.*—Some leases reserve to the lessor an interest in addition to his normal royalty interest, such as an overriding royalty or oil payment.

In *Lacy, Inc. v. Jarrett*,⁷⁴ the owner of an undivided $\frac{7}{12}$ mineral interest purported to lease the entire mineral interest.⁷⁵ The lease reserved an oil payment "out of one-eighth of seven-eighths of the oil . . . produced . . . from said land under this lease." The court directed that the oil payment be satisfied from $\frac{1}{8}$ of $\frac{7}{8}$ of the oil produced rather than $\frac{1}{8}$ of $\frac{7}{12}$ of $\frac{7}{8}$.

The lease in *McMahon v. Christmann*⁷⁶ reserved to the owner of an undivided $\frac{1}{6}$ mineral interest "without reduction, as an overriding royalty, a net $\frac{1}{32}$ nd of $\frac{8}{8}$ ths of all oil . . . produced . . . from the above described premises. . . ."⁷⁷ Under the majority opinion the words "without reduction" in the overriding royalty clause conflicted with and prevailed over the proportionate reduction clause.

⁷³ 156 Tex. 289, 294 S.W.2d 781 (1956), 7 Oil & Gas Rep. 610. The cases cited by the court as controlling on this point are deed transaction cases discussed in text accompanying and following note 12 supra.

⁷⁴ 214 S.W.2d 692 (Tex. Civ. App. 1948) error ref.

⁷⁵ The grantor's normal royalty was subject to the proportionate reduction clause.

⁷⁶ — Tex. —, 303 S.W.2d 341 (1957), 7 Oil & Gas Rep. 610.

⁷⁷ Id. at —, 303 S.W.2d at 343. All parties admitted that the grantor's normal royalty was subject to the proportionate reduction clause.

Accordingly, the majority held the overriding royalty to be 1/32 of the total production.

2. *The "Reference to a Prior Deed" Rule and The "Of" versus The "Out Of" Rule*

The writer is not aware of any Texas case in which the applicability of these rules to lease transactions has been discussed. However, there would seem to be no reason why these rules of construction should not also apply to language used in a lease transaction.

C. *Posing The "Insufficient Fraction" Problem*

Just as the proportionate reduction clause abridges the "which fraction" problem, so also it abridges the "insufficient fraction" problem. The proportionate reduction clause explicitly sets out a formula which determines the exact quantum of royalty reserved to a lessor who owns but a fractional mineral interest, whatever that fraction may be. Consequently, in lease transactions "insufficient fraction" dissensions occur only as to interests reserved by the lessor which are not governed by a proportionate reduction clause.

D. *Solving The "Insufficient Fraction" Problem*

It is now settled that the rule in the *Dubig* case does not apply to mineral leases. This is the unequivocal holding of the *McMahon* case, which disavowed any implication to the contrary in the earlier *Gibson* case.

The lessee in the *McMahon* case contended for application of the *Dubig* rule to the mineral lease litigated, but the majority refused to extend its application to the construction of oil, gas, and mineral leases. The dominant reason given by the majority was that if the *Dubig* rule were applied to mineral lease transactions, the lessee in many instances would be thereby entitled to take all of the lessor's fractional mineral interest without having to pay any royalty.⁷⁸ Such a result, in the majority's view, would be "unthinkable and contrary to all modern human experience in the oil and gas industry" and would "all too often frustrate rather than effectuate the intention of the parties."⁷⁹

Appraisal at this date of the court's decision in *McMahon* not to apply the *Dubig* rule to mineral leases partakes of post-mortem examination. The same factors which assure judicial adherence to the

⁷⁸ Such would have been the result in the *McMahon* case under the majority opinion if the *Duhig* rule had been applied.

⁷⁹ 303 S.W.2d at 346.

Dubig rule in deed transactions equally assure adherence to the *McMahon* rule in lease transactions. Courts are rightfully averse to reversing rules of construction which affect property interests because of the reliance which may have been placed upon these rules. Furthermore, the court's conclusion seems sound. The *Dubig* rule, born of equitable considerations, should not apply in equity to mineral leases where its literal application would often estop the lessor from claiming any royalty interest whatever, normal or overriding, thus producing a result totally foreign to the very nature of oil and gas leases.

It should be noted, however, that in neither the *McMahon* case nor the *Gibson* case did the lessee contend that total deprivation of the lessor's reserved interest should flow from breach of warranty. Instead the lessees envisaged an equitable reduction. The rule of estoppel they sought might be stated in these terms: Where a warranty lease purports to lease the entire mineral interest in described land, the lessor will be estopped to assert title in the reserved fractional mineral interest to the extent that such assertion would exceed the proportion which the lessor's fractional mineral interest bears to the entire mineral interest. Such a rule of estoppel closely follows, but is not in all respects identical to, the statement of the *Dubig* rule.⁸⁰

Admittedly, such a rule would have certain equitable appeal. But would not its application in the *Gibson* case, in practical effect, reinstate what the parties expunged—the proportionate reduction clause? Would not its application in the *McMahon* case, in net result, delete what the parties inscribed—the “without reduction” phrase? Indeed, one might ponder whether a transaction could ever occur where the equities favoring the use of estoppel as a vehicle for proportionate reduction would not be offset, directly or indirectly, affirmatively or negatively, by a proportionate reduction clause.

III. CONCLUSION

The substantive conclusions are contained in the body of this Article, and it is unnecessary to summarize them here. It need only be added that whenever a Texas attorney is requested to draft or approve a deed or lease for execution by the owner of a fractional mineral interest, a “red flag” should be raised in his mind, forewarning him of the potential “which fraction” and “insufficient fraction”

⁸⁰ See p. 330 *supra*.

problems inherent in these transactions. With an awareness of these problems and a mastery of the courts' solutions, the attorney may then proceed to tailor the instrument to the particular transaction.⁸¹

⁸¹ For suggested clauses see Masterson, *supra* note 2, at 289-90. With regard to the "which fraction" problem in deed transactions, the writer recommends inclusion of an intention clause to this effect: "It is the intention of the parties to this instrument to convey to the grantee an undivided _____ (/) of the entire mineral interest in the above described land, which is an undivided _____ (/) of the grantor's _____ (/) of the entire mineral interest in said land." Cf. *Humble Oil & Ref. Co. v. Harrison*, 146 Tex. 216, 205 S.W.2d 355 (1947). Regarding the "insufficient fraction" problem in deed transactions, if a non-Duhig rule result is desired, the writer suggests the type of clause quoted in the text accompanying note 56 *supra*.