# A WALK DOWN "BAD DEED LANE"

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**CHAPTER 15**

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# A WALK DOWN "BAD DEED LANE"

Your client is conveying an interest in real property. As part of the transaction you prepare a warranty deed. Your client is a party to a lawsuit challenging his or her ownership interest in real property. The first documents you ask to review are your client's vesting deed and a title run to determine your client's chain of title. How difficult can drafting a deed be? How difficult can defending your client's ownership interest in real property be? Apparently more difficult than we may think. The Texas Supreme Court has issued eight opinions in the last ten years addressing the following issues[1]:

- Whether the grantee in a deed conveying fee simple title with no exceptions now has ownership of an undivided 1/14th interest claimed by the grantor's heirs.
- Whether grantee obtained ½ of all royalties from the minerals produced from the surface estate owned and being conveyed by grantor or ½ of all the royalties from the minerals from the ¾ of all royalties from the minerals owned by grantor.
- Whether the common law rule against perpetuities invalidates a grantee's future interest in the grantor's reserved non-participating royalty interest.
- Whether the granting clause is ambiguous because it purports to convey all of the grantor's interest in the county—a large amount of property—although located in the same paragraph as the Mother Hubbard clause, a catch-all for small, overlooked interests.
- Whether the adjacent landowners had to be joined by plaintiff pursuant to Texas Rule of Civil Procedure 39 as ordered by the trial court, when the answer involved an analysis of the underlying controversy based upon the "common law strip-and-gore" doctrine.
- Whether the existing 1/8 NPRI applies to the entire mineral estate where the deed reserved 5/8's mineral estate to grantor and made the mineral estate conveyed to grantee subject to an outstanding 1/8 NPRI.
- Whether the metes and bounds description in a deed control when it conflicts with a general description in the deed.
- Whether a grantor can seek reformation of a deed by asserting that it had no knowledge of the omitted material term until after the expiration of the four-year statute of limitations.

The purpose of this paper is to take a walk down "Bad Deed Lane" in order to avoid potential drafting errors, recognize title issues, and defend adverse claims to real property interests.[2]

## I. A LOOK AT THE MAP

Before setting out on our adventure, let's look at the map. Let's see the twists and turns that we can identify on the Warranty Deed itself. Unfolding the map, we see From 5-1 from the State Bar of Texas Real Estate Forms Manual, 3rd Edition[3]. This deed is "the same in substance" to the form set out in the Texas Property Code which "conveys a fee simple estate in real property with a covenant of general warranty." Tex. Prop. Code Sec. 5.022(a). Keep in mind that a covenant

[1] While this paper is being written, the Texas Supreme Court has granted review in *Chicago Title Ins. Co. v. Cochran Investments, Inc.*, 121319 TXSC, 0676, wherein Chicago Title Ins. Co. is challenging the decision in *Cochran Investments, Inc., v. Chicago Title Ins. Co.*, 550 S.W.3d 196 (Tex. App. –Houston [14th Dist.] 2018, pet pending). In this case the Houston Court of Appeals for the 14th District has created a real controversy among real estate practitioners by disregarding what was believed to be settled law incident to the covenant of seisin in warranty deeds. *Compare Childress v. Siler*, 272 S.W.2d 417 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.) ("the covenants of seisin and of good right to convey are synonymous, and in the absence of qualifying expressions… are read into every conveyance of land or interest of land, except in quitclaims deeds") *with Cochran Investments, Inc., v. Chicago Title Ins. Co.*, 550 S.W.3d 196 (Tex. App. –Houston [14th Dist.] 2018, pet pending) (a deed implies a covenant of seisin only if the grant includes in the conveyance a representation or claim of ownership, and the special warranty deed in question did not include an implied covenant of seisin).

[2] *See* Sheehan, T. & Williams, W., *Conveyances—Recent Developments, Deeds, Reservations and Exceptions, and Things I Have to Look Up Every Four Years*, State Bar of Texas 41st Annual Real Estate Law, 2019 (sets out an analysis of *Cochran Investments, Inc., v. Chicago Title Ins. Co.*, 550 S.W.3d 196 (Tex. App. –Houston [14th Dist.] 2018, pet pending), and an explanation of the various types of deeds, the difference between reservations and exceptions, and other issues which permeate a real estate law practice); Love, G.R., *Conveyancing Documents & Correction Instruments*, State Bar of Texas 28th Annual Advanced Real Estate Drafting, 2017 (sets out an excellent summary of law applicable to a conveyance and an analysis of the statutory provisions governing correction instruments, Tex. Prop. Code Secs. 5.027-.030).

*See also* Whelan, T. , *Scattershooting While Wondering Whatever Happened at the Courthouse to Frequently Litigated Provisions in My Favorite Real Estate Sales Forms"*, State Bar of Texas Advanced Real Estate Drafting, 2015 (an excellent analysis of what can possible go wrong in a real estate transaction, including an entire section on deeds and conveyances).

[3] Form 5-1 from the State Bar of Texas Real Estate Forms Manual, 3d Edition, is attached at the end of this paper.

of warranty is not required, and a deed may include any clause or be in any form "not in contravention of the law." *Id.* at (b) & (c). Let's not forget that a deed "must be in writing and must be subscribed and delivered by the [grantor] or by the [grantor's] agent authorized in writing." Tex. Prop. Code Sec. 5.021.

With Tex. Prop. Code Sec. 5.021 and 5.022 as our background, what other directions can we gleam from this map.

**Form 5-1**

**General Warranty Deed**

**Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.**

If a party to a deed is an individual, the deed must contain the confidentiality notice required by Tex. Prop. Code Sec. 11.008(c).

**Date:**

A deed does not have to be dated to be effective. *Webb v. Huff*, 61 Tex. 677 (1884) ("A date is not necessary to the validity even of a deed. If a deed have [sic] no date or an impossible date, as the 30th of February, it will take effect from the date of delivery. *Id. at 679. See Rosestone Properties v. Schliemann*, 662 S.W.2d 49, 52 (Tex. Civ. App.—San Antonio 1983, writ ref'd n.r.e.) (*citing Webb v. Huff).*

**Grantor:**

A deed must be signed by the grantor or the its authorized agent. Tex. Prop. Code Sec. 5.021.

**Grantor's Mailing Address:**

**Grantee:**

"The established general rule is that a deed can only be made to grantees in existence at the time of the execution of the deed." *Wilson v. Dearing, Inc.*, 415 S.W.2d 475, 477 (Tex. Civ. App.—Eastland 1967, no writ).

**Grantee's Mailing Address:**

**Consideration:**

"If the parties prefer not to show the amount of cash paid in a document that will become a public record, the deed may recite as consideration "cash" or a nominal amount and "other consideration.… Note, however, that the fictional recitation of a nominal amount may create rights in the grantee or other consequences that the parties do not intend. *See 1464–Eight, Ltd. v. Joppich*, 154 S.W. 3d 101 (Tex. 2004). "[4] State Bar of Texas Real Estate Forms Manual, 3d Edition, Chapter 5.

"The well established rule is that where no express vendor's lien is reserved in the deed, a vendor's lien nevertheless arises by operation of law to secure the payment of the purchase money, and where the purchase money is not paid, the vendor has an implied equitable lien which may be established and foreclosed in a suit brought for this purpose. Briscoe v. Bronaugh, 1 Tex. 326 (1846); Zapata v. Torres, 464 S.W.2d 926 (Tex.Civ.App., Dallas, 1971, n.w.h.); 58 Tex.Jur.2d sec. 335, p. 575, et seq." *Dilley v. Unknown Stockholders of the Brotherly & Sisterly Club of Christ, Inc.*, 509 S.W. 2d 709, 714 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).

A bona fide purchaser for value and without notice of the implied vendor's lien, however, takes title free from the implied lien. *Smith v. Price*, 230 S.W. 836, 838 (Tex. Civ. App.—Austin 1921, no writ).

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[4] Addressing whether an option contract is enforceable when it only recites nominal consideration which was not paid, the Court stated:

> Nevertheless, we are persuaded that the position of the Restatement (Second) of Contracts, which is supported by a well-articulated and sound rationale, represents the better approach. *See, e.g.*, Restatement (Second) of Contracts § 87 cmt. b (1981) ("The fact that the option is an appropriate preliminary step in the conclusion of a socially useful transaction provides a sufficient substantive basis for enforcement, and a signed writing taking a form appropriate to a bargain satisfies the desiderata of form."); Gordon, *Consideration and the Commercial-Gift Dichotomy*, 44 Vand. L.Rev. 283, 293-94 (1991) ("Option contracts are related to economic exchanges--transactions based on self-interest, not altruism. Moreover, people expect that option contracts are serious and binding commitments.") (footnote omitted).

*1464–Eight, Ltd. v. Joppich*, 154 S.W. 3d 101, 110 (Tex. 2004).

The essential elements of a gift [deed] made during a grantor's life are donative intent, delivery, and acceptance. *Gannon v. Baker*, 830 S.W.2d 706, 710 (Tex. Civ. App.—Houston [1st Dist.] 1992, writ denied).

**Property (including any improvements):** "It is well settled that in order for a conveyance or contract of sale to meet the requirements of the Statute of Frauds, it must, insofar as the property description is concerned, furnish within itself or by reference to other identified writings then in existence, the means or data by which the particular land to be conveyed may be identified with specific certainty. Jones v. Kelley, 614 S.W.2d 95, 99 (Tex.1981); Morrow v. Shotwell, 477 S.W.2d 538, 539 (Tex.1972); Wilson v. Fisher, 144 Tex. 53, 188 S.W.2d 150, 152 (1945). Pick v. Bartel, 659 S.W.2d 636, 27 Tex. Sup. Ct. J. 73 (Tex. 1983)" *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983.)

A deed conveys fee simple "unless the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or operation of law." Tex. Prop. Code Sec. 5.001.

A deed can only convey the right or estate owned by grantor even if the deed "purports to transfer a greater right or estate in the property" owned by the grantor. Tex. Prop. Code Sec. 5.003.

**Reservations from Conveyance:**[5]

> While the words "exception" and "reservation" are often used indiscriminately, each has its own separate meaning, and in the construction of deeds containing such terms courts will not look upon the terms as synonymous, or attribute to the one the meaning of the other, unless from the face of the instrument it is apparent that by the use of one word the other was intended. 14 Tex. Jur. 958-960; Donnell v. Otts (Tex. Civ. App.) 230 S. W. 864. The primary distinction between a reservation and exception is that a reservation must always be in favor of and for the benefit of the grantor, whereas, an exception is a mere exclusion from the grant, in favor of the grantor only to the extent that such interest as is excepted may then be vested in the grantor, and not outstanding in another. Allen v. Henson, 186 Ky. 201, 217 S. W. 120; Arnett v. Elkhorn Coal Corp., 191 Ky. 706, 231 S. W. 219, 220; Reynolds v. McMan Oil & Gas Co. (Tex. Com. App.) 11 S.W.(2d) 778.

*Klein v. Humble Oil & Refining Co.*, 67 S.W.2d 911, 915 (Tex. Civ. App.—Beaumont 1934), *aff'd* 86 S.W.2d 1077 (Tex. 1935).

> In 7 Words and Phrases, p. 6140, under the title of "Reservation," it is said:
> "A reservation is a clause in a deed creating or reserving something out of the thing granted that was not in existence before" ... A reservation in a deed is something created out of the granted premises by force and effect of the reservation itself, as an easement out of land granted, or rent out of premises devised. … A reservation is a proviso in a deed which reserves to the grantor some new right or interest in the thing granted, not before existing in him, operating by way of an implied grant. If it does not contain words of inheritance, it will only give an estate for the life of the grantor."

Donnell v. Otts, 230 S.W. 864, 865 (Tex. App. 1921).

If the grantor wishes to reserve a property right from the conveyance, the reservation should be described under that heading in the deed. A reservation in favor of a third party in inoperative. *Linder v. Linder*, 651 S.W.2d 895, 900-01 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

**Exceptions to Conveyance and Warranty:**

Properly used, an exception excludes an existing outstanding interest from the conveyance. *Donnell v. Otts*, 230 S.W. 864, 865-66 (Tex. Civ. App.—Fort Worth 1921, no writ). Exceptions should be drafted so as not to validate an instrument that is no longer in effect. *Morgan v. Fox*, 536 S.W.2d 644, 649-50 (Tex. Civ. App. –Corpus Christi 1976, writ ref'd n.r.e.).

"'An exception in a deed or other instrument is something existing before as a part of the thing granted, and which is excepted from the operation of the conveyance.'" *Donnell v. Otts*, 230 S.W. 864, 865-66 (Tex. Civ. App.—Fort Worth 1921, no writ) (*citing* 3 Words and Phrases, p. 2538 et seq).

**Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and**

[5] *See* Dysart, S., *Reservation Or Exception, What Is It Going To Be?*, State Bar of Texas 39th Annual Advanced Real Estate Law, 2017 (reviews Texas court cases distinguishing "reservations" and "exceptions" in deeds).

**successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty**.6

"Unless the [deed] expressly provides otherwise, the use of 'grant' or 'convey' in a [deed] of … fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs and assigns: (1) that prior to the execution of the [deed] the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and (2) that at the time of the execution of the [deed] the estate is free from encumbrances." Tex. Prop. Code Sec. 5.023. "An implied covenant under this section may be the basis for a lawsuit as if it had been expressed in the [deed]. *Id.* (b). "'Encumbrance' includes a tax, an assessment, and a lien on real property." *Id.* Sec. 5.024.

A deed does not have to include warranties, i.e. grantor does not have "to warrant and forever defend all and singular the Property…" *Id* Sec. 5.022(b).

> If from the whole instrument we can ascertain a grantor and a grantee and there are operative words or words of grant showing an intention by the grantor to convey title to land which is sufficiently described to the grantee, and it is signed and acknowledged by the grantor, it is a deed. Harlowe v. Hudgins, 84 Tex. 107, 19 S.W. 364; Baker v. Westcott, 73 Tex. 129, 11 S.W. 157; Young v. Rudd, Tex.Civ.App., 226 S.W.2d 469, ref., n.r.e.; Devlin on Real Estate, 3rd Edition, Vol. 1, Sec. 174. Harris v. Strawbridge, 330 S.W.2d 911 (Tex. Ct. App. 1959).

*Harris v. Strawbridge*, 330 S.W.2d 911, 915 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

> Referring to the covenant of general warranty this court has observed that the nature and purpose of such a covenant is for the indemnity of the purchaser against the loss or injury he may sustain by a failure or defect in the vendor's title. McClelland v. Moore, 48 Tex. 355, 363. The warranty does not constitute a part of the conveyance nor strengthen or enlarge the title conveyed. Richardson v. Levi, 67 Tex. 359, 3 S.W. 444; White v. Dupree, 91 Tex. 66, 40 S.W. 962. The covenant against incumbrances is embraced within the general warranty clause, and it is the legal duty of the grantor to pay off and discharge all liens and incumbrances incurred prior to the conveyance which are not assumed by the warrantee. Delta County v. Blackburn, 100 Tex. 51, 93 S.W. 419; Taylor v. Lane, 18 Tex.Civ.App. 545, 45 S.W. 317; Robinson v. Douthit, 64 Tex. 101. The covenantor warrants that he will restore the purchase price to the grantee if the land is entirely lost; and in cases of partial loss the measure of damages is modified so as to allow a recovery of only such proportion of the consideration as the amount of the loss bears to the whole of it. Hollingsworth v. Mexia, 14 Tex.Civ.App., 363, 37 S.W. 455.
>
> The statutory covenant against incumbrances, as provided by article 1297, is implied from the use of the words "grant" or "convey" in a conveyance by which an estate of inheritance or fee simple is transferred, unless the implication is restrained by express terms contained in the conveyances. Garrett v. Butler, Tex. Civ.App., 260 S.W. 1069; Chapin v. Ford, Tex.Civ.App., 194 S.W. 494. The covenant is separate and distinct from the warranty of title; it is intended to protect the grantee against rights or interests in third persons, which, while consistent with the fee being in the grantor, diminish the value of the estate conveyed. Such a covenant may be styled one of indemnity, promising compensation for damages arising from some outstanding right or interest of a third person; an engagement that the grantor's title is unincumbered, and a covenant in praesenti, which is breached, if at all, upon the execution and delivery of the deed, though damages may not arise until a later date. Woodward v. Harlin, 121 Tex. 46, 39 S.W.2d 8, rehearing denied 121 Tex. 46, 41 S.W.2d 204; Walcott v. Kershner, Tex. Com.App., 291 S.W. 195; Texas & P. R. Co. v. El Paso & N. E. R. Co.,

**6** "The traditional deed clauses include the granting clause, the habendum clause, and the warranty clause. The customary granting clause includes the grant of the property with its related rights and appurtenances and begins with 'grants, sells, and conveys.' The customary habendum clause defines the extent of property ownership to be held by the grantee and begins with 'to have and to hold.' The customary warranty clause describes the warranty of title made by the grantor and begins with 'Grantor binds.'" State Bar of Texas Real Estate Forms Manual, Chapter 5.

> Tex.Civ. App., 156 S.W. 561, writ of error refused 161 S.W. xvi.
>
> In Sutherland on Damages, 4th Ed., vol. 2, sec. 620, p. 2148, a clear and concise statement is found on the scope of the covenant against incumbrances, which, as pertinent here, is as follows:
>
> "The diminution of the value of the thing granted, which is said to be the test of an incumbrance, is not to be limited to cases where the thing granted is, by reason of some outstanding right or interest in a third person of less pecuniary worth, but extends to and embraces cases where the grantee, by reason of such an outstanding right or interest, does not acquire by the grant the complete dominion over the thing granted which the grant apparently gives but is or may be deprived thereby of the whole or some part of its use or possession."

*City of Beaumont v. Moore*, 202 S.W.2d 448, 453 (Tex. 1947).

A deed must be delivered. Tex. Prop. Code Sec. 5.021.

> In order for a deed to take effect as a conveyance it must be delivered. Two elements are essential to delivery. The instrument must be placed within the control of the grantee and with the intention it become operative as a conveyance. Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S.W. 823. And actual manual delivery is not necessary. Every case must depend on its own circumstances attending it, and the relations of the parties. There must be an intention to deliver and acts sufficient to show a constructive delivery. Hubbard v. Cox, 76 Tex. 239, 13 S.W. 170.

*Smith v. Smith*, 607 S.W.2d 617, 620 (Tex. Ct. App. 1980).

> It has long been the law that a deed must be delivered in order to transfer title. Dikes v. Miller, 24 Tex. 417 (1859). Delivery involves and requires acceptance of the instrument, either expressly or impliedly. A deed not accepted by the grantee conveys no interest. The sufficiency of the facts necessary to constitute acceptance of a deed is a question of law for the courts, while ascertainment of the underlying facts is, of course, for the trier of the facts. 19 Tex.Jur.2d Deeds sec. 82, p. 359 et seq. Robert Burns Concrete Contractors, Inc. v. Norman, 561 S.W.2d 614 (Tex. Ct. App. 1978).

*Robert Burns Concrete Contractors, Inc., v. Norman,* 561 S.W.2d 614, 618 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

> It has long been the law that a deed, in order to be effective to transfer title to land, must be delivered to the grantee. Dikes v. Miller, 24 Tex. 417 (1859). Delivery requires acceptance of the deed, either expressly or impliedly. Robert Burns Concrete Contractors, Inc. v. Norman, 561 S.W.2d 614, 618 (Tex.Civ.App.--Tyler 1978, writ ref'd n.r.e.). Therefore, a deed which is not accepted by the grantee does not convey any interest in the land. There is no summary judgment evidence in the case at bar that the deed was ever delivered by defendants to plaintiff. Martin v. Uvalde Sav. and Loan Ass'n, 773 S.W.2d 808 (Tex. App. 1989).

*Martin v. Uvalde Savings & Loan Ass'n*, 773 S.W.2d 808, 812 (Tex. App.—San Antonio 1989, no writ).

A deed that fails as a conveyance because applicable provisions of Chapter 5 of the Texas Property Code is enforceable as a contract to convey the property to the extent permitted by law. Tex. Prop. Code Sec. 5.002.

**When the context requires, singular nouns and pronouns include the plural.**

_____
[**Name of grantor**]

A deed must be signed by the grantor or its authorized agent. Tex. Prop. Code Sec. 5.021.

_____
[**Name of grantee**]

A deed that imposes obligations on the grantee often provides for the signature of the grantee. State Bar of Texas Real Estate Forms Manual, 3d Edition, Chapter 5.[7]

[7] In commercial transactions where the warranty deed has extensive "AS IS, WHERE IS" provisions, practitioners are often adding the signature of the grantee.

**Form 3-31**[8]

**Short Form Certificate of Acknowledgement**

STATE OF TEXAS

COUNTY OF [**county**]

This instrument was acknowledged before me on [**date**] by [**name**].

_____

[SEAL] [**Title of officer**]
My commission expires: [**date**]

**Ordinary Form Certificate of Acknowledgement**

**STATE OF TEXAS**

**COUNTY OF [**county**]**

**Before me, [**name and title of officer**], on this day personally appeared [**name of acknowledger**], [known to me/proved to me on the oath of [**name of witness**]/proved to me through [**description of identity card or other document**]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.**

**Given under my hand and seal of office this [**specify**] day of [**month**], [**year**].**

_____

**[SEAL]** [Title of officer]
**My commission expires:** [date]

**Form 3-35**[9]

**Jurat**

**SUBSCRIBED AND SWORN TO before me on _____ by [**name of affiant**].**

_____

**Notary Public, State of Texas**

"A [deed] is void as to as to a creditor or to a subsequent purchaser for valuable consideration without notice unless the [deed] has been acknowledged, sworn to, or proved and filed of record as required by law." Tex. Prop. Code Sec. 13.001(a).

The unrecorded deed is binding on a party to the deed, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the [deed]. *Id.* (b). *See McCracken v. Sullivan*, 221 S.W. 336, 338 (Tex. Civ. App.—San Antonio 1920, no writ).

To be recorded, a deed must have an acknowledgement, sworn to with a jurat, or proved according to law. Tex. Prop. Code Sec. 12.001(a). [A deed] may not be recorded unless it is signed and acknowledged or sworn to by the grantor in the presence of two or more credible subscribing witnesses or acknowledged and sworn to before and certified by an officer authorized to take acknowledgements or oaths as applicable." *Id.* (b).[10]

## II. RULES OF THE ROAD

What other rules of law or equity come into play when parties are claiming adverse interests based upon the terms of a deed? Let's review a few more "rules of the road" before traveling down "Bad Deed Lane".

### A. Four Corners Doctrine

"The construction of an unambiguous deed is a question of law for the court." Luckel v. White, 819 S.W.2d 459, 461 (Tex. 1991). When construing an unambiguous deed, our primary duty is to ascertain the intent of the parties from all of the language within the four corners of the deed. Id. The parties' intent, " when ascertained, prevails over arbitrary rules." Id. at 462 (quoting Harris v. Windsor, 156 Tex. 324, 294 S.W.2d 798, 800 (Tex. 1956)). In Luckel, we rejected mechanical rules of construction, such as giving priority to certain clauses over others, or requiring the use of so-called " magic words." See Concord Oil Co. v. Pennzoil Expl. & Prod. Co., 966 S.W.2d 451, 465 (Tex. 1998) (citing Luckel, 819 S.W.2d at 462).

*Wenske v. Ealy*, 521 S.W. 3d 791, 794 (Tex. 2017) (*Emphasis added)*.

### B. Land to be Identified with Reasonable Certainty

While the Statute of Frauds requires only that certain promises or agreements be in writing and signed by the person to be charged [*citing* Tex. Bus. & Comm. Code Sec 26.01], as applied to real-estate conveyances, " the writing must furnish within itself, or by reference to some other existing writing, the means or data by

[8] State Bar of Texas Real Estate Forms Manual, 3rd Edition, Chapter 3.
[9] *Id.*

[10] Good luck getting a deed "sworn to by the grantor in the presence of two or more credible subscribing witness" accepted by a county clerk's office for recordation. The author has tried and was not successful.

which the land to be conveyed may be identified with reasonable certainty [*citing Morrow v. Shotwell,* 477 S.W. 2d 538, 539 (Tex. 1972)]."

*Davis & d/b/a/ JD Minerals, and JDMI, LLC v. Mueller,* 528 S.W.3d 97, 100 (2017).

**C. Specific v. General Legal Descriptions**

An unambiguous specific description, such as a metes and bounds description, will prevail over a conflicting general description. *See Stribling v. Millican DPC Partners, LP,* 458 S.W.3d 17, 22 (Tex. 2015). "When the two conflict with each other, and the general description cannot 'override a particular description about which there can be no doubt.'" *(citing Cullers*, 16 S.W. at 1005.

*Stribling v. Millican*, 458 S.W.3d 17, 22 (Tex. 2015).

> Rather, the general description may be used to help interpret the specific description when the specific description is "defective or doubtful". *Cullers,* 16 S.W. at 1005, when the deed language evidences an intent to convey both the land covered by the metes and bounds and additional land described in the general description, *Sun Oil, Co.,* 84 S.W.2d at 443, or when the general and specific descriptions may otherwise be harmonized without sacrificing one for the other, *see Am. Sav. & Loan Ass'n of Hous. v. Musick,* 531 S.W.2d 581, 585 (Tex. 1975).

*Stribling v. Millican*, 458 S.W.3d 17, 22 (Tex. 2015).

**D. Strip-and-Gore Doctrine**

The strip-and-gore doctrine generally provides:

> Where it appears that a grantor has conveyed all land owned by him adjoining a narrow strip of land that has ceased to be of any benefit or importance to him, the presumption is that the grantor intended to include such strip in such conveyance; unless it clearly appears in the deed, by plain and specific language, that the grantor intended to reserve the strip. *Cantley v. Gulf Prod. Co.,* 135 Tex. 339, 143 S.W.2d 912, 915 (Tex. 1940).

*Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 909 (Tex. 2017).

**E. The Equitable Theory of Estoppel by Deed**

In the broadest sense, estoppel by deed stands for the proposition that all parties to a deed are bound by the recitals in it, which operate as an estoppel. *See generally Green v. White,* 153 S.W.2d 575, 583-84 (Tex. 1941) (observing that 'the recital of one deed in another binds the parties to the deed containing the recital, and those who claim under them, and may take the place of a deed and thus form a muniment of title'). *Trial v. Dragon,* No. 18-0203 (Tex. 2019).

> The doctrine, however, is not without limitations. See id. Estoppel by deed "does not bind mere strangers, or those who claim by title paramount to the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed."

*Id.*

**F. The *Duhig* Application of Estoppel by Deed**

This Court explained that, in that situation [where the grantor conveyed more than he owned], the grantor breached his general warranty in the deed by appearing to convey more than he actually did. See id. at 880 ("When the deed is so interpreted [that] the warranty is breached at the very time of the execution and delivery of the deed, . . . [t]he result is that the grantor has breached his warranty . . . ."). Had the Court stopped its analysis with that observation, then the holding would have rested exclusively on breach of warranty, with the remedy being self-correcting-that any reservation is rendered ineffective until the shortfall in the warranty is remedied, which would presumably be captured by damages. But the Court went on to apply equitable principles because the grantor, Duhig, had and held "in virtue of the deed containing the warranty the very interest, one-half of the minerals, required to remedy the breach" at the very instance of execution and breach. Id. The Court held:

> We recognize the rule that the covenant of general warranty does not enlarge the title conveyed and does not determine the character of the title. The decision here made assumes, as has been stated, that Duhig by the deed reserved for himself a one-half interest in the minerals. The covenant is not construed as affecting or impairing the title so reserved. It operates as an estoppel denying to the grantor and those claiming under him the right to set up such title against the grantee and those who claim under it.

*Trial v. Dragon,* No. 18-0203 (Tex. 2019).

**G. The Doctrine of After Acquired Title**

It is a general rule, supported by many authorities, that a deed purporting to convey a fee simple or a lesser definite estate in land and containing covenants of general warranty of title or of ownership will operate to

estop the grantor from asserting an after-acquired title or interest in the land, or the estate which the deed purports to convey, as against the grantee and those claiming under him. Id. at 880 (citations omitted).
*Trial v. Dragon,* No. 18-0203 (Tex. 2019).

### H. Breach of Warranty

When a grantor delivers a general warranty deed conveying an interest in property that the grantor does not own, the grantor breaches its warranty of title and the proper remedy is damages.[11]

*Trial v. Dragon,* No. 18-0203 (Tex. 2019).

### I. Mother Hubbard Clause

A Mother Hubbard clause in a warranty deed will convey to the grantee "small pieces that may have been overlooked or incorrectly described."

*Davis & d/b/a/ JD Minerals, and JDMI, LLC v. Mueller,* 528 S.W.3d 97, 102 (Tex. 2017).

### J. "SAVES AND EXCEPTS"

> …Although an "exception" can refer to any "mere exclusion from the grant," a "reservation" must "always be in favor of and for the benefit of the grantor." *Pich v. Lankford,* 157 Tex. 335, 302 S.W.2d 645, 650 (1957). We will not find "reservations by implication." *Sharp v. Fowler,* 151 Tex. 490, 252 S.W.2d 153, 154 (1952). "A reservation of minerals to be effective must be by clear language." *Id.*

*Perryman v. Spartan Texas Six Capital Partners, Ltd.,* 546 S.W.3d 110, 119 (Tex. 2018).

> But as we will explain, the phrase limits the interest the deeds except; it does not purport to limit the interest the deeds convey.

*Perryman v. Spartan Texas Six Capital Partners, Ltd.,* 546 S.W.3d 110, 119 (Tex. 2018).

### K. Last Antecedent Construction Clause v. Series-Qualifier Canon

First, the clause's grammatical structure and punctuation indicate that the phrase "which are now owned by Grantor" modifies the term "premises," which immediately precedes that phrase, and not the term "royalties," which appears much earlier in the clause. *See Sullivan v. Abraham,*488 S.W.3d 294, 297 (Tex. 2016). *Sullivan* involved a statutory provision that requires courts to award "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action *as justice and equity may require.*" *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a) (emphasis added). The issue was whether the justice-and equity phrase modified "court costs" and "reasonable attorney's fees," so that the court could award less than the party's reasonable attorney's fees if "justice and equity" required, or only the phrase "other expenses incurred in defending against the legal action." *Sullivan*, 488 S.W.3d at 297. We noted that under the last-antecedent construction canon,[6] the justice-and-equity phrase would modify only the award of "other expenses incurred," but under the series-qualifier canon,[7] it would modify all three items listed. *Id.* We concluded that either canon might reasonably apply to the statute, but the absence of a comma after "other expenses" or "legal action" "indicates an intent to limit the justice-and-equity modifier to the last item in the series." *Id*. at 298.

*Perryman v. Spartan Texas Six Capital Partners, Ltd.,* 546 S.W.3d 110, 121 (Tex. 2018).

### L. "Subject to" Clause

The words 'subject to,' used in their ordinary sense, mean subordinate to, subservient to or limited by." Kokernot v. Caldwell, 231 S.W.2d 528, 531 (Tex.Civ.App.--Dallas 1950, writ ref'd) (citations and quotation marks omitted). And although the subject-to clause in Bass was tied to the grant and not the warranty, in general, the principal function of a subject-to clause in a deed is to protect a grantor against a claim for breach of warranty when some mineral interest is already outstanding. See Walker v. Foss, 930 S.W.2d 701, 706 (Tex.App.--San Antonio 1996, no writ); Ernest E. Smith, The " Subject To" Clause, 30 Rocky Mtn. Min. L. Inst. § 15.01 (1984); see also Richard W. Hemingway, The Law of Oil and Gas § 9.1 (3d ed. 1991) (collecting cases from multiple jurisdictions to that effect).

*Wenske v. Ealy,* 521 S.W.3d 791, 796 (Tex. 2017).

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[11] "The proper measure of damages for breach of the covenants of seisin and warranty of good title is the consideration paid for the conveyance." *Sun Exploration & Production Co. v. Benton,* 738 S.W.2d 35, 37 (Tex. 1987). "The measure of damages in a suit for breach of warranty is governed by the rule applicable to partial failure of title, that the damages will bear the same proportion to the whole purchase money as the value of the part to which the title fails bears to the whole premises estimated at the price paid. City of Beaumont v. Moore, supra; Hynes v. Packard, 92 Tex. 44, 45 S.W. 562; 15 Tex.Jur.2d, 'Covenants', Sec. 80. Ragsdale v. Langford, 358 S.W.2d 936 (Tex. Ct. App. 1962)". *Ragsdale v. Langford,* 358 S.W.2d 936, 938 (Tex. Civ. App. —Austin 1962, writ ref'd n.r.e.).

**M. The Recording Statute and the Discovery Rule**

Today we expressly hold what we have suggested for almost half a century: Plainly obvious and material omissions in an unambiguous deed charge parties with irrebuttable notice for limitations purposes.

Also disputed in this case is whether Property Code section 13.002--" [a]n instrument that is properly recorded in the proper county is . . . notice to all persons of the existence of the instrument" --provides all persons, including the grantor, with notice of the deed's contents as well.[ 3] We hold that it does. Parties to a deed have the opportunity to inspect the deed for mistakes at execution. Because section 13.002 imposes notice of a deed's existence, it would be fanciful to conclude that an injury stemming from a plainly evident mutual mistake in the deed's contents would be inherently undiscoverable when any reasonable person could examine the deed and detect the obvious mistake within the limitations period.

*Cosgrove v. Cade*, 468 S.W. 3d 32 (Tex. 2015).

**N. Rule Against Perpetuity**

… the Texas Constitution does not define "perpetuities," and without a statute on the subject, the common law on the matter is the law of the state. Trustees of Casa View Assembly of God Church v. Williams, 414 S.W.2d 697, 702 (Tex.Civ.App.-Austin, 1967, no writ); Hunt v. Carroll, 157 S.W.2d 429, 436 (Tex.Civ.App.-Beaumont 1941, writ dism'd); see also 12 B TEX. JUR. 3d Constitutional Law § 17 (2012) ("Constitutional construction is a matter for the courts."). The Rule developed at common law to prevent landowners from using remote contingencies to tie up land title and remove it from commerce indefinitely. See Kettler, 383 S.W.2d at 560.

*Conocophillips Company v. Koopman*, 547 S.W. 3d 858, 872 (Tex. 2018).

## III. BAD DEED LANE

Now for the walk down "Bad Deed Lane".

**A. Liability for Grantor's Breach of Warranty**

In *Trial v. Dragon*, No. 18-0203 (Tex. 2019), the Court addressed the issue of whether the grantee in a deed conveying fee simple title with no exceptions now has ownership of an undivided 1/14th interest claimed by the grantor's heirs.

Grantor conveyed ½ of his 1/7th undivided interest to his wife in 237 acres in Karnes County (the "Karnes County Property") that he owned with his six siblings. Grantor, along with his six siblings, then signed and delivered a deed conveying "all that certain tract of land [the Karnes County Property]" to grantee. Grantor breached his warranty of title upon signing and delivering the second deed.[12] Grantor's two sons acquired the outstanding 1/14th interest from their mother through intestate succession.

Overruling the appellate court's decision, the Texas Supreme Court reached its decision after determining that the following equitable remedies did not apply: (i) the equitable theory of estoppel by deed, (ii) the Court's application of this equitable theory in *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878, 880-81 (1940), and (iii) the doctrine of after-acquired title. The Court held that there was no question that grantor breached the warranty of title.

> As [Grantor's] direct heirs, the Trial sons are bound by the general warranty to warrant and forever defend the [Grantee] from adverse claims to the Karnes County Property. The question is whether the Trial sons are liable for damages when they failed to warrant and defend against their own adverse claim to the property-their claim deriving from the interest they inherited from Ruth's [their mother's] separate property-and if so, what the amount of these damages would be. Neither the trial court nor the court of appeals has considered this damages question.

Finding that the Trial's [grantor's] sons' title to the Karnes Property could not be awarded to Dragon [grantee's successor in interest] as a remedy for breach of warranty and that the proper remedy would be monetary damages, the Court reversed and remanded the case to the trial court to determine whether damages are appropriate against the Trial sons. *See Trial v. Dragon*, No. 18-0203 (Tex. 2019).

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In 2008, Grantee, Dragon, approaches the oil and gas operator to pay royalties to Dragon because the Trial's mineral reservation expired. Royalties were paid to Dragon until 2014 when the oil and gas operator determined that Ruth owned 1/14th of the mineral interest "in her own right."

In 2010, Ruth dies intestate, resulting in her two sons, Joseph Trial and Michael Trial, owning 1/28th interest each in the Karnes County Property, including the mineral interest.

Dragon files suit against the Trial sons claiming ownership of the 1/14th interest based upon various causes of action including breach of warranty and estoppel by deed.

**B. How Does a Single Contract-Interpretation Question Impact Eight Deeds?**

The issue in *Perryman v. Spartan Texas Six Capital Partners, Ltd.*, 546 S.W.3d 110 (Tex. 2018), the Court addressed

> … a single contract-interpretation question: What is the function of a clause that "saves and excepts" 1/2 of "all royalties from the production of oil, gas and/or other minerals that may be produced from the above described premises *which are now owned by Grantor* ," when the deed does not disclose that the grantor does not own all of the royalty interests and does not except any other royalty interests from the conveyance?[13]

*Id*. at 113.

In other words, the issue is whether grantee obtained ½ of all royalties from the minerals produced from the surface estate owned and being conveyed by grantor or ½ of all the royalties from the minerals from the ¾ of all royalties from the minerals owned by grantor.

The deed creating this issue was from a grantor who owned only ¾ of the royalties and conveyed to grantee the property same "LESS, SAVE AND EXCEPT" clause that was in grantor's vesting deed which was from a grantor who owned 100% of all the royalty interest.

> LESS, SAVE AND EXCEPT an undivided one-half (1/2) of all royalties from the production of oil, gas and/or other minerals that may be produced from the above described premises which are now owned by Grantor. It being understood that all of the rest of my ownership in and to the mineral estate in and under the above described lands is being conveyed hereby.
>
> The deed also included a warranty clause in which grantor agreed to "Warrant and Forever Defend, all and singular the said premises." The deed did not mention that grantor's niece already owned 1/4 of the royalty interest or expressly except that interest from the grant.

*Id.* at 113-14.

1. "Less, save and except"

> We do not agree with the parties or the court of appeals that the "less, save and except" clause *reserved* any royalty interest for the grantors. Although an "exception" can refer to any "mere exclusion from the grant," a "reservation" must "always be in favor of and for the benefit of the grantor." *Pich v. Lankford*, 157 Tex. 335, 302 S.W.2d 645, 650 (1957). We will not find "reservations by implication." *Sharp v. Fowler*, 151 Tex. 490, 252 S.W.2d 153, 154 (1952). "A reservation of minerals to be effective must be by clear language." *Id.*
>
> …The sentence makes clear that the grantor conveyed all of the mineral estate except the portion of the royalty interests the prior sentence excepted. But it does not suggest that the exception was actually a reservation unto the grantor. Because the clause creates an exception and not a reservation, the deeds do not purport to both convey and reserve unto the grantors more than the grantors own, so they do not present an over conveyance or breach-of-warranty problem that would require us to consider *Duhig* estoppel. Ultimately, we agree with Spartan and Menser's calculations, but we need not rely on *Duhig* estoppel to get there.

546 S.W.3d at 119.

2. "Now owned by Grantors"

First, the clause's grammatical structure and punctuation indicate that the phrase "which are now owned by Grantor" modifies the term "premises," which immediately precedes that phrase, and not the term "royalties," which appears much earlier in the clause.[14]

[13] This complicated dispute involves a chain of eight separate real-property deeds.

[14] *See Sullivan v. Abraham*,488 S.W.3d 294, 297 (Tex. 2016). *Sullivan* involved a statutory provision that requires courts to award "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action *as justice and equity may require.*" *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a) (emphasis added). The issue was whether the justice-and equity phrase modified "court costs" and "reasonable attorney's fees," so that the court could award less than the party's reasonable attorney's fees if "justice and equity" required, or only the phrase "other expenses incurred in defending against the legal action." *Sullivan*, 488 S.W.3d at 297. We noted that under the last-antecedent construction canon,[6] the justice-and-equity phrase would modify only the award of "other expenses incurred," but under the series-qualifier canon,[7] it would modify all three

The Court determined that the deed

> "… purported on its face to convey to the grantee all of the interests in the First Tract's surface, minerals, and royalties, "less, save and except" 1/2 of all the royalties from the minerals produced from the "described premises which [were then] owned by Grantor." As a result, the deeds purported to convey 1/2 and except 1/2 of all of the First Tract's royalty interests, not just one half of the royalty interest the grantors then owned. We now turn to the effect of those conveyances and then determine the parties' respective royalty interests.

546 S.W.3d at 124.

This result caused grantee to own ½ of all the royalties from the minerals from the premises and not just ½ of the ¾ royalties owned by grantor [or 3/8th of all the royalties from the minerals]. Since this deed was the third deed in the chain of 8 deeds, this result impacted all the grantee's royalty interest in the remaining 5 deeds.

*Id.*

### C. The Application of the Common Law Rule Against Perpetuities to a Grantee's Future Interest in the Grantor's NPRI

In *Conocophillips Company v. Koopman*, 547 S.W. 3d 858 (Tex. 2018), the Court addressed the issue of whether the common law rule against perpetuities invalidates a grantee's future interest in the grantor's reserved non-participating royalty interest.

> RESERVATIONS FROM AND EXCEPTIONS TO CONVEYANCE AND WARRANTY:
>
> There is EXCEPTED from this conveyance and RESERVED to the Grantor and her heirs and assigns for the term hereinafter set forth one-half (½ ) of the royalties from the production of oil, gas ... and all other minerals ... which reserved royalty interest is a non-participating interest and is reserved for the limited term of 15 years from the date of this Deed and as long thereafter as there is production in paying or commercial quantities of oil, gas, or said other minerals from said land or lands pooled therewith. If at the expiration of 15 years from the date of this Deed, oil, gas, or said other minerals are not being produced or mined from said land ... this reserved royalty interest shall be null and void and the Grantor's rights in such reserved royalty shall terminate. It is expressly understood, however, that if any oil, gas, or mineral or mining lease covering said land ... is maintained in force and effect by payment of shut-in royalties or any other similar payments made to the lessors or royalty holder in lieu of actual production while there is located on the lease or land pooled therewith a well or mine capable of producing oil, gas, or other minerals in paying or commercial quantities but shut-in for lack of market or any other reason, then ... it will be considered that production in paying or commercial quantities is being obtained from the land herein conveyed.

*Id.*at 862-63.

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> items listed. *Id.* We concluded that either canon might reasonably apply to the statute, but the absence of a comma after "other expenses" or "legal action" "indicates an intent to limit the justice-and-equity modifier to the last item in the series." *Id*. at 298.
>
> …
>
> Although the last-antecedent doctrine is "neither controlling nor inflexible," *City of Corsicana v. Willmann*, 147 Tex. 377, 216 S.W.2d 175, 176 (1949), we conclude that the most reasonable grammatical construction of this deed is that the clause excepts 1/2 of all royalties from the minerals produced from the "*premises* which are now owned by Grantor." (Emphasis added.) And since each of the grantors owned all of the premises described in each deed, the clause excepted 1/2 of all the royalties produced from those premises. *See, e.g.*, *In re C.J.N.-S.*, No. 16-0909, 540 S.W.3d 589, 590-92 (Tex. 2018) (applying last-antecedent doctrine to statute that grants standing to "a parent of the child or another person having physical custody or guardianship of the child under a court order," and holding that phrase "under a court order" does not modify the phrase "a parent of the child").

546 S.W.3d at 121.

> For the reasons stated above, it is appropriate to hold that in this oil and gas context, where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the Rule does not invalidate the grantee's future interest.

*Id.*at 872.

**D. Can a Mother Hubbard Clause Negate a General Granting Clause?**

In *Davis & d/b/a/ JD Minerals, and JDMI, LLC v. Mueller*, 528 S.W.3d 97 (Tex. 2017), the Court addressed the issue of whether the granting clause is ambiguous because it purports to convey all of the grantor's interest in the county—a large amount of property—although located in the same paragraph as the Mother Hubbard clause, a catch-all for small, overlooked interests.[15]

> Mueller argues that the 1991 deeds are ambiguous because the general granting clause is in the same paragraph as the Mother Hubbard clause. A Mother Hubbard clause is not effective to convey a significant property interest not adequately described in the deed.[*see Jones v. Colle*, 727 S.W.2d 262, 263 (Tex. 1987)] The proximity shows, Mueller contends, that the general grant was only of all small pieces of the specifically described tracts in Harrison County, not of other tracts. But if that were true, the general grant would accomplish nothing; the Mother Hubbard clause itself covers small pieces that may have been overlooked or incorrectly described. The general grant's conveyance of " all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described" could not be clearer. All means all.

*Davis & d/b/a/ JD Minerals, and JDMI, LLC v. Mueller*, 528 S.W.3d 97, 102 (Tex. 2017).

**E. Can the "Common Law Strip-and-Gore Doctrine" Transfer a Mineral Interest?**

In *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906 (Tex. 2017), the Court addressed the issue was whether the adjacent landowners had to be joined by plaintiff pursuant to Texas Rule of Civil Procedure 39 as ordered by the trial court, the answer involved an analysis of the underlying controversy based upon the "common law strip-and-gore doctrine."

Grantor, Mary, owned 146 acres of land in Tarrant County, Texas. In 1964, Mary conveyed the surface estate of 8.235 acres in fee to Texas Electric Service Company, expressly reserving the oil and gas under the tract ("Crawford Tract"), In 1987, Mary conveyed the property north and south of the Crawford Tract without reserving the minerals. Much of that property was subsequently subdivided into residential lots.

In 2007, Mary executed an oil and gas lease (Crawford Lease) on the Crawford Tract with XTO Energy, Inc.'s predecessor in interest, which included a royalty payment on gas and casinghead gas from the leased premises. Mary died in November 2007 and her son, Richard, inherited her estate. In 2009, Richard executed and recorded a ratification of the Crawford lease. In 2010, when XTO drilled a well and began producing, it obtained a title run and concluded that the share of royalties from the Crawford Tract belonged to the forty-four adjacent landowners pursuant to the common law strip-and-gore doctrine.

> The strip-and-gore doctrine generally provides: Where it appears that a grantor has conveyed all land owned by him adjoining a narrow strip of land that has ceased to be of any benefit or importance to him, the presumption is that the grantor intended to include such strip in such conveyance; unless it clearly appears in the deed, by plain and

[15] The Court described the deed as setting out a list of tracts followed by:

> Grantor agrees to execute any supplemental instrument requested by Grantor for a more complete or accurate description of said land.
>
> A three-sentence paragraph after the sentence just quoted contained a two-sentence Mother Hubbard clause and a general granting clause:
>
> The "Lands" subject to this deed also include all strips, gores, roadways, water bottoms and other lands adjacent to or contiguous with the lands specifically described above and owned or claimed by Grantors. If the description above proves incorrect in any respect or does not include these adjacent or contiguous lands, Grantor shall, without additional consideration, execute, acknowledge, and deliver to Grant[ee], its successors and assigns, such instruments as are useful or necessary to correct the description and evidence such correction in the appropriate public records. Grantor hereby conveys to Grantee all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described.

> specific language, that the grantor intended to reserve the strip. *Cantley v. Gulf Prod. Co.*, 135 Tex. 339, 143 S.W.2d 912, 915 (Tex. 1940). The title opinion led XTO to take the position that the Crawford-tract minerals were included in the 1984 conveyance because the deed contained no language reserving them.

*Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 909 (Tex. 2017).

The case was dismissed because the trial court determined that Plaintiff, Lessor, had to join in the 44 adjacent landowners, and the appellate court affirmed.

The Supreme Court held:

> Rule 39(a) requires joinder of certain persons who " claim [] an interest relating to the subject of the action." The adjacent landowners do not claim an interest relating to the Crawford-tract minerals that are the subject of Crawford's suit against XTO. Accordingly, the trial court abused its discretion in holding that the adjacent landowners are necessary parties under Rule 39 and in dismissing Crawford's suit for his failure to join them. We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

509 S.W.3d at 914.

### F. What Is the Effect of a "Subject To" Provision Referencing a 1/8 NPRI placed in the "Exception to Conveyance and Warranty Clause" on Grantor's and Grantee's Mineral Interest?

In *Wenske v. Ealy*, 521 S.W.3d 791 (Tex. 2017), the Court addressed the issue of whether the existing 1/8 NPRI applies to the entire mineral estate where the deed reserved 5/8's mineral estate to grantor and made the mineral estate conveyed to grantee subject to an outstanding 1/8 NPRI.[16]

In 1988, Benedict and Elizabeth Wenske purchased a 55-acre mineral estate from Marian Vyvjala, Margie Novak, and others. From that 55-acre conveyance, Vyvjala and Novak each reserved a 1/8th NPRI, resulting in a combined 1/4th NPRI over all of the oil, gas, and other minerals produced from the property for a period of 25 years (Vyvjala NPRI).

In 2003, the Wenskes sold the property to Steve and Deborah Ealy by warranty deed. The deed purported to grant all of the surface estate to the Ealys and, by operation of a reservation, effectively divided the mineral estate between the parties: 3/8ths reserved to the Wenskes and 5/8ths conveyed to the Ealys. The relevant parts of the deed are:

> Reservations from Conveyance:
>
> For Grantor and Grantor's heirs, successors, and assigns forever, a reservation of an undivided3/8ths of all oil, gas, and other minerals in and under and that may be produced from the Property. If the mineral estate is subject to existing production or an existing lease, the production, the lease, and the benefits from it are allocated in proportion to ownership in the mineral estate.
>
> Exceptions to Conveyance and Warranty: . . . Undivided one-fourth (1/4) interest in all of the oil, gas and other minerals in and under the herein described property, reserved by Marian Vyvjala, et al for a term of twenty-five (25) years in instrument recorded in Volume 400, Page 590 of the Deed Records of Lavaca County, Texas, together with all rights, express or implied, in and to the property herein described arising out of or connected with said interest and reservation, reference to which instrument is here made for all purposes.

*Id.* at 793.

This deed (1) granted the minerals to the Ealys, (2) reserved 3/8ths of the minerals to the Wenskes, and (3) put the Ealys on notice that the entirety of the minerals are subject to the outstanding 1/4th Vyvjala NPRI to avoid a warranty claim. Giving the words of this deed their plain meaning, reading it in its entirety, and harmonizing all of its parts, we cannot construe it to say that the parties intended the Ealys' interest to be the sole interest subject to the NPRI. " [A] careful and detailed examination of the document in its entirety" leads us to conclude that the only reasonable reading of the deed results in the Wenskes and Ealys bearing the Vyvjala NPRI burden in shares proportionate to their fractional interests in the minerals. See Hysaw, 483 S.W.3d at 16.

To be clear, we do not hold that all conveyances of a fractional mineral interest subject to an outstanding

[16] *See* Burney, L., *The Texas Supreme Court's Evolving Mineral-Deed Jurisprudence in the Shale Era: The Implications of Wenske v. Ealy*, State Bar of Texas Oil, Gas & Mineral Title Examination, 2018 (provides an outstanding analysis of the Court's decision in *Wenske v. Ealy*, and the Texas courts "robust body of law regarding the interpretation of mineral and royalty deeds").

NPRI will, by default, result in the various fractional-interest owners being proportionately responsible for satisfying the NPRI. Analytically, our holding is just the opposite. In construing an unambiguous deed, the parties' intent--determined by a careful and detailed examination of the document in its entirety--is paramount. Rigid, mechanical, arbitrary, and arcane rules, which at one time offered certainty at the expense of effectuating intent, are relics of a bygone era. We disfavor their use.

Yet we are acutely aware that parties who draft agreements rely on the principles and definitions pronounced by this Court. They rightly depend on us for continuity and predictability in the law, especially in the oil-and-gas field. See Averyt, 717 S.W.2d at 895; Davis v. Davis, 521 S.W.2d 603, 608 (Tex. 1975). Our decision today does not vitiate the established background principles of oil-and-gas law nor does it open for debate the meaning of clearly defined terms in every deed dispute. See, e.g., Moser v. U.S. Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (defining, definitively, " minerals" ); Clifton v. Koontz, 160 Tex. 82, 325 S.W.2d 684, 690-91 (Tex. 1959) (defining the standard for " production" and " production in paying quantities" ). Giving effect to the parties' intent advances the principle of certainty under the law. Few things can promote continuity and predictability more than clear expressions of intent within an instrument.

The deed here is not a model of clarity. But, read in its entirety, we see only one reasonable interpretation of its words. Today we give effect to those words. Going forward, drafters of deeds should endeavor to plainly express the contracting parties' intent within the four corners of the instrument they execute. And courts should favor ascertaining and giving effect to that intent over employing arcane rules of construction. Although the court of appeals did not take this route, it nonetheless reached the correct result. Therefore, we affirm its judgment.

521 S.W. 3d at 798-99.

**G. Specific v. General Legal Descriptions**

In *Stribling v. Millican DPC Partners, LP*, 458 S.W.3d 17 (Tex. 2015), the Court addressed the issue of whether the metes and bounds description in a deed control when it conflicts with a general description in the deed. The parties disputed the ownership of a 34.28-acre tract based upon two deeds.

The 1945 Deed, which conveyed 202 acres, described by metes and bounds, included the 34.28-acre tract within the metes and bounds description.

The 1973 Deed, which conveyed 4,942.75 acres and involved a number of tracts of land, which (i) listed 9 parcels, one of which was a reference to the 202 acres as described in the 1945 Deed, and (ii) a metes and bounds description which did not include the 34.28 acres.

The Court held:

> Here, the metes-and-bounds description is not " defective or doubtful." Mere inconsistencies between the metes and bounds and the general description do not themselves render the metes and bounds doubtful. Otherwise, an unambiguous metes-and-bounds description would never, on its own, control despite an inconsistent general description. In this case, the metes and bounds in the 1973 Deed cannot be harmonized with the general description. The two conflict with each other, and the general description cannot " override a particular description about which there can be no doubt." *Cullers*, 16 S.W. at 1005.

*Stribling v. Millican DPC Partners, LP*, 458 S.W.3d 17, 22 (Tex. 2015).

**H. When Are Parties to an Unambiguous Deed Charged with Irrebuttable Notice for Limitations Purposes?**

In *Cosgrove v. Cade*, 468 S.W.3d 32 (Tex. 2015), the Court addressed the issue of whether a grantor can seek reformation of a deed by asserting that it had no knowledge of the omitted material term until after the expiration of the four year statute of limitations.

Reversing the judgment of the court of appeals and ruling for B, the purchaser of the property and grantee under the mistaken deed, the Texas Supreme Court stated:

> Today we expressly hold what we have suggested for almost half a century: Plainly obvious and material omissions in an unambiguous deed charge parties with irrebuttable notice for limitations purposes. [*See McClung v. Lawrence*, 430 S.W.2d 179, 181 (Tex.1968)] Also disputed in this case is whether Property Code section 13.002—"[a]n instrument that is properly recorded in the proper county is ... notice to all persons of the existence of the instrument"—provides all persons, including the grantor, with notice of the deed's contents as well .[Tex. Prop. Code § 13.002.] We hold that it does. Parties to a deed have the opportunity to inspect the deed for mistakes at execution. Because section 13.002 imposes notice of a deed's existence, it would be fanciful to conclude that an injury stemming from a plainly evident mutual mistake in the deed's contents would be inherently undiscoverable when any

> reasonable person could examine the deed and detect the obvious mistake within the limitations period.
>
> A grantor who signs an unambiguous deed is presumed as a matter of law to have immediate knowledge of material omissions. Accordingly, this grantors' suit was untimely, and we reverse the court of appeals' judgment.

468 S.W.3d at 34-35.

## IV. CONCLUSION

The Texas Supreme Court in *Wenske v. Ealy* gave the best travel advice. "Going forward, drafters of deeds should endeavor to plainly express the contracting parties' intent within the four corners of the instrument they execute. And courts should favor ascertaining and giving effect to that intent over employing arcane rules of construction." 521 S.W.3d 791, 798 (Tex. 2017).

### Form 5-1

### General Warranty Deed

**Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.**

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

Property (including any improvements):

Reservations from Conveyance:

Exceptions to Conveyance and Warranty:

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13.

If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

_____

[**Name of grantor**]

_____

[**Name of grantee**]