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Fixed vs.Floating Non-Participating Oil & Gas Royalty in Texas: And the Battles Rage On . . .

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FIXED VS. FLOATING NON-PARTICIPATING OIL & GAS ROYALTY IN TEXAS: AND THE BATTLES RAGE ON . . .

*by Christopher Kulander**

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I. INTRODUCTION

"[M]en forget more easily the death of their father than the loss of their patrimony."[1]

—Niccolò di Bernardo dei Machiavelli, Capitolo 17, *Il Principe* (1532)

Since the extraordinary plunge in oil prices beginning in late 2014, mineral interest owners have found their royalties shrinking fast. Few things rivet the attention and stoke suspicion more than a series of royalty checks that shrink by two-thirds or more over just a year. Such drops inspire lessee/lessor litigation as lessors take closer notice of the language of division orders they once signed without a second glance. Such division orders are now scrutinized more carefully, and every deduction and charge is mulled over. Even more unfortunate, however, are the battles over ownership and the nature of freestanding royalty interests carved from fee mineral estates in severances that are sometimes many decades old. In these cases, not only are the original perpetrators of the poorly drafted, contested instruments often long gone, their descendants find themselves engaged in family-melting legal conflagrations over millions of dollars of royalty, costing tens of thousands of dollars and taking years to resolve. Royalty deduction cases typically pit private lessors against corporations; cases between freestanding royalty owners, such as the septet of cases that has erupted in Texas over the last eight years, punctuated by a Texas Supreme Court decision in late January 2016, are far more harrowing, at least from a ménage perspective.

All seven of these Texas cases began with the separated threads of an unraveled mineral interest. "A severed mineral estate [comprises] five attributes: (1) the right to develop (the right to ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments."[2] Each attribute is a separate, distinct property interest that may be conveyed or reserved in connection with a conveyance of a mineral interest. "However, '[w]hen an undivided mineral interest is conveyed, reserved, or excepted, it is

1. NICCOLÒ MACHIAVELLI, THE PRINCE 67 (Luigi Ricci trans., Grant Richards 1903) (1532).

2. Hamilton v. Morris Res., Ltd., 225 S.W.3d 336, 344 (Tex. App.—San Antonio 2007, pet. denied) (first citing Luckel v. White, 819 S.W.2d 459, 463 (Tex. 1991); then citing Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986)). "A conveyance of a mineral estate need not dispose of all interests; individual interests can be held back, or reserved, in the grantor." French v. Chevron U.S.A. Inc., 896 S.W.2d 795, 797 (Tex. 1995).

presumed that all attributes remain with the mineral interest unless a contrary intent [sic] is expressed.' "[3]

Royalty in the oil and gas context in Texas is commonly defined as a nonpossessory interest in real property.[4] Owners of royalty receive a fraction of the produced hydrocarbons without having to pay any of the exploration and production costs.[5] Because of problems such as shoddy drafting and inconsistent judicial determinations, there has arisen over the decades an enormous amount of litigation, academic analysis, and general hand-wringing centered on whether a conveyed or reserved interest is a royalty or a (generally fractional) interest in the actual minerals—a bundle of sticks that when complete includes the right to a landowner's royalty.

Royalty interests are often categorized into three distinct groups. One is the lessor's (or landowner's) royalty, a royalty interest that is retained when a mineral owner (the "landowner") executes a mineral lease. This interest is effective during the duration of the lease and is determined through a negotiation between the mineral owner and the lessee, typically an oil and gas company or a broker. It is generally a fixed fraction of the gross production, perhaps varying depending on the volume of production.

Historically, the lessor's royalty began during the early 1900s as a widely varying fraction; by the 1930s it had (gradually) settled across the industry at 1/8 for both oil and gas produced. This equilibrium lasted until roughly the mid-1970s, longer than the professional memory of lessors and lessees alike, when market forces driven by the rising prices of hydrocarbons finally overcame tradition and lessor's royalties finally rose. During this stretch of almost fifty years, the idea took hold that lessor's royalties would always be 1/8 for produced oil and gas, even though other produced minerals (such as sulfur) required payment of other fractions, such as 1/10 or 1/16, as described in the very same royalty clauses in the very same leases.[6]

After the 1970s, and through the present, the lessor's royalty for produced oil and gas has most often been 1/6 or greater. Now, with the advent of unconventional onshore plays, lease royalty has in-

3. *French*, 896 S.W.2d at 797 (quoting Day & Co. v. Texland Petroleum, 786 S.W.2d 667, 669 n.1 (Tex. 1990)) (In *Day*, the word is "intention" rather than "intent.").

4. *See* 1 Ernest E. Smith & Jacqueline Lang Weaver, Texas Law of Oil and Gas § 2.4[A], at 2-61 (2d ed. 2015).

5. *Id.*

6. *See* Wynne/Jackson Dev., L.P. v. PAC Capital Holdings, Ltd., No. 13-12-00449-CV, 2013 WL 2470898, at *4 (Tex. App.—Corpus Christi June 6, 2013, pet. denied) (reserving an NPRI measuring it as "a non-participating royalty of one-half (1/2) *of the usual one-eighth (1/8) royalty* in and to all oil, gas, and other materials produced, saved and sold from the above-described property" (emphasis added)). This Author has seen lessor's royalty due on produced minerals other than oil and gas measured as fractions other than 1/8 in many instruments executed from the 1930s to the 1970s.

creased dramatically, commonly reaching 1/5 or 1/4.[7] Leases issued by the Texas General Land Office are now typically set at 1/4.[8] Lease bonuses topped $26,000 per mineral acre in the most prospective portions of the Barnett Shale during the latter half of the 2000s.[9]

In contrast to a lessor's royalty, a non-participatory royalty interest ("NPRI") is an expense-free real-property mineral interest that does not participate (hence the name) in collecting bonus or delay rentals, leasing, or exploring and developing.[10] This interest is "non-possessory in that it does not entitle its owner to produce the minerals himself," as one Texas court described it.[11] "It merely entitles its owner to a share of the production proceeds, free of the expenses of exploration and production."[12] The size of an NPRI can be expressed in one of two ways: The NPRI can be reserved or conveyed as a fixed fraction of gross production, commonly 1/16, or it can be dependent upon the lessor's royalty of the existing lease and every lease covering the captioned land thereafter.[13] In the second instance, the NPRI fraction is typically multiplied by whatever lessor's royalty is found in the existing oil and gas lease covering the captioned land.[14]

Williams and Meyers have collected examples of "fixed NPRIs" under which a fraction or percentage of gross production has been granted or reserved:[15]

7. 1 Smith & Weaver, *supra* note 4, § 2.4[B][1], at 2-64.

8. *Id.*

9. *Neighborhood Group Organizer Wins Burleson Council Seat*, Powell Barnett Shale Newsl., May 26, 2008, at 11, http://www.nctc.edu/docs/default-source/oil-gas-adobe-files/Powell_Barnett_Shale_Newsletter.pdf [https://perma.cc/PY6N-SHLJ].

10. *See* Joseph Shade & Ronnie Blackwell, Primer on the Texas Law of Oil and Gas app. A (5th ed. 2013) (defining "nonparticipating royalty"). The third kind of royalty, not discussed in this Article, is the overriding royalty interest. This is described as "[a]n interest in oil and gas produced at the surface, free of the expense of production. In modern times overriding royalty interests usually refers to a non cost bearing interest carved out of the lessee's working interest under an oil and gas lease." *Id.* A "freestanding royalty" is synonymous with an NPRI.

11. Range Res. Corp. v. Bradshaw, 266 S.W.3d 490, 491 n.1 (Tex. App.—Fort Worth 2008, pet. denied).

12. *Id.*; Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 789 (Tex. 1995); Hamilton v. Morris Res., Ltd., 225 S.W.3d 336, 344 (Tex. App.—San Antonio 2007, pet. denied).

13. 1 Smith & Weaver, *supra* note 4, § 2.4[B][2], at 2-64.

14. *Id.* For example, the owner of an NPRI that gave him the right to "one-eighth of royalty" would be entitled to receive 1/64 of the gross production from a lease containing a 1/8 lessor's royalty (1/8 × 1/8), but would receive 1/48 of the gross production from a lease containing a 1/6 lessor's royalty (1/8 × 1/6). This amount is deducted from the lessor's royalty owed to the lessor himself. Unless uncommon terms are at play, the lessee continues to pay only the amount of the lessor's royalty; he does not typically pay the sum of the lessor's royalty and the NPRI.

15. 2 Howard R. Williams & Charles J. Meyers, Williams & Meyers Oil and Gas Law § 327.1, at 81 (Patrick H. Martin & Bruce M. Kramer eds., 2015).

- "a one-fourth royalty in all oil, gas and other minerals in and under and hereafter produced";[16]
- "a fee royalty of 1/32 of the oil and gas";[17]
- "an undivided one-sixteenth royalty interest of any oil, gas or minerals that may hereafter be produced";[18]
- "one-half of the one-eight[h] royalty interest";[19]
- "an undivided 1/24 of all the oil, gas and other minerals produced, saved, and made available for market";[20]
- "[one percent] royalty of all the oil and gas produced and saved[.]"[21]

The same treatise also provides examples of "floating NPRIs" under which the amount of production received by the royalty owner fluctuates according to the amount of lessor's royalty provided for in the lease.[22] These include:

- "1/16 of all [the] oil royalty";[23]
- "[t]he undivided 2/3 of all royalties";[24]
- "[o]ne-half interest in all royalties received from any oil and gas leases";[25]
- "[a]n undivided one-half interest in and to all of the royalty";[26]
- "[o]ne-half of one-eighth of the oil, gas and other mineral royalty that may be produced";[27]
- "one-half of the usual one-eighth royalty."[28]

16. *Id.* (quoting Arnold v. Ashbel Smith Land Co., 307 S.W.2d 818, 820 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.)).
17. *Id.* (quoting Caraway v. Owens, 254 S.W.2d 425, 426 (Tex. Civ. App.—Texarkana 1953, writ ref'd)).
18. *Id.* (quoting Masterson v. Gulf Oil Corp., 301 S.W.2d 486, 487 (Tex. Civ. App.—Galveston 1957, writ ref'd n.r.e.)).
19. *Id.* (alteration in original) (quoting Duvall v. Stone, 213 P.2d 212, 213 (N.M. 1949)).
20. *Id.* (quoting Miller v. Speed, 259 S.W.2d 235, 237 (Tex. Civ. App.—Eastland 1952, no writ)).
21. *Id.* (quoting Mitchell v. Hannah, 208 P.2d 812, 812 (Mont. 1949)).
22. *Id.* at 83–84.
23. *Id.* at 83 (alteration in original) (quoting Crews v. Burke, 309 P.2d 291, 293 (Okla. 1957)).
24. *Id.* at 84 (alteration in original) (quoting Meeks v. Harmon, 250 P.2d 203, 205 (Okla. 1952)).
25. *Id.* (alteration in original) (quoting Fed. Land Bank of Wichita v. Nicholson, 251 P.2d 490, 491 (Okla. 1952)).
26. *Id.* (alteration in original) (quoting State Nat'l Bank of Corpus Christi v. Morgan, 143 S.W.2d 757, 761 (Tex. Comm'n App. 1940)).
27. *Id.* (quoting Harriss v. Ritter, 279 S.W.2d 845, 846 (Tex. 1955)).
28. *Id.* (citing Butler v. Horton, 447 S.W.3d 514, 518 (Tex. App.—Eastland 2014, no pet.)).

Each example in the first list represents a royalty of an exact, calculable magnitude. Each example in the second list—most containing the word "of," which commonly acts as a multiplication sign in such instances—is dependent on the magnitude of the lessor's royalty in a future lease and thus can vary in magnitude over time.

Conundrums have sometimes arisen over whether a particular reserved or conveyed NPRI is a "fixed" or "floating" royalty interest. The presumption that lessor's royalties would remain 1/8 would have remained a historical footnote if perpetual NPRI conveyances made during this "lessor's royalty is always 1/8" period had not inadvertently introduced ambiguity into the mix.

A. *Multiple Fractions*

A classic interpretation problem is presented when language in the conveyance or reservation could be read to convey or reserve either a fixed or floating NPRI. A classic example was provided by *Sundance Minerals, L.P. v. Moore* wherein a dispute over whether the reservation of an undivided 1/2 interest in and to all of the royalty that may be payable under any and all oil and gas leases, by which royalty is meant 1/8 of production reserved a fixed NPRI (1/2 of 1/8 = 1/16) or a floating NPRI (1/2 of [whatever the lessor's royalty is of any future lease]).[29] As discussed below, while the courts historically favored finding a fixed royalty where no other language in the instrument gave any further hints as to the drafter's intent, in *Sundance*, the court set aside judicial recognition of the usual 1/8 lessor's royalty, despite the express reference to that royalty in the deed, and found that a floating NPRI was reserved by the grantor.

Sometimes called a "double fraction" problem, fixed vs. floating NPRI issues are often encountered in the form of an instrument expressing an (often reserved) NPRI as the product of two fractions, such as "1/2 of the usual 1/8." Disputes arise about whether such double fractions must be multiplied and the royalty interest fixed without regard to the royalty negotiated in a future mineral lease (a fixed NPRI) or whether 1/8 was intended as a synonym for any quantity of lessor's royalty negotiated in the future (a floating NPRI).[30] The Texas Supreme Court, in early 2016, noted that "[t]he proper construction of instruments containing double-fraction language is a dilemma of increasing concern in the oil and gas industry, as uncertainty

29. Sundance Minerals, L.P. v. Moore, 354 S.W.3d 507, 510 (Tex. App.—Fort Worth 2011, pet. denied).

30. *See* Laura H. Burney, *Interpreting Mineral and Royalty Deeds: The Legacy of the One-Eighth Royalty and Other Stories*, 33 St. Mary's L.J. 1, 4 (2001) (discussing at length both the "double fraction" or "restated fraction" problem as well as "estate misconception"—the confusion created by further-explanation clauses such as the reservation of "an undivided one-half non-participating royalty" followed by the parenthetical, "([b]eing equal to, not less than an undivided 1/16th) of all the oil, gas and minerals . . . .").

abounds, disputes proliferate, and courts have seemingly varied in their approaches to this complicated issue."[31]

Current title examiners sometimes wonder why early mineral deeds contained different fractions in initial granting and subsequent subject-to and future lease provisions. One reason, other than those arising from various manifestations of poor draftsmanship—math errors, forgotten prior reservations, tortuous language—is the historical plateau of 1/8 lessor's royalty that lasted for approximately half a century. In 1984, the Kansas Supreme Court took judicial notice of this when it considered a 1925 deed that granted "an undivided 1/16 interest in and to all of the oil, gas and other minerals" and later stipulated that if the captioned land was covered by a lease, the grantees "shall have an undivided 1/2 interest in the Royalties, Rentals, and Proceeds therefrom."[32] The Court stated that "the use of the fraction '1/16' in the initial clause of this mineral deed was simply an error commonly made in the early days of oil and gas conveyancing."[33] The confusion is not uncommon today. In *Shepard v. John Hancock Mutual Life Insurance Co.*, there is an excellent discussion of this early-day misconception and misuse of the fraction "1/16" when "1/2" was really intended.[34] Referencing *Shepard*, the Supreme Court of Kansas said in *Heyen v. Harnett*:

> As the most common leasing arrangement provides for a one-eighth royalty reserved to the lessor, the confusion of fractional interests stems primarily from the mistaken premise that all the lessor-landowner owns is a one-eighth royalty. In conveying minerals subject to an existing lease and also assigning a corresponding fractional interest in the royalties received, [a] mistake is often made in the fraction of the minerals conveyed by multiplying the intended fraction by one-eighth. Thus, if a conveyance of an undivided one-half of the minerals is intended, the parties will multiply one-half by one-eighth and the instrument will erroneously specify a conveyance of one-sixteenth of the minerals upon the assumption that one-sixteenth is one-half of what the grantor owns. An ambiguity is created because the instrument will also show that the conveyance of one-sixteenth of the minerals is meant to entitle the grantor to one-half of the royalty. Of course, an undivided one-half of the minerals is needed to carry one-half of any royalties reserved.
>
>> And so here. In computing the fractional interest reserved the parties were aware of the existence of the Jennings leases providing for 1/8th royalty to the landowner, and it is obvious the scrivener multiplied 1/4th by 1/8th and the instrument erroneously specified a reservation of 1/32nd as the interest reserved, apparently upon the assump-

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31. Hysaw v. Dawkins, 483 S.W.3d 1, 4 (Tex. 2016).
32. Heyen v. Hartnett, 679 P.2d 1152, 1154, 1158–59 (Kan. 1984).
33. *Id.* at 1158.
34. Shepard v. John Hancock Mut. Life Ins. Co., 368 P.2d 19, 26–27 (Kan. 1962).

> tion that 1/32nd interest in and to all oil, gas or other minerals, would constitute ownership of 1/4th of the landowners' 1/8th royalty, when the intention of the reservation as disclosed by its other terms indicate that the fraction 1/4th should have been used instead of the fraction 1/32nd. When this is done, the intent of the grantor is clear and no ambiguity exists. Hence, contrary to plaintiffs' contention, no occasion exists for the application of any rule of construction to aid in the interpretation of the reservation.
>
> On the basis of the reasoning set forth above, we hold that the ambiguous mineral deed of 1925 should be construed to convey to the grantees an undivided 1/2 interest in the oil and gas and other minerals in and under the land in question, so as to carry out the intention of the parties to give the grantees and their successors in title an undivided 1/2 interest in the royalties produced under the Iannitti lease.[35]

A clever but unsuccessful argument based on the prevalence of the 1/8 landowner's royalty throughout most of the twentieth century was advanced in *Hudspeth v. Berry*.[36] The case involved a 1943 conveyance in which two brothers granted each of their individual one-third interests in a mineral estate to their third brother while each grantor reserved an "undivided 1/40th royalty interest (being 1/5th of 1/8th)."[37] More than sixty years later, the successor of the grantee executed an oil and gas lease providing for a 1/5 royalty.[38] The successors of the grantors argued that because 1/8 was the standard lessor's royalty for several decades in the early and middle 1900s, the term "1/8th" was synonymous with "lessor's royalty" and therefore could be replaced with "lessor's royalty," and they were therefore each entitled to 1/5 of the 1/5 royalty that the plaintiff had reserved in the oil and gas lease.[39] The court rejected the argument, pointing out that the 1943 deed did not contain conflicting fractions but plainly reserved two fixed 1/40 royalty interests.[40]

II. Prior Case Law & Commentary

Related to the problem of fixed vs. floating royalty is the larger problem of multiple granting/reservation clauses that seemingly entangle the various mineral "sticks" with multiple clauses using multiple fractions. Perhaps resulting from the work of inexperienced drafters, such instruments often contain a clear statement of convey-

35. *Heyen*, 679 P.2d at 1158–59 (quoting *Shepard*, 368 P.2d at 26–27).
36. Hudspeth v. Berry, No. 2-09-225-CV, 2010 WL 2813408 (Tex. App.—Fort Worth July 15, 2010, no pet.).
37. *Id.* at *2.
38. *Id.* at *1.
39. *Id.* at *2–3.
40. *Id.* at *4.

ance or reservation followed by one or more involved "clarifying" clauses that, as described in the cases they spawn, do little to clarify and may actually contradict the first clause.

"*Altman v. Blake*, cited by many sources as the definitive Texas case for the proposition that the mineral estate consists of five distinct sticks, seemed to help usher in the modern view of the five-faceted separable mineral estate."[41] In *Altman*, the owner of an entire fee mineral estate was held by the Texas Supreme Court to have retained a fee mineral interest despite having conveyed away the right to collect delay rentals and the executive right.[42] The Court noted that it had "before recognized that a mineral interest shorn of the executive right and the right to receive delay rentals remains an interest in the mineral fee."[43]

One of the first Texas decisions that tackled an instrument with multiple fractions was *Tipps v. Bodine*.[44] The granting clause seemingly conveyed a 1/16 interest in the minerals.[45] If so, the grantee would receive only 1/16 *of* royalties payable under any future leases, along with 1/16 *of* delay rentals, and 1/16 *of* any bonus—a 1/16 fraction of each. Further on, however, the drafters might have outsmarted themselves by inserting three other clauses under which the grantor effectively conveyed a larger fraction of each the lessor's royalty, delay rentals, and bonus. Specifically, the instrument then conveyed a 1/2 interest in any benefits received "under the existing lease, a 1/2 interest in the possibility of reverter and executive rights,"[46] "a 1/2 interest in all benefits under future leases," and, giving a brief lesson in daffy drafting, "a 1/2 interest in all future events."[47] The Sixth Court of Appeals in Texarkana held that these provisions, in toto, resulted in grants of a 1/2 interest in the mineral fee even though the initial granting clause specified "1/16."[48] The drafter's intent was conjured from the four corners of the document.

Twenty years later, in 1957, the situation encountered by the Texas Supreme Court in *Garrett v. Dils Co.*[49] was similar to that in *Tipps*. The first granting clause provided for the conveyance of a 1/64 interest in the minerals; a later clause, however, identified the existing lease over the captioned land and provided that "this sale . . . covers and

41. Christopher S. Kulander, *The Executive Right to Lease Mineral Real Property in Texas Before and After* Lesley v. Veterans Land Board, 44 ST. MARY'S L.J. 529, 543 (2013).
42. Altman v. Blake, 712 S.W.2d 117, 119–20 (Tex. 1986).
43. *Id.* at 118–19.
44. Tipps v. Bodine, 101 S.W.2d 1076 (Tex. Civ. App.—Texarkana 1936, writ ref'd).
45. *Id.*
46. The "lease interest," according to the Texas Supreme Court in *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 455 (Tex. 1998).
47. *Id.*; *Tipps*, 101 S.W.2d at 1079.
48. *Tipps*, 101 S.W.2d at 1079.
49. Garrett v. Dils Co., 299 S.W.2d 904 (Tex. 1957).

includes one-eighth of all . . . rental or royalty due."[50] The deed in *Garrett* also had a clause addressing the future: It stated that the grantee would own "an undivided one-eighth of the lease interest and all future rentals . . . and other mineral privileges . . . [the grantee] owning one-eighth of one-eighth of all oil, gas, and other minerals . . . together with one-eighth interest in all future rentals."[51] The Court held that because the grantee now had the right to receive 1/8 of the royalty, 1/8 of the "lease interest" (i.e., the executive right to lease), and 1/8 of future rentals, the grantee was now "the owner of one-eighth of the minerals in the land."[52] Once again, the Court used the "four corners" of the instrument to define what the grantee acquired, which amounted to 1/8 of all the attributes of mineral ownership.

Contemplating once again the troublesome reservation construction, "an undivided one-half interest in and to all of the royalty that may be payable under any and all oil and gas leases, by which royalty is meant one-eighth of production," two commentators have opined that such language plainly indicates that the parties believed they were dealing with a 1/8 lessor's royalty from which the NPRI would be deducted, and therefore the reservation specified a fixed 1/8 lessor's royalty.[53] Since the reservation comes out of the royalty amount owed the lessor, the lessor is left with 1/16, provided that the lessor's royalty was 1/8.[54]

The four corners rule provides that the meaning of an instrument deemed unambiguous is to be divined from the words of the instrument alone. The four corners rule "bars the parties to a written contract that is 'clear on its face'—meaning that a reader who is competent in English but unaware of the agreement's context would think the writing admitted of only one meaning—from presenting evidence bearing on interpretation, which is to say 'extrinsic' evidence—evidence outside the 'four corners' of the written contract," one tireless commentator noted.[55] "The judge alone determines what the contract means when no extrinsic evidence is presented because he is a more competent interpreter of a document than a jury is."[56] The executed instrument and its exhibits are presumed to embody the entire agreement, and Texas courts typically do not impute into the instrument additional provisions.[57]

In order to understand where the law resides today with regard to the fixed vs. floating royalty conundrum in Texas, it helps to examine

50. *Id.* at 906.
51. *Id.*
52. *Id.* at 907.
53. 1 SMITH & WEAVER, *supra* note 4, § 2.4[B][3], at 2-65.
54. *Id.*
55. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1596 (2005).
56. *Id.*
57. Danciger Oil & Ref. Co. v. Powell, 154 S.W.2d 632, 635 (Tex. 1941).

earlier fixed vs. floating case law landmarks. The saga is hardly straightforward.

A. Alford v. Krum *and the Repugnant-to-the-Grant Theory*

The four corners rule did not initially carry over to fixed vs. floating royalty questions. Before the early 1990s, most courts resolved contradictory NPRI reservation/conveyance descriptions by utilizing the "repugnant-to-the-grant" theory, made popular in Texas by the case of *Alford v. Krum*.[58] In that case, the Supreme Court of Texas held that a granting clause conveyed a 1/16 mineral interest despite the fact that the actual language of the clause described the interest as a multiple of a fraction—1/2 of 1/8.[59] Specifically, in *Alford*, a mineral conveyance from 1929 granted a "one-half of the one-eighth interest in and to all of the oil, gas and other minerals."[60] This was followed by a provision noting that the conveyance "covers and includes 1/16 of all the oil royalty and gas rental or royalty due and to be paid under the terms of said lease."[61] Both clauses were then topped off with the recognition that future leases might follow and, in such cases, the grantor and grantee would each own "a one-half interest in all oil, gas and other minerals in and upon said land, together with one-half interest in all future rents."[62]

Litigation ensued, with courts asked to consider whether the grantee received a 1/2 mineral interest or only a 1/16 mineral interest—1/2 of 1/8. The Texas Supreme Court majority, its eye seemingly fixed on a policy of title clarity, noted the "clear and unambiguous language of the granting clause" and held that the deed conveyed only a perpetual 1/16 mineral interest to the grantee.[63] The Court formulated a bright-line rule:

> In cases involving the construction of mineral deeds, the "controlling language" and the "key expression of intent" is to be found in the granting clause, as it defines the nature of the permanent mineral estate conveyed. It logically follows that when there is an irreconcilable conflict between clauses of a deed, the granting clause prevails over all other provisions.[64]

As one commentator opined, the majority ignored the lease clauses covering the present lease and any future leases as they muddied "the

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

59. *See id.* at 873–74; Krum v. Alford, 653 S.W.2d 464, 467 (Tex. App.—Corpus Christi 1982), *rev'd*, 671 S.W.2d 870 (Tex. 1984).

60. *Alford*, 671 S.W.2d at 871.

61. *Id.* at 872.

62. *Id.*

63. *Id.* at 874.

64. *Id.* at 872 (citation omitted).

clear and unambiguous language of the granting clause."[65] Such a rule empowered Texas courts to declare such "present" and "future" lease clauses as found in *Alford* unambiguously "repugnant" to the granting clause and thus allowed them to ignore such clauses as a matter of law.[66] As David Pierce notes:

> Because [the 'present' and 'future' lease clauses] conflict[ ] with the granting clause, a judge might be inclined to declare the conveyance "ambiguous" to allow the court to conduct a wider search of the facts for the parties' meaning. However, this result is avoided by [*Alford*] . . . . Once they are eliminated from the analysis, we are left with "the clear and unambiguous language of the granting clause . . . ." This allows the court to remove conflicting language from the express terms of the deed *before* it considers whether it is ambiguous.
>
> . . . The court applied a rule to ensure the document remained "unambiguous" and then used the same rule to assign a generic meaning to the language in the document.[67]

Alford, therefore, essentially ignores language subsequent to the granting clause that may conflict with the express result of the granting clause. While *Alford* would seemingly tarnish the intent of drafters in some instances, presumably Texas title examiners could more easily interpret mineral deeds by simply ignoring language that challenged the granting clause.

The three dissenting justices in *Alford* read the future lease clause as a separate grant, turning away from a perceived failure by the majority to examine the four corners of the instrument in an effort to give effect to all the provisions in the deed and the intent of the drafters.

B. Luckel v. White, Jupiter Oil Co. v. Snow, *and the "Two-Grant" Doctrine*

The minority's time would soon come. Seven years later, the Texas Supreme Court changed course with the majority's opinion in *Luckel v. White*, wherein the Court held that conveyances should generally be interpreted by harmonizing all of the provisions rather than allowing the first granting provision primacy over subsequent grants.[68]

Under the "two-grant" doctrine, a deed with multiple clauses is construed as making separate grants of different types of interests in a particular tract of property or varying sizes of one interest at different

65. David E. Pierce, *Interpreting Oil and Gas Instruments*, 1 TEX. J. OIL, GAS, & ENERGY L. 1, 9 (2006) (citing *Alford*, 671 S.W.2d at 874).

66. *Id.*

67. *Id.* at 9–10 (quoting *Alford*, 671 S.W.2d at 874).

68. Luckel v. White, 819 S.W.2d 459, 464 (Tex. 1991).

times.[69] One commentator has noted the two-grant theory works only if it is supposed that only one grant functions at a time.[70] That supposition, however, typically conflicts with the express language of both the initial granting/reservation clause and subsequent "further explanation" or "subject to" clauses. Deeds where the fractions used in the granting clause and in the subsequent "covers and includes" clause, or its equivalent, are not consistent with each other have provided the most controversial applications of the two-grant theory. If, for example, the land is subject to an oil and gas lease providing for a 1/8 lessor's royalty, the granting clause may purport to convey 1/32 of the oil and gas beneath the tract, while the "subject to" clause states that the deed covers and includes 1/4 of all rents and royalties under the outstanding lease and under all future leases.

Luckel illustrates the problems involved in construing this type of deed, as it deals with a royalty deed containing terms that, so long as the royalty payable under any future lease over the captioned land was 1/8, it remained consistent with the other deed provisions. The granting and warranty clauses of the royalty deed provided for a 1/32 non-participating royalty interest.[71] In contrast, a subsequent provision describing an existing lease and another provision addressing the possibility of subsequent leases stated, respectively, that the grantee would "receive one-fourth" and "be entitled to one-fourth" of all royalties.[72] This would, of course, equal a 1/32 royalty under a 1/8 royalty lease—the prevailing oil and gas royalty at the time. Problems in construing the deed arose, however, with subsequent leases that provided for a 1/6 royalty[73]—1/4 of 1/6 does not equal 1/32. The Court ruled that a 1/4 *of* royalty—a "floating" royalty based upon the product of 1/4 and whatever the future lease's royalty fraction might be—resulted rather than a "fixed" 1/32 royalty.[74]

Interestingly, the Court went on to provide that the "floating" royalty could never be below 1/32—the contrasting language was held to provide a "floor" value for the grantee's royalty.[75] In the unlikely circumstance that a future lease contained, say, a 1/10 royalty, that would still provide the grantee with a 1/32 royalty and not a 1/40 royalty (1/4 of 1/10), as the 1/4 of royalty otherwise payable under any given lease could not result in less than a 1/32 royalty.

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

70. *See* David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: The Continuing Search for Analytical Foundations*, *in* 47 OIL & GAS LAW & TAXATION § 1.05, at 1–24 (1996).

71. *Luckel*, 819 S.W.2d at 461.

72. *Id.* (emphasis omitted).

73. *Id.*

74. *Id.* at 464.

75. *Id.* at 464–65.

The Texas Supreme Court held that the majority in *Alford* had failed to harmonize the provisions as required by the "four corners rule."[76] Contemporaneously with *Luckel*, the Texas Supreme Court decided *Jupiter Oil Co. v. Snow*,[77] a case involving a granting clause in a mineral deed that first provided for a conveyance of a 1/16 mineral interest: "all that certain undivided 1/16 interest in and to all the oil, gas, and other minerals of whatsoever kind and character in and under the following described lot."[78]

The next paragraph acknowledged that the tract in dispute was under lease at the time. Another paragraph in the deed, however, addressed an existing lease and provided that the parties intended that the grantee should receive a 1/16 interest in the minerals produced from the existing lease and that the parties intended for the grantor to convey "1/2 of the interest they now have in any such production under said lease."[79] The existing lease provided for a (then typical) 1/8 royalty.[80] A third provision in the contested deed provided that upon expiration of the then-existing lease, the grantee would "have and hold" the following:

> [I]n the event the lease now on said land is forfeited or terminated withou[t] producing mineral of any kind, then the grantee herein or his assigns are to have and hold under this conveyance an undivided 1/2 of all the oil. [sic] gas or other mineral of whatsoever kind character in and under the land herein described, and it is the intention of the grantors herein that in the event said lease is forfeited, then in that event the grantee is to have and hold an equal undivided one half of all such minerals.[81]

The successor-grantor argued that this meant the grantee, upon deed execution and delivery, would receive a 1/16 royalty interest in the existing lease and would own a 1/16 mineral interest after the lease expired. The successor-grantee argued that this meant the deed passed a 1/2 interest with the possibility of reverter in the minerals (with the lessee holding a fee simple determinable), and the grantee owned an undivided fifty percent mineral interest upon termination of the then-existing lease.

The conveyance was first held to be unambiguous.[82] Then the Court, trying to harmonize all the terms of the deed—and apparently trying to give specific meaning to the "one-half of the interest they now have in such production under said lease" language—held that the deed immediately gave the grantee a 1/16 interest in the mineral

76. *Id.* at 464.
77. Jupiter Oil Co. v. Snow, 819 S.W.2d 466 (Tex. 1991).
78. *Id.* at 468.
79. Snow v. Jupiter Oil Co., 802 S.W.2d 354, 356 (Tex. App.—Eastland 1990), *rev'd*, 819 S.W.2d 466 (Tex. 1991).
80. *Jupiter Oil*, 819 S.W.2d at 467.
81. *Id.* at 468 (alteration in original).
82. *Id.* at 469.

estate.[83] Upon the termination of the then-existing lease, fee simple title revested in the grantor.[84] The third paragraph then conveyed one-half of the grantor's possibility of reverter, so that when the then-existing lease ended, the grantee's interest in the mineral estate simultaneously expanded into a full one-half by operation of law.[85] *Alford* was expressly found inapplicable.[86] Had the Court's jurisprudence in *Alford* been followed, one suspects that the Court would not have reversed and instead held that the first clause simply trumped the later language regarding the passage of a one-half interest and ruled that only a post-lease 1/16 mineral interest had passed. *Jupiter Oil* did not delve as deeply into the jurisprudential and policy reasons for why *Alford* was inapplicable in *Luckel*, but the result was fully consistent with *Luckel*.

Luckel and *Jupiter Oil* eliminated the repugnant-to-the-grant rule of construction that had been adopted in *Alford* with a definitive knell, opting instead for the "four corners" approach currently applied to instruments deemed unambiguous in Texas: the intent of the parties is to be determined (or surmised) at law by attempting to harmonize all the provisions of the instrument in question.[87] This task was later summarized in *J.M. Davidson, Inc. v. Webster*: "[W]e must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless."[88] "No single provision taken alone will be given controlling effect; rather, all the [deed] provisions must be considered with reference to the whole instrument."[89]

In *Luckel* and *Jupiter Oil*, the granting clause expressed a smaller fixed fractional interest conveyance (a 1/32 royalty in *Luckel* and a 1/16 mineral interest in *Jupiter Oil*) than the floating royalty conveyance or mineral interest in subsequent parts of the conveyance (a 1/4 *of* royalty in *Luckel* and a 1/2 interest in production under any current lease, followed later in the conveyance by a 1/2 interest in all minerals, in *Jupiter Oil*). In both instruments, the conveyance appeared to contain clear and unambiguous provisions that provided for what interest the grantee was to receive under various subsequent circumstances. In both cases, the subsequent fractions were harmonious in all clauses except the initial granting clause. More importantly, in both cases, when all the received interests of the grantee under the provisions subsequent to the granting clause were compiled, the grantee had (de-

83. *Id.* at 468–69; *id.* at 469 (Hecht, J., concurring).
84. *Id.* at 469 (majority opinion).
85. *Id.*
86. *Id.* at 467.
87. *Id.* at 468; Luckel v. White, 819 S.W.2d 459, 461–62 (Tex. 1991).
88. J.M. Davidson Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003).
89. Seagull Energy E & P, Inc. v. Eland Energy, Inc., 207 S.W.3d 342, 345 (Tex. 2006) (quoting Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983)).

pendent on the measure of lessor's royalty in *Luckel*) received a larger estate than granted by the opening granting clause.

Of course, these decisions should not imply that no grant or assignment can be interpreted to convey royalty and/or mineral interests of different amounts. A grantor of a royalty or mineral interest may convey one or more, or fractions of one or more, of any attribute of the mineral estate, all royalty or a fraction of royalties, the right to receive delay rentals or shut-in royalties, and the executive right to lease. The litigation begins when different fractions appear in the conveyance, giving rise to a question of subsequent ownership, and a court must attempt to determine the intent of the drafters from the "four corners" of the instrument.

C. *Prior Contrasting Decisions*

Cases involving instruments conveying and reserving fractional royalty interests in land subject to an oil and gas lease and containing references to rights in future leases have gone both ways before—even from the same court inside of a decade. For example, *Hausser v. Cuellar*, where, in 1936, respondents' predecessors—whose land was subject to an oil and gas lease providing for a 1/8 royalty—executed a deed granting "an undivided (1/2) interest in and to all of the oil royalty [and] gas royalty" and providing that if a future lease was executed after the termination of the existing lease, "the Grantees shall receive under such future lease or leases one sixteenth (1/16) part of all oil, gas and other minerals."[90] In 2006, decades after the original lease had terminated, the grantor's successors executed a new lease providing for a 1/4 royalty.[91] Claimants, who were the successors of the grantees in the 1936 deed, brought suit for a declaratory judgment that they were entitled to one-half of the 1/4 royalty, i.e., 1/8 of production, rather than only 1/16 of production, as contended by the defendant.[92] In ruling for the plaintiffs, the court pointed to the absence of any language in the 1936 deed suggesting that two different estates were being conveyed, i.e., a present right to one-half of royalty and a future right to a 1/16 royalty; rather, the deed conveyed a single, fixed estate of one-half of royalty.[93] Contrast that holding with the Fourth Court of Appeals's earlier construction of a similar deed in *Neel v. Killam Oil Co. Ltd.*,[94] in which it had reached the opposite result. The court distinguished the two cases on the ground that the *Neel* decision did not rely entirely upon the language of the deed at issue, but was

90. Hausser v. Cuellar, 345 S.W.3d 462, 467–68 (Tex. App.—San Antonio 2011, pet. denied) (en banc).
91. *Id.* at 465.
92. *Id.*
93. *Id.* at 470–71.
94. Neel v. Killam Oil Co., 88 S.W.3d 334 (Tex. App.—San Antonio 2002, pet. denied).

based, in part, upon an earlier deed in which the grantor of the deed in *Neel* had received only a 1/16 royalty and hence could convey only as much as he owned.[95]

Coghill v. Griffith is illustrative of the current application of the modern interpretive approach spawned by *Luckel*.[96] In 1961, Wood, Coghill's predecessor, who had executed an oil and gas lease providing for a 1/8 lessor's royalty, conveyed the leased land to Welch, the Griffiths' predecessor.[97] In the deed the grantor reserved "an undivided one-eighth (1/8) interest in and to all of the oil royalty [and] gas royalty" under the existing lease "as well as an undivided one-eighth (1/8) *of the usual one-eighth (1/8) royalties* provided for in any future oil, gas and/or mineral lease."[98] A further provision stipulated that the grantee would never execute a new oil and gas lease unless the lease provided "for at least a royalty on oil of the usual one-eighth (1/8)," and if the grantee or a successor developed the minerals, the grantor was entitled to receive "as a free royalty hereunder, (1) an undivided one-sixty fourth [sic] (1/64)."[99] After the original lease terminated, Welch, the original grantee, executed two new oil and gas leases providing for a 3/16 royalty and subsequently signed a division order showing that both he and Coghill, who had inherited the grantor's interest, were each entitled to 1/8 of the 3/16 royalty.[100] Subsequently, the Griffiths purchased Welch's interest in the property and disputed Coghill's claim to 1/8 of the lease royalty.[101] They argued that the original deed had reserved only a right to 1/64 of production.[102] The court held that the 1961 deed specifically reserved a right to 1/8 of royalty in the existing lease and in future leases—a "floating" royalty.[103] The references to the usual 1/8 royalty did not compel a conclusion that the parties to the deed intended to limit the reservation to a fixed 1/64 royalty.[104] Similarly, the requirement that future leases provide for "at least" a 1/8 royalty and that the grantor receive 1/64 of production if the grantee or his successors developed the land was included to guarantee that the reserved royalty would never be less than 1/64 of production.[105] Setting a floor on the royalty did not indicate an intent to limit the royalty to the amount guaranteed by the floor.[106]

Some deeds describe a reserved or conveyed royalty interest with an initial fraction, followed by a clause that attempts to clarify or aug-

95. *Hausser*, 345 S.W.3d at 469–70 (citing *Neel*, 88 S.W.3d at 340–41).
96. Coghill v. Griffith, 358 S.W.3d 834 (Tex. App.—Tyler 2012, pet. denied).
97. *Id.* at 835.
98. *Id.* at 835–36 (emphasis added).
99. *Id.* at 836 (emphasis omitted).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 839–40.
104. *Id.* at 839.
105. *Id.*
106. *Id.*

ment the language containing the first fraction, often in a parenthetical. The majority in *Alford* did not consider or address the significance of why the drafters of the disputed conveyance would list two fractions (1/2 and 1/8) instead of 1/16. This problem has been bracketed by the Texas Supreme Court in two cases noteworthy not only for the differences in the deed language interpreted but also for the dissents encountered.

In *Brown v. Havard*, the Browns granted some mineral rights while reserving to themselves a perpetual "one-half non-participating royalty ([b]eing equal to, not less than an undivided 1/16th) of all the oil, gas and other minerals, in, to and under or that may be produced from said land."[107] Later, successor grantee Havard leased the land for a 3/8 landowner's royalty.[108] When a well was brought in, the Browns refused to execute division orders providing that their interest was 1/16, instead demanding 1/2 of the 3/8 royalty under the current lease.[109] Setting aside a jury verdict for Havard, the district judge found for Brown, holding that such conveyance language unambiguously reserves a floating royalty computed against the royalty fraction in any later lease.[110] The court of appeals found the conveyance language at issue to be ambiguous, allowing consideration of evidence outside the deed.[111]

A majority of the Texas Supreme Court also found the language at issue subject to more than one interpretation, noting that "ambiguity arises from the inclusion of the parenthetical phrase, ([b]eing equal to, not less than an undivided 1/16th)."[112] Three justices dissented, holding that the contested language unambiguously reserved a 1/2 royalty interest in whatever a subsequent lease provided for in its applicable royalty clause—in this case, 1/2 of 3/8, or 3/16.[113] The dissenters noted that the "not less than" language indicated that the drafters had not only contemplated future leases with royalty values different than 1/8 but also provided for a base level below which the reserved royalty could not fall in value—1/16.[114]

One commentator has applauded the dissent's approach: First, it provides for a bright-lined holding and thus stability and consistency in title work, and second, it gives "weight" to both the "1/2" and "1/16" fractions in the reservation.[115]

107. Brown v. Havard, 593 S.W.2d 939, 940 (Tex. 1980).
108. *Id.* at 940–41.
109. *Id.* at 941.
110. *Id.*
111. *Id.*
112. *Id.* at 942.
113. *Id.* at 945 (McGee, J., dissenting).
114. *Id.* at 946.
115. Burney, *supra* note 30, at 28.

III. Ambiguity and Rules of Interpretation and Grammar

The above panoply of cases shows the evolution of the interpretation of instruments with conflicting NPRI reservations and conveyances; and of the definition of the various aspects of the mineral estate, generally, and quantitative aspects of NPRIs, specifically. When interpreting these troublesome instruments, the first hurdle is to consider whether the instrument is ambiguous or not.

A. *On Ambiguity*

In Texas, an oil and gas deed is a contract and must be interpreted as a contract.[116] A contract or provision is ambiguous if it is reasonably susceptible to more than one interpretation.[117] When considering the presence of ambiguity, a court may consider how someone who is familiar with the customs, practices, and terminology as generally understood by a particular trade or business would read such a provision.[118] The instrument should be considered in light of the circumstances in which it was drafted.[119] A provision in an instrument is not ambiguous simply because the parties to the case dispute its proper interpretation or offer alternative constructions.[120]

Several canons of construction impact the determination of ambiguity. Important in fixed vs. floating NPRI debates, when balancing different words and phrases, the more specific and detailed govern the general.[121] Terms and phrases repeated in different portions of the contested instrument all have the same meaning.[122] When determining whether ambiguity is present, courts consider both the express

116. Chesapeake Expl., L.L.C. v. Hyder, 427 S.W.3d 472, 475 (Tex. App.—San Antonio 2014, pet. granted) (first citing Tittizer v. Union Gas Corp., 171 S.W.3d 857, 860 (Tex. 2005); then citing Hitzelberger v. Samedan Oil Corp., 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, pet. denied)).

117. Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996) (citing Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983)).

118. Schwartz v. Prairie Producing Co., 727 S.W.2d 289, 292 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

119. Anglo-Dutch Petroleum Int'l v. Greenberg Peden, P.C., 352 S.W.3d 445, 449–50 (Tex. 2011) (quoting David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 451 (Tex. 2008) (per curiam)).

120. Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433, 446 (Tex. 2009) ("A dispute over meaning does not render a text ambiguous; many disputes lack substance." (footnote omitted)).

121. Shell v. Austin Rehearsal Complex, Inc., No. 03-97-00411-CV, 1998 WL 476728, at *12 (Tex. App.—Austin 1998, no pet.) (first citing Guadalupe-Blanco River Auth. v. City of San Antonio, 200 S.W.2d 989, 1001 (Tex. 1947); then citing City of San Antonio v. Heath & Stich, Inc., 567 S.W.2d 56, 60 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)).

122. *See* Tex. Osage Co-op Royalty Pool, Inc. v. Thomas, 270 S.W.2d 450, 455 (Tex. Civ. App.—Eastland 1954, writ ref'd n.r.e.) ("[T]he words 'stipulated surveys' in the above quoted provision of the second deed was [sic] intended by the parties to have the same meaning as intended in the first deed of the same date and between the same parties . . . .").

words and phrases of the instrument itself and the inferences that can be drawn from those express words and phrases.[123] When dealing with sophisticated parties like oil and gas companies, however, courts are more likely to give deference to the express language used.[124] Uncertainty or lack of clarity in the language chosen by the parties typically does not render an instrument ambiguous.[125] Generally, silence on a disputed point does not make an instrument ambiguous in itself.[126] Finally, mere punctuation should never be allowed to cause ambiguity or to challenge the otherwise distinct meaning of an instrument, as it is always subordinate to the text.[127]

For reasons that remain unclear, Texas has dominated recent fixed vs. floating royalty cases, and all these cases have involved possibilities of ambiguous instruments. The last non-Texas case found dealing with the fractional vs. floating problem is *Parham v. Worthen Trust* out of the Arkansas Supreme Court in 1996.[128] The case involved a 1922 deed by which the appellants—heirs and grantees—obtained an NPRI burdening the appellees' mineral fee.[129] The Court affirmed that the appellants owned a 1/16 rather than a 1/12 royalty interest in the oil and gas produced pursuant to a lease executed by the appellees in 1992.[130]

The courts of states other than Texas use different names for various interests. In *Parham*, the court construed the issue as deciding whether the contested granted interest was a "fractional share" (i.e., a fixed NPRI) or a "fraction of a share" (i.e., a floating NPRI—note the use of the word "of"). It noted that the opening granting clause of the disputed instrument provided:

> That we, Claude L. Smith and Helen E. Smith . . . grant, bargain, sell, convey, set over and assign and deliver unto the said I.L. and J.P. Cooper the following to-wit: An undivided 1/16 interest in and

123. *See* Gulf Metals Indus., Inc. v. Chi. Ins. Co., 993 S.W.2d 800, 808 (Tex. App.—Austin 1999, pet. denied) ("The ambiguity must become evident when the contract is read in context of the surrounding circumstances . . . .") (quoting Nat'l Union Fire Ins. Co. v. CBI Indus., 907 S.W.2d 517, 521 (Tex. 1995)).

124. El Paso Field Servs., L.P. v. MasTec N. Am., Inc., 389 S.W.3d 802, 811–12 (Tex. 2012) (construing the contract by the express language in the document after accounting for the sophistication of the parties).

125. Universal C.I.T. Credit Corp. v. Daniel, 243 S.W.2d 154, 157 (Tex. 1951); City of Houston v. Howe & Wise, 323 S.W.2d 134, 142 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); City of Houston v. Howe & Wise, 373 S.W.2d 781 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.).

126. *See* State Farm Life Ins. Co. v. Beaston, 907 S.W.2d 430, 433–34 (Tex. 1995); Coats v. Farmers Ins. Exch., 230 S.W.3d 215, 219 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

127. Anderson & Kerr Drilling Co. v. Bruhlmeyer, 136 S.W.2d 800, 803 (Tex. 1940) ("The words, not the punctuation, are the controlling guide in construing a contract.").

128. Parham v. Worthen Tr. Co., 933 S.W.2d 384 (Ark. 1996).

129. *Id.* at 385.

130. *Id.*

> to all of the oil, gas and other minerals in the soil and under the surface thereof that may be produced from the land hereinafter described.[131]

The Court noted that if the grant stopped there, the granted interest would clearly be a fixed royalty interest—a 1/16 NPRI or fractional share.[132] As in the prior examples, however, the grant went on:

> [S]aid undivided 1/16 interest in the oil, gas and other minerals herein conveyed is to cover and apply to that portion only, *which is 1/2 of 1/8 of the oil, gas and other minerals, reserved by the grantor herein* . . . .[133]

And then:

> [T]he grant herein giving the grantee a mineral interest *only to 1/16 of the oil, gas or other minerals to be delivered out of any royalty* existing by virtue of any lease now on said land, or any that may be placed on said land by any party.[134]

The Court acknowledged that if the appellants' argument was correct with regard to the second clause and the present lease provided for a 1/6 lessor's royalty, then the grantee would only receive 1/2 of 1/8 of 1/6, or a 1/96 share.[135] The Court seized upon two points in the third clause in its interpretation. First, the words "any royalty" contemplated subsequent leases with varying lessor's royalty.[136] Second, the words "only to 1/16 of [oil, gas, and minerals]" in the third clause fixed the royalty reserved at 1/16, regardless of any deviation from the usual 1/8 lessor's royalty in leases subsequently executed.[137]

The appellants argued that since 1/8 was the traditional lessor's royalty retained in leases at the time, "the grantors used the customary 1/8th designation when they really meant to state 1/2 of whatever interest was retained by the grantors in future leases."[138] The Court held that "an *equally logical* explanation is that the grantors wished to make it clear that the interest conveyed was 1/16 of the total production and not merely 1/16 of the 1/8 royalty interest they retained" and that to take up the appellants' argument would be to go beyond the four corners of an unambiguous instrument; the meaning was obvious.[139]

Parham is illustrative of a court using additional language past the first granting clause to provide a rationale for dismissing judicial rec-

131. *Id.* at 386 (alteration in original) (emphasis omitted).
132. *Id.*
133. *Id.* (alteration in original).
134. *Id.* (alteration in original).
135. *Id.* at 387.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* (emphasis added) (first citing Wilson v. Brown, 897 S.W.2d 546 (Ark. 1995); then citing Wynn v. Sklar & Phillips Oil Co., 493 S.W.2d 439 (Ark. 1973)).

ognition of the usual 1/8 lessor's royalty. Interestingly, however, if both the interpretation ultimately decided upon by the Court *and* the appellant's interpretation were thought to be "equally logical," it would seem to reopen the question of whether the instrument was ambiguous.

B. *On Interpretation*

"Contract language that can be given a certain or definite meaning is not ambiguous and is construed as a matter of law."[140] Texas courts construe an unambiguous deed by ascertaining the intent of the parties from the entire deed plus any exhibits and nothing more.[141] When seeking to ascertain the intention of the parties, the court attempts to harmonize all parts of the instrument.[142] Even if different parts of the deed appear contradictory or inconsistent, Texas courts strive to harmonize all of the parts, construing the instrument to give effect to all of its provisions.[143] The court should "not strike down any part of the deed, unless there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part thereof."[144]

Opinions covering disputes over the interpretation of instruments deemed unambiguous typically follow a pattern. First, the facts are described, followed by the procedural history, culminating in the lower court ruling and, where determinable, its rationale. Then, oftentimes, the court will provide a litany of interpretative tools and canons that it will apply to the question before it.[145] Finally, the opinion finishes with an application of the tools and canons to the language of the disputed instrument. While a complete look at this topic is beyond the scope of this Article, an outline of these interpretative tools and

140. Chrysler Ins. Co. v. Greenspoint Dodge of Hous., Inc., 297 S.W.3d 248, 252 (Tex. 2009).

141. Garrett v. Dils Co., 299 S.W.2d 904, 906 (Tex. 1957); Luckel v. White, 819 S.W.2d 459, 461–62 (Tex. 1991) (first citing 1 EUGENE KUNTZ, THE LAW OF OIL AND GAS § 16.1 (Anderson Publishing Co. 1987); then citing 6 RICHARD R. POWELL, THE LAW OF REAL PROPERTY ¶ 899[3], at 81A-108 (P. Rohan ed. 1991)). "That intention, when ascertained, prevails over arbitrary rules." *Id.* (quoting Harris v. Windsor, 294 S.W.2d 798, 800 (Tex. 1956))).

142. Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986) ("[T]he parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement." (citing Alford v. Krum, 671 S.W.2d 870, 872 (Tex. 1984), *overruled by* Luckel v. White, 819 S.W.2d 459 (Tex. 1991))).

143. Benge v. Scharbauer, 259 S.W.2d 166, 167 (Tex. 1953).

144. *Id.*

145. An excellent compilation of these contract interpretative tools and canons of interpretation, focusing on New York, was compiled by Vincent Martorama, former partner in the New York office of Reed Smith LLP, in a white paper entitled *A Guide to Contract Interpretation*. Vincent Martorama, *A Guide to Contract Interpretation*, REED SMITH (July 2014), http://www.reedsmith.com/files/uploads/miscellany/A_Guide_to_Contract_Interpretation__July_2014_.pdf [https://perma.cc/G6E4-JRD6].

canons is necessary to understand the new fixed vs. floating NPRI cases.

Any interpretive exercise begins by recognizing that the actual intent of the parties, as expressed in the deed as a whole, controls over any arbitrary rules.[146] The interpretation of an unambiguous deed is a question of law, meaning the court can shut out all other information and evidence other than the instrument, with its exhibits, by itself, along with any documents that the instrument references.[147] In conducting this exercise, Texas courts will construe a deed in a manner that will avoid a construction that "is unreasonable, inequitable, and oppressive."[148]

Texas courts construe contract terms so as "to give rational meaning to all provisions in the document," whenever possible.[149] Therefore, they avoid striking any part of an instrument in the absence of irreconcilable inconsistencies whereby one clause obliterates the effect of another.[150] While doing this, courts must keep in mind that "[l]anguage should be given its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated."[151] A court must give the terms of an instrument their plain and ordinary meanings unless the instrument shows the parties' intent to interpret the terms in an alternative manner.[152] Further, "[t]he intent of a contract is not changed simply because the circumstances do not precisely match the scenarios anticipated by the contract."[153]

C. *Rules of Grammar*

Rules of grammar may be invoked in litigation over the size of an interest conveyed or reserved. For example, in *Stewman Ranch, Inc. v. Double M. Ranch, Ltd.*, the grantors had executed a deed providing that the conveyance was subject to various outstanding mineral and royalty interests and reserving "an undivided one-half (1/2) of the royalties to be paid on the production of oil, gas and other hydrocarbons from the described lands which are presently owned by Grantors . . . ."[154] In a subsequent dispute over whether the grantors had re-

146. *Luckel*, 819 S.W.2d at 462.
147. *Altman*, 712 S.W.2d at 118.
148. Frost Nat'l Bank v. L & F Distribs., Ltd., 165 S.W.3d 310, 311–12 (Tex. 2005) (quoting Reilly v. Rangers Mgmt., Inc., 727 S.W.2d 527, 530 (Tex. 1987)).
149. Glencore Ltd. v. Degussa Engineered Carbons, L.P., 848 F. Supp. 2d 410, 433 (S.D.N.Y. 2012).
150. *Luckel*, 819 S.W.2d at 462 (quoting Benge v. Scharbauer, 259 S.W.2d 166, 167 (1953)).
151. Caldwell v. Curioni, 125 S.W.3d 784, 792 (Tex. App.—Dallas 2004, pet. denied) (citing *Reilly*, 727 S.W.2d at 529).
152. Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996) (citing W. Reserve Life Ins. Co. v. Meadows, 261 S.W.2d 554, 557 (Tex. 1953)).
153. SAS Inst., Inc. v. Breitenfeld, 167 S.W.3d 840, 841 (Tex. 2005).
154. Stewman Ranch, Inc. v. Double M. Ranch, Ltd., 192 S.W.3d 808, 810 (Tex. App.—Eastland 2006, pet. denied).

served one-half of all royalties payable on production from the land or only one-half of the royalties owned by the grantors at the time of the conveyance, the grantors attempted to invoke the grammatical rule that a restricting clause that is not set off by commas modifies the word or phrase immediately preceding it.[155] They argued that the phrase "which are presently owned by Grantors" referred to "the described lands" rather than to "royalties."[156] While acknowledging the existence of the rule of grammar, the court nonetheless rejected it on the ground that its application would make the restricting clause superfluous.[157] The court held that "which are presently owned by Grantors" referred to "royalties," and the grantors had thus reserved only half of the royalties that they owned at the time of the conveyance.[158]

In contrast with the result reached in *Stewman*, the Oklahoma court in *James v. Beckwith* applied the rule of grammar to a granting clause that excepted "oil, gas and other minerals, reservations and conveyances and oil and gas leases and easements of record."[159] The court held that the phrase "of record" did not modify "oil, gas and other minerals," and the conveyance did not include any interest in the mineral estate.[160]

IV. The Latest Cases

In a dispute over who owns a mineral or royalty interest, millions of dollars can be at stake. With unambiguous documents, the court only has the language in the contested instrument to consider when attempting to divine the intention of the drafters. That this highlights the need for effective drafting is obvious: The decision to not spend thousands on sound legal counsel when drafting an instrument can end up costing millions. Thus, multi-year litigation, costing tens of thousands of dollars, that examines in excruciating detail a few lines of scattered instrument language continues today. In addition to *Coghill v. Griffith*, detailed above, in the last half-dozen years Texas courts alone have considered at least seven cases involving squabbles over whether a conveyance or reservation involved fixed or floating royalties.

A. *Range Resources Corp. v. Bradshaw*

The earliest of the seven cases, a memorandum opinion out of the Second Court of Appeals in Fort Worth, involved whether the grantor

155. *Id.* at 812.
156. *Id.*
157. *Id.* at 812–13.
158. *Id.*
159. James v. Beckwith, 805 P.2d 117, 118 (Okla. Civ. App. 1990).
160. *Id.* at 119–20.

of an interest in minerals reserved a fixed or floating NPRI.[161] The royalty reservation provided the following:

> [1] The Grantors herein reserve unto themselves, their heirs and assigns, and except from this conveyance an undivided one-half (1/2) Royalty (*Being equal to not less than* an undivided one-sixteent[h] (1/16)[)] of all the oil, gas and/or other minerals in, to, and under or that may be produced from said . . . land . . . .
> [2] Said interest hereby reserved is a Non-Participating Royalty . . . provided, however, that all such leases shall provide for Royalty of *not less than* one-eighth (1/8) . . . .
> [3] In the event oil, gas or other minerals are produced from said land, then said Grantors, their heirs and assigns, shall receive *not less than one-sixteenth (1/16) portion (being equal to one-half (1/2) of the customary one-eighth (1/8) Royalty) of the entire gross production and/or such net proceeds as hereinabove provided . . . .*[162]

The successor grantor, current owner of the NPRI, argued the interest reserved was one-half "of royalty"—a floating NPRI—and the mineral owners countered that the NPRI reserved was a fixed 1/16 NPRI.[163] Echoing the methodology of *Luckel*, the court examined the four corners of the instrument to determine the intent of the drafters.[164] The court first noted that each paragraph contained the phrase "not less than" with the parenthetical in paragraph [1] suggesting a minimum 1/16 NPRI.[165]

In paragraph [2], the court noted language providing that all leases "shall provide for a royalty of not less than 1/8" and held that when the first two paragraphs were read in sequence, it was manifest that the parties contemplated future leases with varying lessor's royalty.[166] Paragraph [2] was found to ensure the grantor that the retained NPRI would be calculated as a product of at least 1/8 royalty—in other words, a fixed 1/16 NPRI minimum.[167] Like the other paragraphs, the "not less than" language in paragraph [3] made clear that the grantor would receive a minimum 1/16 NPRI.[168] Ultimately, the "not less than" language instructed the court that the NPRI was variable and not intended to be fixed.[169]

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161. Range Res. Corp. v. Bradshaw, No. 2-07-263-CV, 2008 Tex. App. LEXIS 3426 (Tex. App.—Fort Worth May 8, 2008), *withdrawn*, 266 S.W.3d 490 (Tex. App.—Fort Worth 2008, pet. denied).
162. *Range Res. Corp.*, 266 S.W.3d at 493–94 (alteration in original).
163. *Id.* at 492.
164. *Id.* at 493, 496 (citing Luckel v. White, 819 S.W.2d 459, 461–62 (Tex. 1991)).
165. *Id.* at 495–96.
166. *Id.* at 496.
167. *Id.*
168. *Id.*
169. *Id.*

B. *Wynne/Jackson Development, L.P. v. PAC Capital Holdings, Ltd.*[170]

On June 6, 2013, the Thirteenth Court of Appeals in Corpus Christi withdrew and substituted its opinion upon rehearing in which it considered a suit brought by PAC Capital Holdings, Ltd., ("PAC"), which sought a declaratory judgment that its NPRI under three deeds (collectively, the "Porter Deeds") was a "fraction of" royalty.[171] The deed described the contested NPRI and other interests as:

> [A] non-participating royalty of one-half (1/2) of the usual one-eighth (1/8) royalty in and to all oil, gas, and other materials produced, saved and sold from the above-described property, provided, however, that although said reserved royalty is non-participating and Grantee shall own and possess all leasing rights in and to all oil, gas and other minerals, Grantor shall, nevertheless, have the right to receive one-half (1/2) of any bonus, overriding royalty interest, or other payments, similar or dissimilar, payable under the terms of any oil, gas and mineral lease covering the above-described property.[172]

PAC contended that this reservation reserved a fraction of royalty and thus PAC was entitled to receive an indefinite NPRI equal to one-half of the royalties in all of the mineral leases, whatever those lessor's royalty amounts were, that had been executed since 1968 when the Porter Deeds were first executed. Wynne/Jackson Development, L.P. and W/J Lakes, L.P. ("Wynne Jackson"), collectively the owner of the mineral property encumbered by PAC's NPRI, contended that the NPRI under the Porter Deeds reserved only a definite fractional royalty. Thus, PAC was entitled only to a fixed royalty that was equal to one-half of 1/8 (or 1/16) of production regardless of the language contained in any mineral leases that had been executed after the Porter Deeds. After both PAC and Wynne Jackson filed cross motions for partial summary judgment regarding the proper calculation of PAC's NPRI, the trial court granted partial summary judgment in favor of PAC.

On appeal, PAC cited the aforementioned *Sundance Minerals, L.P. v. Moore*[173] in support of its contention that its NPRI under the Porter Deeds was a floating NPRI. The deed in question in *Sundance* conveyed 515 acres of real mineral property, reserving "an undivided and non-participating one-half interest in the oil, gas, and other mineral rights."[174] The deed further contained a second statement that Moore

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170. Wynne/Jackson Dev., L.P. v. PAC Capital Holdings, Ltd., No. 13-12-00449-CV, 2013 WL 2470898 (Tex. App.—Corpus Christi June 6, 2013, pet. denied) (mem. op.).
171. *Id.* at *1.
172. *Id.* at *4.
173. Sundance Minerals, L.P. v. Moore, 354 S.W.3d 507, 510 (Tex. App.—Fort Worth 2011, pet. denied).
174. *Id.*

"shall be entitled to one half of the usual one eighth royalty received forsuch [sic] oil, gas and other minerals produced from said land."[175] The court of appeals in *Sundance* held that the parties intended to reserve one-half of the royalty in any future lease and that the second provision stating "one half of the usual one eighth" limited the reservation to royalty (and thus did not include bonus and delay rentals) and was merely to serve as an illustration of how the royalty reservation would be calculated.[176] Thus, the reserved royalty in *Sundance* was not a fixed "fractional royalty" but rather an indefinite or "floating" 1/2 royalty interest that entitled the NPRI owner to one-half of any future lessor's royalty. The present court, however, was not persuaded, as the *Sundance* court did not quote the entire operative language of the deed the court had construed.[177] Instead, the *Sundance* court had summarized the language of the deed, making it impossible for the present court to compare and contrast the language of the *Sundance* deed to the Porter Deeds.[178]

The court also rejected PAC's proposal that the reservation of bonus payments and delay rentals be construed as a single reservation, as in *Sundance* where the language of the deeds purported to reserve an undivided interest across the entire spectrum of mineral interests.[179] The court determined that, by doing so, the distinction between the different components of the mineral estate would be blurred when the Porter Deeds clearly sought to maintain such distinction—they clearly reserved the bonus payments and delay rentals.[180] Thus, by relying on the precedent of *Harriss v. Ritter*[181] and *Pickens v. Hope*,[182] the court of appeals concluded that the Porter Deeds in this case reserved a fixed NPRI (fractional royalty), not a fractional NPRI (fraction *of* royalty).[183] In that way, although mindful of *Sundance*, the case is more similar to *Parham*, and as one commentator noted, unlike *Sundance*, the *Wynne/Jackson* decision purposely sets aside the mistaken judicial recognition of the usual 1/8 landowner's royalty as discussed in *Sundance* (and, below, *Hysaw*) "despite the express reference to that royalty in the deed."[184]

175. *Id.*
176. *Id.* at 512–13.
177. *Wynne/Jackson*, 2013 WL 2470898, at *5.
178. *Id.*
179. *Id.*
180. *Id.*
181. Harriss v. Ritter, 279 S.W.2d 845, 847 (Tex. 1955).
182. Pickens v. Hope, 764 S.W.2d 256, 258–59 (Tex. App.—San Antonio 1988, writ denied).
183. *Wynne/Jackson*, 2013 WL 2470898, at *5.
184. Laura H. Burney, *Oil, Gas, and Mineral Titles: Resolving Perennial Problems in the Shale Era*, 62 U. KAN. L. REV. 97, 120 (2013).

C. Butler v. Horton[185]

On October 16, 2014, the Eleventh Court of Appeals in Eastland considered a reservation contained in a 1968 deed. The appellants were the successors in interest to the grantors in the 1968 deed, and the appellees comprised the successors in interest to the grantees. The reservation in the deed was as follows:

> There is excepted from this conveyance and reserved unto . . . grantors, their heirs and assigns, *one-half of the usual 1/8th royalty* on all oil, gas, [and other minerals,] . . . it being understood and agreed that it shall not be necessary for the Grantors, their heirs or assigns, to join in the execution of any mineral lease or leases on the property, but that the Grantors, their heirs or assigns, shall be entitled to one-half of any bonus payments or delay rentals which may be paid in connection with any lease on the property, and that in the event of production from said land, either by a lessee, by an owner, or by anyone else, the Grantors, their heirs or assigns, shall be entitled, free of cost, to one-half of the royalty on said minerals, *as provided above*[.][186]

Both parties agreed the disputed instrument was unambiguous and offered their own interpretations.[187] The dispute and the question before the court was typical: Was the reservation in the deed a floating one-half of lessor's royalty or a fixed 1/16 fractional royalty interest regardless of the amount that might be provided for in future leases?[188] Appellants (grantors) argued that the phrase "as provided above" clarified the fact that the interest reserved in favor of their predecessor in title was a fraction *of* royalty—a floating NPRI.[189] Appellees (grantees) argued that the phrase "one-half of the usual 1/8 royalty" created a fixed NPRI (1/16) and that the phrase "as provided above" limited any future royalty interest to that same fraction.[190]

The court, agreeing the instrument was unambiguous, further agreed with the appellants/grantors and found a floating NPRI had been reserved.[191] The court pointed to the *Williams & Meyers* list of examples of fractions of royalty (i.e., floating NPRIs) quoted above as rationale for its decision before focusing on the meaning of "as provided above" at the end of the clause.[192] Appellees/grantees had argued that the words "as provided above" referred to that—as they interpreted it—fixed-NPRI language first shown in the reservation in the second line of the excerpt above. If that were true, the court noted, the later language in the reservation, "to one-half of the royalty

185. Butler v. Horton, 447 S.W.3d 514 (Tex. App.—Eastland 2014, no pet.).
186. *Id.* at 516–17 (alteration in original) (emphasis added).
187. *Id.* at 517.
188. *Id.*
189. *Id.* at 519.
190. *Id.* at 517.
191. *Id.* at 519.
192. *Id.* at 519 (citing 2 WILLIAMS & MEYERS, *supra* note 15, § 327.2, at 83–84).

on said minerals"—clear floating-NPRI language—therefore meant the "as provided above" language that followed, meaning the first reservation was also a floating NPRI like the second clause.[193] On the other hand, if "as provided above" referred to anything else in the reservation, then it was *even more* clear that the reservation was a reservation of a floating NPRI because of the repeated reference to "one-half of" in connection with all of the attributes of mineral ownership (except the right to execute leases, a right that was not reserved).[194]

D. Graham v. Prochaska[195]

In an opinion delivered and filed on December 31, 2013, the Fourth Court of Appeals in San Antonio analyzed a 1950 warranty deed to determine whether a reserved royalty was a "fixed" or a "floating" royalty—i.e., whether a reservation of royalty was fixed at the time of the reservation or whether the reserved royalty was dependent on the amount of lessor's royalty provided for in future leases.

In 1950, George and Elsie Ann Prochaska (collectively, "Prochaska") conveyed a tract of land in Karnes County, Texas, to John and Frances Regmund (collectively, "Regmund"—later including Roger Graham, the first named appellant).[196] The granting clause conveyed "all that certain tract or parcel of land."[197] Prochaska, however, reserved a royalty interest as follows:

> SAVE AND EXCEPT, however, there is reserved unto George Prochaska, his heirs and assigns, one-half (1/2) of the one-eighth (1/8) royalty to be provided in any and all leases for oil, gas and other minerals now upon or hereafter given on said land, or any part thereof, same being equal to one-sixteenth (1/16th) of all oil, gas and other minerals of any nature, free and clear of all costs of production, except taxes;
>
> . . .
>
> AND PROVIDED this reservation is burdened with paying the two outstanding mineral royalty reservations, each of One-Fourth (1/4) of one-eighth (1/8) royalty, one of which reservations is described in the deed from John Hancock Mutual Life Insurance Company to E.S. Joslin, now of record in Vol. 141, page 161, Deed Records of Karnes County, Texas, and the other reservation is described in the deed from E.S. Joslin, et ux to A.W. Powell, Jr., et al now of record in Vol. 165, page 80 of the Deed Records of Karnes County, Texas; And this reservation shall only be effective to the

193. *Id.* at 517, 519.
194. *Id.* at 519.
195. Graham v. Prochaska, 429 S.W.3d 650 (Tex. App.—San Antonio 2013, pet. denied).
196. *Id.* at 653.
197. *Id.*

> extent that one or both of said outstanding reservations become terminated.
>
> It being the intent of the parties hereto that John W. Regmund and wife, Frances E. Regmund, as of the effective date hereof, shall be vested with and entitled to one-half (1/2) of the usual one-eighth (1/8) royalty in and to all oil, gas and other minerals in on and/or under the property herein conveyed, and the reservation herein above recited in favor of the grantor herein, shall relate to and cover only the one-half (1/2) of one-eighth (1/8) royalty interest previously reserved in favor of John Hancock Mutual Life Insurance Company and Ennis Joslin, if, as and when said interest in favor of said parties terminate.[198]

The original mineral leases provided for the (then) typical 1/8 lessor's royalty in effect at the time of the 1950 conveyance. After these expired, Regmund executed new leases that provided for a 1/5 lessor's royalty. Then, as a preventive measure, Regmund filed a lawsuit seeking a declaratory judgment that Prochaska had only reserved a "fixed" 1/16 royalty interest from the 1950 deed. Under the Regmund interpretation, Prochaska would receive 1/16 of production and Regmund would keep the remaining 11/80 of production from the lessor's royalty (1/5 - 1/16 = 11/80).[199]

Prochaska counterclaimed for declaratory relief, contending they were entitled to a "floating" 1/2 royalty interest. Under the interpretation promoted by Prochaska, they should receive one-half of whatever lessor's royalty Regmund secured on the conveyed lands, now and in the future. Accordingly, Prochaska contended they should currently receive one-tenth of production, which was one-half of the lessor's royalty, and Regmund would take the remaining 1/10 of production (1/5 × 1/2 = 1/10).[200]

Despite the differences in interpretation, both parties contended that the deed was unambiguous. The trial court held a hearing on the parties' competing motions for summary judgment before rendering judgment for Prochaska by construing the deed as reserving a floating 1/2 lessor's royalty interest in the current—and any future—mineral leases. Regmund appealed.[201]

Charged with interpreting the Prochaska-Regmund deed de novo, the court of appeals first summarized the effect of the three clauses as follows: The "save and except" clause[202] excluded a royalty interest from passing under the deed, while the "and provided" clause[203] identified previously reserved "mineral royalty" interests that encumbered

198. *Id.* at 653–54.
199. *Id.* at 654.
200. *Id.*
201. *Id.* at 654–55.
202. *Id.* at 658–61.
203. *Id.* at 662–64.

("burdened") the royalty interest of Prochaska. The "intent" clause[204] clarified the relationship between the reserved interest of Prochaska, the received interest of Regmund, and the previously reserved interests identified in the "provided" clause.

The court of appeals agreed with Prochaska that the "one-eighth royalty" must be read in light of the surrounding language. The court refused to construe the "one-eighth" in the description of the lessor's royalty as a limitation fixing the royalty owned by Prochaska, instead ruling that its presence reflected the "common misconception of that period that the landowner's royalty would always be one-eighth of production obtained under a lease."[205] Accordingly, the court then construed the "one-eighth" within the context of the surrounding language ("the . . . royalty to be provided in any and all leases for oil, gas and other minerals now upon or hereafter given on said land, or any part thereof") as an objective expression of the parties' intent to measure the reserved royalty of Prochaska on the basis of any lessor's royalty on any future lease *along with* the mistaken assumption that that landowner's royalty would always be one-eighth of production.[206]

The court then attempted to harmonize the first portion of the "save and except" clause with the second clause, describing the reserved interest as "same being equal to one-sixteenth (1/16th) of all oil, gas and other minerals of any nature, free and clear of all costs of production, except taxes," noting that this language, standing alone, would normally reserve a fixed royalty interest.[207] But the court then held that the first clause showed the parties' true intention that the royalty "float," and it "harmonized" the second phrase with the first. The court opined that the parties had again mistakenly believed that one-half of the lessor's royalty under future leases would always equal 1/16 of production but their true intention was that the overall "save and except" clause unambiguously showed the intent to reserve one-half of the lessor's royalty "in any and all leases for oil, gas and other minerals now upon or hereafter given on said land . . . ."[208]

The court of appeals then turned to the third and final paragraph (the "intent" clause) and found that it confirmed both that the parties had mistakenly assumed that the lessor's royalty in future leases would always be one-eighth of production ("as of the effective date hereof, shall be vested with and entitled to one-half (1/2) of the usual

204. *Id.* at 661–62.

205. *Id.* at 660 (first citing Concord Oil Co. v. Pennzoil Expl. & Prod. Co., 966 S.W.2d 451, 460 (Tex. 1998); then citing Garrett v. Dils Co., 299 S.W.2d 904, 907 (Tex. 1957); then citing 1 SMITH & WEAVER, *supra* note 4, § 3.7[A], at 3-47; and then citing Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996) ("We give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense.")).

206. *Id.*

207. *Id.* at 661.

208. *Id.*

one-eighth (1/8) royalty in and to all oil, gas and other minerals in on and/or under the property herein conveyed") and that the interest of Prochaska would bear the two existing, outstanding, terminable mineral royalty reservations until they expired.[209] Thus, the Prochaska interest was a future interest, not a present or immediately effective one.

The "as provided" clause describes the two "outstanding mineral royalty reservations" as terminable interests that preempted immediate activation of the Prochaska royalty as "each of One-fourth of one-eighth (1/8) royalty."[210] The "intent" clause later repeats this seemingly fixed formula. The court acknowledged that if "outstanding mineral royalty reservations" meant "royalty interests," then the terminable interests would be fixed, and it would be challenging to interpret the Prochaska reservation of those interests as floating interests.

However, since the Prochaska-Regmund deed specifically referred to and identified the two instruments creating the interests that burdened the reservation of Prochaska, those two instruments were incorporated into the Prochaska-Regmund deed, and the descriptions of the interests in the prior deeds were therefore also incorporated into the Prochaska-Regmund deed. Since the royalty interests in the two prior instruments were "floating," the court determined that no conflict existed in concluding that the Prochaska NPRI reservations also "floated."

E. Medina Interests, Ltd. v. Trial[211]

On June 24, 2015, the Fourth Court of Appeals in San Antonio interpreted a 1949 deed to determine whether the grantors reserved a floating or fixed NPRI. After determining that the instrument was not ambiguous, the court determined that the grantors had intended to reserve a floating royalty.

In September of 1949, Annie Trial, along with six of her eight children (collectively, "the Trials"), conveyed by warranty deed (the "1949 Deed") all surface and mineral interests in a 278-acre tract of land in Karnes County, Texas.[212] The grantees were Alex and Leo Trial, the two other children.[213] The 1949 deed provided as follows, with the court's italics added:

> There is reserved to each of us signing this deed, except Mrs. Annie Trial, *our undivided interest in and to the 1/8 royalties paid the land owner upon production of oil, gas and other minerals from said*

209. *Id.* at 661–62.
210. *Id.* at 662.
211. Medina Interests, Ltd. v. Trial, 469 S.W.3d 619 (Tex. App.—San Antonio 2015, pet. denied).
212. *Id.* at 620–21.
213. *Id.*

> *278 acre tract of land* hereby conveyed, and *this royalty interest reserved to each of us* shall be non-participating and perpetual.
>
> It is agreed and here stipulated that *the 1/8 royalties paid the land owner upon production of oil, gas and other minerals is hereby pooled among all the grantors and grantees to this deed,* except the grantor, Mrs. Annie Trial who shall not participate in said royalties, and *in the case of the production of oil, gas and other minerals from said tract of land, each of the [T]rial heirs named above, except Mrs. Annie Trial, shall share in said royalties equally.*
>
> It is understood that the said Leo Trial and Alex Trial shall have the right to lease said tract of land for oil, gas or other minerals, without the joinder of the grantors herein, or their heirs or assigns, and that said grantees shall have the right to collect the bonus moneys and delay rentals arising out of said mineral leases, *but in case of production of oil, gas or other minerals from said tract of land in paying quantities each of the Trial Heirs, either grantor or grantee, except Mrs. Annie Trial shall share equally in said pooled royalties.*[214]

Medina Interests, Ltd. ("Medina") was the successor-in-interest to the original grantees—Alex and Leo. Medina entered into a paid-up oil and gas lease[215] in 2007, and Marathon Oil was one of the lessees. In the "Stipulations of Mineral Interests" sent to all of the prospective royalty owners, Marathon contended that the Trials had reserved "all of the royalties of leases entered into subsequent to the date of the 1949 Deed . . . ."[216]

Medina sued the Trials for trespass to try title and for money had and received. Medina contended that the Trial children named as grantors of the 1949 Deed shared a fixed 1/8 royalty. The Trials argued that they each were entitled to a portion of a floating royalty. The trial court determined that the deed reserved a floating royalty for each of the eight Trial children mentioned as grantors and no royalty for Annie Trial, as provided in the deed.[217]

On appeal, the only issue before the court of appeals was whether the 1949 Deed reserved a fixed or fractional royalty. To interpret the reservation, the court turned to the examples provided in *Williams & Meyers, Oil and Gas Law*—the oft-cited authority on questions of floating or fixed royalty reservations.[218] The court first noted that the

214. *Id.* at 624.

215. A paid-up oil and gas lease is one in which the lessee pays all of the delay rentals for the entire primary term upfront so that the lease will not fail for untimely or improper payment of delay rentals.

216. *Medina*, 469 S.W.3d at 621. A stipulation of mineral interests is a tool that oil producers often use to ensure agreement between the parties as to their prospective mineral ownership. It is essentially a cross-conveyance in which all parties can agree on mineral ownership, even when their actual ownership is not completely clear.

217. *Id.*

218. *E.g.*, Dawkins v. Hysaw, 450 S.W.3d 147, 153 (Tex. App.—San Antonio 2014), *rev'd*, 483 S.W.3d 1 (Tex. 2016).

phrase in the deed "the 1/8 royalties" typically provides for a fixed royalty.[219] The court also noted, however, that in interpreting an unambiguous deed, a Texas tribunal must consider the entire document to harmonize the language and give effect to all provisions within the deed.[220]

Examining in particular the first language in italics above, the court noted that the 1949 Deed used words that contemplated the possibility of future production.[221] This, the court thought, evidenced the idea that the grantors had contemplated future leasing on the property, particularly given that no lease was operative on the effective date of the 1949 Deed, and that they had intended their interests to adjust according to the royalties under the lease.[222]

Further, the court noted the "estate misconception theory" first mentioned in *Garrett*[223] and, citing the recently issued *Graham* opinion and its language quoted above, again found cause to dismiss the use of the fixed fraction 1/8. The court opined that in older deeds such as the 1949 Deed, the 1/8 royalty provided to landowners was so consistent and ubiquitous that landowners would often refer to "*the* 1/8 royalty" when they actually meant to refer to the royalty, *of whatever size,* that the lease provided to the landowner.[224]

If the 1/8 fraction could be read out of the reservation as the result of a historical misapprehension, then the fact that the 1949 Deed provided that the "1/8 royalties" reserved for the grantees and grantors would be shared and pooled equally becomes more important. Combined with the fact that no lease covered the tract in 1949, this express equality among grantees and grantors suggests that the quantity of any future NPRI that floated depending on the amount of lessor's royalty reserved in a lease would be split equally among the eight children.

Finally, because the grantors reserved "*the* 1/8 royalties paid the land owner upon production," and no lease existed at the time of the conveyance, this was taken as evidence that the word "the" indicated that this language spoke of *whatever the future lessor's royalty happened to be under future leases*—that is, eight kids, each getting an eighth of the lessor's royalty. And since the same paragraph later dis-

219. *Medina*, 469 S.W.3d at 624.

220. *Id.* at 624 (quoting Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983)).

221. *Medina*, 469 S.W.3d at 624. The court did not specifically point to any dispositive language, but examples of language within the deed that contemplates future production includes "upon production" and "in case of production." *Id.*

222. *See id.* at 624–25.

223. *See* Garrett v. Dils Co., 299 S.W.2d 904, 907 (Tex. 1957) (taking judicial notice "of the fact that the usual royalty provided in mineral leases is one-eighth"); *see also* Luckel v. White, 819 S.W.2d 459, 462 (Tex. 1991) (citing *Garrett*, 299 S.W.2d at 907) ("One-eighth was the 'usual' royalty so standard in the 1920s and 1930s that all Texas courts took judicial notice of it.").

224. Graham v. Prochaska, 429 S.W.3d 650, 657–60 (Tex. App.—San Antonio 2013, pet. denied).

cussed "royalties paid the land owner," this was deemed "indicative of a royalty that 'floats' in accordance with the size of the landowner's royalty."[225]

Ultimately, the court held that the Trials had not intended to fix their ownership at 1/8.[226] Therefore, the court affirmed that the trial court had properly determined that each of the six Trial children reserved an undivided interest in whatever landowner's royalty was provided under any current or future oil and gas lease.[227]

F. Leal v. Cuantos Antes Mejor LLC[228]

On July 1, 2015, the Fourth Court of Appeals of Texas affirmed the decision of the district court in *Leal v. Cuanto Antes Mejor LLC*, concluding that a conveyance of an NPRI was a floating royalty.[229] Based on that classification, the NPRI holder was entitled to only a fraction of the royalty. The dispute involved a sale of forty acres in Karnes County, Texas. In 1978, David Phillip, as grantor, sold approximately forty acres of land in Karnes County to Rudy Leal and Henry and Rosalinda Leal, as grantees. The contract for sale included the following language: "Subject, however, Grantor reserves all minerals and royalties, except, [h]owever, Grantor shall convey to Grantees a 1/4 non-participating royalty interest."[230] In 1988, David Martin Phillip and his wife, Marguerite W. Phillip (collectively, "the Phillips"), conveyed the surface to Andrea Leal, who was then a trustee for Ramiro Leal, then a minor, and to Robert Leal (collectively, "the Leals").[231] The deed included several exceptions and reservations but included the conveyance of 1/4 non-participating royalty interest to the Leals:

> In addition to the above exceptions, there is reserved and excepted unto Grantors [the Phillips] herein, their heirs and assigns, all of the oil, gas and other minerals in, on and under and that may be produced from the above described property except an *undivided one-fourth (1/4) non-participating royalty interest hereinafter specifically conveyed to Grantees* [the Leals] . . . .
> *There is specifically conveyed to Grantees herein, their heirs and assigns, an undivided one-fourth (1/4) interest in and to all of the royalty paid on the production* . . . of oil, gas and any and all other minerals. The interest conveyed unto Grantees shall be a non-participating royalty interest and Grantees shall not be required to join in the making of any oil, gas or other mineral lease or leases,

225. *Medina*, 469 S.W.3d at 625.
226. *Id.*
227. *Id.* at 626.
228. Leal v. Cuanto Antes Mejor LLC, No. 04-14-00694-CV, 2015 WL 3999034 (Tex. App.—San Antonio July 1, 2015, no pet. h.).
229. *Id.* at *1.
230. *Id.*
231. *Id.* The case involves a contract for sale from 1978 and, ten years later, an actual conveyance covering the same captioned land.

> whether or not the same contain pooling or unitization clauses, but shall be entitled to *a non-participating interest in and to any royalty paid from the production* . . . of oil, gas and any and all other minerals.[232]

Thus, the instrument at issue was a rarity in fixed vs. floating litigation: a grant (instead of a reservation) of freestanding royalty, carved from a broader reservation of the mineral estate.

The Phillips later executed an oil and gas lease with Hilcorp Energy as lessee.[233] The lease covered 152.2 acres of land; the Leals' forty acres were part of the lease. The Phillips later conveyed their (now leased) mineral interest to Cuantos Antes Mejor, LLC ("Cuanto").

After the conveyance to Cuanto, the Leals were asked to sign a "Stipulation of Mineral Interest" and associated division orders, which, according to the Leals, inaccurately quantified their NPRI. The Leals filed a petition for declaratory judgment asking the trial court to interpret the 1988 deed as conveying to them "an undivided 1/4 interest in and to ALL of the royalty paid on production (1/4 of 8/8 non-participating royalty interest)."[234] In response, Cuanto filed a counterclaim for declaratory judgment. Cuanto disputed that the deed conveyed a floating 1/4 NPRI on the royalty paid on production "from any oil and gas or other mineral leases on 'subject property' in effect after [the deed]." Both the Leals and Cuanto filed motions for summary judgment. Cuanto believed that the division order correctly stated the Leals' royalty interest. Cuanto's contention was that the deed conveyed "a non-participating interest in one-fourth (1/4) of any and all of the royalty paid on production from any oil and gas or other mineral leases . . . including the existing oil and gas lease."[235] The trial court granted summary judgment for Cuanto, holding that the 1988 deed conveyed a floating fraction of royalty.[236]

On appeal, after quickly determining that the deed language was unambiguous, the court of appeals addressed only one issue: whether the royalty interest conveyed was a fixed NPRI (the Leals' contention) or a floating NPRI (contention of Cuantos).

The Leals disputed that the royalty was floating for three reasons: First, the Leals noted that the grantor in the disputed conveyance had reserved the mineral estate, "except an undivided one-fourth (1/4) non-participating royalty interest . . . ."[237] The Leals believed that because the deed did not include such words as "the" or "of" before any

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232. *Id.* at *3.

233. Hilcorp then assigned their lease to Marathon Oil Company. Brief of Appellee at 5–6, Leal v. Cuanto Antes Mejor, LLC, No. 04-14-00694-CV (Tex. App.—San Antonio, Dec. 10, 2014).

234. *Leal*, 2015 WL 3999034, at *1.

235. *Id.*

236. *Id.*

237. *Id.* at *3.

discrete royalty fraction in the conveying language, a fixed royalty was therefore conveyed. Additionally, because the deed did not specify a particular lease but rather "the production," the conveyance therefore represented a fixed fraction of all production of multiple leases over time. Generally, the Leals' examination and interpretation of the words of the first grant echoed the jurisprudence of *Krum*, focusing on the language that initially established the disputed property interest.

Second, turning to the second mention of the NPRI in the deed, the Leals focused on the fact that the deed conveyed a 1/4 interest in and to "all of the royalty paid on *the* production," which the Leals construed as a fixed fraction of the total production because, in this instance, the word "*the*" referred to *all* production and not just that fraction of lessor's royalty paid on production under a lease. Thus, according to the Leals, the conveyance language provided that the NPRI was to be calculated as a specific fraction—one-fourth—of all production.[238]

Third, invoking a common canon of interpretation, the Leals believed the deed should be construed against the grantor.[239]

The court disagreed with all three of the Leals' arguments and concluded that the deed conveyed a floating royalty.[240] First, as might be expected from the case law described above, the court examined the deed as a whole to determine the parties' intent, rather than just certain provisions or language separately. The court noted that, although the first paragraph of the deed contained only the reservation of the mineral estate and the conveyance of the NPRI, the deed later expressed that the royalty was a fraction *of* a royalty.

This led the court to address the Leals' second point, as it then noted that the deed provided that the amount of the conveyed royalty was unambiguously expressed as a fraction *of* a royalty: "interest in and to all of the royalty" and "interest in and to any royalty." In the court's estimation, such language clearly established that the amount of NPRI depended on the amount of royalty the lease provided. The language on which the Leals relied—"paid on production" and "paid from the production"—merely stated the grantors' intent that any royalty would not be paid unless and until production occurred.

The court disagreed with the Leals' third contention because the deed was unambiguous, and such canons of interpretation are invoked only for ambiguous deeds.[241]

238. *Id.*

239. *Id.*

240. *Id.* at *4.

241. *See* Alexander Schroeder Lumber Co. v. Corona, 288 S.W.2d 829, 833 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.) ("The rule of strict construction against the grantor is resorted to only to resolve ambiguity and as an aid by legal presumption to arriving at intent.").

G. Hysaw v. Dawkins[242]

Finally, in early 2016, the Texas Supreme Court waded into the double-fraction version of the fixed vs. floating NPRI battle with a decision meant to disentangle confusion originating in a will from 1947. When Ethel Nichols Hysaw executed her will, she owned three tracts in Karnes County, Texas—a 1,065-acre tract, a 200-acre tract, and a 150-acre tract.[243] Her will divided a fee-simple interest in the 1,415 acres of property among her three children as follows: to Inez Hysaw Foote, 600 acres; to Dorothy Francis Hysaw Burris, 465 acres; and to Howard Caldwell Hysaw Jr. 350 acres.[244] Regarding the related mineral estates, the testatrix changed her allocation methodology, encumbering each tract thusly:

> I will and bequeath to each of the above named children fee simple title to the lands designated to go to them, subject, however, to the following:
> That *each of my children* shall have and hold an undivided *one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced from any of said lands*, the same being a non-participating royalty interest . . . .[245]

Ethel Hysaw went on to designate the royalty interest devised to each of her kids in three very similar paragraphs:

> [T]hat is to say, that . . . [the named child] shall not participate in any of the bonus or rentals to keep any lease or leases in force; that it shall not be necessary for the said [named child] to execute any oil, gas or mineral lease over the lands of [the siblings], and that it shall not be necessary for [the named child] to obtain the consent either orally or written of the said [siblings], to lease any portion of said land so willed to [the named child] for oil, gas or other minerals, but that . . . *the said [named child] shall receive one-third of one-eighth royalty, provided there is no royalty sold or conveyed by me covering the lands so willed to [the child]* . . . .[246]

The court noted that before and after executing the will, Ethel Hysaw made several inter vivos conveyances to her children. In 1946, she granted equal royalty interests to each child in the two tracts comprising the 350 acres received by Howard Hysaw Jr. Two years later, she then granted the surface estate of 200 acres to Howard Hysaw Jr. After she died in 1949, the rest of her real property passed via her will. The three Hysaw children later died, and their property interests in the captioned land passed to other successors.

Much later, a lease commanding a 1/5 lessor's royalty was executed over the 600-acre tract of Inez Foote, and a predictable conflict en-

242. Hysaw v. Dawkins, 483 S.W.3d 1 (Tex. 2016).
243. *Id.* at *5.
244. *Id.*
245. *Id.* (alteration in original).
246. *Id.* (alteration in original).

sued concerning the measurement of the NPRIs that burdened the land. Inez Foote's successors claimed that the tracts of Howard Hysaw Jr. were burdened with floating NPRIs of equal measure based on the inter vivos gift, that the 600-acre tract of Inez Foote and the 465-acre tract of Dorothy Burris were each burdened with three NPRIs fixed at 1/24 (each being one-third of a fixed 1/8), and that any royalties in excess of the NPRIs were reserved by the fee owner.[247] The successors of Dorothy Burris and Howard Hysaw Jr. asserted that the language instead meant that each child was due a floating NPRI of 1/3 of any lessor's royalty obtained (1/3 of 1/5, or 1/15, for each successor under the current lease) and that this interpretation was supported by language in the will providing intent for each sibling to receive an equal share of royalties.[248]

The trial court sided with the successors of Howard Hysaw, Jr., and Dorothy Burris and found that the will created three equal floating NPRIs. The court of appeals reversed, ruling that the will unambiguously resulted in the fee mineral interest comprising the 600-acre tract of Inez Foote and the 465-acre tract of Dorothy Burris being burdened by two fixed 1/24 NPRIs, and the 350-acre mineral fee of Howard Hysaw Jr. being burdened by three floating NPRIs measuring 1/3 of any future lessor's royalty from any lease covering that tract.[249] Therefore, the later inter vivos royalty gifts resulted in the will's devising equal NPRI royalty shares on the tracts of Howard Hysaw Jr. and, under the 1/5 lessor's royalty lease, greater royalties to the successor mineral fee owners on the Inez Foote and Dorothy Burris tracts—a fixed 1/24 NPRI plus any lessor's royalty remaining after subtracting the two other fixed 1/24 NPRIs bequeathed to the non-surface-owning children.[250]

In finding fixed NPRIs on the leased tract, the court of appeals highlighted, in two extensive sections, examples of both fixed and floating NPRIs taken from the *Williams & Meyers* treatise.[251] After that, the court focused on each individual clause in the disputed instrument, examining three different clauses and comparing each to an example pulled from the case law compiled in the *Williams & Meyers* treatise. Each clause individually was found to comport with prior fixed-NPRI language. Then, attempting to read the clauses together, the court found that the second provision was "an individualized restatement that affirms both the first royalty provision and the fee simple title devise."[252] More globally, the court of appeals rejected the

247. *Id.* at 6.
248. *Id.*
249. *Id.* at 6–7 (citing Dawkins v. Hysaw, 450 S.W.3d 147, 157 (Tex. App.—San Antonio 2014), *rev'd*, 483 S.W.3d 1 (Tex. 2016)).
250. *Id.* at 7.
251. *Id.* at 6–7 (citing *Dawkins*, 450 S.W.3d at 153).
252. *Dawkins*, 450 S.W.3d at 156.

argument that Ethel Hysaw had intended that all three children would get equal royalty, holding simply that the language in each of the portions it examined expressly provided otherwise.

The Texas Supreme Court reversed on January 29, 2016, with an opinion penned by Justice Eva Guzman. Holding that the court of appeals had "departed from the appropriate analytical approach by construing each royalty provision in isolation" and had merely cited past examples from the *Williams & Meyers* treatise and compared each disputed phrase with its closest syntactical match, the Court found that the NPRIs on the leased tract were floating.[253] Specifically, the Court found that the will devised to each of Ethel Hysaw's three children "an undivided one-third (1/3) of an undivided one-eighth (1/8) of all [minerals]," described each fee mineral's right to receive royalty payments as "one-third of one-eighth royalty," and made clear that should any further NPRI be later conveyed by Ethel Hysaw from the captioned land, the children "shall each receive one-third of the remainder of the unsold royalty."[254]

The Court noted that, without other indicators of the intent of the testatrix, it would be reasonable to interpret the double fraction as a devise of a fixed 1/3 of 1/8 to each of Ethyl Hysaw's children. The Court cautioned, however, that before analyzing the meaning of any particular use of double-fraction language, it was necessary to examine the entire instrument to deduce how each disputed phrase interacted with the rest in order to divine the overall intent.[255] In the present case, the Court found clear intent by Ethel Hysaw to divide the royalty equally among the three children, citing four indicators:

> (1) the deliberate recitation of identical language to effect each child's royalty inheritance;
> (2) the use of double fractions in lieu of single fixed fractions, *with one fraction connoting equality among the three children (1/3) and the other raising the specter of estate misconception or use of the then-standard 1/8 royalty as a synonym for the landowner's royalty*;
> (3) the first royalty provision's global application to all the children and the second provision's language restating the royalty devise of each child individually; and
> (4) the equal-sharing language in the third and final royalty clause.[256]

The Court believed that the most indicative datum of testamentary intent was the equal-royalty-sharing language of the will's third roy-

253. *Hysaw*, 483 S.W.3d at 13–14.
254. *Id.* at 14–15 (alteration in original) (emphasis omitted).
255. *Id.* at 14 (citing Garrett v. Dils Co., 299 S.W.2d 904, 906–07 (Tex. 1957)) (suggesting *Garrett* supports the proposition that "use of double [royalty] fraction juxtaposed with single fraction in another provision clarified that the grantor intended to reserve [a] floating [NPRI] under future leases.").
256. *Hysaw*, 483 S.W.3d at 15 (emphasis added). The four points cited are exact quotes that have been parsed out.

alty clause—that in the event of an inter vivos royalty sale, each child would receive "one-third of the remainder of the unsold royalty." The court of appeals had also found this to convey floating NPRIs, but the Supreme Court looked past the meaning of the isolated phrase and took it as indicative of intent by the testatrix to re-equalize the floating NPRIs of all the children if any particular sibling received an inter vivos gift, and more globally, intent to convey equal floating NPRIs to all children over all the captioned acreage. This, the Court opined, was the holistic approach made necessary by the various shards of intent scattered throughout the contested instrument.[257]

V. The Current Landscape of Fixed vs. Floating Interpretation

The first step in interpreting the mineral or royalty interest reserved or conveyed in any instrument is to acknowledge that all the pertinent conveying/reserving language must be considered, that the days of *Krum*-style "first grant counts" title examination are over, and that the days of the previous "default setting" of choosing a fixed over floating royalty whenever the court is in doubt seem to be waning.[258] Therefore, the first action to take when considering what an instrument conveys or reserves is to highlight all even remotely operational language that attempts to describe the identity and quantum of conveyed or reserved interests.

Second, when considering all the pertinent language, are the terms inherently ambiguous? A conveyance or reservation is ambiguous if it is reasonably susceptible to more than one reasonable interpretation. While recent Texas opinions have hesitated to hold instruments ambiguous, this is not always the case.[259] When considering litigation strategy, whether to claim that an instrument is ambiguous or unambiguous is an important decision. If both sides agree the disputed instrument is unambiguous, the courts commonly deem the instrument so without much discussion. This places the determination of the meaning of the disputed terms solely in the hands of the court as a matter of law. The role of the parties, then, is reduced merely to arguing which interpretation is better.

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257. *Id.* at 13.

258. *See* Medina Interests, Ltd. v. Trial, 469 S.W.3d 619, 623 (Tex. App.—San Antonio 2015, pet. denied).

259. On Feb. 4, 2016, the Texarkana Court of Appeals, in *Mueller v. Davis*, held ambiguous a sentence in a deed that appeared to have unequivocally conveyed all of the grantor's mineral, royalty, and overriding royalty interests in Harrison County. Mueller v. Davis, 485 S.W.3d 622, 630–31 (Tex. App.—Texarkana 2016, no pet. h.). Before *Mueller*, the last oil and gas case to hold a term ambiguous in Texas—at least in a mineral or royalty deed construction context—appears to be *Gore Oil Co. v. Roosth*, 158 S.W.3d 596 (Tex. App.—Eastland 2005, no pet.). The Author thanks William Burford for this information.

The court, then, will use the various canons of interpretation and case law described above, only perhaps guided by the arguments presented by the parties, to decide what the instrument conveys or reserves. The result may be something that neither party wanted, expected, or even thought possible. It is important to have a good understanding of the fixed vs. floating royalty case law landscape and the interpretive prisms through which a court will examine conveyance language. If a party predicts that the case law and/or canons of interpretation are likely to result in the court's deciding upon an unwelcome interpretation, initially claiming that the instrument is ambiguous may be the better (if still perilous) strategy.

The latest cases provide more guidance—or at least grist for consideration. In *Range Resources*, the court seized on the repeated use of the phrase "not less than" and harked back to *Luckel* to hold that the reserved interest could not be a fixed NPRI and therefore a one-half "of royalty" was reserved by grantor.[260] The significance of the case is that it renews "four corners" analysis as a basis for unraveling similar language.

In *Wynne/Jackson*, the dispute revolved around two different phrases: "[an NPRI of] one-half (1/2) of the usual one-eighth (1/8) royalty in and to all oil, gas, and other materials produced, saved and sold from the above-described property," and "[g]rantor shall, nevertheless, have the right to receive one-half (1/2) of any bonus, overriding royalty interest, or other payments . . . payable under the terms of any oil, gas and mineral lease covering the . . . property."[261] Compared with the other recent cases, this was a simpler question with fewer parts to consider and no odd familial components, such as the eight siblings contesting a 1/8 royalty in *Hysaw*.

The *Wynne/Jackson* court found a fixed NPRI after it had refused to apply *Sundance*, as in that case no quote of the entire operative language in the disputed instrument could be found. Although seemingly a sound application of cautious jurisprudence by the *Wynne/Jackson* court, the *idea* raised by the *Sundance* court—setting aside the hitherto-typical judicial recognition of the usual 1/8 lessor's royalty and its mechanical application to interpreting instruments by Texas courts in fixed vs. floating royalty disputes—seems likely to continue to thrive.

Subsequent application of *Sundance* (i.e., setting aside judicial recognition of a typical 1/8 lessor's royalty) and the interpretive principle that a court must attempt to discern the drafters' intent from all the language of the instrument (i.e., four corners interpretation) come to

260. Range Res. Corp. v. Bradshaw, 266 S.W.3d 490, 496–97 (Tex. App.—Fort Worth 2008, pet. denied).

261. Wynne/Jackson Dev., L.P. v. PAC Capital Holdings, Ltd., No. 13-12-00449-CV, 2013 WL 2470898, at *4 (Tex. App.—Corpus Christi June 6, 2013, pet. denied) (mem. op.).

the fore in varying degrees in *Horton*, *Graham*, *Median*, and *Leal*. Each bears a closer examination.

Horton presents a relatively straightforward application of the *Sundance* jurisprudence to very similar language found in that case. The court's explanation of why it arrived at a floating royalty is muddled and difficult to follow as it applies to translating the actual words, which suggests that the court had decided what the result would be before it dug into the language. Ultimately, *Horton* appears to be an example of a Texas court's reliance upon "magic words" that can be easily categorized by the use of the *Williams & Meyers* treatise, as well an instance of a court struggling with unclear language because of its strong predilection not to have outside evidence considered.

In *Graham*, the dispute was of a now-classic pattern: an opening grant followed by language that casts the drafter's initial intent into doubt. Standing alone, the opening clause—"there is reserved . . . one-half (1/2) of the one-eighth (1/8) royalty to be provided in any and all leases for oil, gas and other minerals now upon or hereafter given on said land, or any part thereof, same being equal to one-sixteenth (1/16th) of all oil, gas and other minerals"—would seem to be a fixed royalty reservation ("same *being equal* to . . .").[262] The court noted that "courts generally construe simple grants or reservations of a 'fraction of one-eighth' or its variations as creating a fixed royalty interest, the size of which is determined by multiplying the two fractions together."[263] Another possibility, applying logic similar to that found in *Luckel*, could have been a royalty reservation with 1/16 being the minimum amount, as all leases should provide for a lessor's royalty of at least 1/8 ("the one-eighth (1/8) royalty *to be provided* in any and all leases . . .").

However, after examining the remaining language in the disputed instrument and other documents referenced therein, the court concluded that the parties had intended that a floating NPRI be reserved and they had assumed incorrectly that the lessor's royalty provided in any oil and gas lease would always be 1/8.[264] Therefore, the *Graham* court noted—perhaps articulating what many law professors and practitioners have long thought—that while the instrument reflected an objective expression of the parties' intent to measure the reserved NPRI of Prochaska on the basis of *any* lessor's royalty on any future lease, it also contained the erroneous assumption that the lessor's royalty in leases would always be 1/8 of production. In reaching this destination, the court focused on the words "the usual one-eighth" and explained that the presence of that phrase "reflects the common mis-

262. Graham v. Prochaska, 429 S.W.3d 650, 653 (Tex. App.—San Antonio 2013, pet. denied) (emphasis added).

263. *Id.* at 658 (citations omitted).

264. *Id.* at 661–62.

conception of that period that the landowner's royalty would always be one-eighth of production obtained under a lease."[265]

This is a big step—perhaps *the* big step—in fixed vs. floating NPRI jurisprudence, because courts that follow this precedent of taking judicial notice of a historical muddle can, it seems, dispense more easily with having to contend with troublesome language that they believe arises from this (apparently) mistaken assumption. It follows, then, that when contemplating the "four corners" of a disputed instrument, courts looking to *Graham* will consider some language to lie outside the corners despite the words' appearance in the disputed instrument.

Medina involved an NPRI reservation carved out of the mineral estate with the language "[reserving an] undivided interest in and to the 1/8 royalties paid the land owner upon production of oil, gas and other minerals from said 278-acre tract of land."[266] As in *Graham*, the court considered the historical lessor's royalty mistake—"the estate misconception theory"—first mentioned in *Garrett.* The *Medina* analysis, however, also highlights another interpretation consideration for courts: Does the conveyance/reservation instrument contemplate future leasing and production? The *Medina* court discerned what it construed as evidence for the idea that the drafters contemplated future leasing *and that this manifested intent that the NPRI float, depending on the lessor's royalty in any new lease.*[267]

Such analysis tips the balance heavily toward a "floating NPRI" interpretation when the type of NPRI is in dispute. If no lease exists at the effective time of the disputed conveyance or reservation, then any NPRI conveyed or reserved therein, by definition, contemplates future leases; and if *Medina* resonates with the fact finder and the fact finder can find similar language in the disputed instrument, a floating NPRI is more likely to be the result. In *Medina*, the court read the grantor's reservation—"*the* 1/8 royalties paid the land owner upon production" and "royalties paid the land owner"—and just from those two phrases divined that, because no lease existed on the captioned land when the deed was executed, the mere use of the common word "the" could only be interpreted as referring to the lessor's royalty to be divided among the eight children of Annie Trial—whatever lessor's royalty might be negotiated in a future lease.

As if the use of the word "the" in *Medina* had not set the bar low enough for finding the future intent to lease minerals, the *Medina* court then scrutinized the rest of the instrument for such intent. Finding this intent in the subsequent, arguably innocuous, language de-

265. *Id.* at 660 (first citing Concord Oil Co. v. Pennzoil Expl. & Prod. Co., 966 S.W.2d 451, 460 (Tex. 1998); then citing Garrett v. Dils Co., 299 S.W.2d 904, 907 (Tex. 1957); and then citing 1 Smith & Weaver, *supra* note 4, § 3.7[A], at 3-47).

266. Medina Interests, Ltd. v. Trial, 469 S.W.3d 619, 621 (Tex. App.—San Antonio 2015, pet. denied).

267. *Id.* at 625–26.

scribed above, the *Medina* court expanded the meaning of the presence of this apparent contemplation of future leasing to mean that the parties had therefore contemplated lessor's royalties *different* from the (then) standard 1/8 lessor's royalty. This leap from finding the intention to lease in the future to finding that the parties had contemplated future lessor's royalties other than 1/8 is not so obvious, and although title examiners cannot possibly divine what the parties were thinking, it is quite possible that this had never crossed the minds of the instrument's drafters.

If a lease does exist at the effective time of the disputed conveyance or reservation, then this analysis does not seem so obviously tilted toward the finding of a floating NPRI using the logic of *Medina*. The reference to "the 1/8 royalties paid" could then refer to the lessor's royalties provided for in the existing lease and could therefore possibly *not* imply that the parties were contemplating future leasing.

With regard to future application of *Medina*, the case poses a unique consideration: the highly unlikely presence of exactly eight siblings, each (apparently) entitled to an equal eighth portion of the lessor's royalty on any future leases. Although the court does not mention any equitable grounds for finding that all the children get the same amount, rather than two probably getting more under future leases containing royalties higher than 1/8, it is not difficult to imagine that a desire for equality among siblings imperceptibly shaded the opinion, or that future courts and attorneys may try to distinguish *Medina* on the grounds of its improbable fact pattern. After all, conventional wisdom might exclaim, why would a mother favor one group of her children over another? Possible answers to such questions—perhaps, for example, she had previously given money to the six children in the grantor class and not to the two grantees—lie outside the four corners of the document.

But while it may seem logical that a mother would typically want each of her children to share equally, when considering an unambiguous instrument, it is not the intent of the parties that matters but rather the language of the instrument and those that it references. As the *Luckel* court noted, "[e]ven if the court could discern the actual intent, it is not the actual intent of the parties that governs, but the actual intent of the parties as expressed in the instrument as a whole, 'without reference to matters of mere form, relative position of descriptions, technicalities, or arbitrary rules.'"[268]

Leal, the latest of the recent Texas fixed vs. floating NPRI cases, again centered on multiple disparate phrases. The initial granting clause included:

268. Luckel v. White, 819 S.W.2d 459, 462 (Tex. 1991) (emphasis omitted) (quoting Sun Oil Co. v. Burns, 84 S.W.2d 442, 444 (Tex. Comm'n App. 1935)).

> [E]xcept an undivided one-fourth (1/4) non-participating royalty interest hereinafter specifically conveyed to Grantees [the Leals] . . . .[269]

then continues later in a second paragraph:

> There is specifically conveyed to Grantees herein, their heirs and assigns, an undivided one-fourth (1/4) interest in and to all of the royalty paid on the production . . . .[270]

and still later in that paragraph:

> [Grantees] shall be entitled to a non-participating interest in and to any royalty paid from the production . . . .[271]

Although the third clause seems to mention an NPRI without any quantitative value, that clause is found at the end of the sentence immediately after the second clause. Considering again all the words in the paragraph hosting both clauses, clearly the third clause is in reference to the 1/4 of royalty defined in the second clause.

If just the first clause is considered, this reservation seems clearly worded to convey a fixed 1/4 NPRI. Only the consideration of the following two clauses—as required under the "four corners" interpretation rule—pushes the NPRI into the floating realm. Thus, this example provides two starkly different results depending on the application of the repugnant-to-the-grant rule highlighted in *Krum* vs. the "four corners" rule highlighted in *Luckel*.

Hysaw is where the Texas Supreme Court, seeming to favor *Graham*, charts a tentative course for future fixed vs. floating NPRI case analysis, particularly for instruments that involve double fractions, multiple clauses, suggestions of parties operating under the assumption that all future lessor's royalties would be fixed at 1/8, and family members conveying and reserving mineral and royalty interests to one another.

First, after the preliminaries, the Court addressed the double-fraction dilemma. It noted that "the possibility that the parties were operating under the assumption that future royalties would remain 1/8 will not alter clear and unambiguous language that can otherwise be harmonized."[272] Here, the Court rightfully removed the trap of trying to determine whether the drafters were operating under the eternal 1/8 lessor's royalty misconception, saying that interpreters must focus instead on the language.

Then the Court stated a truism: "[T]he reality is that use of 1/8 (or a multiple of 1/8) in some instruments undoubtedly embodies the parties' [mistaken] expectation that a future lease will provide the typical

269. Leal v. Cuanto Antes Mejor LLC, No. 04-14-00694-CV, 2015 WL 3999034, *3 (Tex. App.—San Antonio July 1, 2015, no pet. h.) (emphasis omitted).
270. *Id.* (emphasis omitted).
271. *Id.* (emphasis omitted).
272. Hysaw v. Dawkins, 483 S.W.3d 1, 10 (Tex. 2016).

1/8th [lessor's] royalty with no intent to convey a fixed fraction of gross production."[273] This is undoubtedly true in *some* instances; which *particular* instances these are, however, remains unknown, hence all the litigation. The Court noted authorities that believe that use of 1/8 in a double fraction makes clear (to them, anyway) that the drafters were operating under the eternal 1/8 lessor's royalty misconception. Further on, the Court noted that no unifying premise has emerged on the fixed vs. floating NPRI royalty.

While the *Hysaw* Court acknowledged the benefit of a "mechanically applied, mathematical approach," it claimed that such an approach failed to recognize the "significance to the use of double fractions in lieu of a single fraction and, in doing so, may interpolate words not actually expressed in an instrument (i.e. a fixed single fraction)."[274] Further, the Court claimed that prior opinions that used double-fraction language (*Garrett*, *Luckel*, and *Concord Oil*) "adhere[d] to an analytical approach that emphasizes the four-corners rule and harmonization principles," and the floating NPRI cases typically involved more complicated, multi-part conveyances/reservations than the fixed NPRI cases, which required more creative interpretations that scrutinized every word.[275]

One commentator has noted that after *Hysaw*, "one can be certain of the construction of a royalty expressed as a fraction of one-eighth only if absolutely identical language has been definitively construed in an earlier case, if then."[276] Such cases cannot put title examiners at ease, as they eschew a more mechanical reading that would allow a more definitive interpretation of NPRIs. While mention of the fraction "of 1/8" cannot be automatically assumed to mean "of any future lessor's royalty" without other indicia of intent for a floating NPRI to be conveyed or reserved, a case-by-case analysis still appears necessary to divine the drafter's intent. "Misconceptions" of what the drafting parties thought the future royalty could be lie outside the four corners, however, and using *Hysaw's* "holistic" approach to NPRIs expressed as double-fractions to craft a "royalty interpretation to suit their own, possibly ill-informed, suspicions of the parties' intent"[277] is a hazard that courts must avoid.

VI. The Shadow of Ambiguity and a Proposal

Gone are the days when *Krum's* repugnant-to-the-grant doctrine ruled the oil and gas property records. Now appellate judges can decide on their own what an unambiguous instrument conveys or

273. *Id.*
274. *Id.* at 12.
275. *Id.*
276. William B. Burford, *Case Law Update*, Proceedings of the 18th Annual Permian Basin Oil & Gas Law Seminar, Chapter A-2, Feb. 26, 2016.
277. *Id.*

reserves, perhaps indulging themselves in trying to come to as clever an interpretation as the Court managed in *Luckel*.[278] Such interpretations can become sophistic brainteasers in which the challenge is to examine every word and phrase, leaving none out and none redundant in the quest to arrive at an interpretation that satisfies this logic.[279] That this curious exercise might result in an interpretation that does not in any way resemble the actual intent of the drafters is immaterial.

The third argument in *Leal*—that the deed should be construed against the grantor—is flatly discounted as being applicable only in the instance of an instrument deemed ambiguous, a seemingly uncommon finding in oil and gas instrument interpretation problems. Sometimes, however, documents really are ambiguous. Care should be taken by courts to avoid glossing over the necessary analysis of whether an instrument is ambiguous or unambiguous in a hurry to come to the latter conclusion. As the Fifth Circuit Court of Appeals recently opined in *Total E & P USA, Inc. v. Kerr-McGee Oil & Gas Corp.*, a case interpreting Louisiana law, "when the words of the contract are not clear and explicit, but are ambiguous, a court should engage in further interpretation in search of the parties' intent by applying [state law] on contractual interpretation and pertinent [state] cases."[280] This further interpretation is necessary even though it opens the door to fact questions about the parties' intent that could require lengthy and contentious discovery and a trial on the merits of difficult facts. As the Louisiana Supreme Court noted,

> [i]n ascertaining [the contracting parties'] intention (where it cannot be adequately discerned from the contract or agreement as a whole) the circumstances surrounding the parties at the time of contracting are a relevant subject of inquiry. . . . The custom of the industry may also be considered in determining the true intent of the parties as to ambiguous contract provisions.[281]

If a document contains ambiguous terms, they must be resolved. This is when courts look to canons of interpretation. Application of two such canons appears particularly inviting in interpreting instruments containing ambiguous fixed vs. floating NPRI clauses: the canons of "construe against the grantor" and "the greatest estate passes."

In Texas, the "construe against the grantor" or "construe in favor of the grantee" canon of interpretation has been recognized for over a

278. *See, e.g.*, Luckel v. White, 819 S.W.2d 459, 462–63 (Tex. 1991).

279. Such puzzles are like catnip to some appellate judges, considering the personalities of the judges that the Author has met over the years.

280. Total E & P USA, Inc. v. Kerr-McGee Oil & Gas Corp., 711 F.3d 478, 494 (5th Cir. 2013) (citing Henry v. Ballard & Cordell Corp., 418 So. 2d 1334, 1339–40 (La. 1982)).

281. *Henry*, 418 So. 2d at 1339–40 (first citing Cooley v. Meridian Lumber Co., 197 So. 2d 255, 258 (La. 1940); then citing Fee v. Vancouver Plywood Co., Inc., 331 So. 2d 151 (La. Ct. App. 1976)).

century.[282] In *Curdy v. Stafford*, the Texas Supreme Court stated that when a grantor creates a deed—using his or her own language—it should be construed against the grantor when there is doubt.[283] In other words, if the grantor reserves an interest when drafting a deed, it will be construed in favor of the grantee.[284]

In *Elder v. Anadarko E & P Co., L.P.*, the grantor conveyed a royalty interest in "the following described lands situated in the County of Rusk . . . ."[285] The contract referenced an "Exhibit A," which included four tracts in Rusk County and eight tracts in Gregg County.[286] The grantor contended that only the Rusk tracts were conveyed—not the Gregg tracts—because the contract said "lands situated in the County of Rusk."[287] The court disagreed, holding that the contract conveyed both the Rusk and Gregg County tracts.[288] Additionally, the court recognized that this holding was consistent with the canons of interpretation, specifically that the contract was construed against the grantor.[289]

Equitable principles lurk at the root of this canon: Generally, the grantor drafts the deed.[290] Thus, the grantor usually has the initial advantage. The grantor should therefore not receive the benefit of the doubt when he or she does not provide clear language.[291] Courts have sometimes construed deeds against the grantor, however, when the grantee drafted the instrument.[292] Again, as the *Leal* court discovered, this canon should not be used if no ambiguity exists.[293] Rather, the canon is to be used as an aid for courts to harmonize the deed and effectuate the intent of the parties.[294]

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282. Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 108–117 (1993) (stating that Texas courts later used the word "ambiguous" to describe when the canon of interpretation was necessary); *see also* Curdy v. Stafford, 30 S.W. 551, 552 (Tex. 1895).

283. *Curdy*, 30 S.W. at 552.

284. Settegast v. Foley Bros. Dry Goods Co., 270 S.W. 1014, 1016 (Tex. Comm'n App. 1925).

285. Elder v. Anadarko E & P Co., No. 12-10-00250-CV, 2011 WL 2713817, at *1 (Tex. App.—Tyler July 13, 2011, no pet.) (mem. op.); *see also* Richard F. Brown, *385 Elder v. Anadarko E & P Co.*, BROWN & FORTUNATO, P.C., http://www.bf-law.com/385-elder-v-anadarko-e-p-co/ [https://perma.cc/ZTP8-WDAY].

286. Brown, *supra* note 285.

287. *Id.*

288. *Id.*

289. *Id.*

290. Kramer, *supra* note 282, at 116.

291. *Id.*

292. *Id.* (citing McGuire v. Bruce, 332 S.W.2d 110, 113 (Tex. Civ. App.—Beaumont 1959, writ ref'd)).

293. Luckel v. White, 792 S.W.2d 485, 488 (Tex. App.—Houston [14th Dist.] 1990), *rev'd*, 819 S.W.2d 459 (Tex. 1991).

294. Arnold v. Ashbel Smith Land Co., 307 S.W.2d 818, 824 (Tex. Civ. App.—Houston [1st Dist.] 1957, writ ref'd n.r.e.) ("[Construing against the grantor] . . . is not applicable in the absence of ambiguity, and even in its presence is never used as a

Of related interest is the common-law rule of the "greatest possible estate." Under this theory, a deed will pass the entire estate owned by the grantor unless the grantor reserves or excepts a portion of the estate conveyed.[295] In Texas, it is presumed that a fee simple is conveyed unless "limited by express words," and deeds are construed to convey the "greatest estate" that the instrument will allow.[296] Therefore, with oil and gas conveyances, the surface and mineral estate would be conveyed—but could be severed with a reservation or exception.[297]

In Texas, the "greatest possible estate" rule has been applied in the context of oil and gas real property. For example, it was once questioned whether the "greatest possible estate" theory applied to the executive right. Originally, the executive right—the right to lease—was treated as a contract-based right.[298] In *Pan American Petroleum Corp. v. Cain*, the Texas Supreme Court addressed one issue: whether a reservation of the executive right remained with the grantor's heirs upon the grantor's death.[299] The Court concluded that unless the parties intended for the executive right to be retained with the heirs, it terminated upon the death of the holder.[300] Under this rationale, the executive right was treated as a contractual right.

In 1990, the Texas Supreme Court revisited the process of conveying/reserving the executive right in *Day & Co. v. Texland Petroleum, Inc.*[301] In the case, a grantee was conveyed eighty acres, a 1/2 fee mineral interest, and the executive right.[302] Next, the grantee conveyed a portion of the acreage to a third party, reserving a 1/4 mineral interest; this conveyance did not mention the executive right.[303] The third party executed a mineral lease, using the executive right.[304]

The grantee argued that the executive right should be treated as a contract-based interest, requiring an "express assignment."[305] Citing *Cain*, the grantee contended that because the executive right was not mentioned in the conveyance to the third party, it retained the execu-

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hypercritical and overly literal tool to override the manifest object and purpose of the language of writings.") (quoting Alexander Schroeder Lumber Co. v. Corona, 288 S.W.2d 829, 833 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.)).

295. Day & Co. v. Texland Petroleum Inc., 786 S.W.2d 667, 669 n.1 (Tex. 1990).

296. TEX. PROP. CODE ANN. § 5.001(a) (West 2016); Lott v. Lott, 370 S.W.2d 463, 465 (Tex. 1963).

297. *See* Talley v. Howsley, 176 S.W.2d 158, 158 (Tex. 1943).

298. Pan Am. Petroleum Corp. v. Cain, 355 S.W.2d 506, 507 (Tex. 1962), *overruled by Day & Co.*, 786 S.W.2d 667.

299. *Id.*

300. *Id.* at 509.

301. *Day & Co.*, 786 S.W.2d 667 (Tex. 1990).

302. *Id.* at 667–68.

303. *Id.* at 668.

304. *Id.*

305. *Id.*

tive right.[306] On the other hand, the third party and its lessee asserted that the executive right is a real property interest. Therefore, property law should apply, specifically, the "greatest possible estate" rule.[307] The Court agreed with the grantor and its lessee: The executive right is a real property interest upon which property principles govern.[308] In its holding, the Court overruled *Cain* and concluded that the executive right was conveyed to the third party because the grantee did not reserve or except the interest.[309]

How can these two canons be applied to fixed vs. floating NPRI dilemmas rooted in ambiguous terms? If the operative language is truly unclear, as in references to the "usual 1/8th royalty"—now apparently a mistaken assumption to be read out of the instrument—but it is also followed by references to a clearly fixed 1/16 NPRI, expensive fact-finding may be avoided, and title opinion writers may be happier when these two canons are exercised in lieu of labyrinthine attempts to divine intent from multiple parts of a long and complicated instrument. For example, if the ambiguous example clauses just mentioned together constitute a reservation, then a court could construe the instrument against the grantor or use the greatest-estate canon to deem an NPRI "fixed" (a fractional freestanding royalty), which almost always will be equal to or less than the quantity of a floating NPRI. In the rarer circumstance in which the NPRI is granted and not reserved, the same canons could be applied to reach the opposite result, namely that a floating NPRI (fraction of freestanding royalty) was conveyed.

Functionally, if more cases result in disputed instruments being deemed ambiguous in part or in whole, more trials will need to be conducted with juries and district court judges determining the meanings of ambiguous terms. Appellate courts will then consider the results in a different light—not de novo, but rather focused on whether or not the fact finder made a reasonable decision given the facts before it. In essence, district courts will make the interpretive call, and appellate courts will act more as referees rather than a second round of independent interpreters.

Trial courts in such a role may well face a hard task, not only determining what evidence to consider outside the four corners of the document but in circumstances when no such evidence exists. This would be especially common in instances in which a disputed instrument was very old, nobody remained who could attest to the meaning of its contents, and no other extrinsic evidence existed, such as drafts or corre-

306. *Id.* at 668–69.
307. *Id.* at 668.
308. *Id.* at 669 ("We erred in *Cain* when we compared the executive right to a power of appointment. Although the executive right is similar to a power, it is not a product of contract, but rather a *creature of property rights*." (emphasis added)).
309. *Id.* at 669–70.

spondence. In addition, as a matter of public policy, such evidential scavenger hunts may prove expensive and time-consuming in the aggregate.

In the (admittedly rare) instance where the grant or reservation of a disputed NPRI is held unambiguous, little other language exists outside the granting clause from which to divine intent, and no indication exists within the granting clause that the parties were operating under a misconception regarding future royalties differing from 1/8, the Author proposes that the finding of a fixed NPRI should be favored. For example, considering the language granting or reserving, "an undivided one-half interest in and to all of the royalty that may be payable under any and all oil and gas leases, by which royalty is meant 1/8th of production"—provided this is considered unambiguous, which is not an easy call—then a holding finding a floating NPRI essentially reads out the last clause, misconception or not. In contrast, a holding finding a fixed NPRI does not read out any specific portion of the first clause; although rambling, both clauses are necessary to make sense of the grant or reservation.

Prolixity is not the same thing as a misapprehension. Without indication of a misconception—e.g., "by which royalty is meant *the usual* 1/8th of production" or similar—all the words in an instrument should usually be given effect. Recognition of such a canon of instrument interpretation would help title examiners in certain instances and provide courts some certainty given the lack of further language.

VII. Conclusion

Outside of *Wynne/Jackson*, which is predicted herein to do little to promote the finding of a fixed NPRI in other instruments, the latest Texas cases would appear to make the fixed vs. floating NPRI exercise more likely to result in a floating NPRI. *Graham* echoes *Sundance* as an enabler for courts seeking to disregard judicial recognition of the usual 1/8 landowner's royalty. If no lease burdened the captioned land at the time, the court then could hunt for language in the document that it could construe as contemplating future leasing—an ostensibly easy task for the *Medina* court. If found, the final step—as suggested by *Medina*—is to see whether that language can be construed as to possibly contemplate *varying quantities* of lessor's royalty in any future leases.

Hysaw scrutinizes the double-fraction problem on a tract with no lease at the time of NPRI reservation in light of the historical plateau of 1/8 lessor's royalty and the assumption that this would continue indefinitely. The case applies a "holistic" approach with the idea that the very fact that the drafters used double fractions in lieu of a single fraction, combined with other indicia in the instrument, may suggest that the intention of the parties was for the NPRI to float dependent on future lessor's royalty.

While it is tempting to seek a simple and mechanical solution that can be applied to all instances of the seemingly endless parade of frustrating, expensive, and ostensibly trivial litigation that can arise from a couple of problematic lines found in a property instrument from eighty years before, these problems are unlikely to disappear overnight for at least three reasons. First, there is no end to the permutations of troublesome phrases that can be included in an instrument; bad drafting is a many-splendored thing. Second, despite the outwardly innocuous phrases and recondite interpretive schemes that are applied, millions of dollars may be at stake—dollars that provide oxygen to the litigious conflagrations that follow. Third, such interpretative battles are reviewed de novo by appellate courts. Don't like the trial-level result? Why *not* appeal when you can present your argument anew upon a clean slate? For these reasons, fixed vs. floating royalty cases like the ones described above are likely to continue, only slowly declining in number as the once nearly universal 1/8 lessor's royalties recede into the historical rear-view mirror.