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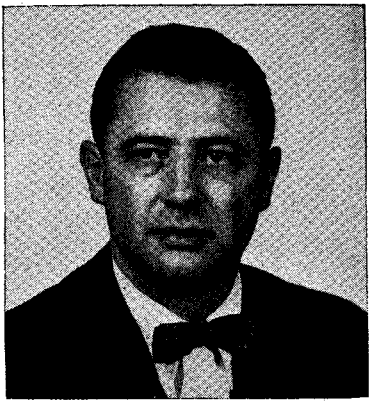

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With the decision in *Simson v. Langholf*,[1] Colorado joins those oil producing states whose appellate courts have been required to engage in the game of semantics and conjecture known as "the construction of transfers and reservations of royalty and mineral fee interests."[2]

Recognition in Colorado of an interest in minerals in place as an estate in land separate and apart from the surface ownership commenced with *Union Pacific R. R. Co. v. Hanna*,[3] and the doctrine has become well entrenched through a series of decisions.[4] In *Frank v. Bauer*[5] and *Pike v. Empfield*,[6] without attempting definition or discussion, the Colorado Court of Appeals impliedly recognized the creation and existence of royalty interests in ore mined and produced. *Pierce v. Marland Oil Co.*[7] dealth with overriding royalties on Indian leases, the court pronouncing the "rents and royalties are profits issuing out of the land."[8] It was not until the *Simson* case, however, that an appellate court in Colorado was faced with the necessity of construing a conveyance pertaining to an interest in minerals, necessitating a judicial differentiation between royalty and mineral in place.

The *Simson* case involved an action to quiet title in fee simple to 49% of all the oil and gas underlying certain property in Jackson

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[1] 133 Colo. 208, 293 P.2d 302 (1956). For discussions of this case see Note, 28 Rocky Mt. L. Rev. 441 (1956); Discussion Note, 6 Oil and Gas Rep. 1011 (1956).

[2] The Colorado Supreme Court thus joins its judicial brethren in the states of Alabama, Arkansas, California, Florida, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia and Wyoming.

[3] 73 Colo. 162, 214 Pac. 550 (1923).

[4] Farrell v. Sayre, 129 Colo. 368, 270 P.2d 190 (1954), commented on in Note, 31 DICTA 278 (1954); Brown v. Kirk, 127 Colo. 453, 257 P.2d 145 (1953); Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952); Calvat v. Juhan, 119 Colo. 561, 206 P.2d 600 (1949).

[5] 19 Colo. App. 445, 75 Pac. 930 (1903).

[6] 21 Colo. App. 161, 120 Pac. 1054 (1912).

[7] 86 Colo. 59, 278 Pac. 804 (1929).

[8] 86 Colo. 63, 278 Pac. 807.

County, Colorado, the interest in question having been created under the terms of an "agreement" (although in reality a conveyance) which, after reciting a consideration in favor of the grantor of 1% of all oil and/or gas produced, saved and marketed under a United States oil and gas prospecting permit, "assigned and set over" to the grantee, 49% of all oil and/or gas that may be produced, saved and marketed" from certain described lands. The instrument was acknowledged before (and, it is interesting to note, was also prepared by) the county clerk and recorder. The trial court found the instrument to be ambiguous, permitting the introduction of extrinsic evidence to show the intent and meaning of the parties, and held the defendants were the owners of the property involved in fee simple, subject to the right of the plaintiff, his heirs and assigns, to 49% of any royalty payment the defendants might receive by virtue of any oil and gas lease executed on the property. The trial court further ruled that the plaintiff, the owner of the conveyed interest, had no right, title or interest in the fee of the property, and no control in the leasing thereof or in any bonus or delay rental payments. The supreme court reversed the judgment, holding that the plaintiff was the owner in fee simple of 49% of the oil and gas in place, saying:

> "where the conveyance or reservation, as the case may be, consists of an interest in perpetuity to all the oil and gas minerals that may be extracted, the conveyance or reservation is a grant or reservation of the minerals in fee simple with the attributes and rights that go with such ownership, including the right to enter upon the land for exploration of oil, participating in delay rents, bonuses and leasing."[9]

The court recognized that "although confusion often exists in the minds of laymen and inexperienced conveyancers in the words to be used in creating a royalty interest or a mineral interest, the two estates are in fact separate and distinct and have well defined legal attributes."[10] Unfortunately, however, if several of the statements in the decision are to be taken at face value, it would appear that the court has chosen to follow an originally ill-considered, generally rejected doctrine, which is recognized only in the State of West Virginia (and even there is open to question) to the effect

[9] 133 Colo. at 215, 293 P.2d at 307.
[10] *Ibid.*, 293 P.2d at 306, citing Palmer v. Crews, 203 Miss. 806, 35 So. 2d 430 (1948), and Annot., 4 A.L.R.2d (1948).

that a perpetual nonparticipating royalty interest in oil, gas and other minerals cannot be created. For example, consider the statement that:

> "the ordinary meaning of the word 'royalty' as applied to an existing oil and gas lease is the compensation provided in the lease for the privilege of drilling for and producing oil and gas and consists of a share of the oil and gas produced or the profits therefrom, *but it does not include a perpetual interest in the realty.*"[11]

And again, the pronouncement that:

> "there being no oil or gas lease in existence at the time of the conveyance or reservation, the words of the grant or reservation 'assigned and set over' are such as to convey a partial interest in the minerals in perpetuity, and an estate in fee simple is thus created."[12]

In arriving at these conclusions, the court cited numerous decisions from other jurisdictions.[13] Careful scrutiny of these cases, however, indicates that most of them are not authority for the proposition advanced by the Colorado court, and a few are directly *contra.*

As a further bulwark to its conclusions, the court relied upon the time-honored, but often misconstrued and misapplied dictum of Coke that "if a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery *secundum formam chartae,* the whole land itself doth pass. For what is the land but the profits thereof?"[14] With deference to Lord Coke, it is suggested that a statement of feudal rights in real property is hardly a realistic basis for the construction of grants of oil and gas. Furthermore, the court overlooked the fact that the royalty right is only one of the profits which may be derived by the landowner from the oil and gas underlying his property. Bonus payments for leasing to oil and gas operators and delay rentals arising under such leases for the privilege of deferring drilling operations are likewise profits arising out of the ownership of oil and gas, as is the right of the landowner to develop and produce the minerals himself, thereby entitling him to all of the proceeds received from any purchaser. Certainly, Coke does not suggest that the conveyance of the right to cut timber, for example, being one of the possible profits derived from land, constitutes a grant of the entire fee simple estate.

It is of course recognized that in cases of first impression an appellate court must of necessity be guided to a great extent by counsel, and it must be pointed out in fairness that the brief of attorneys for the successful appellant was brilliantly conceived and written.[15] In addition, there is no question but that the court was faced with something of a dilemma in the construction of the interest involved. A literal construction of the instrument in ques-

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[11] 133 Colo. at 215, 293 P.2d at 306 (emphasis supplied).
[12] *Id.* at 216, 293 P.2d at 307.
[13] *Id.* at 216-17, 293 P.2d at 307.
[14] 1 Co. Litt. 45.
[15] Brief of plaintiff in error, Simson v. Langholf, 133 Colo. 208, 293 P.2d 302 (1956) (case No. 17674).

tion was neither feasible nor desirable. It cannot seriously be contended that the interest created was a full 49% perpetual nonparticipating royalty interest, thereby entitling the owner to 49 out of every 100 barrels of oil produced. Such a conclusion would, for all practical purposes, completely prevent development of the property for oil and gas purposes. Few, if any, operators would be willing to incur the expense and risk involved in the drilling of an oil or gas well knowing that the remuneration, if successful, would be limited to 51% of the production obtained. From a practical standpoint, then, the court was required to select one of two possible alternatives: First, that the interest conveyed was a perpetual non-participating royalty interest amounting to 49% of the royalty on all oil and gas produced, saved and marketed, this being the conclusion reached by the trial court; or, second, that the grantee received an undivided 49% fee simple interest in the oil and gas in place, thereby entitling him to the right of entry for exploitation of the minerals, and participation in delay rentals and bonuses derived under any oil and gas lease, this being the result erroneously arrived at by the supreme court. A possible third, and in the opinion of the writer, a less desirable solution would be a holding that the interest conveyed was an estate in fee simple in the oil and gas underlying the property, but not entitling the owner to enter and develop the minerals or participate in delay rentals and bonuses. The obviously hybrid nature of such an alternative is readily apparent.

Standing alone, the result reached in the *Simson* case would not be irretrievably damaging to the development of the law of oil and gas in Colorado. The holding could have been justified on the theory that use of a large fraction such as 49% discloses on the face of the instrument that the parties were dealing with the oil and gas in place and not with the royalty interest in these substances. The danger in the decision is the repeated suggestion that a perpetual nonparticipating royalty interest cannot be reserved or conveyed, and that the attempt to do results in the creation of a fee simple interest in the oil and gas in place. The implications of such a doctrine are far reaching and possibly catastrophic. The attorney representing an oil and gas lessee must, on the basis of this decision, require his client to obtain oil and gas leases from every owner of what would otherwise appear to be royalty interests appearing in the chain of title. Attorneys representing purchasers and sellers of interests in oil and gas must be aware that if they prepare an instrument purportedly transferring or reserving a perpetual nonparticipating royalty interest,

they may very well be carving up the ownership of the fee simple title to the oil and gas in place. Oil and gas lessees who are presently producing properties charged with what have always been construed as royalty interests may find they are tenants in common in the mineral estate with the so-called royalty owners whose interests are unleased. Even more dangerous is the position of the royalty owner holding, let us say, under a transfer of a 2% perpetual nonparticipating royalty. If the *Simson* decision, and its dictum, are the law in Colorado, this royalty owner (assuming the standard ⅛ royalty lease) will be entitled not to 2% of the gross production from the property in which he holds his interest, but will receive only 2% of ⅛ of the total production.

There are a number of excellent and definitive treatises concerning the judicial construction of transfers of minearl and royalty interest.[16] It is not the purpose of this article, therefore, to retrace the paths already trod by much more learned authors, nor to attempt a correlation of the vast number of cases dealing with the problem. However, due to the rapidity with which decisions pertaining to royalty and mineral interests are being rendered,[17] and because of the literally hundreds of decided cases concerned with the question, a compilation of the decisions on a jurisdictional basis, and a survey of what appear to be the prevailing views of the appellate courts of the various states should be of interest and value.

DEFINITIONS

A nonparticipating royalty interest has a well-understood meaning in the oil industry, and has been frequently defined by numerous courts and authors.[18] A particularly lucid definition advanced by one authority is that nonparticiapting royalty is "an interest in the gross prduction of oil, gas and other minerals carved out of the the right to participate in the execution of, the bonus payable for, or mineral fee estate as a free royalty, which does not carry with it the delay rentals to accrue under, oil, gas and mineral leases executed by the owner of the mineral fee estate."[19] As a necessary

[16] See, e.g., Cantwell, *Term Royalty*, Seventh Annual Institute on Oil and Gas Law and Taxation 339 (Southwestern Legal Foundation 1956); Colby, *Law of Oil and Gas*, 31 Calif. L. Rev. 357 (1943); Jones, *Problems Presented by the Separation of the Exclusive Leasing Power from the Ownership of Land, Minerals or Royalty*, Second Annual Institute on Oil and Gas Law and Taxation 271 (Southwestern Legal Foundation 1951); Jones, *Non-Participating Royalty*, 26 Texas L. Rev. (1948) [primarily concerned with the duties owed the non-participating royalty owner by the holder of the executive or leasing rights and the effect of Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 542 (1937) and Brown v. Smith, 141 Tex. 425, 174 S.W.2d 43 (1943)]; Levy, *Oil Royalties, A Distinct Species of Property*, 11 So. Calif. L. Rev. 319 (1938) (containing a critique of many of the California decisions); Masterson, *A Survey of Basic Oil and Gas Law*, Fourth Annual Institute on Oil and Gas Law and Taxation 219 (Southwestern Legal Foundation 1953); Maxwell, *The Mineral-Royalty Distinction and the Expense of Production*, 33 Texas L. Rev. 463 (1955)(author convincingly asserts that the basic distinction between a mineral interest and a royalty interest is that the former is expense-bearing and he latter expense-free); Maxwell, *A Primer of Mineral and Royalty Conveyancing*, 3 U.C.L.A.L. Rev. 449 (1956); Morris, *Some Legal Consequences Resulting from a Separation of the Incidents of Ownership of a Mineral Interest*, 7 Okla. L. Rev. 285 (1954); and see Annot. 4 A.L.R.2d 492 (1948); Moulton, *Problems and Pitfalls Arising From Mineral and Royalty Conveyances*, Proceedings, Mineral Law Section, A.B.A. 285 (1956) (containing an informative discussion of the Montana decisions in the field); Nabors, *The Louisiana Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute*, 25 Tul. L. Rev. 30, 303, 485 (1950-51), 26 Tul. L. Rev. 23, 172, 303 (1951-52); Stanton, *Recent Developments in the Construction of Mineral and Royalty Grants and Reservations*, Seventh Annual Institute on Oil and Gas Law and Taxation 301 (Southwestern Legal Foundation 1956); Sullivan, *Assignments by the Landowner and Lessee*, 17 Mont. L. Rev. 64 (1955); Summers, *Transfers of Oil and Gas Rents and Royalties*, 10 Texas L. Rev. 1 (1931); Tippit, *Creating Mineral and Royalty Interests*, 29 DICTA 186 (1952) (concerned primarily with practical problems of conveyances); Turpin, *Mineral Deeds and Royalty Transfers*, First Annual Institute on Oil and Gas Law and Taxation 221 (Southwestern Legal Foundation 1949).

[17] Since early 1952 over 75 cases dealing with the mineral v. royalty question have been decided.

[18] *E.g., Bellport v. Harrison*, 123 Kan. 310, 255 Pac. 52 (1927); Palmer v. Crews, 203 Miss. 806, 35 So.2d 43 (1948); Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543 (1937); Moulton, *supra* note 16.

[19] Jones, *Non-Participating Royalty*, *supra* note 16.

adjunct to this definition it might be added that the owner of the nonparticipating royalty interest does not have the right or privilege of entering upon and producing the minerals from the land involved. Nonparticipating royalty interests may be perpetual,[20] or limited to a prescribed term of years, in which case the creating instrument ordinarily provides for perpetuation by production.[21]

In contra-distinction to the royalty interest is the so-called "mineral-fee interest" which consists of the ownership in fee simple of the oil, gas and other minerals together with the rights, attributes and privileges appurtenant to such ownership, including the right to enter upon the lands and explore for, produce and develop the minerals, or the right to grant leases to others for such purposes and to participate in the bonus payments, delay rentals and royalties derived from or payable by virtue of such leases. As previously indicated, the mineral fee estate, which may exist in conjunction

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[20] In connection with perpetual non-participating royalty interests the problem of the Rule against Perpetuities has been raised in a few jurisdictions, notably Kansas. See Lathrop v. Eyestone, 170 Kan. 419, 227 P.2d 136 (1951) (holding that a perpetual non-participating royalty interest created while the lands were leased, but prior to production, was invalid as a violation of the Rule); cf. Miller v. Sooy, 120 Kan. 81, 242 Pac. 140 (1926). The conclusion reached in the Lathrop case, however, would seem to be severely limited by later Kansas decisions in Froelich v. United Royalty Co., 178 Kan. 503, 290 P.2d 93 (1955); Howell v. Co-op. Refinery Ass'n, 176 Kan. 572, 271 P.2d 271 (1954); Kenoyer v. Magnolia Petroleum Co., 173 Kan. 183, 245 P.2d 176 (1952). Arkansas has rejected the doctrine of the Lathrop case, holding expressly *contra* in Hanson v. Ware, 224 Ark. 430, 274 S.W.2d 359 (1955). Although generally outside the scope of this article, the reader is referred to Kuntz, *The Rule Against Perpetuities and Mineral Interests*, 8 Okla. L. Rev. 183 (1955) and Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests*, 32 Texas L. Rev. 369 (1954) for alluminating treatments of the subject.

[21] See Cantwell, *supra* note 16, for a treatment of determinable royalty interests, pointing up the problems involved when the interest is susceptible of continuation by production.

with or severed and apart from the surface ownership is well recognized in Colorado.[22] This view of the mineral ownership, that the landowner actually "owns" the oil and gas in place in fee simple, has become known as the doctrine of "absolute ownership" or "title in place," and the states (including Colorado) following this theory are generally referred to as the "absolute ownership states."[23] Some jurisdictions, however, including California, Louisiana and apparently Oklahoma, are more or less committed to the so-called "non-ownership" or "no title in place" theory, to the effect that the landowner does not have an absolute unqualified title to the oil and gas in place, holding instead only the exclusive right to drill for and produce these substances.[24] Whether a state follows the ownership theory or the non-ownership or qualified ownership theory has thus far had little bearing on the differentiation between royalty and mineral interests.[25] This follows from the fact that even the so-called non-ownership states have recognized the difference between an expense-bearing interest in the minerals as distinguished from the expense-free royalty interest. Actually, the ownership versus non-ownership controversy is often simply a matter of semantics, the application of either doctrine leading to the same practical result in many situations.

With this brief introduction to basic terminology we proceed to a discussion of decisions in states other than Colorado.[26]

TEXAS

Texas was perhaps the originator, and is certainly the leading exponent of the absolute ownership theory, having projected this doctrine to its logical extreme by holding that an oil and gas lease conveys to the lessee a determinable fee interest in the oil and gas in place.[27]

The evolution of the law concerning transfers and reservations of mineral and royalty interests did not have a particularly auspicious genesis in Texas. Several early decisions held the royalty interest reserved by a lessor in an oil and gas lease (particularly where payable in money rather than in kind) to be personalty.[28] Fortunately, this view was partially thwarted in *Hager v. Stakes*,[29] and completely overruled in *Sheffield v. Hogg*.[30] Confusion was also created by *Caruthers v. Leonard*[31] holding that the conveyance of

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[22] See cases cited at notes 1, 3 and 4, *supra*.

[23] Kulp, *Oil and Gas Rights* § 10.5 (1954) and cases cited at note 7 therein. The author points out that "sometimes the decisions in the same jurisdictions are conflicting, while a state is vacillating as to which theory to follow" and in support of this cites a number of decisions. *Id.* n. 8.

[24] *Ibid.*, and cases cited at note 8 therein.

[25] *But see* Little v. Mountain View Dairies, 35 Cal. 2d 232, 217 P.2d 416 (1950).

[26] In the discussion that follows, the author has attempted to at least cite most of the cases from the particular jurisdiction in question bearing directly on the subject matter of this article. Because of the almost overwhelming number of decisions, however, it is impossible to include them all.

[27] Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717 (1915); Kulp, *op. cit. supra*, note 23; Walker, *The Nature of the Property Interest Created By an Oil and Gas Lease*, 7 Texas L. Rev. 1, 7 (1928).

[28] Curlee v. Anderson and Patterson, 235 S.W. 622 (Tex. Civ. App. 1921); Farmers & Merchants State Bank v. Tullis, 211 S.W. 847 (Tex. Civ. App. 1919); Jones v. O'Brien, 251 S.W. 208 (Tex. Com. App. 1923), *aff'd*, O'Brien v. Jones, 274 S.W. 242 (Tex. Civ. App. 1925).

[29] 116 Tex. 453, 294 S.W. 835 (1927), see Comment, 13 Texas L. Rev. 501 (1935), and Note, 6 Texas L. Rev. 236 (1928).

[30] 124 Tex. 290, 77 S.W.2d 1021 (1934).

[31] 254 S.W. 779 (Tex. Com. App. 1923), possibly, although not expressly, adopting dictum in Walker v. Ames, 229 S.W. 365 (Tex. Civ. App. 1921). See also Queen v. Turman, 257 S.W. 1092 (Tex. Civ. App. 1924).

a fractional mineral interest did not entitle the grantee to share in delay rentals payable under an existing lease. In a case decided at approximately the same time, however, it was held that a mineral conveyance coupled with an express transfer of the same fractional interest "in all the rights and royalties accruing by reason" of an existing lease, entitled the grantee to his share of the rentals.[32] The erroneous pronouncement of *Caruthers v. Leonard* was probably disposed of in *Hager v. Stakes*,[33] and was uneqivocally overruled in *Harris v. Currie*.[34] *Guess v. Harmonson* [35] correctly held that a conveyance of an undivided $1/2$ interest in and to the royalties to be derived from the production of oil, gas and other minerals did not permit the grantee to participate in bonus and delay rental payments, recognizing the fundamental distinction between royalty and mineral interests.

Early Decisions

Hogg v. Magnolia Petroleum Co.[36] and *Porter v. Shaw*,[37] both pioneer cases, illustrate the common misconception still extant that the landowner's ownership in the oil and gas is limited to a $1/8$ interest, and also point up the loose manner in which the terms "royalty" and "mineral" are used interchangeably by laymen, lawyers and the judiciary. In the *Hogg* case, the court assumed, without deciding, that the conveyance of an undivided 1/32 interest in and to all of

[32] Collins v. Stilger, 253 S.W. 572 (Tex. Civ. App. 1923).
[33] 116 Tex. 453, 294 S.W. 835 (1927).
[34] 142 Tex. 93, 176 S.W.2d 302 (1943), discussed in Comment, 13 Texas L. Rev. 501 (1935).
[35] 4 S.W.2d 124 (Tex. Civ. App. 1928).
[36] 267 S.W. 482 (Tex. Com. App. 1924).
[37] 12 S.W.2d 595 (Tex. Civ. App. 1929).

the oil, gas and other minerals "in, on and under said land" transferred (in addition to a 1/32 interest in the minerals in place) a 1/32 part of the gross production.[38] In the *Porter* case, the court reconciled the grant of a 1/16 interest in the minerals with a statement contained in the deed that the grantor and grantee were to share equally in benefits under future leases. In *Way v. Venus*,[39] it was held that a reservation of minerals "which may be found in the future on any of the lands" reserved a present vested interest, the words "which may be found in the future" being simply expressive of the uncertainty of the existence of minerals, rather than imposing a condition upon the reservation. In an unsatisfactory opinion, blest with a well reasoned dissent, the court in *Jones v. Bedford*[40] construed a grant of "one-eighth of one-eighth royalty interest" as conveying an undivided 1/64 interest in the oil, gas and other minerals in place, entitling the grantee to only 1/64 of the standard ⅛ royalty. The court simply eliminated the word "royalty" from the granting clause because of additional provisions in the deed reciting that the grantees should be entitled to ⅛ of ⅛ of the money rentals under any oil and gas lease and should own the same fractional interest in the oil, gas and other minerals.

Schlittler v. Smith[41] is a landmark case in Texas for several reasons. It was one of the first cases in Texas recognizing the creation of a pure royalty interest, holding expressly that the reservation of a ½ interest "in and to the royalty rights" in all oil, gas and other minerals did not constitute a reservation of the mineral fee estate entitling the holder to participation in bonus or delay rentals. Just as important, however, the case created a new legal concept in the court's enunciation that "utmost fair dealing" must be used by the holder of the exclusive leasing privilege in his relationship with the royalty owners. Similar implications appear in succeeding decisions,[42] culminating in *Brown v. Smith*.[43]

Regardless of the well-defined distinctions between the royalty and mineral fee interest, the presence or absence of the word "royalty" in a conveyance imports no particular magic.[44] Several decisions have construed the grant or reservation of a fractional interest in the oil and gas as creating a royalty interest although the word "royalty" was not employed in the conveyance.[45] In like

[38] A conclusion possibly justified by the action of the parties in executing simultaneous documents referring to a ¼ royalty interest.

[39] 35 S.W.2d 467 (Tex. Civ. App. 1931).

[40] 56 S.W.2d 305 (Tex. Civ. App. 1933) (an example, incidentally, of the misuse of printed forms).

[41] 128 Tex. 628, 101 S.W.2d 543 (1937), *reversing*, Smith v. Schlittler, 66 S.W.2d 353 (Tex. Civ. App. 1933).

[42] Winterman v. McDonald, 129 Tex. 275, 286, 102 S.W.2d 167, 173 (1937) (duty of "ordinary care and diligence"); Moore v. City of Beaumont, 195 S.W.2d 968, 980 (Tex. Civ. App. 1946) (implied obligation).

[43] 141 Tex. 425, 174 S.W.2d 43 (1943) (restricting the holder of the exclusive leasing power in his right to combine in a single lease acreage charged with a royalty interest with lands not so encumbered).

[44] See, e.g., Jones v. Bedford, 56 S.W.2d 305 (Tex. Civ. App. 1933).

[45] Klein v. Humble Oil & Refining Co., 126 Tex. 450, 86 S.W.2d 1077 (1935) (reservation of ⅛ "mineral rights," with provision that grantors not entitled to lease or participate in bonus or rental held to be ⅛ royalty—Query whether the interest should not be ⅛ of the royalty); Pinchback v. Gulf Oil Corp. 242 S.W.2d 242 (Tex. Civ. App. 1952) (holding that a reservation of ⅛ of all minerals "that may hereafter be produced and saved" constituted a perpetual non-participating royalty interest, but erroneously opining that the grantee received "⅞ of the oil beneath the surface" subject to the royalty charge); Miller v. Speed, 248 S.W.2d 250 (Tex. Civ. App. 1952), a case distinguished for its erudite discussion of the mineral-royalty distinction, and construing "1/24 of all oil, gas and other minerals produced, saved and made available for market," as a royalty interest. The court probably over-emphasizes the importance of the words "produced, saved and made available for market" for even these words, when coupled with the executive right to lease and participate in bonus and rentals, might compel construction as a mineral fee. See Discussion Note, 1 Oil and Gas Rep. 960 and cases cited in note 46, *infra*.

manner, the grant of a fractional "royalty" interest has been held to create a mineral fee estate where the deed specifies that the grantee shall be entitled to ingress and egress to produce and develop the property and to participate in delay rents and bonuses, or where the instrument discloses a clear intention to convey minerals in place rather than royalties.[46]

The "Double Grant" Doctrine

The concept of double grants or "two-grants-in-one" has been the source of considerable confusion, and in some instances moderate chaos, in the construction of mineral and royalty instruments in Texas. First propounded in *Hoffman v. Magnolia Petroleum Co.*,[47] its application has almost unerringly failed to effectuate the probable intention of the parties. The concept arises in connection with the use of mineral deed forms containing granting, "subject-to," participation and reversionary clauses, all of which provide blanks for the insertion of fractions.[48] Compound the numerous blank spaces in the deed form with the average layman's misconception of the landowner's interest in the minerals, add the frenzied dealing in the heat of a new oil discovery, and the result is at best puzling. Considering the prevalence of and addiction to the printed form mineral deed, the situation is not likely to improve. On the almost invariably valid assumption that both parties intend the grantee to participate in rentals and royalties under all leases, whether existing or future, in the same proportion, and contemplate the same undivided ownership in the minerals both before and after the termination of an existing lease, the deed form mentioned should be completed by the insertion of the same fractional interest in all of the blanks. Unfortunately, however, the cases disclose an almost irresistible impulse to insert one fraction in the granting and reversionary clauses and a fraction eight times as large in the "subject-to" and "participation" clauses. *Tipps v. Bodine*[49] and several other decisions,[50] exemplify the dilemma posed by the misuse of fractions in these forms.

The "double grant" theory in essence holds that an instrument may convey one interest in the mineral fee estate both before and after termination of the existing lease, and a completely different

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[46] Loeffler v. King, 149 Tex. 626, 236 S.W.2d 772 (1951), *reversing*, 228 S.W.2d 201 (Tex. Civ. App. 1950); McLain v. First Nat'l Bank, 264 S.W.2d 192 (Tex. Civ. App. 1954); Crumpton v. Scott, 250 S.W.2d 953 (Tex. Civ. App. 1952) (granting clause: 1/3 undivided interest in "our royalty rights"; intention clause: "intended to convey . . . a 1/3 undivided interest in and to all mineral rights"); Acklin v. Fuqua, 193 S.W.2d 297 (Tex. Civ. App. 1946).

[47] 273 S.W. 828 (Tex. Civ. App. 1925).

[48] The granting clause conveying an undivided interest in the minerals, the "subject-to" clause reciting an existing lease and providing for the sharing of rents and royalties thereunder, the "participation clause" governing division of rents and royalties under future leases, and the "reversionary" clause prescribing the ownership in the mineral estate upon termination of the existing lease.

[49] 101 S.W.2d 1075 (Tex. Civ. App. 1937). Amazingly enough the court observed that no language "would more clearly and accurately express the intention of the parties" in construing a deed conveying a 1/16 mineral fee interest and providing for participation in 1/2 the royalty and rental under an existing lease, but reciting that the grantee should own 1/16 of the minerals on termination of the existing lease. The deed was held to convey a 1/2 mineral interest.

[50] Richardson v. Hart, 143 Tex. 392, 185 S.W.2d 563 (1945), *modifying*, 183 S.W.2d 235 (Tex. Civ. App. 1944); Dils Co. v. Garrett, 294 S.W.2d 730 (Tex. Civ. App. 1956) (writ of error granted and case presently pending in the Supreme Court of Texas); Williams v. J. & C. Royalty Co., 254 S.W.2d 178 (Tex. Civ. App. 1952); Acklin v. Fuqua, 193 S.W.2d 297 (Tex. Civ. App. 1946) (mentioning, but apparently not applying, the "double-grant" theory); Schubert v. Miller, 119 S.W.2d (Tex. Civ. App. 1938).

interest in the rentals and royalties to accrue under such lease. As a result of the application of this doctrine, it is not unusual for a court to hold that a grantee shall receive ⅛ of the rental and royalty under an existing lease and 1/64 of these payments under future leases. The fact that the reduced participation under future leases is nearly always ⅛ of the interest under the existing lease lends credence to the supposition that although it might be legally possible to make a double grant in the same instrument, the possibility of the parties so intending is exteremely remote. Instruments of this type appear to be patently amibiguous (notwithstanding the courts' repeated assertions that they are not), requiring the admission of extrinsic evidence in explanation of intention.[51]

Miscellaneous Texas Decisions

Although too numerous, or not of sufficient general importance, to examine in detail and too divergent to categorize, there are several other Texas cases deserving of mention. *Allen v. Creighton*[52] holds that an inconsistency between the granting and a later clause in a royalty deed will be construed in favor of the grantee. *Howell v. Liles*[53] mentions the apparent inconsistency, if not repugnancy, between the phrase "royalty mineral rights" and the words "total mineral rights," both contained in the same deed.[54] *Peacock v. Alexander*[55] and *Commerce Trust Co. v. Lyon*[56] are both decisions limiting a retained royalty interest to an existing lease. *Caraway v. Owens*[57] illustrates that it is not necessary to reserve or convey royalty in terms of "⅛," holding the reservation of "a fee royalty of 1/32 of the oil and gas" as entitling the grantor to 1/32 of the gross production. Another recent decision points up the necessity for careful draftsmanship, holding that the owner of a reserved ½ of ⅛ of the oil, gas and other mineral royalty is entitled to receive, under a standard ⅛ lease, only 1/128 of the gross production.[58]

Related Problems

While not precisely relevant to the present inquiry concerning the distinction between mineral and royalty interests, the convey-

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[51] See Craft v. Hahn, 246 S.W.2d 897 (Tex. Civ. App. 1952), where the plaintiff wisely alleged mutual mistake thus permitting introduction of parol testimony regarding the expressed understanding of the parties. Such an alternative allegation should always be considered in the "inconsistent fraction" cases.

[52] 131 S.W.2d 47 (Tex. Civ. App. 1939).

[53] 246 S.W.2d 260 (Tex. Civ. App. 1951).

[54] The case is principally of interest, however, because it involves the doctrine of Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 144 S.W.2d 878 (1943), which was followed (without citation) in Brown v. Kirk, 127 Colo. 453, 257 P.2d 145 (1953), under which a reservatoin of minerals in a warranty deed was held inclusive of all previously reserved or conveyed mineral interests. First announced in Klein v. Humble Oil & Refining Co., 126 Tex. 450, 86 S.W.2d 1077 (1935), the principle has been followed, explained and modified in Benge v. Schaurbauer, 152 Tex. 447, 259 S.W.2d 166 1953), *modifying*, 254 S.W.2d 236 (Tex. Civ. App. 1952); Sharp v. Fowler, 151 Tex. 490, 252 S.W.2d 153 (1952); Winters v. Slover, 151 Tex. 485, 251 S.W.2d 726 1952); Pich v. Lankford, 295 S.W.2d 749 (Tex. Civ. App. 1956) (writ of error granted and presently pending in the Supreme Court of Texas); Harris v. Windsor, 279 S.W.2d 648 (Tex. Civ. App. 1955); McLain v. First Nat'l Bank, 263 S.W.2d 324 (Tex. Civ. App. 1953); Howell v. Liles, 246 S.W.2d 260 (Tex. Civ. App. 1951); Coffee v. Manley, 166 S.W.2d 377 (Tex. Civ. App. 1942).

[55] 250 S.W.2d 953 (Tex. Civ. App. 1952).

[56] 284 S.W.2d 290 (Tex. Civ. App. 1955).

[57] 254 S.W.2d 425 (Tex. Civ. App. 1955). But see Remuda Oil Co. v. Wilson, 264 S.W.2d 192 (Tex. Civ. App. 1954).

[58] Harris v. Ritter, 154 Tex. 474, 279 S.W.2d 845 (1955), *modifying*, 267 S.W.2d 247 (Tex. Civ. App. 1954).

ancer, regardless of his jurisdiction, should be aware of the various Texas decisions dealing with the problem of transfer of mineral and royalty interests by a grantor owning less than the full interest.[59] One final problem, apparently thus far peculiar to Texas, should also be mentioned. Dicta in two earlier cases indicating that any royalty reserved in an oil and gas lease in excess of ⅛ is "bonus"[60] gave rise to the decision in *Griffith v. Taylor*[61] in the Texas Court of Civil Appeals in Amarillo. The court construed a conveyance granting an undivided ½ interest in the minerals in place, but providing that it included ½ of all of the ⅛ oil royalty under any existing or future lease, as prohibiting the grantee from participating in royalty reserved under a later lease (the grantor having retained the exclusive leasing power) in excess of ⅛. The Supreme Court of Texas reversed, holding that the 1/16 royalty reserved in the lease over and above the standard ⅛ was "royalty" in the normal and ordinary sense, and the grantee of an undivided ½ mineral interest was entitled to share therein.[62] The case seems to establish that any payment to a lessor, whether in money or in kind, of a fractional interest in the production under an oil and gas lease constitutes "royalty," at least where the interest is not terminable after the receipt of a specified sum.[63] There is still a possibility under the decision in *State Nat'l Bank*[64] that a so-called "production payment" which terminates upon receipt of a certain sum of money out of oil would not constitute "royalty." An interesting case would be presented if the amount to be satisfied out of the production payment were so great as to render the interest perpetual for all practical purposes. For example, to cite a ludicrous extreme, a production payment of one billion dollars payable out of 1/16 of the oil and gas produced, saved and marketed from a forty-acre tract.

(To be concluded in a later issue of DICTA)

[59] E.g., Humble Oil & Refining Co. v. Harrison, 146 Tex. 216, 205 S.W.2d 355 (1947); King v. First Nat'l Bank, 144 Tex. 583, 192 S.W.2d 260 (1946); Minchen v. Hirsch, 295 S.W.2d 529 (Tex. Civ. App. 1956); McElmurray v. McElmurray, 270 S.W.2d 880 (Tex. Civ. App. 1955); Dowda v. Hayman, 221 S.W.2d 1016 (Tex. Civ. App. 1949); Hooks v. Neill, 21 S.W.2d 532 (Tex. Civ. App. 1929); Note 25 Texas L. Rev. 100 (1946). And see Masterson, supra note 16, at 254.

[60] State Nat'l Bank v. Morgan, 135 Tex. 509, 143 S.W.2d 757 (1940); Sheppard v. Stanolind Oil & Gas Co., 125 S.W.2d 643 (Tex. Civ. App. 1939).

[61] 284 S.W.2d 768 (Tex. Civ. App. 1955).

[62] Griffith v. Taylor, 291 S.W.2d 673 (Tex. 1956). And see Morris v. First Nat'l Bank, 249 S.W.2d 269 (Tex. Civ. App. 1952).

[63] See McMahon v. Christmann, 285 S.W.2d 818 (Tex. Civ. App. 1955).

[64] State Nat'l Bank v. Morgan, 135 Tex. 509, 143 S.W.2d 757 (1940).