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DOUBLE FRACTION PROBLEMS IN INSTRUMENTS INVOLVING MINERAL INTERESTS

by

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IT is clear that a conveyance of a designated tract of land purports to convey the entire fee simple estate therein to the grantee. It is also clear that if in such a conveyance there is a reservation of a fractional interest, said reservation purports to be of the entire fee simple estate, regardless of whether the grantor owns only a fractional part of that estate.

For example, *A* owns an undivided 1/4 interest in Lot 1. *A* executes a deed in favor of *B* reading "*A* hereby conveys to *B* Lot 1, except that *A* reserves to himself a 1/4 mineral interest therein." Here, clearly *A* has attempted to reserve a full 1/4 mineral interest to himself, not 1/4 of *A*'s 1/4. To what extent *A* succeeds in this attempt will be discussed later herein.

Double fraction problems arise where a fraction, or its equivalent, is inserted in the granting clause, including the property description, and then there is a later exception of a fractional interest in the land or property covered by the deed. Query: In such a case is the reference to the land a reference to the physical land described, or to the fractional interest included in the property description?

The problem is not a new one. In *Callahan v. Martin*,[1] the California Supreme Court had this to say about it:

> "... the word 'property' is commonly used in two different senses: First, it is applied to those external things which are the objects of rights or estates, to those things which, in the language of Blackstone, are objects of dominion or property .... It is also applied to the rights or estates which a man may acquire in and to things .... Thus land, as the object of rights, is described as a thing real, or as real property. The rights or estate which the owner in fee or for life has in land are also described as real property .... "

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[1] 3 Cal. 2d 110, 43 P.2d 788, 792, 101 A.L.R. 871 (1935).

There are several possible ways of putting a fraction in the property description, which is a part of the granting clause. One is to specifically designate a fraction; another is to recite "all of grantor's interest" where said interest is in fact a fractional one; still another is to refer in the property description to a prior deed which conveyed only a fractional interest. Examples follow, in each of which the physical land in question will be referred to as Lot 1.

In *Hooks v. Neill*,[2] *A*, owning an undivided one-half interest in Lot 1, executed a deed in favor of *B*. The granting clause conveyed to *B* all of *A*'s right, title and interest in Lot 1. A later provision in the deed reserved to *A* a "1/32 part of all oil on and under the said land and premises herein described and conveyed." Query: Was this a reservation of 1/32 of grantor's interest, which would be 1/32 of ½, or was it of 1/32 of the entire title to Lot 1? The court answered this question by holding that the reference back was to the interest set forth in the granting clause and that therefore the reservation was of 1/32 of ½.

Exactly the same fraction problem would have been presented if instead of reciting "all of *A*'s right, title and interest in Lot 1," the recital had been "an undivided one-half interest in Lot 1." In either instance, the pivotal question would be whether the reference back was to the physical land or was to the grantor's interest therein.

In *King v. National Bank*,[3] *A* executed a deed in favor of *B*. The granting clause referred to the interest conveyed as an undivided one-half interest in Lot 1. By a later provision *A* reserved one-eighth of royalties from oil, gas or other minerals produced from the above described land. Query: What is the above described land? Is it the physical land, or, to put it another way, the entire title to the physical land? Or is the above described land the fraction of one-half referred to in describing the physical land? The Court held that the reference back was to the physical land and that therefore the reservation was of ⅛ of total royalty, and not ⅛ of ½ of total royalty. The Court distinguished *Hooks v. Neill* on the ground that there the reference was to the land conveyed, whereas here the reference was to the land described. It is submitted that at best this distinction is a tenuous one. It is further submitted that the *King* case, in holding that the reference back is to the physical land (which is another way

[2] 21 S.W.2d 532 (Tex. Civ. App. 1939). Of collateral interest, the reservation here was of oil, not of oil, gas and other minerals.

[3] 144 Tex. 583, 192 S.W.2d 260 (1946). For an interesting discussion of many of the cases which will be discussed herein, see Niblack, CREPTOTHESIA, 20 TEX. BAR J. 115 (1957).

of saying to the entire title to the physical land), probably gave effect to the actual intention of the parties whereas the holding in *Hooks v. Neill* probably did not.

In *Pollock v. McAllister*,[4] *A* owning an undivided one-half mineral interest in Lot 1 executed an oil and gas lease in favor of *B*. The granting clause therein recited "an undivided one-half mineral interest" in Lot 1. In addition to the usual royalties, the lease reserved to *A* "1/16 of 7/8 of the total oil, gas and other minerals produced, saved and marketed under the terms of this lease. Query: Was this a reservation of 1/16 of 7/8 of the 1/2 referred to in granting clause, as distinguished from 1/16 of 7/8 of gross production? The Court held that the reference back was to the fraction set forth in the granting clause, and that therefore the reservation was of 1/16 of 7/8 of 1/2. An alternative ground for the decision was that the proportionate reduction clause in the lease[5] operated to reduce the royalty, assuming the reference to be to the physical land.

Suppose an oil and gas lease on a usual form does not refer to a fraction when in fact all that the lessor owns is a fractional interest. This presents two questions. One is whether the proportionate reduction clause has the effect by implication of placing the fraction owned by the lessor in the granting clause. The second is whether, if it does, the proportionate reduction clause refers to the fraction as distinguished from the physical land. The second question is not reached unless the first is answered in the affirmative.

In *McMahon v. Christman*,[6] *A* owning a 1/6 mineral interest executed a full interest oil and gas lease. In addition to the usual royalty, the lease provided: "The lessors herein reserve unto themselves, their heirs and assigns, without reduction, as an overriding royalty, a net 1/32 of 8/8 of all oil or gas produced and saved from the above described premises." The court held that the effect of the proportionate reduction clause was to make the granting clause the same as if it had granted a 1/6 interest in the physical land, basing this holding, at least in part, upon an admission in oral argument that the proportionate reduction clause operated to avoid breach of warranty. It is submitted that both holdings are in error. If there was any justification for cutting down the additional royalty, it was that the proportionate reduction clause operated to do so. Against such justification, arguably

[4] 215 Ark. 842, 223 S.W.2d 813 (1949).

[5] This is the provision that where the lessor owns less than the entire fee simple estate, rentals and royalty shall be proportionately reduced.

[6] 285 S.W.2d 818, 5 OIL AND GAS REP. 1254 (Tex. Civ. App. 1955) *error granted.*

the additional provision being typewritten and being more specific, should control. Overriding these questions is that of whether *A* would be estopped to claim a royalty larger in proportion than his mineral interest.

In *Clemmons v. Kennedy*,[7] *A* owning a 1/2 mineral interest executed a full interest oil and gas lease. *A* later conveyed a 1/2 mineral interest to *B*. The deed recited that it was subject to the lease but included 1/2 of royalty payable thereunder. By reason of the proportionate reduction clause, only 1/2 of the 1/8 was payable thereunder. The court, however, held that the deed conveyed 1/2 of the royalty purportedly payable under the lease and that therefore *B* acquired the entire interest of *A*. This result is believed to be the correct one.

A similar result was reached in *R. Lacy Inc. v. Jarrett*,[8] wherein *A* owning a 7/12 interest executed an oil and gas lease on a usual form providing for a $15,000 oil payment payable out of 1/8 of 7/8 "of the oil if, as and only when produced, saved and marketed from said land under this lease." The court construed this reservation to be 1/8 of 7/8 gross. Query: Why did not the proportionate reduction clause operate to reduce the interest reserved? The answer is that a production payment is a form of bonus and hence is not covered by the usual proportionate reduction clause, which is limited to royalty and rental. This points to the importance of adding a proportionate reduction clause to a production payment, if the parties intend such reduction.

In *Texas Co. v. Parks*,[9] *A* executed an oil and gas lease in which the granting clause referred to the property as being an undivided 1/2 interest in Lot 1. The lease provided for an annual delay rental of $160. The lessee construed the proportionate reduction clause as reducing the amount of the rental to $80, and deposited that amount to the lessor's credit in the depositor's bank named in the lease. The court held the proportionate reduction clause referable to the fraction set forth with the description of the physical land and that therefore the payment should have been $160. The result was that the lease terminated by its own terms. The court in reaching this result attempted to disinguish the *King case supra*, but it is thought that in principle the cases are in conflict. It is submitted that the *King* case probably gave effect to the intention of the parties whereas the *Parks* case probably did not.

If, as held in the *Parks* case, putting a fraction in the granting clause

[7] 68 S.W.2d 321 (Tex. Civ. App. 1934) *error ref.*
[8] 214 S.W.2d 692 (Tex. Civ. App. 1948) *error ref.*
[9] 247 S.W.2d 179, 1 OIL AND GAS REP. 555, 2007 (Tex. Civ. App. 1952) *error ref. n.r.e.*

of the lease renders the proportionate clause inapplicable to the extent of said fraction, what is the effect of this holding as to royalty payments? The delay rental is a designated money amount. The royalty is measured by a fraction of production, usually one-eighth of oil and gas production from the land. If land is the designated fractional mineral interest for the purpose of computing rentals it follows that it is the designated fraction for the purpose of computing royalty payments. Therefore, under the *Parks* case, royalty would be 1/8 of 1/2 even though the proportionate reduction clause is not applicable. The reason for this is that the usual royalty is designated as a fraction of production. As to a shut-in royalty or a minimum royalty designating an amount of money payable, the *Parks* case would seem applicable and thereunder the amount of such payment would not be reduced.

In *Humble Oil & Refining Co. v. Harrison*,[10] *A* owning a 3/4 mineral interest in Lot 1 executed an oil and gas lease which was expressly limited to the undivided 3/4 interest. *A* later conveyed a one-half mineral interest to *B*. The deed recited that it was subject to the outstanding lease but included 1/2 of royalty payable thereunder and 1/2 of delay rentals "which may be paid on the above-described land." The lessee paid 1/2 of the designated rental to *B*. The Court held that this was incorrect because the reference to 1/2 meant 1/2 of total delay rentals. In support of this result, the Court stressed the language "which may be paid on the above-described land." The Court did not reach the problem of how royalty should be paid.

Incidentally, the deed in question was sufficiently ambiguous that under all of the facts of the case the grantee was estopped to assert termination of the lease because of the erroneous payment.

A possible way, in addition to those heretofore considered, of having a double fraction problem is by referring in the granting clause to a prior deed which in turn conveyed only a fractional interest.

Three possible circumstances are presented where in the property description in a deed or other instrument a prior deed, which conveyed only a fractional interest, is referred to and then later a fractional interest is reserved "in the above-described land" or "in the land hereby conveyed" or "in the premises herein described." One is that the reserved interest is of the fraction conveyed in the deed referred to. Another is that the effect of the reference is to deduct from the to and also the fractional interest later reserved. The third possibility is

[10] 146 Tex. 216, 265 S.W.2d 355 (1947).

interest of the grantee both the fractional interest in the deed referred that the reference back is to describe, or further describe, the physical land being conveyed.

In *Winters v. Slover*,[11] *A* conveyed Lot 1 to *B*, reserving one-half of the minerals. *B* executed a deed of trust securing a debt payable to *E*, which specifically described Lot 1 and then referred to it as the same property conveyed by *A* to *B*. The Court, as an alternative ground for its decision in the case, held that the reference back cut down the interest covered by the deed of trust to that which was conveyed by *A* and *B*, and hence that the deed of trust did not purport to cover ½ mineral interest excepted from the earlier deed. Looking for the intention of the parties, it seems probable that the reference back was to identify the physical land and not to cut down the interest covered by the deed of trust.

In the later case of *Sharp v. Fowler*,[12] *A* deeded Lot 1 to *B*, reserving all the minerals. *A* later deeded the minerals in Lot 1 to *B*. *B* later conveyed ¾ of the minerals to *X*. *B* later conveyed to *C* by a deed, the sole property description in which was that the land was the same land conveyed in the first deed from *A* to *B*—which deed conveyed only the surface estate. Query: Was the reference back to define the estate granted, or was it to identify the physical land described in the deed? The Court held that it was to describe the physical land and that therefore the deed conveyed both the surface estate and also *B*'s ¼ mineral interest. The Court said:

> "To describe land is to outline its boundaries so that it may be located on the ground, and not to define the estate conveyed therein."

It is submitted that *Sharp v. Fowler* is correct and also that it cannot be reconciled in principle with *Winters v. Slover*, or, for that matter, although to a lesser extent, with *Hooks v. Neill* or *Parks v. Texas Co.*

In *Duhig v. Peavy-Moore Lumber Co.*,[13] *A* owned the surface and ½ of the minerals in a tract of land. *A* executed a deed to *B* which described the physical land and then recited that it was the same land formerly owned by *X*. (*X* had owned only the surface and the same ½ mineral interest which *A* owned.) Later in the deed from *A* to *B*, *A* reserved ½ mineral interest "in the land."

A contended that by referring back to *X*'s title, the granting clause only conveyed the surface and ½ of the minerals and that the sub-

[11] 151 Tex. 485, 251 S.W.2d 726, 1 OIL AND GAS REP. 1873 (1952).
[12] 151 Tex. 490, 252 S.W.2d 153, 1 OIL AND GAS REP. 1835 (1952).
[13] 135 Tex. 503, 144 S.W.2d 878 (1940).

sequent reservation of ½ of the minerals was a reservation of ½ of ½ of the minerals. The Court did not reach the second contention—that is, that the reference back was to the fractional interest thertofore owned by *X*—because the Court held that the only effect of the reference was to further define the physical land covered by the deed. Based upon this holding, the Court held that the effect of the reservation was that the deed purported to convey to *B* the entire title minus the ½ mineral interest reserved to *A*, which equalled the surface estate plus ½ of the minerals; that as *A* owned only a ½ mineral interest, his attempt to reserve the interest failed, the interest passing under an analogy to the doctrine of after-acquired title. The Court mentioned but did not base its decision on the earlier case of *Klein v. Humble Oil & Refining Co.*[14] In that case a reservation was held to evidence an intent to carve out of the grant the interest theretofore conveyed and not to reserve any interest in the grantor.

The *Duhig* case seems correct in holding that *A* attempted to and intended to reserve an interest to himself and was not referring to the outstanding interest. Query: Looking at the instrument from its four corners, did the reference to prior ownership, plus the reserved interest, establish an intention to deduct from the interest granted both the outstanding interest and also an additional ½ mineral interest in the grantor? Let us consider this possibility in analyzing the next two cases.

In *Remuda Oil Co. v. Windsor*,[15] *A* conveyed to *B*, reserving "½ of ⅛ royalty, being 1/16 of all oil, gas and other minerals." *A* later conveyed to *C* ¼ of royalty in a tract which was specifically described. The description was followed by this clause: "being the same land described [in the deed from *A* to *B*] reference to which deed is here made for all purposes." *B* later executed an oil and gas lease which provided for a ¼ royalty. The total royalty attributable to the interests of *A* and *C* was 1/16 of gross. This was because *A's* reservation was of a 1/16 royalty. The royalty can vary with the fraction reserved in the lease only when the royalty interest is "of royalty." For example, the owner of ½ royalty, under a lease providing for a ¼ royalty, would be entitled to ½ of ¼, being ⅛ of gross. The owner of a 1/16 royalty interest could never have a right to more than a free 1/16 of gross.

Under the lease in question, *A* contended that his conveyance to *C* was of ½ of his 1/16, while *C* contended it was ¼ of royalty,

[14] 126 Tex. 450, 86 S.W.2d 1077 (1935).
[15] 264 S.W.2d 192, 3 OIL AND GAS REP. 842 (Tex. Civ. App. 1954) *error ref. n.r.e.*

which would entitle *C* to ¼ of the ¼ royalty, being 1/16 of gross production, leaving *A* nothing. The court held that the effect of referring back to the prior deed from *A* to *B*, when construed with the rest of the provisions of the deed, evidenced an intent upon the part of *A* and *C* that *C* should receive ½ of *A's* 1/16 royalty interest.

In *Harris v. Windsor*,[16] *L* conveyed to *T* reserving to *L* an undivided ½ mineral interest. *T's* interest became vested in a bank. The bank conveyed to *W* by a deed in which the general warranty provision was qualified by a provsion that the deed was subject to all restrictions and reservations in the deed from *L* to *T*, reference to which deed was made for all legal purposes. *W* conveyed to *H*. This deed described the physical land, and then recited, " . . . and being the same land described in Warranty deed from [the bank to *W*, followed by recording data] reference to which is made for all purposes . . . " Following this reference was a reservation to *W* of ⅜ "interest in and to all of the oil, gas and other minerals in and under that may be produced from the above described premises . . . " The Court held that the effect of referring to the prior deed for all purposes was to deduct from the estate granted to *H* both the interest reserved out of the prior deed, and also the ⅜ mineral interest reserved by *H*.

While it is possible to distinguish the last two cases from the earlier cases discussed herein, including the *Duhig* case, the last two cases seem to represent a liberalization by the courts of the four-corner rule to give effect to a reserved interest even though the reserving party has overconveyed—unless saved from doing so by the reference back to the prior deed. Also, both of the last two cases, at least by inference, support the proposition that the reference back is not to cut down or otherwise modify a subsequent reservation in the same deed of a fractional interest "in the above described land."

One might with some reason wonder whether, under recent cases, even without a reference back to a prior deed, a reservation to the grantor which cuts down the estate granted should be given effect upon the theory that the grantee is charged as a matter of law with knowledge of the contents of all instruments in his chain of title, and that it follows that the intention of both parties is probably enforced more often by giving effect to the reservation than by holding that the interest passes by a doctrine analogous to that of after-acquired title.

[16] 294 S.W.2d 798, 6 OIL AND GAS REP. 1234 (1956).

CONCLUSIONS

1. This article deals primarily with two problems. The first is where two fractions are inserted, either directly or indirectly, in the same instrument, or in related instruments, and the question is whether a reference to land, or some similar word is to the fraction or to the entire title in the physical land described.[17]

2. In the present state of the authorities, if a fraction is possibly included in the granting clause, either in the words of grant or in the property description, and there is a later reservation of an interest "in the above land," or some similar phrase, there is a serious question whether the refernce will be held to be to the fraction or to the entire title in the physical land. A fraction is included in the granting clause where a specific fraction is included therein, or where grantor, owning only a fractional interest, grants "all of grantor's right, title and interest." A fraction is possibly included in the granting clause where the property description refers to a prior deed which conveyed only a fractional interest.

In addition to this fraction problem another question is whether in a situation where there is a prior outstanding interest, which causes the fraction reserved to amount to an overconveyance, the reserved interest passes under the doctrine of the *Dubig* case.[18]

To avoid these problems, it is suggested that the fraction be computed upon the basis of gross production and that the reservation be so worded as to make this clear. It should also be made clear, when intended, that the reserved interest is in addition to any outstanding interest. For example:

> There is hereby reserved and excepted unto grantor, and not conveyed hereby, an undivided one-half of eight-eighths of all of the oil, gas and other minerals in and under the physical land above described. There is also excepted and reserved herefrom, and not conveyed hereby, any and all interest in the minerals, and other interests in said physical land, record title to which is outstanding in anyone other than the grantor herein.

The suggested provision assumes that the parties intend to except only outstanding interests of record. If the agreement is to except

[17] Cases beyond the scope hereof include those in which by using two fractions, several different sets of interest are created, one when there is no lease, and another when there is a lease. See, for example, Hoffman v. Magnolia Petroleum Co., 273 S.W. 828 (Tex. Comm. App. 1925); Benge v. Scharbauer, 152 Tex. 477, 259 S.W.2d 166, 2 OIL AND GAS REP. 1350 (1953); Woods v. Sims, 154 Tex. 59, 273 S.W.2d 617, 4 OIL AND GAS REP. 193 (1954).

[18] For a discussion of the difference between a reservation and an exception and the importance of this difference in determining when the *Dubig* case doctrine is applicable, see discussion note to Gibson v. Turner, —Tex.—, 294 S.W.2d 781 (1956), in 6 OIL AND GAS REP. 1212.

all outstanding interests, the word "record" should be deleted. Such deletion might cause the deed to be construed as a quit claim. Also, the suggested provision would not protect an outstanding record interest in grantor. If such is not the intent of the parties, the provision could easily be changed by so stating therein.

3. Where in an oil and gas lease, a fraction, or its equivalent or possible equivalent, is placed in the granting clause, either in the words of grant or in the property description, the only safe position for a lessee to take is to assume that the proportionate reduction clause does not cut down the amount of the delay rentals provided for in the lease. If the lessee desires to make the proportionate reduction clause clearly applicable, it must be rewritten to provide in substance: "If the lessor owns less than the entire fee simple estate in 8/8 of the physical land described herein [etc.]."

4. If a royalty or production payment, in addition to that provided for in the printed lease form, is reserved, the provision reserving it should expressly cover the question of whether the proportionate reduction clause is applicable, or should include its own proportionate reduction clause.

5. If an interest is sold subject to an outstanding lease which purports to cover, or possibly purports to cover, only a fractional interest, and the grantee's rights under such lease are defined, care should be taken to avoid a situation like that in *Humble Oil & Refining Co. v. Harrison, supra.* For example, suppose the outstanding lease is expressly limited to a one-half interest. A deed of a ½ mineral interest executed thereafter recites that it is subject to said lease but covers and includes ..... of royalty payable thereunder. This blank should be filled in by the word "all." If there is a question about what the outstanding lease does or says, the deed could provide:

> This deed is subject to any and all valid, recorded oil and gas leases, but covers and includes, and grants to the grantee herein, exactly the same right to delay rentals, royalties, and any other unaccrued interests owned by or payable to grantor herein under the terms of any such lease or leases as the grantee would have had, had he, owning the interest hereby conveyed, been a party lessor in any such lease or leases.