

Oil and Gas, Natural Resources, and Energy Journal

Volume 3 | Number 2

A Collection of Archived Works from the Deans of Oil and Gas Law

July 2017

The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction [reprint, first published 1993]

Bruce M. Kramer

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Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction [reprint, first published 1993]*, 3 OIL & GAS, NAT. RESOURCES & ENERGY J. 135 (2017), <https://digitalcommons.law.ou.edu/onej/vol3/iss2/3>

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ONE J

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THE SISYPHEAN TASK OF INTERPRETING
MINERAL DEEDS AND LEASES: AN
ENCYCLOPEDIA OF CANONS OF CONSTRUCTION*
[reprint, first published 1993]

BRUCE M. KRAMER**

This article was originally published in the *Texas Tech Law Review*. See Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1 (1993), available at <https://ttu-ir.tdl.org/ttu-ir/bitstream/handle/10601/572/kramer5.pdf?sequence=1>. The Journal would like to thank Professor Kramer and the editorial staff of the *Texas Tech Law Review* for their permission to republish the article. For more information about the *Texas Tech Law Review*, visit <http://texastechlawreview.org/>.

* Copyright 1993 by Bruce M. Kramer. Preparation of this article was funded in part by a generous research grant provided by the Oil, Gas & Mineral Law Section of the State Bar of Texas. Chief Justice Shannon described the Sisyphean myth in *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 801 n.9 (Tex. App.—Austin 1982, writ ref'd n.r.e.) as follows:

In Hades, Sisyphus was condemned to roll to the top of a hill a huge stone which constantly rolled back again, making his task incessant.

Then I witnessed the tortures of Sisyphus, as he tackled his huge rock with both hands. Leaning against it with his arms and thrusting with his legs, he would contrive to push the boulder up-hill to the top. But every time, as he was going to send it toppling over the crest, its sheer weight turned it back, and the misbegotten rock came bounding down again to level ground. So once more he had to wrestle with the thing and push it up, while the sweat poured from his limbs and the dust rose high above his head.

Id. (quoting HOMER, *THE ODYSSEY*, BOOK XI 187 (Penguin Classics, 1956)).

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I. Introduction

The task of preparing an “encyclopedia” of canons of construction of mineral deeds and leases is made all the more difficult by the imprecision of the English language and the imprecision of the use of canons by the

courts.¹ Part of our problem with canons derives from the now generally accepted view that most written instruments are unambiguous so that parol or extrinsic evidence, or even surrounding circumstances, cannot be used to determine what the parties intended when they executed a particular written instrument. It should be noted that several early Texas cases² considered extrinsic evidence or surrounding circumstances in seeking to ascertain the intent of the parties.³ As time passed, however, fewer and fewer deed construction cases allowed such evidence. While there are many good reasons for not allowing extrinsic evidence in deed cases, the resulting difficulty in attempting to divine the parties' intent has led the courts to greater and greater reliance on these canons. This, in turn, has led to some difficulties because of the nature of canons of construction.

Mineral conveyances do not exist in a vacuum. While this article will focus on mineral conveyances, many of the canons had their origin in non-mineral deed and contract cases. The Texas Supreme Court has noted, on numerous occasions, that the canons of construction for deeds are also applicable to mineral deeds.⁴ While mineral conveyances sometimes create unique problems for which specific canons of construction have been adopted, most mineral conveyancing issues apply canons that are equally applicable in the traditional deed situation. Equally prevalent is the court's

1. For the most part, I have cited and discussed cases which involve the transfer of a mineral interest. However, the origin of many of the canons is in the contract venue. In addition, many early cases involved the adequacy of the description given in a deed conveying the unsevered fee simple absolute. In most cases, I will not designate these cases as nonmineral conveyance cases because the principles they stand for are just as appropriate for mineral deeds as they are for contracts or non-mineral deeds.

The Texas Supreme Court acknowledged the ad hoc nature of contract and deed interpretation issues, as well as the ad hoc nature of the application of canons of construction in *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193 (Tex. 1962). In interpreting the words "may earn" in a farmout agreement, the court stated: "The courts are to ascertain the real intention of the parties, and the very nature of the inquiry dictates that there can be no fixed rule, for every case, in a great measure, depends upon its own facts, the context of the instrument, and circumstances." *Id.* at 196.

2. *See, e.g.*, *Smith v. Brown*, 66 Tex. 543, 1 S.W. 573 (1886); *Faulk v. Dashiell*, 62 Tex. 642 (1884); *Hunt v. White*, 24 Tex. 643 (1860); *Hancock v. Butler*, 21 Tex. 804 (1858).

3. It is also interesting to note that even though *Hancock & Smith* allowed surrounding circumstances to assist the court in determining intent, they both also used traditional canons of construction to support the court's findings. *See* 66 Tex. at 545, 1 S.W. at 574; 21 Tex. at 806.

4. *See, e.g.*, *Murphy v. Dilworth*, 137 Tex. 32, 151 S.W.2d 1004 (1941); *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940).

use of canons for any written instrument, whether it is a contract, a deed or a mineral deed.⁵

Although discussing statutory canons of construction, Karl Llewellyn captured the essence of the difficulty of such judicial reliance on canons. Before he listed some 28 pairs of opposing canons, he stated:

Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language*.⁶

The following explanation of canons of construction explains why they exist, why they are used and why they are so popular:

Canons of construction are merely statements of judicial preference for the resolution of a particular problem. They are based on common human experience and are designed to achieve what the court believes to be the “normal” result for the problem under consideration. Thus, their purpose is not to ascertain the intent of the parties to the transaction. Rather, it is to resolve a dispute when it is otherwise impossible to ascertain the parties’ intent.⁷

5. See *Thompson v. Waits*, 159 S.W. 82 (Tex. Civ. App.—Austin 1913, writ ref’d) (discussing the rule of construction relating to written instruments); see also *Faulk v. Dashiell*, 62 Tex. 642 (1884) (using the “construe against the grantor” canon in a deed interpretation); *Hancock v. Butler*, 21 Tex. 806 (1858) (using the harmonizing canon in a deed interpretation).

6. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521 (1960). The following pairs of canons are easily transferable to the mineral deed situation: (1) A statute cannot go beyond its text, but to effect its purpose a statute may be implemented beyond its text; (2) Where design has been distinctly stated, no place is left for construction, but courts have the power to inquire into real - as distinct from ostensible - purpose; (3) If language is plain and unambiguous it must be given effect, not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose; and (4) every word and clause must be given effect, but if inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage. *Id.* at 522–25.

7. 6A RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* 899[3], at 81A-108 (Patrick J. Rohan ed. 1992). In *Remuda Oil Co. v. Wilson*, 264 S.W.2d 192 (Tex. Civ. App.—Galveston 1954, writ ref’d n.r.e.), the court said the following about ascertaining the intent of the parties: “Where a doubt arises as to the real intention, an interpretation which plainly leads to an injustice should be rejected, and one which does not produce unusual and unjust

When understood not to be a substitute for rational thought and common sense, canons of construction are very useful and provide a degree of certainty to the conveyancing industry. However, when abused, the battle of the “canons” replaces rational thought and common sense and leads to obfuscation and uncertainty. An example of misuse of canons of construction is *Gibson v. Watson*⁸ in which the court attempted to determine the quantity of acreage conveyed in a particular instrument. Within the opinion, one can conservatively count the recitation of at least twelve different canons of construction, including several related canons that are repeated with minor variations in form. When a court has to cite that many canons to interpret an instrument, instead of focusing on the language of the instrument, the court loses sight of its primary function, which is to interpret the document as the parties have expressed in the written instrument.⁹

results adopted, subject, however, to the rule that the intention of the parties is to be ascertained from the instrument.” *Id.* at 196 (citing 18 C.J. *Deeds* § 201 (1919)).

In many cases, the courts list canons immediately after the recitation of the facts. The analysis then follows without a clear indication of how the canons have affected the court’s rationale. A good example of this approach is *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986) where the court lists the “intent of the party must be sought,” “four corners” and harmonizing canons, before it resolves the constructional issue. None of the canons appears to affect the court’s analysis that found that the deed conveyed a non-executive mineral interest. *Id.*

8. 315 S.W.2d 48 (Tex. Civ. App.—Texarkana 1958, writ ref’d n.r.e.); see also *Bailey v. Mullins*, 313 S.W.2d 99 (Tex. Civ. App.—San Antonio 1958, writ ref’d n.r.e.). In *Bailey*, the court listed eight different canons at the beginning of its analysis relating to the adequacy of the legal description and then concluded that the language was sufficiently clear to pass title. *Id.* at 102.

Courts also have a tendency to list several canons and then suggest that one takes precedence over another. See *Hedick v. Lone Star Steel Co.*, 277 S.W.2d 925 (Tex. Civ. App.—Texarkana 1955, writ ref’d n.r.e.). In *Hedick*, the court recited at least nine different canons, but set off one in italics and used it to decide that the instrument passed a fee simple absolute title rather than a mere easement or lesser interest. In *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818 (Tex. Civ. App.—Houston [1st Dist.] 1957, writ ref’d n.r.e.), the court cited at least eight canons, including the “intent prevails over canon” canon.

9. *Gibson* is another multiple fraction case in which the granting clause grants a 1/32 mineral interest while the subject-to clause referred to a 1/4 interest, a present and future delay rental clause referred to a 1/4 interest, and a future interest clause also referred to a 1/4 interest. 315 S.W.2d at 50–51. Among the canons cited were: (1) typewritten language prevails over repugnant printed language; (2) the ancient rules of construction are relaxed; (3) the intent of the parties controls when it can be ascertained from a consideration of all parts of the instrument; (4) intention if ascertained prevails over arbitrary rules; (5) all doubts should be resolved against the grantors; (6) the greatest estate possible should be

Justice Calvert, with his usual insight into the law, described the court's thought processes in interpreting written instruments:

Courts try to solve disputes over the *meaning* of contracts by giving them the meaning the parties intended them to have. This is as it should be. But what meaning the parties to a contract *intended* it to have is often unclear. Once a dispute arises over meaning, it can hardly be expected that the parties will agree on what meaning was intended. It is for this reason that the courts have built up a system of rules of interpretation and construction to arrive at meaning, ignoring testimony of subjective intent. "Intention of the parties" is often guess-work at best. Sometimes the true intention of one or even of both parties may be defeated So, while use of rules of interpretation and construction may not always result in ascertaining the true intention of parties in using particular language . . . , their use yet must be better than pure guess-work in most cases else they would never have been evolved.¹⁰

If we would all take heed from Chief Justice Calvert's sage advice, canons would take their proper place as a useful tool in resolving legal disputes over written instruments. But since Texas Courts have been less than sanguine in using canons, we must attempt to push the Sisyphian boulder

granted; (7) where there is an irreconcilable conflict between the granting, habendum and warranty clause and other recitals, the recitals must yield to the specific clauses; (8) where the first part of a deed is definite and certain and the remainder is irreconcilable or uncertain the first part prevails; (9) do not give effect to language which creates ambiguity; (10) no part of the instrument is to be rejected, unless as a last resort it becomes necessary; and (11) a general description will not control or override a specific description unless the specific description is independently defective or doubtful. *Id.* at 52–58.

10. *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 59 (Tex. 1964) (Calvert, C.J., concurring) (emphasis added). Before it was *de rigueur* to find most written instruments unambiguous, courts would regularly apply the Calvert rationale by stating that canons of construction would only apply when the written instrument was ambiguous. For example, in *Hinson v. Noble*, 122 S.W.2d 1082 (Tex. Civ. App.—Fort Worth 1938, no writ), a case involving a dispute over which of several dates on a lease was the effective date, the court stated the following about judicial construction of written instruments:

It is only when there is room for reasonable minds to differ as to the meaning of language used that a construction thereof is necessary. The term 'construction' implies uncertainty as to the meaning of language used in a written instrument. It has been said that where a contract is clear and unambiguous, there is nothing to be construed by the courts.

Id. at 1087 (citing 10 TEX. JUR. *Contracts* § 158 (1930)).

up the hill by analyzing what they have said and hope that the exposition will eventually lead to a successful conclusion of having the boulder remain at the top of the hill.

II. The Use of Extrinsic Evidence

A. The Basic Texas Approach

There may be an inverse relationship between the liberality of a court's acceptance of extrinsic or parol evidence and a court's use of canons of construction in cases involving the interpretation of a written instrument. The more extrinsic evidence that is admitted, the less the court needs to resort to canons of construction.¹¹ In Texas, the admission of extrinsic evidence is tied to the determination of whether the deed is treated as ambiguous or unambiguous, which in recent years has almost always led to a finding that the language used is unambiguous.¹²

11. This inverse relationship may also exist in the statutory construction cases. Canons of construction were used frequently in the period before the 1950's. To a certain degree, however, canons have lost their predominant role, being replaced by a greater reliance on legislative history. *See generally* Richard A. Posner, *Statutory Interpretation - In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 803-05 (1983) (discussing the education of law students in researching legislative history). That trend, however, may change as the Supreme Court has expressed discontent over the use of legislative history to interpret statutory language that it finds has a "plain meaning." *See, e.g.*, *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138 (1991); *Pierce v. Underwood*, 487 U.S. 552 (1988); *Thompson v. Thompson*, 484 U.S. 174 (1988) (Scalia, J., concurring); *see also* Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160 (examining and criticizing U.S. Supreme Court Justice Antonin Scalia's disdain for the use of legislative history in statutory construction). We may yet return to the problems raised in Posner, *supra*, at 803-05, and LLEWELLYN, *supra* note 6, at 521-35.

In addition to the relationship between admission of parol evidence and the use of canons, there is a relationship between the number of rules of law and the use of canons. The more rules that apply, the less the court needs to rely on canons. But the major trend in the past 100 years has been to minimize the number of "intent defeating" rules to govern deed construction cases, and increase the use of canons. *See infra* parts IV, V, and VI.

12. *See, e.g.*, *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 583, 136 S.W.2d 800, 805 (1940); *Williford v. Spies*, 530 S.W.2d 127, 130 (Tex. Civ. App.—Waco 1975, no writ); *Chandler v. Hartt*, 467 S.W.2d 629, 634 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.); *Black v. Shell Oil Co.*, 397 S.W.2d 877, 887-88 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.). This was not always the case. As stated in *Cox v. Rust*, 29 S.W. 807 (Tex. Civ. App. 1895, no writ):

In every judicial investigation the discovery of the truth should be the aim and desire of the court, and obviously, if an instrument of writing is obscure, the

A classic view of the problem of ambiguous versus unambiguous language in a mineral deed is represented by the court of civil appeals and supreme court decisions in *Richardson v. Hart*.¹³ The problem related to a deed that contained multiple fractions and a mineral/ royalty confusion in the granting, subject-to, intention and future lease clauses. The granting

ascertainment of the intent of the parties to it should be the end sought, and, if that end can be accomplished by evidence aliunde, it should be admitted.

Id. at 808. In *Cox* the issue was whether a deed description was sufficiently definite in order to pass title. *Id.*; see also *Masterson v. Amarillo Oil Co.*, 253 S.W. 908 (Tex. Civ. App.—Amarillo 1923, writ dismissed w.o.j.). In *Masterson*, the court said that parol evidence can be admitted if it relates to post-execution events even if it would have the effect of altering, changing, or modifying the written contract. *Id.* at 914.

13. 183 S.W.2d 235 (Tex. Civ. App.—Texarkana 1944), *aff'd*, 143 Tex. 392, 185 S.W.2d 563 (1945). A modern example of the difficulty courts have in dealing with the problem of legal ambiguity is *Schwartz v. Prairie Producing Co.*, 727 S.W.2d 289 (Tex. App.—Houston [1st Dist.] 1987, writ refused n.r.e.). The court was construing the royalty provision in a standard oil and gas lease that differentiated between “gas” and “sulphur mined and marketed.” *Id.* at 290. The lessee was producing sulfur from a sour gas stream and was paying royalties based on the “mined and marketed” standard of \$1.00/long ton. *Id.* A similar question had plagued the Fifth Circuit, which had reached different conclusions in three different cases. Compare *Scott Paper Co. v. Taslog, Inc.*, 638 F.2d 790 (5th Cir. 1981) (stating that when an instrument granted a royalty on “gas including casinghead gas and other gaseous substances,” the dividend covered any gas produced) with *First Nat’l Bank v. Pursue Energy Corp.*, 784 F.2d 659 (5th Cir.) (holding a mineral lease ambiguous as to whether sulphur produced from sour gas was covered for the payment of a royalty), *vacated*, 799 F.2d 149 (5th Cir. 1986) (holding a lease unambiguous and differentiating between royalties on gas and casinghead gas, and all other minerals mined and marketed; sulphur not “mined” but “produced”). The Texas court of appeals split three ways. Justice Cohen found the language unambiguously required the lessee to pay royalty on “gas.” 727 S.W.2d at 292–93. He also used the “construe against the lessee” canon to support that conclusion. See *infra* part VII.B. Justice Dunn concurred, but found that the language was ambiguous and therefore the summary judgment order should be reversed. 727 S.W.2d at 293 (Dunn, J., concurring). Finally, Justice Bass dissented finding that royalty should be paid on the basis of the “mined and marketed” standard even if the court found the language ambiguous. 727 S.W.2d at 294 (Bass, J., dissenting). Justice Bass would use the “four corners” and harmonizing canons to support his conclusion. *Id.*

When the parties to a deed seek the remedy of reformation, extrinsic evidence should be admitted to see if there was the requisite fraud, duress, or mutual mistake. But, as this article evidences, Texas courts rarely reform written instruments. See, e.g., *Clemmens v. Kennedy*, 68 S.W.2d 321, 323–24 (Tex. Civ. App.—Texarkana 1934, writ refused). But cf. *Gilbert v. Smith*, 49 S.W.2d 702 (Tex. Comm’n App. 1932, judgment adopted) (holding that mutual mistake as to size of mineral interest conveyed would not defeat reformation); *Martin v. Snuggs*, 302 S.W.2d 676, 680 (Tex. Civ. App.—Fort Worth 1957, writ refused n.r.e.) (allowing reformation of a deed where the contract failed to express the agreement entered into, and the mistake was of such a nature as to justify and require equitable relief).

clause referred to the conveyed interest as “an undivided 1/16th of 1/8th interest in and to all of the oil, gas and other minerals. . . .” A right of ingress and egress for drilling and exploring purposes was also given. A subject-to clause referred to the interest as covering and including “1/16th of 1/8th of all of the oil royalty. . . .” The intention clause withheld from the grantee any delay rentals. The future lease clause said that “none of the lease interest and all future rentals . . . for oil, gas and other mineral privileges shall be owned by said Grantee, he owning 1/16th of 1/8th of all oil, gas . . . in and under said lands, together with no interest in all future rents.”¹⁴

In resolving the conflicting signals between the transfer of a 1/128 mineral interest and a 1/128 royalty interest, the court of civil appeals treated the contract as ambiguous on its face and admitted extrinsic evidence. The court then applied a canon of construction for extrinsic evidence which finds that the best evidence of the intent of the parties is the practical construction and the acts of the parties in implementing the terms of the instrument.¹⁵ The court affirmed the trial court’s finding that the grantee was entitled to a 1/128 share of the oil runs under the existing lease. The trial court considered a division order and several deeds which reflected that the grantee was to receive the equivalent of a 1/128 royalty.¹⁶

The supreme court, on the other hand, found, without much explanation, that the deed was not ambiguous.¹⁷ Only upon a showing of fraud, accident, or mistake should parol evidence be admitted, and since there were no such findings in this case, its admission was error.¹⁸ Thus evidence of the

14. 143 Tex. at 392, 185 S.W.2d at 563.

15. 183 S.W.2d at 235 (citing *Texas & N.O.R. Co. v. Orange County*, 206 S.W. 539, 544 (Tex. Civ. App.—Beaumont 1918, writ ref’d)); *see also Cavazos v. Trevino*, 73 U.S. (6 Wall.) 773 (1867) (holding that acts of parties in accepting and using boundaries dispositive as to their intent).

16. 183 S.W.2d at 236. The court of civil appeals described the interest as 1/128 of all the oil produced, which to me is a royalty interest. Yet, in its concluding paragraph, the court affirmed the trial court’s finding that the grantee was to receive a 1/128 interest in all the minerals in and under the land described therein. If they received a 1/128 mineral interest, they should have been receiving only a 1/1024 royalty.

In *Rutherford v. Randal*, 593 S.W.2d 949, 952 (Tex. 1980), the Texas Supreme Court concluded that a deed, which described the conveyed interest as a 1/240 mineral interest in the granting clause and in the description clause, referred to the grantor’s interests as that which was recorded, a 1/24 mineral interest, was not ambiguous and therefore, the deed could not be construed through the admission of parol evidence.

17. 143 Tex. at 395, 185 S.W.2d at 564.

18. *Id.* at 395–96, 185 S.W.2d at 564.

parties' acts and construction of the instrument were inadmissible to vary the terms of the written instrument.¹⁹ Without relying on any canons of construction, the supreme court found that the deed only conveyed a 1/128 mineral interest, entitling the grantees to a 1/1024 interest in the royalties. The court found the subject-to clause language of 1/16 of 1/8 of all the oil royalty to be the equivalent of 1/128 of all the oil royalty. That interpretation harmonizes all of the clauses and is consistent with *Hoffman v. Magnolia Petroleum Co.*²⁰ because each of the clauses could be different fractions or different interests if that is what the parties expressly state. Here, the three clauses, as interpreted by the supreme court, are all the same fractional interest. In addition, the subject-to clause's reference to royalty merely described the state of a mineral interest that is transferred during the existence of a valid lease.

While the result in *Richardson* may be correct, it still ignores a continuing problem in deed interpretation cases. The Texas Supreme Court in *McMahon v. Christmann*²¹ stated the problem as follows:

As is often true in litigation involving the interpretation and construction of written instruments both parties insist that the instrument is 'plain and unambiguous' and admits of no reasonable meaning other than that for which they contend. Petitioners, . . . having taken the position that the lease was plain and unambiguous, were not permitted on the trial to introduce extrinsic evidence They were permitted to prove that the lease was prepared by respondents, that the typewritten rider . . . was prepared by and attached to the lease by petitioners. . . .²²

The court then applied the basic canons for mineral deeds to mineral leases without resorting to extrinsic evidence to ascertain the intent of the parties.²³

19. *Id.*; see, e.g., *Harriss v. Ritter*, 154 Tex. 474, 279 S.W.2d 845 (1955); *Murphy v. Dilworth*, 137 Tex. 32, 151 S.W.2d 1004 (1941); *Henry v. Phillips*, 105 Tex. 459, 151 S.W. 533 (1912).

20. 273 S.W. 828 (Tex. 1925).

21. 157 Tex. 403, 303 S.W.2d 341 (1957). For the dissenting opinion of Justice Garwood in *McMahon*, see 304 S.W.2d 267.

22. 157 Tex. at 406, 303 S.W.2d at 344; see also *Phillips Petroleum Co. v. Harnly*, 348 S.W.2d 856 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.) (stating that different conclusions reached by opposing parties does not alone make a contract ambiguous).

23. 157 Tex. at 411, 303 S.W.2d at 346. The court said: "In the interpretation and construction of oil, gas and mineral leases we will seek to give effect to the true intention of

In *Anderson & Kerr Drilling Co. v. Bruhlmeier*,²⁴ the Texas Supreme Court was attempting to determine whether the reservation of “all Minerells [sic] Paint Rock &c [sic] found or will be found on said discribed [sic] tract of land” included oil and gas.²⁵ The court noted the two views on the admission of extrinsic evidence.²⁶ It first recognized the rule that:

[w]hen an instrument does not by its terms plainly and clearly disclose the intention of the parties, or is phrased in language fairly susceptible of more than one interpretation, the intention is to be ascertained, not solely from the words of the instrument, but from its language when read in the light of the circumstances surrounding the transaction.²⁷

The court further stated:

[i]t is plainly implied, however, from the statement of the rule that when the instrument by its terms plainly and clearly discloses the intention of the parties, or is phrased in language not fairly susceptible of more than one interpretation, the intention of the parties is to be ascertained by the court as a matter of law from the language used in the writing and without aid from evidence as to the attending circumstances.²⁸

the parties, following in that endeavor established rules used to interpret and construe contracts and other bilateral written instruments.” *Id.*

24. 134 Tex. 574, 136 S.W.2d 800 (1940); *see also* *Chandler v. Hartt*, 467 S.W.2d 629, 634 (Tex. Civ. App.—Tyler 1971, writ ref’d n.r.e.) (citing *Bruhlmeier*); *Easley v. Brookline Trust Co.*, 256 S.W.2d 983, 985 (Tex. Civ. App.—Amarillo 1952, writ ref’d n.r.e.) (citing *Bruhlmeier*).

25. 134 Tex. at 579, 136 S.W.2d at 803.

26. *Id.* at 583, 136 S.W.2d at 805.

27. *Id.*; *see also* *Gulf Prod. Co. v. Spear*, 125 Tex. 530, 84 S.W.2d 452 (1935) (holding that intention of parties in a lease susceptible of more than one construction must be ascertained from its language, read in light of circumstances surrounding the execution); *Colquitt v. Eureka Producing Co.*, 63 S.W.2d 1018 (Tex. Comm’n App. 1933, judgment adopted) (stating that in determining intent of parties to instrument, assigning oil and gas lease in language fairly susceptible of different interpretations, a court must consider surrounding circumstances when instrument was executed); *Ryan v. Kent*, 36 S.W.2d 1007 (Tex. Comm’n App. 1931, judgment adopted) (stating that to ascertain what parties intended in the lease, the court may look to the surrounding circumstances when entered into).

28. 134 Tex. at 583, 136 S.W.2d at 805 (citing *Soell v. Haddon*, 85 Tex. 182, 187, 19 S.W. 1087, 1089 (1892); *Reynolds v. McMan Oil & Gas Co.*, 11 S.W.2d 778, 781, 785 (Tex. Comm’n App. 1928, holding approved); *Benskin v. Barksdale*, 246 S.W. 360 (Tex.

This duality has existed in Texas jurisprudence for a long time. While today the courts clearly favor the finding that most instruments are unambiguous, there are still cases that follow the view espoused in the Restatement of Property that surrounding circumstances may be used to interpret a written instrument.²⁹ It is important to note that while the *Bruhlmeier* language refers to the instrument as having more than one meaning, which is the traditional definition of an ambiguous document, it also says that surrounding circumstances can be used where the language does not “plainly and clearly” disclose the intention of the parties. There is at least a suggestion, although one that has not been generally followed, that surrounding or attendant circumstances can be used even if the language is not ambiguous, but if the intention of the parties is not plainly and clearly disclosed.

Another issue, relating to the determination of whether a deed is ambiguous, is whether the court should apply the canons of construction to render what might be an ambiguous document unambiguous. In *Davis v. Andrews*³⁰ the issue was whether a twenty year limit contained in the warranty clause of a mineral deed affected only the length of the warranty, or the nature of the estate granted. In addition to the original deed, the parties had executed a correction deed in which the language restricting the warranty to twenty years was omitted. In rejecting the claim that the language of the original deed was ambiguous, and therefore allowing the admission of extrinsic evidence, the court said: “A contract is not ambiguous in the sense that parol evidence is admissible to explain its meaning unless application of the pertinent rules of interpretation leave a real uncertainty as to which of two or more possible meanings represent the true intention of the parties.”³¹

The court’s conclusion contains some valuable insights into the interpretational process. Initially, the court admits that the issue is one involving “legal” ambiguity, not “layperson” ambiguity. Secondly, the court imposes a standard of “real uncertainty” as to the dual meanings. This would suggest a high standard and burden of proof on the party claiming ambiguity. This point may in fact be moot since in most deed cases neither

Comm’n App. 1923, holding approved); *Graham’s Estate v. Stewart*, 15 S.W.2d 72 (Tex. Civ. App.—Fort Worth 1929, writ ref’d).

29. RESTATEMENT OF PROPERTY § 242 (1940); *see infra* part II.B; *see also* *Kuklies v. Reinert*, 256 S.W.2d 435, 443 (Tex. Civ. App.—Waco 1953, writ ref’d n.r.e.) (following RESTATEMENT OF PROPERTY § 242).

30. 361 S.W.2d 419 (Tex. Civ. App.—Dallas 1962, writ ref’d n.r.e.).

31. *Id.* at 425.

party claims that the instrument is ambiguous. Lastly, the court would apply the canons of construction as a condition precedent to the finding of ambiguity, and only if, after applying those canons the language was capable of two or more meanings would extrinsic evidence be admitted. Given the fact that there are many canons covering almost every conceivable issue, it would appear unlikely that a court would find an instrument ambiguous under that approach. In *Davis*, for example, the court cites some eleven different canons in reaching its conclusion that the twenty year limit only applied to the warranty clause.³² While not all of the cited canons necessarily support the court's interpretation, they clearly make it difficult to prove that a "real uncertainty" exists regarding the intent of the parties.³³

The approach of using canons before determining legal ambiguity is borrowed from the contract arena. However, in contract cases, it appears that the burden of proof on the party claiming ambiguity is not as difficult as that applied in *Davis*. For example, in *Universal C.I.T. Credit Corp. v. Daniel*,³⁴ the Texas Supreme Court said: "[I]f after applying established rules of interpretation to the contract it remains reasonably susceptible to more than one meaning it is ambiguous, but if only one reasonable meaning clearly emerges it is not ambiguous."³⁵

However, even when this more lenient standard is applied in the context of mineral deeds, the result consistently remains that the language is unambiguous.³⁶ The *Universal C.I.T.* test has been interpreted to suggest that only where there is "genuine uncertainty" in which one of two reasonable meanings is proper after the application of the rules of construction can an instrument be deemed ambiguous.³⁷ This appears to be

32. *Id.* at 423–26. Some of the cited canons are "the granting clause prevails," "the intention of the parties prevails," "the intention of the parties as expressed prevails," the "four corners" canon, the "greatest estate" canon and the "liberal construction of grants" canon. *Id.*

33. Two courts recently have applied the canon that the court does not determine ambiguity until after it has applied the "appropriate rules of construction." See *Buffalo Ranch Co. v. Thomason*, 727 S.W.2d 331 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Diamond Shamrock Corp. v. Cone*, 673 S.W.2d 310 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

34. 150 Tex. 513, 243 S.W.2d 154 (1951).

35. *Id.* at 517, 243 S.W.2d at 157. This quote was cited in *Ellis v. Waters*, 308 S.W.2d 169, 172 (Tex. Civ. App.—Amarillo 1957), *rev'd*, 158 Tex. 342, 312 S.W.2d 231 (1958).

36. *Prairie Producing Co. v. Schlachter*, 786 S.W.2d 409 (Tex. App.—Texarkana 1990, writ denied).

37. *Id.* at 413.

a narrow reading of the Texas Supreme Court's language and is much more consistent with the mineral deed cases discussed earlier.

The issue of whether or not there is an ambiguity is a question of law for the court.³⁸ But is the issue of what constitutes a clear and plain disclosure of intent an additional loophole for the admission of extrinsic evidence? For example, in a leading case involving land descriptions, *Gulf Production Co. v. Spear*,³⁹ the court allowed surrounding circumstances to be considered where the deed did not "clearly and plainly" describe the land and used language that was "susceptible of more than one construction."⁴⁰ Clear and plain language is undoubtedly unambiguous, but it does not necessarily follow that language which is not clear and plain is legally ambiguous.

Where the instrument is held to be unambiguous it is "the duty of the trial court to give the deed [a] . . . construction as a matter of law, without looking to the attending or surrounding circumstances for explanation."⁴¹ Yet, as the next section shows, courts have on occasion allowed the use of surrounding circumstances to assist in the interpretation of a written instrument even where the court has not found the instrument ambiguous. But, the majority of deed and mineral deed cases clearly prefer the route of using other canons and not extrinsic evidence or surrounding circumstances to ascertain the intent of the parties.

B. The Use of "Surrounding Circumstances"

Notwithstanding the general Texas rule regarding the admission of extrinsic or parol evidence, the Restatement of Property, in discussing general rules of construction, allows the "circumstances of the formulation" of the conveyance to be used in reaching the "judicially ascertained intent"

38. *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193 (Tex. 1962).

39. 125 Tex. 530, 84 S.W.2d 452 (1935). The Texas Commission of Appeals issued three opinions within two weeks regarding the adequacy of land descriptions. In the other two, the court did not discuss the canon of allowing "surrounding" circumstances to be considered to determine intent. *Sun Oil Co. v. Burns*, 125 Tex. 549, 84 S.W.2d 442 (1935); *Sun Oil Co. v. Bennett*, 125 Tex. 540, 84 S.W.2d 447 (1935). In *Spear*, the court specifically noted that the description in its deed was not "plain and unambiguous." 125 Tex. at 534, 84 S.W.2d at 454 (contrasting that deed with the deed in *Bums* and *Bennett*).

40. 125 Tex. at 535, 84 S.W.2d at 455; *see also* *Crumpton v. Scott*, 250 S.W.2d 953, 956 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.) (stating that when a mineral deed does not clearly and plainly describe the intent of the parties, intent is to be ascertained from the deed's language in light of circumstances surrounding the transaction).

41. *Williford v. Spies*, 530 S.W.2d 127, 130 (Tex. Civ. App.—Waco 1975, no writ).

of the parties.⁴² This was not intended to bring in all forms of extrinsic evidence. The comments to the Restatement make it clear that the type of evidence that is relevant is limited to pre-conveyancing issues. The comments suggest that vocabulary peculiar to the conveyer, utilization of a drafting agent or use of a form instrument, the skill of the scrivener in the use of language or terms of art, the prevailing manners of expression at the time, and other evidence that has affected the formulation of the terms of the instrument can be admitted to ascertain the intent of the conveyer.⁴³ Yet, clearly these limited surrounding circumstances, if relevant, would call for the admission of extrinsic evidence to ascertain the intent of the parties.

The first use of the “surrounding” circumstances rule typifies the difficulties encountered with this rule and the parol evidence rule. The issue in *Hunt v. White*⁴⁴ was one of the construction of a will. The court first announced that “extrinsic evidence of intention, as an independent fact, is inadmissible.”⁴⁵ But then went on to say that:

42. RESTATEMENT OF PROPERTY § 242 (1940). While the rules of construction are located in the section dealing with future interests, the comments suggest that the rules are applicable in other types of conveyancing situations. The source of the need to look to these surrounding circumstances is stated as follows:

Language consists of words which are mere symbols of ideas. The ideas of the conveyer and the symbols selected by him for their expression are determined by the circumstances of the conveyer at the time of the conveyance and by his experiences prior thereto. Consequently any ascertainment of the meaning of language requires consideration of the atmosphere in which the conveyance originated. . . .

RESTATEMENT OF PROPERTY § 241 (Comment on Subsection (1)) (1940). These provisions of the Restatement have been followed in Texas. *See, e.g.*, *Chadwick v. Bristow*, 204 S.W.2d 65, 67 (Tex. Civ. App.—Austin 1947) (will construction), *aff’d*, 146 Tex. 481, 208 S.W.2d 888 (1948); *Bryson v. Connecticut Gen. Life Ins. Co.*, 196 S.W.2d 532 (Tex. Civ. App.—Austin 1946, writ ref’d). *But cf.* *Connecticut Gen. Life Ins. Co. v. Bryson*, 148 Tex. 86, 219 S.W.2d 799 (1949) (deed construction).

43. RESTATEMENT OF PROPERTY § 242 cmts. c–f (1940).

44. 24 Tex. 643 (1860); *see also* *Heirs of Watrous v. McKie*, 54 Tex. 65 (1880) (holding that extrinsic evidence is admissible to show consideration and purpose of the agreement); *Self v. King*, 28 Tex. 552, 554 (1866) (holding that a court may read a document in light of surrounding circumstances but cannot hear parol evidence on the language used in the writing). In *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, 106 Tex. 94, 102, 157 S.W. 737, 739 (1913), the Texas Supreme Court looked at the “attending facts and circumstances” to determine if a deed conveyed a corporeal or incorporeal estate. At the same time the court also used the “construe against the grantor” canon. *Id.* at 102–03; 157 S.W. at 739–40. .

45. 24 Tex. at 652.

[i]t is competent to admit parol evidence, . . . to explain a will (or other written instrument) by showing the situation of the testator, in his relation to persons and things around him; or as it is often expressed, by proof of the *surrounding circumstances*; in order that his will may be read in the light of the circumstances in which he was placed at the time of making it. His intent must be ascertained from the meaning of the words in the instrument, and from those words alone. But as he may be supposed to have used language, with reference to the situation in which he was placed . . . the law admits extrinsic evidence. . . .⁴⁶

The conundrum raised by this early decision has never been satisfactorily resolved as cases admitting surrounding circumstances, cases applying the

46. *Id.*; see also *Faulk v. Dashiell*, 62 Tex. 642, 646 (1884) (using the “surrounding circumstances” canon in a will construction); *Parrish v. Mills*, 102 S.W. 184 (Tex. Civ. App.— Austin 1907) (interpreting a trust instrument), *aff’d*, 101 Tex. 276, 106 S.W. 882 (1908).

If we think that modern courts have difficulty with the use of canons interpreting deeds and further think that it might have been easier to deal with interpretational problems by admitting evidence of “surrounding circumstances,” this excerpt, as I read it, has as many pitfalls in it as does the modern use of canons:

The first rule of exposition, which governs every other, is that contracts should be so interpreted as to give effect to the intention of the parties; and, while the words selected by the parties themselves as a symbol to denote their purpose are usually the primary source from which intention is drawn, and the best and surest guide to its discovery, yet being employed sometimes by designing persons to disguise rather than to express the true thought, and being liable to careless misuse or ignorant misapplication, it is always the duty of the court, in all cases where they are susceptible of different constructions, to take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted, for the purpose of ascertaining the true intent; for the intention of the parties is manifestly paramount to the manner chosen to effect it. The courts, therefore, may avail themselves of the same light which the parties enjoyed when the contract was executed, and may place themselves in the same situation as the parties who made it, in order that they may view the circumstances as those parties viewed them, and so judge the meaning of the words and the correct application of the language and the things described; and if any of the terms used seem to contradict the manifest intention, as clearly indicated by the agreement as a whole, the intention must govern.

Stevens v. Galveston, H. & S.A. Ry., 212 S.W. 639, 642 (Tex. Comm’n App. 1919, judgment adopted) (citing *Lockwood v. Ohio River Ry.*, 103 F. 243 (4th Cir. 1900), *cert. denied*, 180 U.S. 637 (1901)).

parol evidence rule and cases applying the “four corners” canon still co-exist in a somewhat uneasy peace.

Another early Texas case which allowed a court to look at the “attendant” or “surrounding” circumstances was *Smith v. Brown*,⁴⁷ an 1886 decision of the Texas Supreme Court. The issue was whether a deed gave the land to the grantee as a trustee for third parties or for the grantee’s own use. The court, after citing the canon that the intent must be ascertained, stated that “to arrive at this intention, the situation of the parties and the subject-matter at the time of contracting should be considered.”⁴⁸ While also citing the four corners canon, the court relied on the surrounding circumstances, including the fact that the beneficiaries were the issue of the grantee, to conclude that the deed intended to pass only naked legal title to the grantee who held the land in trust for the designated beneficiaries.⁴⁹

Another example where the court admitted “surrounding” circumstances without specifically finding the instrument ambiguous was *Hedick v. Lone Star Steel Co.*⁵⁰ There the issue was whether the deed passed a fee simple

47. 66 Tex. 543, 1 S.W. 573 (1886).

48. *Id.* at 545, 1 S.W. at 574 (citing *Brannan v. Mesick*, 10 Cal. 95, 106 (1858)).

49. *Id.* In another early case involving a contract for the sale of land, the court also looked at the surrounding circumstances to determine whether or not the contract was executory or executed. *See Lipscomb v. Fuqua*, 103 Tex. 585, 131 S.W. 1061 (1910); *see also Crumpton v. Scott*, 250 S.W.2d 953, 957 (Tex. Civ. App.—Fort Worth 1982, writ ref’d n.r.e.) (holding that surrounding circumstances were admissible to determine whether a contract was executory or executed with respect to a conveyance of a mineral interest).

50. 277 S.W.2d 925 (Tex. Civ. App.—Texarkana 1955, writ ref’d n.r.e.). In *Thomas v. Texas Osage Co-Op Royalty Pool, Inc.*, 248 S.W.2d 201 (Tex. Civ. App.—Eastland 1952, writ ref’d n.r.e.), the court found that surrounding circumstances could be considered if the language was susceptible to more than one meaning (ambiguous), or if the instrument did not “by its terms clearly and plainly describe the land affected.” *Id.* at 205. This clearly suggests that a lesser standard than legal ambiguity would justify looking into the surrounding circumstances. *See also Gulf Prod. Co. v. Spear*, 125 Tex. 530, 535, 84 S.W.2d 452, 455 (1935) (holding that evidence of surrounding circumstances admissible where language in an instrument is susceptible to more than one meaning); *Colquitt v. Eureka Producing Co.*, 63 S.W.2d 1018, 1021 (Tex. Comm’n App. 1933, judgm’t adopted) (holding that evidence of surrounding circumstances admissible to prove intent of parties); *Ryan v. Kent*, 36 S.W.2d 1007, 1010 (Tex. Comm’n App. 1931, judgm’t adopted) (holding that evidence of surrounding circumstances admissible to prove intent of parties with respect to oil and gas lease); *Remuda Oil Co. v. Wilson*, 264 S.W.2d 192, 194 (Tex. Civ. App.—Galveston 1954, writ ref’d n.r.e.) (holding that evidence of surrounding circumstances admissible to prove intent of parties in drafting deed where terms of deed ambiguous); *Leopard v. Stanolind Oil & Gas Co.*, 220 S.W.2d 259, 263 (Tex. Civ. App.—Dallas 1949, writ ref’d n.r.e.) (holding that evidence of surrounding circumstances admissible to prove intent of parties in ambiguity in lease). In an early case trying to define the term “minerals”

absolute estate in iron ore or merely an easement to explore for such ore. The court found that the language was sufficient to constitute a “good and sufficient” description of the property interest to be conveyed. Yet, the court also applied the canon that “the intention of the parties is to be ascertained and given effect, as gathered from the entire instrument, together with the surrounding circumstances. . . .”⁵¹

Sometimes a court states that it is admitting surrounding circumstances, but then looks solely at the language of the instrument to interpret it. In *Bailey v. Mullens*,⁵² the court was attempting to interpret a written instrument to determine if it was a valid deed.⁵³ Justice Barrow looked exclusively at the written instrument to determine that a valid deed was executed although there was some contrary indications contained in the instrument.⁵⁴ Nonetheless, language allowing the consideration of surrounding circumstances was cited.⁵⁵

The surrounding circumstances rule has also been cited, although not relied on, in *Psencik v. Wessels*,⁵⁶ a case finding that sand and gravel were not included in a reservation of “all minerals.” The trial court had admitted

in a grant, the court said that surrounding circumstances could be used to ascertain the intent of the parties. *See Atwood v. Rodman*, 355 S.W.2d 206, 212 (Tex. Civ. App.—El Paso 1962, writ ref’d n.r.e.).

The Texas Supreme Court in *Gibson v. Turner*, 156 Tex. 289, 297, 294 S.W.2d 781, 785 (1956) clearly followed the earlier cases finding that surrounding circumstances could be considered even where the written instrument was not ambiguous.

51. 277 S.W.2d at 929. The source of the canon is cited as 14 TEX. JUR. *Deeds* § 132 (1956). *See* *Murphy v. Dilworth*, 137 Tex. 32, 151 S.W.2d 1004 (1941); *Lipscomb v. Fuqua*, 103 Tex. 585, 131 S.W. 1061 (1910); *Self v. King*, 28 Tex. 552 (1866); *Dublin Elec. & Gas Co. v. Thompson*, 166 S.W. 113 (Tex. Civ. App.—Fort Worth 1914, no writ); *see also Hoffer Oil Corp. v. Hughes*, 16 S.W.2d 901 (Tex. Civ. App.—Fort Worth 1929, no writ) (holding that all surrounding circumstances are considered in determining whether to give a peremptory instruction to either party).

52. 313 S.W.2d 99 (Tex. Civ. App.—San Antonio 1958, writ ref’d n.r.e.).

53. *Id.* at 102.

54. *See id.* at 103.

55. *Id.* at 102. The source of the canon was 14 TEX. JUR. *Deeds* § 132 (1956). In some cases the opposite analytical scheme may be followed. In *Pierce Estates, Inc. v. Howard*, 100 S.W.2d 749 (Tex. Civ. App.—Beaumont 1936, writ dism’d w.o.j.), the court applied the “four corners” canon and ostensibly limited its review to the language of the instrument. Yet the court’s analysis looks at the surrounding circumstances in finding that a specific description of a 132 acre tract would control over a general description that included an additional 400 acre tract. *See* 100 S.W.2d at 752. The court looked at the field notes and discussed the source of title to both tracts in determining that only 132 acres were intended to be conveyed. *Id.* at 751–52.

56. 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref’d).

parol evidence but the court of civil appeals suggested that it should have been excluded. Nonetheless, evidence about the surface destruction that would follow the sand and gravel extraction was considered by the court in its determination.⁵⁷

The tendency of courts to admit surrounding circumstances has declined in recent years.⁵⁸ The surrounding circumstances rule is a victim of the courts' general reluctance to admit parol evidence in mineral deed cases. The difficulty in admitting evidence of surrounding circumstances existing at the time the instrument was executed, or more broadly admitting extrinsic evidence of events that occur after the execution of the instrument is evident. Title examiners would no longer be able to rely on the written word. Individual adjudication of deeds would lead to disparate results depending on factors extraneous to the instrument. The fact that from its inception many courts treated the admission of surrounding circumstances as being a part of the four corners canon, which ostensibly limits the court to looking solely at the written document, suggests the courts felt uncomfortable moving away from the instrument to ascertain the intent of the parties.⁵⁹

III. The Use of Canons in Resolving the Multiple Fraction Problem

With the overruling of *Alford v. Krum*,⁶⁰ the problems of interpreting multiple grant deed forms and subject-to clauses will not disappear. Instead, prior caselaw will have to be reviewed once again to see if there existed any

57. *Id.* at 659. For other cases applying this canon, see *Victoria Bank & Trust Co. v. Cooley*, 417 S.W.2d 814 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.), in which the court applied the canon even when the deed was unambiguous. But, in *Milam v. Coleman*, 418 S.W.2d 329 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.), the court cited the canon, but seemingly gave more credence to the four corners canon and cited *Smith v. Allison*, 157 Tex. 220, 301 S.W.2d 608 (1956), a case in which the deed was considered ambiguous.

58. For other cases admitting surrounding circumstances, see *Gulf Oil Corp. v. Southland Royalty Co.*, 478 S.W.2d 583, 586, (Tex. Civ. App.—El Paso 1972), *aff'd*, 496 S.W.2d 547 (Tex. 1973); *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515 (Tex. 1968). *Pinehurst* was a contract case, but the use of surrounding circumstances has had a wider use in the contract interpretation arena. See 478 S.W.2d at 586.

59. See *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193 (Tex. 1962). In *Myers*, the court emphasized the ad hoc nature of instrument interpretation and stated that every case depends “upon its own facts, the context of the instrument, and circumstances.” *Id.* at 196.

60. 671 S.W.2d 870 (Tex. 1984).

common thread or rationale for dealing with the problems caused by the use of form deeds with multiple grant provisions. These decisions can raise difficult interpretational problems because the parties include inconsistent provisions within the multiple grant sections of the deed. Two excellent articles by Ernest Smith⁶¹ and Tevis Herd⁶² discuss the many problems that followed the incorporation of the subject to clause into standard deed forms. This section will not re-plow those fertile fields, but will instead focus on the use of canons of construction in the individual cases to determine if they were used consistently until *Alford* so that post-*Luckel* courts will be able to apply them in a meaningful way. In most of these cases, the courts are given the choice of harmonizing the inconsistent provisions or treating one or more of the provisions as controlling.⁶³

The starting point must be *Hoffman v. Magnolia Petroleum Co.*⁶⁴ In *Hoffman*, the grantor conveyed a 1/2 mineral interest in a 90 acre tract. The deed contained a clause which stated: "It is understood and agreed that this sale is made subject to said lease but covers and includes one-half of all the oil royalty and gas rental or royalty due to be paid under the terms of said lease."⁶⁵ The grantor had owned and leased a 320 acre tract, of which the 90 acres was a part. Oil was produced on the 230 acres not conveyed. Under the non-apportionment doctrine, the grantee would not be entitled to any royalties if his interest was restricted to the described 90 acres.

61. Ernest Smith, *The "Subject To" Clause*, 30 ROCKY MTN. MIN. L. INST. 15-1 (1984).

62. Tevis Herd, *Deed Construction and the "Repugnant to the Grant" Doctrine*, 21 TEX. TECH L. REV. 635 (1990).

63. The courts could also treat the instrument as ambiguous and admit parol evidence or find that the deed needs to be reformed. Both of those options are rarely used. *See* Herd, *supra* note 62 at 649-50. The following cases allowed the deeds to be reformed: *Thalman v. Martin*, 635 S.W.2d 411, 413 (Tex. 1982); *State v. Wales*, 271 S.W.2d 728, 732 (Tex. Civ. App.—Beaumont 1954, writ ref'd n.r.e.); *Craft v. Hahn*, 246 S.W.2d 897, 900 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.). In only a few cases have the courts admitted parol evidence after finding the deeds ambiguous. *See, e.g., Klein v. Humble Oil & Ref. Co.*, 126 Tex. 450, 86 S.W.2d 1077 (1935); *cf. McMahon v. Christmann*, 157 Tex. 403, 407, 303 S.W.2d 341, 344 (1957) (allowing parol evidence only after applying rules of interpretation and ambiguity in the contract still exists).

64. 273 S.W. 828 (Tex. 1925). *Hoffman*, of course, was preceded by *Caruthers v. Leonard*, 254 S.W. 779 (Tex. Comm'n App. 1923, holding approved), which held that a transfer of a mineral interest that had been leased did not transfer either the delay rentals or the royalties payable under the existing lease. *Caruthers* was overruled in *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (1943).

65. 273 S.W. at 830.

Typical of many deed interpretation cases, the Texas Commission of Appeals listed, seriatim, several canons of construction that were to control its decision. The court said:

This deed, if its intention be ambiguous, is to be construed against grantors rather than against grantee; and yet, if what it purports to convey is distinctly pointed out in a manner and under circumstances showing that royalty as to wells located outside of the 90 acres was not in contemplation, although the contrary could be construed as within other language when considered separately, the specific and restricted intent would control. . . . But the instrument must, if possible, be considered and made to speak consistently, as a whole, without the rejection of any words, and so as to declare the evident intention of the parties, and the latter is the principal rule to apply.⁶⁶

In light of the result finding that the grantor intended to make two grants, one limited to the 90 acres and another encompassing all of the 320 acres contained in the existing lease, it is hard to ascertain which, if any, of the listed canons is critical. The general canon of attempting to ascertain the “evident intention” of the parties is meaningless. The remaining three canons all support the result. However, the court’s suggestion that the language only be construed against the grantor if the language is ambiguous suggests that the “construe against the grantor” canon was not a decisive factor since the court never makes a finding of ambiguity and no parol evidence seemed to have been admitted.⁶⁷ The court does not mention the greatest estate canon which would also support its finding that the grantee received an interest in the entire 320 acre leasehold estate during the life of the existing lease.

The two other canons might be treated as somewhat inconsistent. Although inartfully worded, the court seemed to apply the “harmonizing” canon so that the two apparently conflicting grants could both be implemented. This would support a finding of two grants by giving effect to each clause. Yet the court also applied the “specific controls the general” canon which gives greater weight to the subject-to clause than to the more general granting clause.⁶⁸ The court deemed critical the use of the language

66. *Id.* The court cited the following cases as supporting the application of the canons so named: *Regan v. Hatch*, 91 Tex. 616, 45 S.W. 386 (1898); *Cartwright v. Trueblood*, 90 Tex. 535, 39 S.W. 930 (1897); *Cullers v. Platt*, 81 Tex. 258, 16 S.W. 1003 (1891).

67. *See infra* part VII.C for a discussion of the “construe against the grantor” canon.

68. *See* 273 S.W. at 830.

“all” to describe royalties under the terms of “said lease.” Because the lease covered the entire 320 acres, the court reasoned the parties must have intended the subject-to clause to include not just the 90 acre tract but the totality of the acreage in the existing lease.⁶⁹ It appears that the court tried to harmonize the two clauses rather than give one preemptive weight, but nonetheless, used the “specific controls the general” canon to find that two independent grants were contained in the single deed.

Without the *Hoffman* conclusion that the parties could create two different interests in a single instrument, the present debate over the multiple grant issue probably would have never developed. In mixed fraction or mineral/royalty situations, the issue after *Hoffman* was not which of the clauses would necessarily prevail and govern the others, but could the court give effect to all of the inconsistent provisions. Without the two grant approach, one would have to go with an anti-harmonizing canon giving one part of the deed controlling authority. However, the two grant approach essentially harmonizes the inconsistent provisions by giving effect to all parts of the deed.

Ernest Smith used *Mitchell v. Simms*⁷⁰ to illustrate the difficulty in applying the multiple grants theory on the basis that it reflects the intent of the parties.⁷¹ In *Mitchell*, the grantor conveyed 1/2 of the minerals underlying the east 1/2 of a 320 acre tract that was subject to an existing lease.⁷² A typical subject-to clause was used so that the transfer included 1/2 of the rents and royalties payable under the lease. If *Hoffman* is applied then the grantee has a right to 1/2 of the royalties from production anywhere on the 320 acres as long as the existing lease remains alive. In a second transaction, the grantor conveyed 1/2 of the minerals underlying the west 1/2 of the 320 acres in an instrument containing a similar subject-to clause. Although the issue was not before the court, the court suggested that if *Hoffman* were followed, the grantor would retain no royalty interests under the existing lease.⁷³ The court found that the first grantee by virtue of the subject-to clause received a 1/2 interest in the full 320 acres and the second grantee likewise received a 1/2 interest in the entire 320 acre leasehold estate. That left the grantee with no royalty interest under the

69. *Id.*; see Smith, *supra* note 61, at 15-5 (criticizing this result as not reflecting the intent of the parties since it was “atypical” and “extraordinary” to believe that the parties actually intended to have two separate grants within the single deed).

70. 63 S.W.2d 371 (Tex. Comm’n App. 1933, holding approved).

71. See Smith, *supra* note 61, at 15-5.

72. 63 S.W.2d at 372.

73. *Id.* at 373.

existing lease, a result clearly not intended by the grantor, but dictated by the application of *Hoffman*. Because a construction of the respective deeds was not needed, the issue in the case being the late tender and acceptance of delay rental payments, the court did not apply any canons of construction.⁷⁴

The difficulty of applying *Hoffman* in cases involving only areal inconsistencies, as opposed to fractional or mineral/royalty inconsistencies, is reflected in the court of civil appeals and supreme court opinions in *Woods v. Sims*.⁷⁵ Areal inconsistencies arise when a mistake is made about the amount of land described in the deed.⁷⁶ In *Woods*, several deeds purported to transfer a 25/200 mineral interest in land already leased.⁷⁷ The granting clause used that fractional share. The subject-to clause covered and included a 25/200 share of all of the royalties and rentals due. A rental clause conveyed a 25/200 share and the future interest clause also referred to a 25/200 mineral interest. The intention clause, however, said: “It being the intention of the grantor to convey . . . an undivided Twenty-five acre mineral interest. . . .”⁷⁸ As it turned out, the land described in the deeds and the lease actually contained 226.88 acres. The grantor claimed that the

74. *Id.* at 373–74.

75. 154 Tex. 59, 273 S.W.2d 617 (1954), *rev’g* 267 S.W.2d 571 (Tex. Civ. App.—Fort Worth 1954).

76. In *Olvey v. Jones*, 95 S.W.2d 980, 980 (Tex. Civ. App.—Texarkana 1936, writ *dism’d w.o.j.*), the deed conveyed a 1/2 mineral interest with a subject-to clause including 1/2 of the royalty under the lease. The future lease clause also referred to the interest as 1/2 of the minerals. The description clause stated that the lands contained “55 acres, more or less.” However, the actual description encompassed 83.23 acres. The consideration for the deed was \$2,750 allegedly reflecting the price of \$100/acre. The grantors alleged that the grantees were only entitled to a 27.5/83.23 share of royalties, while the grantees alleged they were entitled to 1/2 of the royalties. *Id.* at 981. The trial judge ordered the deed reformed to reflect the transfer of a 27.5/83.23 mineral interest. The court of civil appeals reversed, finding that even if the granting clause was reformed, the grantee was entitled to a full 1/2 interest because of the subject-to clause’s granting of 1/2 of the royalties due under the lease. *Id.* at 982. The court’s finding was based on *Hoffman* without the citation of any canons. *Id.* While the result may be justified on other grounds, the use of the *Hoffman* two-grants theory was probably inappropriate. The deed consistently transfers a 1/2 interest in the land described. Unless all of the clauses relating to the 1/2 interest are to be ignored or preempted by the intention clause’s reference to 55 acres, the deed taken as a whole expressed an intent to transfer 1/2 of the mineral interest. On later trial and appeal, the court found that reformation of both the granting clause and the subject-to clause was appropriate. *Olvey v. Jones*, 137 Tex. 639, 642–47, 156 S.W.2d 977, 978–81 (1941).

77. 154 Tex. at 62–63, 273 S.W.2d at 619.

78. *Id.*

grantees were entitled to a 25/226.88 mineral interest, while the grantees argued they were entitled to a 25/200 mineral interest.⁷⁹

The trial court found that the grantees were entitled to a 25/200 share of royalties under the existing lease, but if the lease terminated they would only receive a 25/226.88 mineral interest.⁸⁰ The court of civil appeals disagreed and found the grantees were only entitled to a 25/226.88 share of both existing royalties and the future interest in the mineral estate.⁸¹ The court of civil appeals cited several different canons in support of its decision and basically found that the intent clause, identifying the quantum of interest to be conveyed as 25 mineral acres, controlled over the other clauses.⁸² The canons cited, however, are as inconsistent as the intention clause and the other clauses. For example, the court stated:

Courts may not by construction destroy any provision of a deed when all may be harmonized; and when it can be done, all of them must be allowed to stand without regard to any relative value of conventional clauses.⁸³

Then the court added: “It has been held that specific language of an instrument will control general terms.”⁸⁴ Applying the harmonizing canon to resolve the multiple fraction problem is consistent with the *Hoffman* result because the harmonizing canon gives effect to all of the provisions, notwithstanding the apparent conflict. In *Woods*, the court of civil appeals gave preemptive effect to the intention clause, even though all of the other provisions of the lease gave a contrary signal as to the fractional share of the mineral estate that was conveyed.⁸⁵ The *Woods* court clearly chose an

79. *Id.* at 63, 273 S.W.2d at 620. The litigant/grantees either owned an aggregated 47.5/200 interest or a 47.5/226.88 interest.

80. *Id.*

81. *Id.*

82. *Id.* at 65–66, 273 S.W.2d at 620–21.

83. *Sims v. Woods*, 267 S.W.2d 571, 574 (Tex. Civ. App.—Fort Worth), *rev'd*, 154 Tex. 59, 273 S.W.2d 617 (1954) (citing *Sun Oil Co. v. Bums*, 125 Tex. 549, 84 S.W.2d 442 (1935); *Moore v. City of Waco*, 85 Tex. 206, 20 S.W. 61 (1892); *Ogletree v. Abrams*, 67 S.W.2d 227 (Tex. Comm’n App. 1934, judgment adopted); *Scheller v. Groesbeck*, 231 S.W. 1092 (Tex. Comm’n App. 1921, judgment adopted)); *see infra* part V (discussing the harmonizing and anti-harmonizing canons).

84. 267 S.W.2d at 574 (citing *Reynolds v. McMan Oil & Gas Co.*, 11 S.W.2d 778 (Tex. Comm’n App. 1928, holding approved)).

85. *See id.* at 572–73. The court of civil appeals also cited the following canons:

The intention of the parties may be expressed anywhere in the instrument, and when it may be ascertained it should be given effect, without regard to technical rules of construction. . . . Such construction must be given to a deed

anti-harmonizing canon to resolve the conflicting language even though the result required the court to ignore four different references to a 25/200 interest.⁸⁶

The *Woods* court rejected applying *Hoffman*, although it is ostensibly applicable and would lead to a contrary result.⁸⁷ The court did so because the subject-to clause conveyed all the royalty “in so far as it covers the above described land.”⁸⁸ In addition, the *Hoffman* deed did not have an intention clause. This latter distinction is probably more important because it is the reason for the inconsistency. The result reached by the court of civil appeals is an improvement over the trial court’s finding of two different fractional grants. While the intention clause follows the granting clause and precedes the subject-to and future interest clauses, the intention clause is not by its terms limited in application to the granting clause. If the intention clause is to be given effect, which in this case means preemptive effect, it should apply to the possibility of reverter as well as the right to share in existing lease royalties.

The Texas Supreme Court reversed, using some of the same canons of construction as the court of civil appeals.⁸⁹ The supreme court cited an extended definition of the harmonizing canon and added that only when there is an irreconcilable conflict can the court apply an anti-harmonizing canon.⁹⁰ The court used the *Hoffman* rationale to find that the intent clause, referring to the twenty-five acres, modified the grant of the possibility of reverter that was conveyed in the granting clause.⁹¹ Thus, the Texas Supreme Court reinstated the trial court’s finding that as to future leases, the grantor would receive a 25/226.88 mineral interest. This result does harmonize, but whether it reflects the true intent of the parties is less than clear. Again, it is hard to believe that the parties intended to create two different grants, one under the existing lease and one for future leases given the continued reference to a 25/200 share. Although reformation of the deed

as will effectuate the intention of the parties, if it is legally possible to do so . . . the question being, not what the parties meant to say, but the meaning of what they said. The intention of the grantor as gathered from the deed as a whole controls the interpretation. . . .

Id. at 573–74.

86. *See id.* at 573.

87. *Id.* at 574.

88. *See id.* at 573.

89. *See Woods v. Sims*, 154 Tex. 59, 273 S.W.2d 617 (1954).

90. *See id.* at 64, 273 S.W.2d at 620–21.

91. *See id.* at 66, 273 S.W.2d at 621–22.

was not sought, given the parties mistake about the number of acres in the tract, reforming the deed to change all of the denominators to the actual acreage in the tract might have been appropriate.

A good example of the use of the *Hoffman* approach to solve discrepancies between the granting, subject-to, and future lease clauses is *Richardson v. Hart*.⁹² As discussed earlier,⁹³ the Texas Supreme Court found, without use of any canons of construction, that two different estates were transferred when there was a conflict between the granting, future lease, and intention clauses and the subject-to clause.⁹⁴ The first three clauses conveyed a 1/128 mineral interest while the court interpreted the subject-to clause as conveying a 1/128 royalty interest. The court concluded that two grants were included in the deed.⁹⁵ This was consistent with *Hoffman* because the court could conclude that the parties intended two different grants when the conflict was between the subject-to clause and the granting and future lease clauses. In effect, the grantor conveyed a 1/128 mineral interest in the possibility of reverter and a separate 1/128 royalty interest during the life of the existing lease. The fractions were the same, but, as interpreted by the court, the subject-to clause was treated as conveying a 1/128 royalty, not a 1/128 of royalty.⁹⁶ The court of civil appeals had harmonized the descriptions by treating all of the interests as a 1/128 mineral estate, but had admitted extrinsic evidence that the supreme court excluded because it had found the deed unambiguous.⁹⁷ When the conflict is between the subject-to and the granting or future lease clauses, use of the harmonizing canon is consistent with the *Hoffman* two grant approach because one can give effect to both signals. As suggested above, however, it is not evident in these cases whether the parties intended to create two separate grants. It appears more likely that confusion regarding the “transformation” of mineral interests into royalty interests, after a lease, has led to the inconsistent or conflicting use of fractions or descriptions.

Four cases of the Texas Supreme Court illustrate the practical and conceptual difficulties the court has grappled with in resolving multiple

92. 143 Tex. 392, 185 S.W.2d 563 (1945); *see also* Porter v. Shaw, 12 S.W.2d 595 (Tex. Civ. App.—Texarkana 1928, no writ) (finding that the writing of an instrument showed that the parties were contracting with reference to two subjects).

93. *See supra* notes 13–20 and accompanying text.

94. *See* 143 Tex. at 396, 185 S.W.2d at 564–65.

95. *See id.* at 396, 185 S.W.2d at 564.

96. *See id.* at 396, 185 S.W.2d at 565.

97. *See id.* at 395–96, 185 S.W.2d at 564.

grant deed cases.⁹⁸ The four cases reflect the use or misuse of canons of construction that should not be substituted for sound judgment and reason. The first case is the five to four decision in *Garrett v. Dils Co.*⁹⁹ In *Garrett*, the granting clause conveyed “an undivided one sixty-fourth interest” in the mineral estate.¹⁰⁰ The subject-to clause conveyed “one-eighth of all of the oil royalty and gas rental” and “one-eighth of the money rentals which may be paid to extend the term . . . of said lease.” The future lease clause conveyed “an undivided one-eighth of the lease interest and all future rentals.”¹⁰¹ Finally, an intention clause stated that the grantee owned “one-eighth of one-eighth of all oil, gas and other minerals in and under said lands, together with one-eighth interest in all future rents.”¹⁰²

The inconsistent fractions are clear. The granting clause and the first part of the intention clause appear to transfer a 1/64 mineral interest. The subject-to, future lease, and last part of the intention clauses appear to transfer a 1/8 mineral interest. The original lease terminated and the issue was whether the grantee was entitled to a 1/64 or a 1/512 royalty.¹⁰³

The majority opinion used four canons to reach its conclusion that the parties intended to convey a 1/8 mineral interest, thereby entitling the grantee to a 1/64 royalty. The first canon is: “[T]he intention of the parties,

98. See *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991); *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984); *Garrett v. Dils Co.*, 157 Tex. 92, 299 S.W.2d 904 (1957).

99. 157 Tex. 92, 299 S.W.2d 904 (1957).

100. *Id.* at 93, 299 S.W.2d at 905.

101. *Id.* The Court interpreted the term “lease interest” as not to encompass the possibility of reverter, but merely to describe the executive power. *Id.* at 96, 299 S.W.2d at 907. Thus, in cases such as *Delta Drilling Co. v. Simmons*, 161 Tex. 122, 338 S.W.2d 143 (1960), in which the granting clause and the future lease clause both gave the grantee a 1/4 mineral interest, but none of the lease interests, the court was able to harmonize by concluding that the grantee received a 1/4 mineral interest with none of the executive power. *Id.* at 126, 338 S.W.2d at 146. This is consistent with the general rule that the owner of a mineral estate is free to convey or reserve any of the constituent elements of a mineral estate. See *Altman v. Blake*, 712 S.W.2d 117 (Tex. 1986).

102. 157 Tex. at 94, 299 S.W.2d at 905.

103. *Id.* The trial court found that the grantee was entitled to a 1/512 royalty while the court of civil appeals found the grantee should receive a 1/64 royalty. *Id.* The court skirted the issue of whether a division order signed by the grantees and giving them a 1/512 royalty would be binding. *Id.* The court concluded that because the lease was unambiguous, no extrinsic evidence could be admitted and therefore the division order could not vary the terms of the deed. *Id.* The court did not answer the question of whether the division order would bind the royalty owner until it was revoked. See *id.* at 906. For a contrasting approach, see *Richardson v. Hart*, 183 S.W.2d 235 (Tex. Civ. App.—Texarkana 1944), *aff’d on other grounds*, 143 Tex. 392, 185 S.W.2d 563 (1945).

when it can be ascertained from a consideration of all parts of the instrument, will be given effect when possible.”¹⁰⁴ The second canon then states: “That intention, when ascertained, prevails over arbitrary rules.”¹⁰⁵ This looks like the four corners or harmonizing canon that would attempt to reconcile and give meaning to all of the inconsistent fractions. The court does not identify what “arbitrary rules” it otherwise would have applied had it not ascertained the intent of the parties.

The third and fourth canons are related. As stated by the *Garrett* court: “should there be any doubt as to the proper construction of the deed, that doubt should be resolved against the grantors, whose language it is, and be held to convey the greatest estate permissible under its language.”¹⁰⁶ These two canons clearly lead to the result reached by the court.

By applying the four corners canon, the court had to deal with the granting and intention clause fractions that indicated a grant of a 1/64 mineral interest. Since at the time of the deed the land was under lease, the transfer of a mineral interest, without more, was a transfer of that fractional share of the leasehold benefits, including royalty, and that fractional share of the possibility of reverter.¹⁰⁷ The court could have applied *Hoffman*, which might have treated the deed as conveying two separate grants, one involving interests under the existing lease and the other involving the possibility of reverter. When a mineral deed is executed while a lease is in existence and the conflicting fractions are in the granting and future lease clause, the conflicting clauses cannot be harmonized. Both clauses essentially describe the same interest. Only when the subject-to and granting or future lease clauses are inconsistent can *Hoffman* be legitimately applied.

Instead, the court looked at the language of the subject-to clause as defining what the parties really meant when they used the fraction 1/64 and the mineral estate language.¹⁰⁸ The subject-to clause is properly construed to transfer a 1/64 royalty and a 1/8 share of delay rentals. Likewise, with the

104. 157 Tex. at 95, 299 S.W.2d at 906 (quoting *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798 (1956)).

105. *Id.* at 96, 299 S.W.2d at 906.

106. *Id.* For a discussion of the “construe against the scrivener” or grantor rule, see *infra* part VII.A, and for a discussion of the greatest estate canon, see *infra* part VII.D.

107. *See id.* at 96–97, 299 S.W.2d at 906–07. This result has been the law in Texas since *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (1943) (overruling *Carruthers v. Leonard*, 254 S.W. 779 (Tex. Comm’n App. 1923, judgm’t adopted)).

108. 157 Tex. at 96, 299 S.W.2d at 906. The court readily admitted that the clear and unambiguous language of the granting clause transferred an undivided 1/64 mineral interest. *Id.*

intention clause, the court construed the conflicting term “one-eighth of one-eighth” to reflect a royalty interest and not a mineral interest.¹⁰⁹ In effect, the court is giving greater weight to the subject-to and future lease clauses by overriding the clear signals in the granting clause that only a 1/64 mineral interest was to be granted. The majority’s opinion in *Garrett* is clearly consistent with the construe against the scrivener and greatest estate canons because it results in the grantee receiving a 1/8 rather than a 1/64 mineral interest.¹¹⁰

The dissenting justices, on the other hand, expressly relied on only one canon, namely that the intention of the parties must “be ascertained from the language contained therein.”¹¹¹ Because that general canon does not provide much guidance, other than to exclude extrinsic evidence, the dissenting justices’ conclusion was based on their reading of some earlier cases and their reluctance to so easily disregard the express language of the granting clause.¹¹² It is not clear, however, whether the reliance on *Richardson* and its application of the *Hoffman* two grant approach or the reluctance to ignore the plain language of the granting clause led Justice Norvell to conclude that the parties had conveyed a 1/64th mineral interest in the possibility of reverter as evidenced by the granting and future lease clauses and a 1/64th royalty interest under the subject-to clause.

The next major milestone was *Alford v. Krum*.¹¹³ In *Alford*, the granting clause conveyed “one-half of the one-eighth interest” in the mineral estate.¹¹⁴ The subject-to clause conveyed “1/16 of all the oil royalty and gas rental or royalty due,” while the future lease clause provided that the grantee would own “a one-half interest” in the mineral estate. The subject-

109. *Id.* at 96, 299 S.W.2d at 907.

110. If the majority were relying on these two canons, the results would be different even when the fractions were identical if the deed reserved, rather than granted, the interest. But, if the court was applying the four corners canon, a different result would not be required.

111. 157 Tex. at 97, 299 S.W.2d at 907 (Norvell, J., dissenting).

112. *See id.* at 99, 299 S.W.2d at 908. Justice Norvell stated:

It is clear enough that [the grantor] intended to convey . . . an undivided 1/64th interest in and to all of the oil, gas and other minerals in and under the tract of land involved. The formal granting clause expressly so provides. The remaining question is whether there is other language in the deed which would expand or increase the interest specifically conveyed in the formal granting clause. . . .

Id. at 97, 299 S.W.2d at 907. This language is similar to the “granting clause prevails” approach adopted by the court in *Alford*, although it is not written to require that the granting clause language always prevails.

113. 671 S.W.2d 870 (Tex. 1984).

114. *Id.* at 871.

to clause, however, provided that the grantees were to receive none of the money rentals under the existing lease. In *Alford*, the conflicting signals occurred between the granting and subject-to clauses and the future lease clause, whereas in *Garrett*, the conflict existed between the granting clause and the subject-to and future lease clauses. It is the conflict between the granting and future lease clauses that creates the problem. Conflicts between the subject to and future lease clauses can be resolved, as they were in *Richardson*, through the use of the *Hoffman* two grant approach, which gives effect to the entire instrument.¹¹⁵ But when, as in *Garrett* and *Alford*, the conflict is between the granting and future lease clauses, they both cannot be given effect. Either the granting clause language must prevail or the future lease clause language must prevail.¹¹⁶

Alford cited at least eight canons of construction, although it is obvious that only two were critical to the court's rationale.¹¹⁷ Three of the canons related to the court's function of trying to ascertain the intent of the parties to the instrument.¹¹⁸

The court's departure from prior decisions, however, came in its juxtaposition of the harmonizing and anti-harmonizing canons.¹¹⁹ Prior cases had principally relied on the harmonizing or four corners canon to deal with multiple fraction problems. The results were not always consistent but the approach was the same. In *Alford*, the court cited the harmonizing canon, noting that the parties in effect are presumed to want to give effect to all parts of the deed.¹²⁰ But then the court applied another

115. See *Richardson v. Hart*, 143 Tex. 392, 396, 185 S.W.2d 563, 564–65 (1945); *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828, 830 (Tex. 1925).

116. As will be seen shortly in the discussion of *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466 (Tex. 1991), see *infra* note 158 and accompanying text, there is a third approach which does give meaning to both the granting clause and the future lease clause. I believe, however, that the *Snow* analysis is fatally flawed and based on an erroneous assumption about what interests are retained by a mineral owner after a lease has been executed. See *infra* notes 158–81 and accompanying text.

117. See 671 S.W.2d at 872–73.

118. *Id.* at 872. The court began with the canon, “The primary duty of the court . . . is to ascertain the intent of the parties,” followed by “that it is not the intention that the parties may have had but failed to express in the instrument, but it is the intention that is expressed by said instrument,” and concluded with “[w]e must construe this language as it is written and we have no right to alter it by interpolation of substitution.” *Id.* If any canon need be cited it is the second canon that it is the intention of the parties as expressed in the instrument that is controlling. See *infra* part IV.A.1.

119. See *infra* part VI.

120. 671 S.W.2d at 872 (citing *Woods v. Sims*, 154 Tex. 59, 64, 273 S.W.2d 617, 620 (1954)); see *supra* notes 75–91 and accompanying text.

canon that can only be used when harmonizing is impossible. The court stated: “[W]e realize that irreconcilable conflicts do exist; therefore, when it is impossible to harmonize internally inconsistent expressions of intent, the court must give effect to the ‘controlling language’ of the deed and not allow ambiguities to ‘destroy the key expression of intent’ included within the deed’s terms.”¹²¹

As noted above, when the conflict is between the granting clause and the future lease clause, one cannot give effect to both unless one follows the approach taken in *Snow*. A transfer of a mineral interest that has been leased is a transfer of the possibility of reverter and the economic benefits under the lease.¹²² If the fraction or areal descriptions between the granting and future lease clause are different only one can be given effect. The other, by the very nature of the problem, must be preempted. Or, as was done in *Garrett*, rather than apply a canon that chooses between the two competing clauses, a more general “party-related” canon can be used, such as the “construe against the scrivener” or greatest estate canon, to resolve the conflict.¹²³

Having opted for an anti-harmonizing preemptive canon, the *Alford* court then had to choose a canon that would signify which clause was to have preemptive effect.¹²⁴ The court concluded:

the “controlling language” and the “key expression of intent” is to be found in the granting clause, as it defines the nature of the permanent mineral estate conveyed. [citation omitted] It

121. *Id.* The court cited *Texas Pac. Coal & Oil Co. v. Masterson*, 160 Tex. 548, 553, 334 S.W.2d 436, 439 (1960) as the source of these canons. The quote really contains two different canons. One is that when irreconcilable conflicts do exist the court should give effect to the controlling language and the other is that it should not allow ambiguities to destroy the key expression of intent. 671 S.W.2d at 872. The *Masterson* case involved a deed that conveyed “[a]ll of the unsold portion containing 186.4 acres out of the 640 acres known as the Manuel Tigerino Survey.” 160 Tex. at 551, 334 S.W.2d at 438. The issue was whether the court should give effect to the term “all the unsold portion,” or to the description “containing 186.4 acres.” In a 6-3 decision, the court applied the harmonizing canon but modified it by stating that key words must be given effect. *See id.* at 552, 334 S.W.2d at 439. The court concluded that the key words were “all the unsold portion” which meant that a 1/4 mineral estate in lands outside of the 186.4 acres were also conveyed by the deed. *Id.* The court also relied on the greatest estate canon that probably is more appropriately used in the context of the *Masterson* case. *See id.* (citing *Cartwright v. Trueblood*, 90 Tex. 535, 537–38, 39 S.W. 930, 931 (1897)).

122. *Harris v. Currie*, 142 Tex. 93, 99–100, 176 S.W.2d 302, 305 (1943).

123. *See Garrett v. Dils Co.*, 157 Tex. 92, 95, 299 S.W.2d 904, 906 (1957).

124. *See* 671 S.W.2d at 872.

logically follows that when there is an irreconcilable conflict between clauses of a deed, the granting clause prevails over all other provisions.¹²⁵

The grant of a 1/16 mineral interest in the granting clause in effect gives the grantee a 1/16 share of the economic benefits under the existing lease, and a 1/16 share of the possibility of reverter. The future lease clause reference to a 1/2 interest is inconsistent with, and makes ambiguous, the earlier reference to a 1/16 interest. Applying the “granting clause prevails” canon and the canon that it is impermissible to give effect to language which creates an ambiguity or destroys certainty, the majority found that only a 1/16 mineral interest was conveyed.¹²⁶

Chief Justice Pope, in dissent, basically mirrored the *Garrett* approach.¹²⁷ He correctly read the majority opinion as disregarding the future lease clause in favor of the granting clause. However, he runs into the same trap as the *Garrett* court. It is impossible to harmonize inconsistent fractions in the granting and future lease clause when the mineral interest being conveyed has been leased. One must give preemptive weight to either clause. The *Hoffman* approach is likewise inapplicable

125. *Id.* The court cites *Kokernot v. Caldwell*, 231 S.W.2d 528, 531–32 (Tex. Civ. App.—Dallas 1950, writ ref’d) as the basis of the granting clause prevails canon. *Kokernot* did not involve conflicting fractional grants, but involved conflicting temporal limits between the granting and subject-to clauses. The granting clause created a fixed term mineral interest of 20 years while the subject-to clause only referred to the terms of the existing lease. 231 S.W.2d at 530–31. The grantee alleged that the subject-to clause was a transfer of an estate, which was to last as long as the lease, while the grantor alleged that the interest was to terminate after 20 years. *See id.* at 531. Because the dispute was between the granting and subject-to clauses, the court could have relied on *Hoffman* and found that the granting clause created a term for years mineral estate in the grantor’s possibility of reverter, and the subject-to clause created a second interest that was to last as long as the existing lease. But, instead, the court relied on several other canons, including the irreconcilable conflicts canon, to give preemptive effect to the granting clause limitation of 20 years. *See* 671 S.W.2d at 873–74. The court acknowledged that two separate estates could be created in a single mineral deed but found that a reasonable construction of the language of this deed would not support such an interpretation. *See id.* at 873. *But cf.* *Acklin v. Fuqua*, 193 S.W.2d 297 (Tex. Civ. App.—Amarillo 1946, writ ref’d n.r.e.) (stating that two separate and distinct mineral estates can be conveyed by one instrument to subsist during and beyond the life of an existing lease, and a royalty to be due and payable under the lease).

126. 671 S.W.2d at 874.

127. *See id.* at 876 (Pope, C.J., dissenting).

because both clauses effectively seek to transfer the same possibility of reverter.¹²⁸

Alford was a clear departure from previous decisions that had clearly favored giving effect to the future lease provisions rather than granting clause. The *Alford* approach has the advantage of certainty, but as a departure from prior caselaw, it upset the expectations of those in the conveyancing industry. When the conflict was between differing fractions in the granting and the future lease clause, the granting clause fraction would prevail. A number of court of appeals decisions noted the change and followed the *Alford* analysis.¹²⁹

In *Luckel v. White*,¹³⁰ the Texas Supreme Court overruled *Alford* in a case involving conflicting fractions in a royalty deed.¹³¹

The following are the clauses that created the difficulty:

[Granting Clause] I, Mary Etta Mayes . . . [convey to] L.C. Luckel, Jr. an undivided one thirty-second (1/32nd) royalty interest in and to the following described property. . .

[Habendum and Warranty Clauses] TO HAVE AND TO HOLD the above described 1/32nd royalty interest . . . unto the [grantee] . . . to warrant and forever defend . . . the said 1/32nd royalty interest.

[Subject-to Clause] It is understood that said premises are now under lease . . . and that the grantee herein shall receive no part of the rentals as provided for under said lease, but shall receive one-fourth of any and all royalties paid under the terms of said lease.

[Future Lease Clause] It is expressly understood and agreed that the grantor herein reserved [sic] the right upon expiration of the present term of the lease on said premises to make other and

128. *Id.* at 875 (Pope, C.J., dissenting). Chief Justice Pope is correct in noting that with this particular form deed one can have the grant of a mineral interest with a different fractional share of either the executive power or the right to receive delay rentals. Under these circumstances, all of the provisions can be given effect as the grantor is free to divide his mineral estate into as many of the constituent elements as he pleases.

129. *See, e.g.*, *Hawkins v. Texas Oil & Gas Corp.*, 724 S.W.2d 878, 886 (Tex. App.—Waco 1987, writ ref'd n.r.e.); *Stag Sales Co. v. Flores*, 697 S.W.2d 493, 495 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

130. 819 S.W.2d 459 (Tex. 1991).

131. *See id.* at 464.

additional leases . . . and the grantee shall be bound by the terms of any such leases . . . [and] shall be entitled to one-fourth of any and all royalties reserved under said leases.

[Final Clause] It is understood and agreed that [grantor] is the owner of one-half of the royalties to be paid under the terms of the present existing lease, the other one-half having been transferred by her to her children and by the execution of this instrument, [grantor] conveyed one-half of the one-sixteenth (1/16th) royalty now reserved by her.¹³²

The existing lease expired, and the conveyed royalty interest had been the subject of five different oil and gas leases.¹³³ Four of those leases provided for a royalty of 1/6. The grantee's successors claimed that they were entitled to a 1/24 royalty, while the grantor's successors argued that the grant was absolutely limited to a fixed 1/32 royalty.¹³⁴ If *Alford* were to apply, the fixed fraction of a 1/32 royalty in the granting clause would prevail over the inconsistent signal of a 1/4 of royalty in the future lease and other clauses. This was the result in the court of appeals.¹³⁵

In a 5-4 decision, the Texas Supreme Court overruled *Alford*.¹³⁶ What may be more important than the overruling of *Alford* is what analytical methodology replaces the "granting clause prevails" canon. Unfortunately, ascertaining that methodology and applying it to other situations was made difficult by the fact that the *Luckel* deed was a royalty deed, while most of the prior cases involved mineral interests. The majority aptly points out that for many purposes, a royalty and a mineral conveyance are analogous.¹³⁷ They both involve the transfer of an interest in real property, both are subject to the traditional canons of construction, and both must comply with the various formalities required for a transfer of an interest in realty.¹³⁸

The court, however, ignored a basic difference between the conveyance of a mineral and a royalty interest. As noted earlier, the transfer of a mineral interest that has been leased is in effect the transfer of a future interest

132. *Id.* at 461.

133. *Id.*

134. *See id.*

135. *See Luckel v. White*, 792 S.W.2d 485, 490 (Tex. App.—Houston [14th Dist.] 1990), *rev'd*, 819 S.W.2d 459 (Tex. 1991).

136. 819 S.W.2d at 461 (Tex. 1991). Justice Mauzy concurred in the result to add the 5th vote, while Chief Justice Phillips authored a dissent joined by Justices Gonzalez, Cook and Hightower.

137. *See id.* at 463–64.

138. *Id.*

(possibility of reverter) and the transfer of the right to receive economic benefits, including royalty, under the existing lease. Neither the present development, possessory or executive rights are transferred. A royalty interest is a single element interest. When it is transferred, the fact that a lease exists is irrelevant. The parties convey the right to present and future royalty, unless of course the royalty is specifically conveyed as a future interest.¹³⁹ Thus, the conflict between the granting, subject-to and future lease clauses may be resolved by using the *Hoffman* harmonizing analysis without having to worry about any of the clauses having preemptive effect. While different fractional or areal descriptions of mineral estates in the granting and future lease clauses are “clearly repugnant” when the mineral estate has been leased, such is not the case with a royalty interest. In any event, because the court treated the interests as analogous, the reader must presume that the *Luckel* analysis applies to both mineral and royalty deeds which have different descriptions in the various clauses.

The majority’s analysis begins with a typical litany of several canons of construction, including the two that gave rise to the conflict between *Alford* and *Garrett*.¹⁴⁰ Initially, the court applied what it labeled the “four corners” rule which is the rule that the court must ascertain the intent from all of the language.¹⁴¹ Although this is a helpful canon, it is reasonably meaningless and does not resolve the conflict. A second canon is that the intent which is ascertained from the “four corners” prevails over arbitrary rules.¹⁴²

The battle of the canons, however, is between the harmonizing canon, which requires a court to harmonize contradictory or inconsistent provisions of a deed, and the anti-harmonizing canon, which states that a court can opt not to give effect to language that destroys another part of the deed.¹⁴³ This canon, however, only allows a court to choose one part of the

139. For example, O can transfer a 1/8 royalty interest to A for A’s life and to B and his heirs. A gets the present life estate in any royalties while B has an indefeasibly vested remainder in the royalties.

140. See 819 S.W.2d at 461–62.

141. 819 S.W.2d at 461 (citing *Garrett v. Dils Co.*, 157 Tex. 92, 299 S.W.2d 904 (1957)).

142. *Id.* at 462 (citing *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798 (1956)). The court does not identify what arbitrary rules or canons should be ignored. See *infra* part IV.B.

143. 819 S.W.2d at 462. Symptomatic of the difficulty courts have in defining the harmonizing canon, the court used three different sentences to describe the canon. It stated:

The court, when seeking to ascertain the intention of the parties, attempts to harmonize all parts of the deed. . . . “[T]he parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement.” . . . Even if different parts of the deed appear contradictory or inconsistent, the court must strive to harmonize all of the parts, construing the

deed over another. It does not require any particular clause to prevail. For a particular clause to prevail, a second canon is required, such as the “granting clause prevails canon” used in *Alford*.

In *Luckel*, the conflicting signals were contained in the granting, habendum and warranty, and final clauses, which refer to a 1/32 royalty interest, and the subject-to and future lease clauses, which refer to a 1/4 of royalty.¹⁴⁴ The court of appeals applied the harmonizing canon and took judicial notice that at the time of the deed, a leasehold royalty of 1/8 was universally reserved.¹⁴⁵ By harmonizing the clauses, the court of appeals concluded that 1/4 of royalty was undoubtedly the same as 1/4 of 1/8 or a 1/32.¹⁴⁶ Therefore, the grantee was only entitled to a fixed 1/32 royalty interest.

The supreme court disagreed, not with the use of the harmonizing canon, but with its application. Instead of treating the 1/4 of royalty as 1/4 of 1/8, the majority concluded that the parties intended to give a 1/4 of all reserved royalty since a 1/32 was a 1/4 of the 1/8 royalty contained in the existing lease.¹⁴⁷ Because the harmonizing canon did not lead to a clear result, the court applied other canons as the basis for resolving these difficulties.¹⁴⁸ The court went back to the basic intent canon that “the actual intent of the parties *as expressed in the instrument as a whole*, ‘without reference to matters of mere form, relative position of descriptions, technicalities, or arbitrary rules.’ ” must be sought.¹⁴⁹ This canon is not particularly helpful in dealing with the *Luckel* deed’s use of inconsistent fractions. The court then cited another, somewhat disingenuous canon, namely that courts “should give effect to the substance of unambiguous provisions.”¹⁵⁰ The court then found the subject-to and future lease clause language as

instrument to give effect to all of its provisions.
Id. (citing *Benge v. Scharbauer*, 152 Tex. 447, 451, 259 S.W.2d 166, 167 (1953)). See generally *infra* part VI (discussing the harmonizing and anti-harmonizing canons).

144. 819 S.W.2d at 460.

145. *Id.* at 462.

146. *Id.*

147. *Id.*

148. *Id.* at 462–63.

149. *Id.* at 462. The court cited *Sun Oil Co. v. Burns*, 125 Tex. 549, 84 S.W.2d 442 (1935), and suggested that the arbitrary rules, which are to be ignored, are the “ancient” rules relating to deed descriptions.

150. 819 S.W.2d at 463. I had thought that the primary purpose of deed interpretation cases was to give effect to the language used by the parties without resorting to parol evidence. The difficulty is not in giving effect to unambiguous language, but in resolving conflicts or inconsistencies between individually unambiguous provisions.

unambiguously giving 1/4 of royalty to the grantee. The court did not explain why the equally unambiguous granting, warranty and habendum, and final clauses did not operate to convey a 1/32 royalty. The court cited several additional canons that require a court to “construe this language as it is written and . . . [the court has] no right to alter it by interpolation or substitution.”¹⁵¹ At this point in the opinion, even without a direct overruling of *Alford*, it would seem clear that when there were fractional differences between the granting and subject-to or future lease clauses, the fraction used in the latter clauses would prevail. The court’s further writings suggest, however, that such a simple analysis is not intended.¹⁵² This would be a return to the approach taken in *Garrett*, as well as the rejection of *Alford*.

The *Luckel* majority, in specifically overruling *Alford*, suggested that the problems in *Alford* and *Luckel* were identical. One cannot give effect to the granting clause of a mineral deed when that fraction is different from the fraction contained in the subject-to and future lease clauses. Any other conflict can be harmonized if the court chooses to follow the *Hoffman* multi-grant approach. In a royalty deed case, however, the irreconcilable conflict exists when there is a fractional conflict between the granting and subject-to clauses within an existing lease. Conflicts between either of those clauses and the future lease clause can be harmonized if the court follows the *Hoffman* approach. Because the existing lease had lapsed, the “irreconcilable conflict” that had existed in *Luckel* between the subject-to and the granting clause was a moot point. The court merely could have applied *Hoffman* at this point and stated that the grantor conveyed a 1/4 of royalty interest that would take effect at the expiration of the existing lease.

The court, however, in describing this future interest in the royalty, called it a possibility of reverter.¹⁵³ This was needlessly confusing since the

151. *Id.* (citing *Dalberg v. Holden*, 150 Tex. 179, 183, 238 S.W.2d 699, 701 (1951)).

152. *See id.*

153. *Id.* at 464. Although possibilities of reverter were not alienable inter vivos at early common law, most states treat them as alienable. 1 AMERICAN LAW OF PROPERTY § 4.70 (1952). Texas has allowed possibilities of reverter to be conveyed since 1923. *Caruthers v. Leonard*, 254 S.W. 779, 782 (Tex. Comm’n App. 1923, holding approved); *see also Bagby v. Bredthauer*, 627 S.W.2d 190, 197 (Tex. App.—Austin 1981, no writ) (holding that a grantor may expressly reserve a possibility of reverter); *York v. Kenilworth Oil Co.*, 614 S.W.2d 468, 471 (Tex. Civ. App.—Waco 1981, writ ref’d n.r.e.) (excepting a possibility of reverter from a grant does not pass this interest to a grantee); *Murphy v. Jamison*, 117 S.W.2d 127, 130 (Tex. Civ. App.—Beaumont 1938, writ ref’d) (recognizing that a mineral rights owner has the power to sever his estate in the minerals from his estate in the remainder).

royalty was no longer part of the possibility of reverter that had become possessory when the first lease terminated. When the royalty conveyance was executed, a “fee simple absolute” estate was passed. The royalty was not a possessory interest but was a present interest of infinite duration. The owner became immediately entitled to the fractional royalty share regardless of the existence of a lease.¹⁵⁴ In effect, if the court wanted to continue to use the common law estate system to describe a non-possessory interest, the deed could have been described as transferring either a 1/4 of royalty or a 1/32 royalty in a fee simple subject to an executory limitation and an executory interest in a 1/4 of royalty.¹⁵⁵ It would be the equivalent of O transferring a 1/32 royalty to A so long as the existing lease exists and then a 1/4 of royalty to A and his heirs. This would have been entirely consistent with the *Hoffman* multi-grant approach. The *Luckel* court’s discussion of the transfer of part of the possibility of reverter is confusing, but reaches the same result as suggested above.

The court, however, was left with the dilemma of giving some meaning to the granting clause. It found that the 1/32 fixed royalty was a minimum royalty, so that even if a future lease provided for a leasehold royalty of less than 1/8, the grantee would receive no less than 1/32 royalty. This harmonizing does give some meaning to the granting clause, but believing that the use of a fixed fraction in the granting clause was intended to be a minimum fraction is a leap of faith that is difficult to accept. The court, however, was constrained by its embrace of the harmonizing canon to give effect to the granting and other clauses, and therefore, chose an interpretation that gave it an unlikely, but rather harmless meaning.¹⁵⁶

Chief Justice Phillips, in dissent, concluded that the overruling of *Alford* was premature, although the use of the harmonizing canon in light of the inconsistent fractions suggested that *Alford* would not last much longer. The dissent’s approach was based on the following assumption: “The oft-repeated expression that a grantor has the power to convey by one instrument different interests in the possibility of reverter and under the

154. 819 S.W.2d at 465.

155. The use of the inconsistent fractions in the deed, along with its mootness, did not require the court to resolve that “irreconcilable conflict.” If the court had treated the subject-to clause as controlling the granting clause then the grantee received a 1/4 of royalty in fee simple absolute.

156. Justice Mauzy, in concurring, would merely apply the harmonizing canon and find as a matter of law that a 1/4 of royalty was intended. 819 S.W.2d at 465 (Mauzy, J., concurring). He saw the canons used in *Alford* as within the category of “arbitrary rules” that must fall in the face of the parties’ intent. *Id.* He would adopt Chief Justice Pope’s dissent in *Alford*. See *supra* note 111 and accompanying text.

subsisting lease should not obscure the fact that very few grantors really intend to convey interests of different magnitude.”¹⁵⁷ This assumption implicitly rejects the result in *Hoffman* in the absence of clear language to the contrary. But it does not resolve the difficulty of harmonizing different fractional or areal signals when they are in clear conflict. The dissent read the same deed as the majority and the concurring justices, and harmonized by concluding that the parties intended a 1/32 fixed royalty. Justice Mauzy and the court of appeals read the same language, applied the harmonizing canon and found that the parties intended to transfer a 1/4 of royalty. Ay, there’s the rub with the harmonizing canon and the multiple fraction problem.

The difficulty of applying the *Luckel* analysis has been geometrically increased by the supreme court’s opinion in *Jupiter Oil Co. v. Snow*,¹⁵⁸ which was decided at the same time as *Luckel*. The approach taken in *Snow* unnecessarily complicates the job of the title opinion attorney. Dean Frank Elliott noted the problem raised by the *Snow* approach over 30 years ago when he stated:

The greatest source of confusion is the failure to understand the exact nature of the property interest of a landowner after the execution of an oil and gas lease. The lessor often thinks of his ownership as a 1/8th royalty interest rather than a possibility of reverter in all the minerals.¹⁵⁹

By leasing, the mineral owner conveys his entire (100 percent) possessory estate in the minerals, burdened by the lessee’s obligations to pay a fractional royalty and other leasehold benefits. The mineral owner after the lease retains no part of the present possessory mineral estate, but merely a possibility of reverter of 100 percent of the minerals. Thus, when the lease expires, the lessor’s possibility of reverter becomes a fee simple absolute in 100 percent of the mineral estate.

In *Tipps v. Bodine*¹⁶⁰ the granting clause stated that the grantee was to receive “an undivided 1/16 interest in and to all of the oil, gas and other

157. 819 S.W.2d at 466 (citing 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 340.2, at 242–43 (1990)).

158. 819 S.W.2d 466 (Tex. 1991).

159. Frank W. Elliott, *The Fractional Mineral Deed “Subject To” a Lease*, 36 TEX. L. REV. 620, 622 (1958).

160. 101 S.W.2d 1076 (Tex. Civ. App.—Texarkana 1936, writ ref’d). Prior to *Snow*, the *Tipps* case had been cited in only 6 cases. The only case that involved a multiple fraction and

minerals in and under. . . .”¹⁶¹ The subject-to clause stated that it “covers and includes one-half of all the oil royalty and gas rental . . . [and] one-half of the money rentals which may be paid to extend the term. . . .”¹⁶² The future lease clause provided that if the existing lease expired “an undivided one-half of the lease interests and all future rentals on said land for oil, gas and other mineral privileges shall be owned by the said Grantee . . . owning 1/16 of all oil, gas and other minerals in and under said lands, together with one-half interest in all future events.”¹⁶³ The granting clause and the final clause suggest that the grantee was to receive a 1/16 mineral interest while the subject-to and future lease clauses suggest that the grantee was to receive a 1/2 mineral interest.¹⁶⁴

The court only applied one canon of construction, namely that the intent of the parties is “to be gathered from the instrument as a whole. . . .”¹⁶⁵ The extant lease expired and the issue was whether the grantee received a 1/16 or a 1/2 interest.¹⁶⁶ The trial court had reformed the deed placing the fraction 1/2 wherever the fraction 1/16 was located.¹⁶⁷ The court of civil appeals agreed with the result but not the analysis.¹⁶⁸

The court mysteriously concluded that the granting clause of a 1/16 interest in *all* the minerals was in effect a grant of 1/2 of the 1/8th interest retained by the lessor after the lease.¹⁶⁹ As noted above, the lessor retained no mineral interest after a lease.¹⁷⁰ The lessor could not have transferred a possessory interest in the minerals while an outstanding lease on the premises existed. The lessor owned a royalty interest and economic benefits that burden the lessee’s 100 percent possessory estate. The lessor also owned a 100 percent interest in the possibility of reverter. But, the court did

did not follow the *Tipps* analysis was *Delta Drilling Co. v. Simmons*, 161 Tex. 122, 338 S.W.2d 143 (1960).

161. 101 S.W.2d at 1076.

162. *Id.*

163. *Id.* at 1076–77.

164. *See id.* at 1077–79.

165. *Id.* at 1078 (citing *Reynolds v. McMan Oil & Gas Co.*, 11 S.W.2d 778 (Tex. Comm’n App. 1928, holding approved)); *see also Sun Oil Co. v. Burns*, 125 Tex. 549, 84 S.W.2d 442 (1935) (utilizing the canon of construction followed in *Reynolds* and *Tipps*).

166. *See* 101 S.W.2d at 1078.

167. *Id.*

168. *See id.* at 1078–79.

169. *See id.*

170. *See supra* note 159 and accompanying text.

not want to ignore the express terms and fraction used in the granting clause.¹⁷¹

Moving on to the future lease clause, the court said that this was in effect a transfer of a fractional share of the possibility of reverter.¹⁷² Why the granting clause that transfers a mineral interest is not itself a transfer of the possibility of reverter is not discussed. The court then compounds the confusion by saying that the grantor intended to transfer 1/2 of the 7/8 possibility of reverter.¹⁷³ If one follows the court's own internal logic, maybe the result makes sense, but that requires one to treat the lessor as the owner of a present possessory 1/8 mineral estate after a lease. The result may be defensible given the mixed signals and the likelihood of confusion regarding what the landowner believed she owned while the minerals were under lease. It looks like the lessor wanted to transfer a 1/16 royalty under the existing lease as well as a 1/2 share of the other economic benefits, or as the trial court concluded, the lessor wanted to transfer a 1/2 mineral estate but was confused as to how to accomplish that transfer given the existence of a lease.¹⁷⁴

The *Tipps* approach is consistent with the canon that attempts to give effect to the instrument as a whole, but is inconsistent with the essence of what follows the execution of an oil and gas lease. *Tipps* was not widely followed in multiple fraction cases until it was resuscitated by the supreme court in *Snow*. In *Snow*, the granting clause conveyed a 1/16 mineral interest.¹⁷⁵ The subject-to clause provided that the grantee was to "receive 1/16 part of the oil, gas or other mineral . . . produced by the holder of the lease . . . , that grantors herein now intend to convey 1/2 of the interest they now have."¹⁷⁶ The future lease clause conveyed an "undivided 1/2 of all [the oil]."¹⁷⁷ An intention clause also stated that "in the event the lease now on said land is forfeited . . . the grantee . . . [is] to have and hold under this conveyance an equal undivided one-half of all such minerals."¹⁷⁸

171. See 101 S.W.2d at 1078–79.

172. See *id.* at 1078.

173. See *id.*

174. See *id.*

175. See *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466, 467 (Tex. 1991).

176. The supreme court opinion did not reproduce the subject-to clause since the existing lease had expired and was not at issue; it was reproduced by the court of appeals. *Snow v. Jupiter Oil Co.*, 802 S.W.2d 354, 356 (Tex. App.—Eastland 1990), *rev'd*, 819 S.W.2d 466 (Tex. 1991).

177. *Id.* at 356.

178. 819 S.W.2d at 468.

The conflict here is between the granting clause and the first part of the subject-to clause, and the other part of the subject-to clause, the future lease and intention clauses. Refusing to acknowledge the similarity between these clauses and those in *Alford* and *Garrett*, the majority rejected the application of the *Luckel* analysis. Justice Hecht, in his concurrence, stated:

I am puzzled, however, that the Court considers *Alford* . . . , inapplicable to this case. I fail to see a meaningful distinction between this case and *Alford*

If *Alford* and this case are not twins, there is certainly a strong resemblance between them. In *Luckel* and this case both, we depart from the rule stated in *Alford* and adopt the rule proposed in its dissent. The confusion left by the Court's failure to say so is unnecessary.¹⁷⁹

The *Snow* court, in contrast to *Luckel*, only mentioned one canon of construction, which was that the deed is to be read as a whole and all paragraphs must be reconciled to ascertain the intent of the party. This canon came from the *Tipps* opinion. However, the court falls into the same trap as *Garrett* of having to give some meaning to the granting clause that mentions a 1/16 interest. The court stated that the "deed immediately gave the grantee a 1/16 interest in the mineral estate."¹⁸⁰ It is clear that no present possessory estate, containing either the right to develop or the power to lease, could be immediately transferred by the grantor. The grantor could immediately transfer her share of the possibility of reverter, her share of the royalty reserved in the lease, and her share of the economic benefits. But, she cannot immediately transfer a present possessory 1/16th mineral estate. The court continued to follow *Tipps* and concluded that the future lease clause transferred 1/2 of the 7/8 possibility of reverter.¹⁸¹ This conclusion presumed that the grantor retained a 1/16 present possessory estate after the lease, otherwise the possibility of reverter would have been a 15/16 interest and 1/2 of that interest would have been a 15/32 mineral estate. To that 15/32 one would have to add the previously granted 1/16 so that the fraction conveyed should have been 17/32.

179. *Id.* at 469 (Hecht, J., concurring). It is also interesting to note that *Luckel* was a 5-4 decision, while all nine justices joined in *Snow*, with Justice Hecht concurring.

180. 819 S.W.2d at 468-69.

181. *Id.* at 469. If the court is saying that the future lease clause transfers at some later date the grantor's possibility of reverter, there is a Rule Against Perpetuities problem similar to that found in *Peveto v. Starkey*, 645 S.W.2d 770 (Tex. 1982).

Because *Snow* involved a typical multiple grant mineral deed, while *Luckel* involved a royalty deed, it is unclear whether a title opinion writer should follow the *Snow* or *Luckel* approaches when mineral deeds are involved. While the result in *Snow* is consistent with the result in *Garrett*, which gives preference to the future lease clause fraction, the approach cannot work if the fraction stated in the granting clause exceeds 1/8. *Snow* was also based on the false notion that a lessor retains a possessory mineral interest after a lease. For these reasons, caution should be used in relying on the *Snow* approach in dealing with these multiple fraction mineral deed cases.

IV. The “Big Picture” or General Intent Canons

A. “Intent of the Party Must Be Sought and Ascertained” Canon

While today this canon is generally considered to be a truism, as originally developed, this canon was a break from the prior rules and canons that tended to be intent defeating when they were applied.¹⁸² It is universally cited and is clearly not outcome determinative. The first clear expression and use of this canon was in *Smith v. Brown*.¹⁸³ In *Smith*, the court stated: “In construing a written instrument the lawful intent of the

182. This difference was noted by Professors Williams and Meyers. They stated:

The critics may see no difference between the technical rules of the old common law and the technical rules of modern law but age. We think there are differences and important ones. The common law rules defeated clear and obvious intent in almost every case. The modern rules . . . comport with the ordinary, reasonable meaning of the words selected by the conveyancer.

1 WILLIAMS & MEYERS, *supra* note 157, § 314; *see also* Herd, *supra* note 62, at 656–57 (describing the Williams & Meyers approach to deed construction as a plea to use common sense).

183. 66 Tex. 543, 1 S.W. 573 (1886). The *Smith* court cited *Hancock v. Butler*, 21 Tex. 804 (1858) as support for the use of the canon, but the language used in *Hancock* is not a clear statement of the “intent of the parties” canon. In *Berry v. Wright*, 14 Tex. 270, 273 (1855), the court said that minor errors in deed descriptions would not defeat the overall intent of the parties to convey an interest in land that was otherwise evident from the language contained in the deed. *See also* *Cravens v. White*, 73 Tex. 577, 579, 11 S.W. 543, 544 (1889) (holding that an exception of 120 acres in a conveyance was not void, although repugnant to another clause in the deed, because the intent to retain the 120 acres was clear from the language); *Faulk v. Dashiell*, 62 Tex. 642, 646 (1884) (discerning that the intent of a deed of trust encompassed consideration of the surrounding circumstances of the transaction, the position of the parties, and the granted property’s state).

parties must be looked to, and must govern.”¹⁸⁴ *Smith* also reflected a break from the “technical rules” of the conveyancer because the court admitted that a “technical conveyancer would probably have used apter words to express the idea.”¹⁸⁵ That idea or intent was for the grantee to take legal title, but solely as trustee for his children.

Shortly after *Smith*, the Texas Supreme Court held in *Witt v. Harlan*¹⁸⁶ that the court must not only ascertain the intent of the parties, but when so ascertained, that intent will control the interpretation of the written instrument. This concept of intent controlling the interpretation also constituted a break from the early rules of construction that gave controlling effect to the rules and were often intent defeating. For example, in *Cook v. Smith*,¹⁸⁷ the court was faced with determining whether a particular deed was merely a quitclaim or an effective conveyance of an interest in land. The court said:

The intention of the instrument is to be confined, of course, to that which its terms reveal; but . . . if, taken as a whole, it discloses a purpose to convey the property itself, as distinguished from the mere title of the grantor, such as it may be, it should be given the effect of a deed, although some of its characteristics may be those of a quit claim [sic] deed.¹⁸⁸

Thus, the court gave paramount weight to the purpose or intent of the parties as expressed in the entire instrument, even if there were conflicting signals that would otherwise detract from that “discovered” purpose.¹⁸⁹

The general intent canon is often combined with the four corners or harmonizing canons to describe the interpretive process. For example, the

184. 66 Tex. at 545, 1 S.W. at 574. The court also applied the harmonizing canon and looked at surrounding circumstances in interpreting the terms of the deed.

185. *Id.*

186. 66 Tex. 660, 662–63, 2 S.W. 41, 42 (1886). *Witt* involved an allegedly vague deed description.

187. 107 Tex. 119, 174 S.W. 1094 (1915).

188. *Id.* at 122, 174 S.W. at 1095.

189. From this early language, the canon of construction that intent prevails over arbitrary rules was developed. See *infra* part IV.B. It is sometimes said that the court must ascertain the intent of the parties “as of the time the instrument was executed.” *First Nat’l Bank in Dallas v. Kinnabrew*, 589 S.W.2d 137, 148 (Tex. Civ. App.—Tyler 1979, writ ref’d n.r.e.). This is another way of stating that evidence regarding the parties conduct after the deed is executed is immaterial unless the language is ambiguous. See also *Black v. Shell Oil Co.*, 397 S.W.2d 877, 887 (Tex. Civ. App.—Texarkana 1965, writ ref’d n.r.e.) (concluding that the intent of what the grantor conveyed or the grantee received was discernible from the deed itself because the deed was not ambiguous).

supreme court in *Luckel* stated: “The primary duty of a court when construing such a deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the ‘four corners’ rule.”¹⁹⁰ Likewise, the Texas Supreme Court has said: “The intention must be gathered primarily from a fair consideration of the whole instrument . . . and the construction given it should harmonize with the terms of the deed. . . .”¹⁹¹

Had this canon been followed in *Duhig v. Peavy-Moore Lumber Co.*,¹⁹² the *Duhig* rule might merely be the *Duhig* canon. The court of civil appeals in *Duhig* supported its finding that the grantee was to receive a 1/2 interest on the “apparent intention of the parties.”¹⁹³ Justice Smedley, in writing the *Duhig* opinion, candidly admitted that it was his personal view that the judgment should have been affirmed based on the court’s reading of the intent of the parties.¹⁹⁴ The supreme court majority, however, determined that the basis for finding the deed conveyed the 1/2 interest, notwithstanding the outstanding reserved interest, was a combination of estoppel by deed and the doctrine of after-acquired title.¹⁹⁵ Thus was born the *Duhig* rule, which may be intention defeating in certain cases and where the results are preordained should the rule be held applicable.

The “intent of the parties must be ascertained” canon has also been used in lease interpretation cases. For example, in *Sun Oil Co. v. Burns*,¹⁹⁶ the court, in giving effect to a Mother Hubbard clause in a lease, stated that “we must seek to ascertain from the instrument the true intention of the parties.

190. *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991). It was not surprising that a similar statement was made by the court in *Alford v. Krum*, 671 S.W.2d 870, 872 (Tex. 1984).

191. *Fleming v. Ashcroft*, 142 Tex. 41, 49, 175 S.W.2d 401, 406 (1943) (quoting the court of civil appeals case at 168 S.W.2d at 304); *see also* *Citizens Nat’l Bank in Abilene v. Texas & Pac. Ry.*, 136 Tex. 333, 338, 150 S.W.2d 1003, 1006 (1941) (construing the intent of a contract from the language of the contract as a whole), *cert. denied*, 314 U.S. 656 (1941); *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 580–81, 136 S.W.2d 800, 804 (1940) (holding that the absence of a comma and misspelling of “minerals” in the reservation clause at a deed did not preclude the grantor from reserving 1/2 interest in oil and gas); *Rio Bravo Oil v. Weed*, 121 Tex. 427, 443–46, 50 S.W.2d 1080, 1087–88 (1932) (interpreting a partition deed to include the partitioning of a railroad right of way running across the conveyed land even though not expressly mentioned in the deed), *cert. denied*, 288 U.S. 603 (1933).

192. 135 Tex. 503, 144 S.W.2d 878 (1940).

193. *Id.* at 506, 144 S.W.2d at 879.

194. *Id.* at 506–07, 144 S.W.2d at 879–80.

195. *Id.*

196. 125 Tex. 549, 84 S.W.2d 442 (1935).

This is the object of all rules of interpretation or construction. ‘The ultimate purpose in construing a deed is to ascertain the intention of the grantor.’¹⁹⁷ The *Burns* decision also embraced the “intent when ascertained must control” canon.¹⁹⁸ Whether it is used alone or in conjunction with other general canons, the “ascertain the intent of the parties” canon is now firmly entrenched as the polestar for judicial construction of written instruments, including deeds and/or leases.¹⁹⁹

1. “Intent as Expressed Controls” Canon

While courts universally state that they are seeking to ascertain the intent of the parties in deed interpretation cases, this particular canon reflects what the courts are really doing. In an early contract interpretation case, the canon was expressed as follows: “The intention is to be ascertained as expressed by the language used, and not the intention which may have existed in the [maker’s] minds . . . , but is not expressed by their language.”²⁰⁰

197. *Id.* at 552, 84 S.W.2d at 443 (quoting *Gibbs v. Barkley*, 242 S.W. 462, 464 (Tex. Comm’n App. 1922, judgm’t adopted)).

198. *See infra* part IV.B.

199. *See generally* *Garrett v. Dils Co.*, 157 Tex. 92, 94–95, 299 S.W.2d 904, 906 (1957) (considering all parts of an instrument in determining the intent of the parties); *Harris v. Windsor*, 156 Tex. 324, 326–28, 294 S.W.2d 798, 799–800 (1956) (ascertaining the intent of the grantor by considering all parts of a deed to conclude that a reservation clause meant a reservation of 3/8 in 1/2 interest of oil, gas, and minerals); *Germany v. Turner*, 132 Tex. 491, 497–98, 123 S.W.2d 874, 877 (1939) (considering all parts of a deed in determining that the grantor intended to convey title to 20-1/3 acres of land rather than grantor’s undivided 1/2 interest); *Klein v. Humble Oil & Ref. Co.*, 126 Tex. 450, 454–55, 86 S.W.2d 1077, 1079 (1935) (giving effect to the intent of the parties in a series of different instruments with respect to a 1/8 mineral reservation); *Vogel v. Allen*, 118 Tex. 196, 200, 13 S.W.2d 340, 342 (1929) (“[E]very part of a deed should be harmonized and given effect to, if this can be done; but if it is found that there is in the instrument inherent conflict of intentions, then the main intention, the object of the grant being considered, shall have controlling influence.”); *Pugh v. Mays*, 60 Tex. 191 (1883) (applying the rule that every part of a deed should be harmonized and given effect if possible, to construe the contract of the parties when deeds were exchanged).

200. *Slavens v. James*, 229 S.W. 317, 318 (Tex. Comm’n App. 1921, judgm’t adopted); *see also* *Cook v. Smith*, 107 Tex. 119, 123–24, 174 S.W. 1094, 1095 (1915) (holding that the use of the term “quitclaim” in a deed does not make the instrument a quitclaim deed when the terms of the instrument considered as a whole reveal an intention to convey property itself rather than mere title to property); *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corp.*, 228 S.W. 114 (Tex. Comm’n App. 1921, judgm’t adopted) (“The intention sought is not the secret unexpressed intention of one or of all the parties, but the intention which finds expression in the language used.”). In more recent times, the courts

The canon has its origin in a contract case involving an agreement whereby one party was to confess judgment in a pending case, if in another case one of the parties “recovered.”²⁰¹ Whatever the parties may have “actually” intended, their use of the term “recover” governed and was enforced even where the other suit was never tried on the merits, but was decided on a plea of abatement.²⁰² The contracting parties could have made the confession of judgment contingent on a decision on the merits of the other case, but they did not include that intention in the written contract.²⁰³

In a series of cases, courts have used this canon in combination with the intent prevails canon. For example, in *Bumpass v. Bond*,²⁰⁴ the court said: “The dominant purpose in construing a deed is to ascertain the intention of the parties as expressed in the deed itself; and such intention expressed

have defined the canon as follows: “The rights of the parties are governed by the language used and the choice of words is of controlling importance.” *Large v. T. Mayfield, Inc.*, 646 S.W.2d 292, 293 (Tex. App.—Eastland 1983, writ ref’d n.r.e.) (surface/mineral reservation).

201. *Heirs of Watrous v. Mekie*, 54 Tex. 65, 66–67 (1880).

202. *See id.* at 71.

203. *See id.*; *see also* *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corp.*, 228 S.W. 114, 116 (Tex. Comm’n App. 1921, judgment adopted) (citing *Heirs of Watrous v. Mekie*, 54 Tex. 65, 71 (1880)). The court also dealt with the conundrum of admitting surrounding circumstances to determine the intent of the parties even though it was the intent as written that the courts were seeking. *See* 54 Tex. at 70; *supra* part II.B; *see also* *Chandler v. Hartt*, 467 S.W.2d 629, 634 (Tex. Civ. App.—Tyler 1971, writ ref’d n.r.e.) (basing decision on a study of the deed itself and all surrounding facts and circumstances); *Peterson v. Barron*, 401 S.W.2d 680 (Tex. Civ. App.—Dallas 1966, no writ) (holding that extrinsic evidence was not appropriate to alter plain and unambiguous terms of easement deed); *Martin v. Snuggs*, 302 S.W.2d 676, 680 (Tex. Civ. App.—Fort Worth 1957, writ ref’d n.r.e.) (holding that when deed failed to express the actual agreement, it was subject to reformation); *First Nat’l Bank of Snyder v. Evans*, 169 S.W.2d 754, 756 (Tex. Civ. App.—Eastland 1943, writ ref’d) (holding that in construing a deed, it was proper to consider provisions of instruments executed contemporaneously); *Holloway’s Unknown Heirs v. Whatley*, 104 S.W.2d 646, 649 (Tex. Civ. App.—Beaumont 1937) (holding that intent to alter the legal meaning of “land” was not manifest in the deed), *aff’d*, 133 Tex. 608, 615, 131 S.W.2d 89, 92 (1939); *Wilson v. Humble Oil & Ref. Co.*, 82 S.W.2d 1095, 1096 (Tex. Civ. App.—Texarkana 1935, writ ref’d) (stating that the intent of the parties must be gleaned from the language of the instrument); *Amarillo Oil Co. v. McBride*, 67 S.W.2d 1098, 1101 (Tex. Civ. App.—Amarillo 1934, writ ref’d) (stating that any construction of a deed contrary to its plain language was immaterial). In *Whalley*, the court was aware of the harsh results that may accompany the use of this canon, especially when the court presumes that the parties knew the legal meanings of the words chosen, but relied on the policy of title stability to justify the result. 104 S.W.2d at 650.

204. 131 Tex. 266, 114 S.W.2d 1172 (1938); *see also* *Bass v. Harper*, 441 S.W.2d 825, 827 (Tex. 1969) (stating that the deed was presumed to express the intentions of the parties).

therein is a controlling factor.”²⁰⁵ The issue was whether a vendor’s lien attached to the entire undivided interest or merely to a fraction of that interest. In construing the various instruments involved, including the lien, the deed, and the note, the Texas Supreme Court concluded that the language used clearly evinced an intent to have the lien cover the full interest, even though the deed only warranted title to a fractional interest.²⁰⁶

This canon appears in a variety of contexts. It was cited in *Woods v. Sims*,²⁰⁷ a multiple fraction case involving a subject-to clause. There was apparently no dispute about the ambiguity of the language used, so the canon was not particularly useful in deciding how to interpret the deed in question.²⁰⁸ The same canon was cited, however, in *Alford*, even though the *Alford* court reached a different conclusion regarding the interpretation of a multiple fraction deed.²⁰⁹ In *Alford*, the supreme court recognized that the “intent as expressed” canon is a subset or modification of the “intent governs” canon when it said:

This rule [intent governs] of construction, however, must be modified with the restriction that it is not the intention that the parties may have had but failed to express in the instrument, but it is the intention that is expressed by said instrument. That is,

205. 131 Tex. at 271, 114 S.W.2d at 1174 (citing *Totton v. Smith*, 131 Tex. 219, 222, 113 S.W.2d 517, 518 (1938)). Sometimes, this canon is used as a justification for the exclusion of parol evidence or surrounding circumstances evidence. *See, e.g.*, *Davis v. George*, 104 Tex. 106, 110, 134 S.W. 326, 328 (1911) (“It is too well settled to admit of doubt that such a deed can not be collaterally attacked by the parties . . . by evidence tending to show an intention different from that which its language unmistakably expresses.”).

The real issue is whether the language of the deed “unmistakably expresses” an intent that can be divined by the court. In *Bumpass*, the Texas Supreme Court also used this canon to state that courts cannot rewrite instruments executed by the parties and cannot “thwart the intention of the parties expressed in a deed and other instruments.” 131 Tex. at 272, 114 S.W.2d at 1175.

206. *See* 131 Tex. at 273, 114 S.W.2d at 1175. The canon has also been used in a mineral/royalty dispute, in which a court concluded that the reserved interest was a mineral estate. *Buffalo Ranch Co. v. Thomason*, 727 S.W.2d 331, 334 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.).

207. 154 Tex. 59, 64, 273 S.W.2d 617, 620 (1954); *see also* *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 583, 136 S.W.2d 800, 805 (1940) (stating that when an instrument clearly discloses the intention of the parties, that intent is to be ascertained as a matter of law, without consideration of surrounding circumstances); *Williford v. Spies*, 530 S.W.2d 127, 130 (Tex. Civ. App.—Waco 1975, no writ) (holding that because the deed was not ambiguous, it was to be construed without reference to attending circumstances).

208. *See* 154 Tex. at 64, 273 S.W.2d at 620.

209. *See* *Alford v. Krum*, 671 S.W.2d 870, 874 (Tex. 1984).

the question is not what the parties meant to say, but the meaning of what they did say.²¹⁰

The canon has since reappeared in many post-*Alford* multiple fraction cases.²¹¹ Because the canon is also used by the supreme court in *Luckel*, its impact on the outcome of these cases is questionable.²¹²

Merely saying that the court is to carry out the intent of the parties as expressed in the deed does not necessarily require a court to validate a particular instrument that fails to properly identify the subject matter of the conveyance. For example, in *Harlan v. Vetter*,²¹³ the court applied the canon to first find that the instrument was an effective conveyance of title in a future interest. But, it also found that the instrument did not contain a sufficient description of the interests to be conveyed.²¹⁴ Thus, the court concluded that the grantor had not conveyed the mineral interests that he had owned at the time the instrument was executed.²¹⁵

A variation of this canon has been expressed as follows: “Each mineral deed must be construed from the language used in that particular deed.”²¹⁶

210. *Id.* at 872 (citing *Canter v. Lindsey*, 575 S.W.2d 331, 334 (Tex. Civ. App.—El Paso 1978, writ ref’d n.r.e.) and *Davis v. Andrews*, 361 S.W.2d 419, 423 (Tex. Civ. App.—Dallas 1962, writ ref’d n.r.e.); see also *First Nat’l Bank in Dallas v. Kinnabrew*, 589 S.W.2d 137, 148 (Tex. Civ. App.—Tyler 1979, writ ref’d n.r.e.) (applying “intent as expressed” canon to give effect to assignment of royalty interest); *First Nat’l Bank of Snyder v. Evans*, 169 S.W.2d 754, 756 (Tex. Civ. App.—Eastland 1943, writ ref’d) (applying “intent as expressed” canon to determine the nature of the conveyance under the deed).

211. See, e.g., *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991), *rev’g* 792 S.W.2d 485, 488 (Tex. App.—Houston [14th Dist.] 1990); *Snow v. Jupiter Oil Co.*, 819 S.W.2d 466, 468 (Tex. 1991), *rev’g* 802 S.W.2d 354, 356 (Tex. App.—Eastland 1990); *Prairie Producing Co. v. Schlacter*, 786 S.W.2d 409, 412 (Tex. App.—Texarkana 1990, writ denied); *Stag Sales Co. v. Flores*, 697 S.W.2d 493, 494 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.). In *Luckel*, the canon was cited by both the court of appeals and supreme court opinions even though they reached opposite results.

212. For other cases citing the canon, see *Buffalo Ranch Co. v. Thomason*, 727 S.W.2d 331 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.) (mineral/royalty reservation); *Harlan v. Vetter*, 732 S.W.2d 390 (Tex. App.—Eastland 1987, writ ref’d n.r.e.); *Smith v. Graham*, 705 S.W.2d 705 (Tex. App.—Texarkana 1985, writ ref’d n.r.e.) (mineral or working interest being conveyed); *Bentley v. Grewing*, 613 S.W.2d 49 (Tex. Civ. App.—Fort Worth 1981, writ ref’d n.r.e.) (overriding royalty interest reservation).

213. 732 S.W.2d 390, 393 (Tex. App.—Eastland 1987, writ ref’d n.r.e.).

214. *Id.* at 394.

215. *Id.* at 394–95.

216. *Kokernot v. Caldwell*, 231 S.W.2d 528, 532 (Tex. Civ. App.—Dallas 1950, writ ref’d); see also *Peveto v. Starkey*, 645 S.W.2d 770, 772 (Tex. 1982) (holding that language postponed the vesting of an interest until an uncertain future date); *Gibson v. Watson*, 315

This canon suggests that prior case law interpreting other mineral deeds is irrelevant unless the language of the deeds is identical. That undoubtedly overstates what should be the common sense approach to deed interpretation cases; namely, that similar clauses and language should be interpreted consistently so that persons who convey real property can be reasonably assured that the language they employ will lead to an intended result. As this article otherwise illustrates, using different canons in interpreting similar or identical language has led to different results. This uncertainty, which has undesirable societal impacts, merely adds to the “transaction costs” of dealing with property or mineral interests. Courts should seek a level of consistency while still adhering to the general canon that the parties’ intent as expressed should be the goal of the interpretational process.

2. “Ascertain the Intent of the Grantor” Canon

While most courts have applied the “intent of the parties” canon, a number of cases have applied, without explanation, the canon that the court is to seek the intent of the grantor in deed interpretation cases. For example, in *Kennedy v. Shipp*,²¹⁷ the court said: “The primary purpose in the construction of the deed is to arrive at the intention of the grantor.”²¹⁸

The origin of this canon appears to be *Gibbs v. Barkley*.²¹⁹ In *Gibbs*, the issue was whether a deed created a contingent remainder or an indefeasibly

S.W.2d 48, 53 (Tex. Civ. App.—Texarkana 1958, writ ref’d n.r.e.) (stating that the intention of the parties must be ascertained from the language contained in the deed).

This canon has been phrased as follows:

The court cannot make a new contract for the parties or base its decision on what it perceives to be the wisdom of the agreement. Neither can the court put into effect an intention which it believes the parties meant to express but which they failed to express. The contract must be enforced as written.

SMK Energy Corp. v. Westchester Gas Co., 705 S.W.2d 174, 176–77 (Tex. App.—Texarkana 1985, writ ref’d n.r.e.); *see also Hastings v. Pichinson* 370 S.W.2d 1, 5 (Tex. Civ. App.—San Antonio 1963, no writ) (construing leases to determine whether they had revived); *Texas Co. v. Parks*, 247 S.W.2d 179, 181–82 (Tex. Civ. App.—Fort Worth 1952, writ ref’d n.r.e.) (stating that the intent of the parties prevailed, declaring the lease terminated).

217. 135 S.W.2d 204 (Tex. Civ. App.—El Paso 1939, writ dism’d judgm’t cor.).

218. *Id.* at 208. The issue in *Kennedy* was the size of the grant where the grantor conveyed a 1/14 interest in land. *Id.* at 206. The court found that the conveyance was effective not only as to the grantor’s 1/14 surface estate but also as to his mineral estate, which was subject to an existing lease. *See id.* at 208.

219. 242 S.W. 462 (Tex. Comm’n App. 1922, judgm’t adopted). There appears to be some language in *Hancock v. Butler*, 21 Tex. 804, 806 (1858) which suggests that the court

vested remainder in the grantee's children.²²⁰ In answering that question, the court stated: "The ultimate purpose in construing a deed is to ascertain the intention of the grantor. When this intention is ascertained, that construction which carries the intention into effect, when such intention is lawful, governs and controls."²²¹ The court gives no explanation of why the intent of the grantor, rather than the intent of the parties, governs. That result can be partially explained by the fact that the conveyance appears to be a gift to the grantor's daughter and grandchildren.²²² Nonetheless, as a general proposition, the court should be concerned with the intent of the parties to the deed rather than seek to follow only the intent of the grantor.²²³

The Texas Supreme Court apparently rejected the application of this canon in *Smith v. Allison*.²²⁴ In the original opinion, the majority applied the "ascertain the intent of the grantor" canon to help it determine whether a Mother Hubbard clause included lands in a quarter section, which was otherwise not specifically described in the deed.²²⁵ In the opinion on motion for rehearing, however, the court stated the following:

should seek to ascertain and implement the intent of the grantor. However, *Gibbs* is the most oft-cited case for the ascertain the intent of the grantor canon.

220. *See id.* at 464.

221. *Id.*; *see also* *Robinson v. Glenn*, 150 Tex. 169, 172, 238 S.W.2d 169, 170 (1951) (holding that the grantor's intent was to convey a life estate); *Reeves v. Towery*, 621 S.W.2d 209, 212 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (holding that a deed did not reserve land for the grantor); *Kritser v. First Nat'l Bank of Amarillo*, 463 S.W.2d 751, 753 (Tex. Civ. App.—Beaumont 1971) (holding that the grantor's intent in a deed was to distribute the remainder interest to descendants of predeceased children), *writ ref'd per curiam*, 461 S.W.2d 408 (Tex. 1971); *Black v. Shell Oil Co.*, 397 S.W.2d 877, 887 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.) (holding that unambiguous mineral deed conveyed a 1/2 interest in minerals).

222. *See* 242 S.W. at 465.

223. For other cases citing this canon, *see* *Minchen v. Hirsch*, 295 S.W.2d 529, 533 (Tex. Civ. App.—Beaumont 1956, writ ref'd n.r.e.); *Alexander v. Byrd*, 114 S.W.2d 915, 916 (Tex. Civ. App.—El Paso 1938, writ ref'd); *W.T. Carter & Bros. v. Davis*, 88 S.W.2d 596, 599 (Tex. Civ. App.—Beaumont 1935, writ dism'd w.o.j.).

224. 157 Tex. 220, 301 S.W.2d 608 (1956). In *Rutherford v. Randal*, 593 S.W.2d 949 (Tex. 1980), a grantee unsuccessfully tried to use *Smith* to find a deed ambiguous when the language of the description clause seemingly referred to a larger fractional estate than that expressly stated in the granting clause. *Id.* at 952.

225. *See* 158 Tex. at 231, 301 S.W.2d at 616. The deed specifically described an undivided 1/2 mineral interest under the southeast and northwest 1/4 of section 124. The grantor also owned a mineral interest in the northeast 1/4 of section 124. *Id.* at 223, 301 S.W.2d at 610.

we have concluded that the correct rule to be followed in the construction of a deed passing from a seller to a buyer for a valuable consideration is rather that the intention of the *parties* is to be ascertained. This must be true because the deed purports to express a bilateral agreement. It is to evidence a meeting of the minds of both parties as to the property intended to be conveyed and paid for.²²⁶

Thus, with the possible exception of a gift deed, the court rejected the application of the “ascertain the intent of the grantor” canon.²²⁷

B. “Intent Prevails Over Canons/Rules” Canon

This canon has been recently expressed as follows: “[T]he intention of the parties, when ascertained, prevails over arbitrary rules of construction.”²²⁸ As so stated, the canon appears to be tautological. If the

226. *Id.* at 232, 301 S.W.2d at 616. The court cited *Superior Oil Co. v. Stanolind Oil & Gas Co.*, 150 Tex. 317, 240 S.W.2d 281 (1951); *Humble Oil & Ref. Co. v. Mullican*, 144 Tex. 609, 192 S.W.2d 770 (1946); *Humble Oil & Ref. Co. v. Ellison*, 134 Tex. 140, 132 S.W.2d 395 (1939); *Bumpass v. Bond*, 131 Tex. 266, 114 S.W.2d 1172 (1938); *Totton v. Smith*, 131 Tex. 219, 113 S.W.2d 517 (1938); *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S.W.2d 1080 (1932), *cert. denied*, 288 U.S. 603 (1933).

227. A number of post-*Smith* cases have applied the canon in both gift deed and non-gift deed situations. *Compare* *Kritser v. First Nat’l Bank of Amarillo*, 463 S.W.2d 751, 753 (Tex. Civ. App.—Beaumont 1971) (gift deed situation where the court held that the intent of the grantor controls), *writ ref’d per curiam*, 467 S.W.2d 408 (Tex. 1971) and *Newsom v. Newsom*, 378 S.W.2d 842, 844 (Tex. 1964) (holding that the proper construction of a deed is based on the intent of the parties) with *Black v. Shell Oil Co.*, 397 S.W.2d 877, 886 (Tex. Civ. App.—Texarkana 1965, writ ref’d n.r.e.) (holding that the construction which is most consistent with the intent of the grantor is the true one). There is some language in *Reeves v. Towery*, 621 S.W.2d 209, 212 (Tex. Civ. App.—Corpus Christi 1981, writ ref’d n.r.e.) that suggests the court was applying the “ascertain the intent of the grantor” canon in a non-gift deed situation. Yet, the court also recited the intent of the parties canon in its general discussion of applicable canons, suggesting that it was following the *Smith* holding. *Id.* at 214; *see also* *Atwood v. Rodman*, 355 S.W.2d 206, 213 (Tex. Civ. App.—El Paso 1962, writ ref’d n.r.e.) (holding that the intent of the parties should control, as it was consistent with the customs and usages of that area and time).

228. *Large v. T. Mayfield, Inc.*, 646 S.W.2d 292, 294 (Tex. App.—Eastland 1983, writ ref’d n.r.e.). The canon can also be stated so that the court should first attempt to ascertain the intent of the parties, and if that “ ‘does not banish all doubt concerning the conclusions to be drawn from such language and circumstances,’ then rules of construction may be resorted to, in aid of such ascertainment.” *Bryson v. Connecticut Gen. Life Ins. Co.*, 196 S.W.2d 532, 537 (Tex. Civ. App.—Austin 1946, writ ref’d). *Bryson* was a deed construction case relating to the creation of a life estate that followed the Restatement of Property approach to canons of construction. *See also* *Robinson v. Glenn*, 233 S.W.2d 214, 217 (Tex. Civ. App.—

intent of the parties is ascertainable, there should be no dispute as to the meaning of the terms in the instrument. Therefore, no constructional aids would be required. The canon also suggests that only rules of construction which are arbitrary are to be preempted, implying that rational rules or canons are not preempted.

Part of the confusion with the use of the canon reflects the loose use and interchange of the terms “canon” and “rule.” Because canons, if properly used, are aids in determining intent, it is disingenuous to state that intent prevails over canons. However, because rules of law are usually intent-destroying when applied, the canon might have some application when the court interprets the instrument to avoid running afoul of such a rule. An example would be when a court construes an instrument to create a vested rather than a contingent remainder in order to avoid having the contingent remainder voided because it would otherwise violate the rule against perpetuities. Unfortunately, the courts using this canon have not so limited its application.

One of the earliest uses of this canon occurred in *Benskin v. Barksdale*.²²⁹ The court defined the canon as follows: “When the intention of the parties can be plainly ascertained arbitrary rules are not to be resorted to.”²³⁰ The court never stated which arbitrary rules it avoided in its interpretation of an instrument that was being used to claim a shorter statute of limitations in order to adversely possess the title owner’s interest. The instrument was either a quitclaim of the grantor’s tenancy or a purported transfer of fee simple absolute, which at the time of the deed was owned by a third party.²³¹ After applying several canons, including the “intent prevails over arbitrary rules” canon, the court concluded that the parties intended to transfer more than a leasehold interest, therefore, a five year statute of limitations was applicable.²³²

Amarillo 1950) (holding that if the true intent of the testator can be determined, the technical rule is not applied), *aff’d*, 150 Tex. 169, 238 S.W.2d 169 (1951).

229. 246 S.W. 360 (Tex. Comm’n App. 1923, holding approved). Typical of the confusion regarding the use of canons, the Texas Digest suggests that *Smith v. Brown*, 66 Tex. 543, 1 S.W. 573 (1886) is the source for this canon. *Smith* actually used several canons to interpret a particular deed and followed the early rule that one could look at the surrounding circumstances in order to ascertain the intent of the parties. *Id.* at 545, 1 S.W. at 574. The court also applied the four corners rule and stated that “the whole deed should be taken together.” *Id.*

230. 246 S.W. at 363.

231. *Id.*

232. *Id.*

Because the court used several canons of construction and never identified the arbitrary rules it was ignoring, it is hard to discern why this canon was applicable. Use of the harmonizing canon probably would have been sufficient to justify the court's interpretation. Another problem with *Benskin* is that it cited, as its authority for use of this canon, three cases in which the canon was not expressly stated.²³³ In one case, the court used two canons to interpret a trust deed to avoid a result that would have defeated the obvious intent of the grantor to provide for certain beneficiaries during their lifetimes.²³⁴ The court applied the "intent of the grantor must prevail" and the harmonizing canons to define the term "lineal descendants" to defeat a claim by collateral beneficiaries that would eliminate some life estates.²³⁵ Nowhere in the opinion did the court suggest that intent prevails over canons or rules. In fact, the court used two canons to support its interpretation. The second case dealt more with the parol evidence rule and the requirements for valid delivery of a deed than it did with canons of construction.²³⁶ Essentially, a grantor sought to have parol evidence admitted to prove that he lacked intent in delivering two deeds, which on their face transferred two tracts of land to his incompetent wife.²³⁷ The court focused on the apparent lack of intent to make an effective delivery without mentioning the canon.²³⁸ Finally, in the third case, dealing with the effectiveness of an exception of a 120 acre tract out of a 190 acre tract, the court also did not mention the canon.²³⁹ The court in this last case did not actually use any canons to ascertain the intent of the parties, including the "intent controls over canons/rules" canon. The court merely read the language of the deed as evincing a clear intent to except the 120 acres so that the grantee could not have reasonably expected to receive that acreage.²⁴⁰

The "intent prevails over canons/rules" canon was probably used as a further break from the "rules" of construction that had dominated deed interpretation cases prior to the middle of the 18th Century. As with the four corners and harmonizing canons, this canon was used to avoid

233. *Id.* (citing *Parrish v. Mills*, 101 Tex. 276, 106 S.W. 882 (1908); *McCartney v. McCartney*, 93 Tex. 359, 55 S.W. 310 (1900); *Cravens v. White*, 73 Tex. 577, 11 S.W. 543 (1889)).

234. *See id.* at 282, 106 S.W. at 885.

235. *See id.* at 284, 106 S.W. at 886.

236. *See McCartney v. McCartney*, 93 Tex. 359, 55 S.W. 310 (1900).

237. *Id.* at 361, 55 S.W. at 310.

238. *See id.* at 359, 55 S.W. at 310.

239. *Cravens v. White*, 73 Tex. 577, 11 S.W. 543 (1889).

240. *Id.* at 579, 11 S.W. at 544.

applying intent-defeating rules, especially those rules that applied to deed descriptions. The canon was used, for example, in *Associated Oil Co. v. Hart*²⁴¹ to validate a reservation of a mineral estate when the grantee had urged that the reservation was “repugnant” to the grant and therefore void. The court said: “The strictness of the ancient rule as to repugnancy in deeds is now much relaxed, and the saner method is applied of permitting all parts of the instrument to stand where possible and to gather the intention of the parties from the whole instrument.”²⁴²

If understood to be a departure from the intent defeating rules of the ancient common law, the canon clearly served a positive function in Texas jurisprudence. However, its continued use long after the courts have abandoned those ancient rules tends to confuse, rather than clarify because the courts do not always expressly state which ancient, arbitrary, or unreasonable rule they are opting not to apply. Likewise, this canon causes confusion when courts define the canon as one where intent prevails over canons, rather than rules. As noted previously, canons are aids in determining intent. Intent is the polestar of any judicial interpretation of a written instrument. When intent is obvious on the face of the instrument, no resort to canons is justified.

While its origins may have been clouded, the canon has been endorsed by the Texas Supreme Court in *Harris v. Windsor*.²⁴³ *Harris* involved a *Duhig*-type problem.²⁴⁴ Windsor conveyed an interest to Harris that referred to an earlier Federal Land Bank (FLB) deed to Windsor in which the FLB reserved a 1/2 mineral interest. Windsor further reserved a 3/8 mineral interest. Harris claimed that *Duhig* was applicable and that he should have received a 5/8 mineral interest. The court distinguished *Duhig* by looking at the reference in the deed to the earlier FLB deed that was made “for all

241. 277 S.W. 1043 (Tex. 1925).

242. *Id.* at 1044; *see infra* parts V, VI (complete discussion of the four corners and harmonizing canons).

243. 156 Tex. 324, 294 S.W.2d 798 (1956); *see also* Citizens Nat'l Bank in Abilene v. Texas & Pac. Ry., 136 Tex. 333, 338–39, 150 S.W.2d 1003, 1006 (holding that arbitrary rules of construction will not be used by the courts when the intention of the parties is unambiguous), *cert. denied*, 314 U.S. 656 (1941); *Magnolia Petroleum Co. v. Connellee*, 11 S.W.2d 158, 15960 (Tex. 1928) (concluding that no rules of construction should be used where the language of a contract is clear and unambiguous); *Large v. T. Mayfield, Inc.*, 646 S.W.2d 292, 294 (Tex. Civ. App.—Eastland 1983, writ ref'd n.r.e.) (holding that the intention of the parties, when ascertained, prevails over arbitrary rules of construction).

244. 156 Tex. at 325, 294 S.W.2d at 800; *see Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940).

legal purposes.”²⁴⁵ Thus, the court concluded that the intent of the parties was clear, only a 1/8 mineral interest was to be conveyed to Harris.²⁴⁶ Although unnecessary to reach this result, the court made the following interesting statement:

We have long since relaxed the strictness of the ancient rules for the construction of deeds, and have established the rule for the construction of deeds as for the construction of all contracts, that the intention of the parties, when it can be ascertained from a consideration of all parts of the instrument, will be given effect when possible. That intention, when ascertained, prevails over arbitrary rules.²⁴⁷

This excerpt suggests the historical basis of the canon. But, because the court was trying to avoid the application of the *Duhig* rule, which was developed in 1940,²⁴⁸ the canon’s use is not so limited. Here, the use of the canon deflected the court from its more daunting task, limiting the application of *Duhig* even though the only difference in *Harris* was the existence of the reference to the prior deed that reserved the interest. Why the reference in the deed would defeat the *Duhig* rule, which itself was applied where the grantees had actual knowledge of the prior outstanding mineral interest, was left up in the air.

This canon has also been frequently used by courts to distinguish earlier decisions that might lead to a different result. For example, in *Garrett v. Dils Co.*,²⁴⁹ a classic multiple fraction case, the court cited *Harris* to support its conclusion that each of the described fractional interests were to be given their literal application.²⁵⁰ As the dissent noted in *Garrett*,²⁵¹ an earlier Texas Supreme Court decision interpreting a very similar deed had reached a contrary result.²⁵² While noting that the technical rules of construction were not to be used, the court used the four corners and

245. 156 Tex. at 329, 294 S.W.2d at 801.

246. *Id.* at 327, 294 S.W.2d at 800. A similar result was reached in *Remuda Oil Co. v. Wilson*, 264 S.W.2d 192 (Tex. Civ. App.—Galveston 1954, writ ref’d n.r.e.).

247. 156 Tex. at 328, 294 S.W.2d at 800 (citing *Benskin v. Barksdale*, 246 S.W. 360 (Tex. 1923); *Sun Oil Co. v. Burns*, 125 Tex. 549, 84 S.W.2d 442 (Tex. 1935)).

248. *See Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940).

249. 157 Tex. 92, 299 S.W.2d 904 (1957).

250. *Id.* at 94–95, 299 S.W.2d at 906.

251. *Id.* at 97, 299 S.W.2d at 906 (Norvell, J., dissenting).

252. *See Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563 (1945); *see also Porter v. Shaw*, 12 S.W.2d 595 (Tex. Civ. App.—Texarkana 1928, no writ) (applying the four corners canon in finding parol testimony immaterial).

harmonizing canons to support its interpretation that the future lease clause granted a 1/8 of 1/8 royalty and not a 1/64 of 1/8 royalty as had been stated in the granting clause.²⁵³

Similar use of the “intent prevails over canons/rules” canon was made by the court of appeals and then by the supreme court in *Luckel v. White*.²⁵⁴ It was used by the court of appeals to buttress its “suggestion” that *Alford v. Krum*²⁵⁵ should be overruled because the canon the *Alford* court applied to the multiple fraction/multiple grant deed issue was misused.²⁵⁶ This suggestion was accepted by the supreme court. Citing *Harris*, the supreme court stated: “That intention, when ascertained prevails over arbitrary rules.”²⁵⁷

This canon has also been used by the supreme court in *Jupiter Oil Co. v. Snow*.²⁵⁸ There the granting clause conveyed a 1/16 mineral interest while the future interest clause stated that the grantee was to receive a 1/2 mineral interest.²⁵⁹ Treating the future interest clause as a transfer of 1/2 of the mineral owner’s possibility of reverter, the supreme court reversed a court of appeals decision based in part on *Alford* and other canons of construction. The supreme court concluded: “the court of appeals . . . erred in resorting to rules of construction which are inapplicable absent clear conflict.”²⁶⁰ The court failed to mention that the *Alford* court treated similar inconsistent language as a clear repugnancy, requiring it to apply several canons to reach a different result. The cases cited for this proposition all used canons to reach their results.²⁶¹ Yet, it is unclear that there was a specific finding of a clear conflict in the language of the deed in any of these cited cases. As discussed earlier, *Snow* raised several questions, including the use of the “intent prevails canons/rules” canon, when at the

253. 157 Tex. at 95, 299 S.W.2d at 906.

254. 819 S.W.2d 459, 462 (Tex. 1991), *rev’g* 792 S.W.2d 485 (Tex. App.—Houston [14th Dist.] 1990).

255. 671 S.W.2d 870 (Tex. 1984).

256. *See* 792 S.W.2d at 489–91.

257. 819 S.W.2d at 462. For a more complete discussion of *Alford* and *Luckel*, see *supra* part III.

258. 819 S.W.2d 466 (Tex. 1991), *rev’g* 802 S.W.2d 354 (Tex. App.—Eastland 1990).

259. *Id.* at 468.

260. *Id.* at 469 (citing *Harris v. Windsor*, 156 Tex. 324, 328, 294 S.W.2d 798, 800 (1956); *Sun Oil Co. v. Burns*, 125 Tex. 549, 552, 84 S.W.2d 442, 445–56 (1935); *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 893 (Tex. 1986).

261. *See* 156 Tex. at 328, 294 S.W.2d at 800; 125 Tex. at 552, 555–58, 84 S.W.2d at 443–47; 717 S.W.2d at 893.

same time the supreme court was using several canons, including the harmonizing canon, to resolve similar issues in *Luckel*.²⁶²

Reference to the ancient rules of construction of deeds was also made in the earlier Texas Commission of Appeals opinion in *Sun Oil Co. v. Burns*.²⁶³ Again, the opinion cited other canons including “intent of the parties prevails” and the “intent is to be ascertained from the written instrument.”²⁶⁴ In fact, the court struggled with the various canons that deal with general and specific descriptions.²⁶⁵ The court was dealing with a “Mother Hubbard,” or “cover-all” clause in an oil and gas lease and had no difficulty finding that the lease included non-specifically described acreage owned by the lessor.²⁶⁶ The lease covered “any and all other land owned or claimed by lessor,” which the court found would include a non-described 3.736 acre tract.²⁶⁷

The strongest language used to describe the canon occurred in *Arnold v. Ashbel Smith Land Co.*²⁶⁸ The court said: “There being no ambiguity in the language of the contract, resort to rules of construction is not permissible.”²⁶⁹ While this strong language suggests that the court will not use other canons of construction, the *Arnold* court cited at least seven other canons to interpret a deed which reserved a “1/4 royalty in all oil, gas and other minerals in and under or hereafter produced from the above-described land.”²⁷⁰ Only after an extensive discussion of several canons did the court conclude that the plain language showed an intent to reserve a full 1/4 royalty interest, not a 1/4 of royalty interest.²⁷¹

The canon has also been used in “description” cases when one party has challenged, on any of a number of grounds, the legal adequacy of the

262. See 819 S.W.2d at 459, 461–62; see also *supra* text accompanying notes 158–81.

263. 125 Tex. 549, 552, 558, 84 S.W.2d 442, 443–47 (1935).

264. See *id.* at 552, 84 S.W.2d at 443.

265. See *id.* at 557, 84 S.W.2d at 446; see also *infra* part VI.B.2.(b–c) (discussing the “specific clauses prevail” and the “general versus particular language” canons). The Texas Commission of Appeals decided two other cases the same day dealing with descriptions in oil and gas leases. *Sun Oil Co. v. Bennett*, 125 Tex. 540, 84 S.W.2d 447 (1935); *Gulf Prod. Co. v. Spear*, 125 Tex. 530, 84 S.W.2d 452 (1935).

266. See 125 Tex. at 558, 84 S.W.2d at 447.

267. *Id.* at 551, 558, 84 S.W.2d at 443, 447.

268. 307 S.W.2d 818 (Tex. Civ. App.—Houston 1957, writ ref’d n.r.e.).

269. *Id.* at 824 (citing *Wood Motor Co. v. Nebel*, 150 Tex. 86, 93, 238 S.W.2d 181, 185 (1951) (involving an issue of contract interpretation)).

270. *Id.* at 820, 823–25.

271. See 307 S.W.2d at 820. For other cases citing this canon, see *Martin v. Snuggs*, 302 S.W.2d 676 (Tex. Civ. App.—Fort Worth 1957, writ ref’d n.r.e.); *Kennedy v. Shipp*, 135 S.W.2d 204, 208 (Tex. Civ. App.—El Paso 1939, writ dism’d).

description contained in the deed. The canon has been stated as the following: “Our duty is to effectuate the intention of the parties as far as possible, and disregard technical designations, or rules of construction, except as may be absolutely necessary in ascertaining the intention.”²⁷² The canon does have application in description situations because this area historically has been plagued by arbitrary rules for determining the meaning of terms used to describe the subject-matter of the grant or reservation.

The canon has been used in a number of different contexts. It has been cited in a case interpreting an instrument as a partition deed rather than merely an agreement to partition a mineral estate.²⁷³ In another case, the canon was used to interpret a deed to determine whether it conveyed an easement or a corporeal estate.²⁷⁴ Finally, the canon has been used to determine whether a correction deed, which failed to incorporate the mineral reservation contained in the first deed, controlled so as to eliminate the mineral reservation.²⁷⁵ The court found that the correction deed was merely intended to correct the erroneous descriptions contained in the original deed and did not cancel the reservation contained in the original deed.²⁷⁶

272. *Worley v. Empire Gas & Fuel Co.*, 129 Tex. 532, 537, 103 S.W.2d 368, 370 (1937). *Worley* is cited in *Lebow v. Weiner*, 454 S.W.2d 869, 874 (Tex. Civ. App.—Beaumont 1970, writ ref’d n.r.e.).

273. *See* 129 Tex. at 537, 103 S.W.2d at 370. The court also employed the four corners canon to resolve the constructional issue.

274. *See Shaw v. Williams*, 332 S.W.2d 797, 799 (Tex. Civ. App.—Eastland 1960, writ ref’d n.r.e.). The court also used the four corners canon of construction.

275. *See Parker v. McKinnon*, 353 S.W.2d 954, 956 (Tex. Civ. App.—Amarillo 1962, writ ref’d n.r.e.).

276. *Id.* In *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S.W.2d 1080 (1932), *cert. denied*, 288 U.S. 603 (1933), the court used this canon in a different context. The issue involved one of the adequacy of the legal description in the deed to pass title to the middle of an abutting street or highway. The court first stated that there was a legal presumption of an intent to convey title to the center of an abutting street line. *Id.* at 437–38, 50 S.W.2d at 1084. This presumption is in effect a canon of construction, sometimes called the “strip or gore” theory. *Id.* at 440, 50 S.W.2d at 1085. Earlier cases determined that broad social and public policy considerations favor this presumption. *Id.* at 437, 50 S.W.2d at 1084. But, as with other canons, the presumption should only be used where it is appropriate. The Texas Supreme Court has said:

We think the legal presumption is sustained by sound reasons when it is based upon the fact that valuable rights and privileges appurtenant to property should be presumed to pass in a conveyance thereof in the absence of a clear and unequivocal intention to the contrary. It is going a long way, however, when such presumption is given effect strictly upon considerations of public policy, based upon the strip or gore theory. . . . In construing an instrument involving

In general, this canon does not appear to be “outcome determinative.” Its inclusion in an opinion does not give rise to a prediction as to how a court will resolve the interpretational issue before it. The canon has been used in a variety of contexts without a degree of consistency that would allow any conclusions to be drawn from such use. With the possible exception of the times it is used to avoid applying other canons, such as in *Harris, Garrett* and *Luckel*, the canon does not appear to serve any specific function. It is a canon, however, that is supported by “common sense” and sound reason. Courts should not apply canons of construction until every attempt is made to read the instrument as written to see if a clear or plain meaning is evident. Obviously, in the context of litigation, rational arguments usually have been made to support conflicting interpretations. Nonetheless, a court should make every effort to avoid using canons until a careful scrutiny of the language and prior case interpretations of such language has been made. Finally, the canon is usually ignored because in almost all cases where it appears, the courts have used other canons to interpret the contested document.

C. The “Canon Prevails” Canon

To confirm Llewellyn’s thesis that for each canon there is an “equal and opposite” canon, the court in *Humble Oil & Refining Co. v. Kirkindall*,²⁷⁷ in resolving a dispute about the adequacy of a description, stated:

[t]he more sensible rule obtains, in all cases, to ascertain and give effect to the intention of the parties as gathered from the entire instrument, together with the surrounding circumstances, unless such intention is in conflict with some unbending canon of construction or settled rule of property, or is repugnant to the terms of the grant.²⁷⁸

This statement clearly suggests that canons, which may be in conflict with the intent of the parties, prevail. On appeal, the Texas Supreme Court

the conveyance of land, courts should be concerned more in arriving at and effectuating the true intention of the parties than in enforcing an arbitrary rule of construction based solely upon considerations of public policy.

Id. at 440, 50 S.W.2d at 1085.

277. 119 S.W.2d 731 (Tex. Civ. App.—Beaumont 1938), *aff’d*, 136 Tex. 103, 145 S.W.2d 1074 (1941).

278. *Id.* at 734.

affirmed the holding of the court of civil appeals, but did not use this “canon prevails” canon.²⁷⁹

The source of this canon is unclear.²⁸⁰ It has also been cited much less than its counterpart. As with its counterpart, this canon is not outcome-determinative and appears to have little influence on the court’s actual decision.²⁸¹ This canon probably should be discarded insofar as it deals with “unbending canons of construction.” Canons, as discussed earlier, are merely tools designed to assist a court in ascertaining the intent of the party rather than rules of law that may be used to defeat that intent. A canon is not like the Rule in Shelley’s Case or the Rule Against Perpetuities. Canons should never prevail over the language used in the instrument.

A related question is whether canons should be used before the court makes a determination that an instrument is ambiguous or unambiguous. In *Davis v. Andrews*,²⁸² the court interpreted a deed and a subsequent correction deed to determine whether a twenty year time limit contained in the warranty clause applied to the warranty or to the mineral estate being conveyed.²⁸³ The successors-in-interest to the grantors claimed that the language was ambiguous. The court disagreed, concluding that only after applying the appropriate canons of construction and then finding a “real uncertainty” about the meaning of the instrument, should parol evidence be admitted. In *Davis*, the court found no ambiguity after citing some eleven canons of construction in support of its conclusion that the twenty year limit only applied to the warranty and not to the nature of the interest conveyed.²⁸⁴

279. 136 Tex. at 108–10, 145 S.W.2d at 1076–77. The court did apply both the four corners canon and the parol evidence to ascertain the intent of the parties. *Id.* at 109–10, 145 S.W.2d at 1077.

280. The “canon prevails” canon is also cited, but apparently not used, in *Hedick v. Lone Star Steel Co.*, 277 S.W.2d 925, 928 (Tex. Civ. App.—Texarkana 1955, writ ref’d n.r.e.). Both *Hedick* and *Kirkindall* cited the first edition of *Texas Jurisprudence* for this canon.

281. For other cases citing the canon, see *Hudgins v. Lincoln Nat’l Life Ins. Co.*, 144 F. Supp. 192, 196 (E.D. Tex. 1956) (mineral/royalty reservation); *Dilbeck v. Bill Gaynier, Inc.*, 368 S.W.2d 804 (Tex. Civ. App.—Dallas 1963, writ ref’d n.r.e.) (trespass to try title suit involving a commercial zoning provision).

282. 361 S.W.2d 419 (Tex. Civ. App.—Dallas 1962, writ ref’d n.r.e.).

283. *Id.* at 20–21.

284. *Id.*

D. “Construe to Validate” Canon²⁸⁵

From an early date, Texas courts adopted the contractual canon that favors constructions that validate, rather than nullify, written instruments. Three early cases applied this canon in a variety of different circumstances.²⁸⁶ The earliest decision was *Cleveland v. Sims*.²⁸⁷ The issue, relating to the use of the canon, was whether a suit to quiet title should be dismissed due to a variance between the description contained in the deed and that contained in the petition. The court stated:

Under accepted maxims of the law, we must construe the deed, if possible, so that it may have effect; especially if, from other portions of it, the lot intended to be conveyed is clearly indicated.²⁸⁸

The validation canon was similarly used to validate a deed in *Curdy v. Stafford*²⁸⁹ and *Vineyard v. O'Connor*,²⁹⁰ which likewise had vague descriptions.

The basis for the rule was stated by the Texas Supreme Court in *Waters v. Ellis*,²⁹¹ when it said: “It is to be presumed that the parties intended to effect a conveyance and a construction affirming the validity of a deed will be adopted in preference to one which would nullify the instrument.”²⁹² Because people do not enter into transactions involving deeds or other

285. While not really a general intent canon, I have placed the “construe to validate” canon here because it reflects the intent of the parties to enter into a relationship which will have some legal effect. Obviously, parties do not execute deeds unless they believe they are conveying some interest in land.

286. See *Vineyard v. O'Connor*, 90 Tex. 59, 36 S.W. 424 (1896); *Curdy v. Stafford*, 88 Tex. 120, 30 S.W. 551 (1895); *Cleveland v. Sims*, 69 Tex. 153, 6 S.W. 634 (1887).

287. 69 Tex. 153, 6 S.W. 634 (1887).

288. *Id.* at 155, 6 S.W. at 635. In *Coker v. Roberts*, 71 Tex. 597, 9 S.W. 665 (1888), the validation canon was cited, but the court still found the description in the deed too vague to effectively pass title to the grantee. The court said: “It is true, . . . [that] every presumption should be indulged that some interest should pass; but when a deed between individuals is utterly devoid of any matter of identity whatever, . . . it must be held to be void.” *Id.* at 602, 9 S.W. at 667; see also *Kennedy v. Shipp*, 135 S.W.2d 204, 208 (Tex. Civ. App.—El Paso 1939, writ dismissed judgment corrected) (action to try title of a royalty interest).

289. 88 Tex. 120, 124, 30 S.W. 551, 552 (1895).

290. 90 Tex. 59, 63, 36 S.W. 424, 425 (1896).

291. 158 Tex. 342, 312 S.W.2d 231 (1958). The canon can be “shrunk down” so that sentences are interpreted to give them effect rather than choosing an interpretation which makes them “ineffective or meaningless.” *Hasty v. McKnight*, 460 S.W.2d 949, 953 (Tex. Civ. App.—Texarkana 1970, writ refused n.r.e.).

292. 158 Tex. at 347, 312 S.W.2d at 234.

written instruments without the intent to have the written instrument treated as an effective conveyance, this canon gives the court substantial flexibility to carry out that obvious intent.²⁹³

In addition to the problems with deed descriptions, the validation canon has been applied to interpret an instrument that had conflicting language as to whether it was a deed of conveyance or a deed of trust.²⁹⁴ In *Bailey v. Mullens*,²⁹⁵ the opening paragraph of a written form instrument referred to the instrument as a deed of trust.²⁹⁶ However, the remaining parts of the instrument clearly evinced an intent to effect a transfer of the property interest described in the instrument. The court applied the validation canon, among others, and found that it was an effective deed.²⁹⁷ The court also suggested another sub-species of the validation canon, namely that where

293. The following cases are all illustrative of the court finding a way to validate a vague description, even though earlier decisions might have found the instruments too vague to be enforced. *See* *Pan Am. Petroleum Co. v. Texas Pac. Coal & Oil Co.*, 340 S.W.2d 548, 553 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.) (mineral deed conveyance); *Heirs & Unknown Heirs of Barrow v. Champion Paper & Fibre Co.*, 327 S.W.2d 338, 341 (Tex. Civ. App.—Beaumont 1959, writ ref'd n.r.e.) (contract for sale); *Kuklies v. Reinert*, 256 S.W.2d 435, 442 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.) (royalty deed under unitization agreement); *Crumpton v. Scott*, 250 S.W.2d 953, 956 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.) (contract for sale and mineral deed); *Davis v. Field*, 222 S.W.2d 697, 699 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.) (mineral deed); *Rhoden v. Bergman*, 75 S.W.2d 993, 996-97 (Tex. Civ. App.—Beaumont 1934, writ ref'd) (description of survey in deed); *see also* *Lebow v. Weiner*, 454 S.W.2d 869, 874-75 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.) (action for specific performance of alleged contract to convey realty).

294. *See* *Bailey v. Mullens*, 313 S.W.2d 99, 102 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.).

295. 313 S.W.2d 99 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.).

296. *Id.* at 101.

297. *Id.* at 102-03. The court also cited the “construe against the grantor” canon and the four corners canon. The court placed great weight on the “construe the instrument as a whole” canon along with the validation canon. *See* *Vineyard v. O'Connor*, 90 Tex. 59, 63, 36 S.W. 424, 424-25 (1896) (an earlier case reaching a similar result); *see also* *Hedick v. Lone Star Steel Co.*, 277 S.W.2d 925, 929-31 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.) (trespass to try title suit for construction of deed); *Rhoden v. Bergman*, 75 S.W.2d 993 (Tex. Civ. App.—Beaumont 1934, writ ref'd) (suit contesting validity of survey of land for want of description). In *Clark v. Wisdom*, 403 S.W.2d 877, 883 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.), the court used the validation canon to find that a deed created a life estate and vested remainder, rather than a trust that would have excluded the named remaindermen from receiving any benefits.

there is a clause in the deed that is repugnant to, or destructive of, the validity of the deed, that clause can be ignored.²⁹⁸

This canon has also been used to deal with problems concerning the Rule Against Perpetuities. The difficulty with the application of a canon to the Rule is that the Rule by definition is an “intent-defeating” rule of property. Nonetheless, several decisions have applied the validation canon to avoid finding a Rule problem. For example, in *Bagby v. Bredthauer*,²⁹⁹ a future interest was saved from invalidation by application of the canon. The original grantor reserved a 1/16 royalty interest for a period of fifteen years and so long thereafter as oil and gas is produced in paying quantities. This would seemingly create in the grantee an executory interest that would violate the Rule, since it would not vest or fail to vest within a life in being plus 21 years.³⁰⁰ The court noted the difference between a rule and a canon, yet it nonetheless concluded that

[t]he interpretation of a written instrument . . . is ordinarily required for application of the rule. Where the instrument is capable of two constructions, one of which will give effect to the whole of the instrument, while the other would defeat it in whole or in part, preference is given to the construction that will uphold the instrument.³⁰¹

In theory, the court was correct. However, as the canon was applied in this case, the court was not merely construing the instrument, but creating a legal fiction in order to validate it. As written, there was nothing to construe. The deed saved, excepted, and reserved the defeasible term

298. 313 S.W.2d at 103; *see* *Waters v. Ellis*, 158 Tex. 342, 347, 312 S.W.2d 231, 234 (1958); *Coker v. Roberts*, 71 Tex. 597, 602, 9 S.W. 665, 667 (1888); *Hopkins v. Walters*, 224 S.W. 516, 519 (Tex. Civ. App.—Amarillo 1920, no writ); *Martin v. Rutherford*, 153 S.W. 156, 158 (Tex. Civ. App.—Fort Worth 1912, no writ); *see also infra* part VI.B (general discussion of the anti-harmonizing canon).

299. 627 S.W.2d 190, 194 (Tex. App.—Austin 1981, no writ).

300. Had the grantor retained the future interest and conveyed the defeasible fee royalty interest there would have been no Rule problem. The grantee would have received a fee simple determinable and the grantor would have retained a possibility of reverter, which is not subject to the Rule. *See id.* at 195; *see also* *State Nat'l Bank of Corpus Christi v. Morgan*, 135 Tex. 509, 519, 143 S.W.2d 757, 762 (1940) (allowing the admission of extrinsic evidence to determine whether payments were royalty or bonus payments and recognizing that a landowner may create a royalty interest by grant, reservation, or exception).

301. 627 S.W.2d at 194. For other applications of this principle to will construction cases, *see* *Rekdahl v. Long*, 417 S.W.2d 387, 389-91 (Tex. 1967); *Rust v. Rust*, 147 Tex. 181, 214 S.W.2d 462 (1948).

royalty interest. Because the future interest was in a party other than the grantor, that interest had to be an executory interest and the reserved interest had to be a fee simple subject to an executory limitation. Instead, the court applied the legal fiction that a reservation is really the transfer of the fee simple absolute to the grantee and a “re-grant” of the reserved interest back to the grantor.³⁰² That would make the original grantee a grantor of the present possessory estate and a reserver of the future interest in the form of a possibility of reverter. This result could have been reached by the use of two simultaneous deeds, but with the court’s application of the fiction and the canon, two deeds were not needed to avoid application of the Rule. To justify the result on the basis that the parties obviously intended the deed to be effective is to render the Rule Against Perpetuities meaningless. The validation canon may properly be used when the language is susceptible to more than one reasonable interpretation, but in *Bagby*, the language was susceptible of only one meaning.³⁰³

V. *The Four Corners Canon*

This general canon arose in the nineteenth century in response to the use of various arbitrary rules and canons that dominated the deed interpretation arena.³⁰⁴ In its purest form, and the form in which I shall be defining it, the canon merely means that the court must look at the entire instrument to ascertain the intent of the parties.³⁰⁵ This form departs from earlier rules and canons that tended to give preemptive weight to particular clauses,

302. 627 S.W.2d at 196.

303. *See id.* at 197. For arguments for and against the use of “savings” constructions in Rule cases, see the majority and dissenting opinions in *Rekdahl v. Long*, 417 S.W.2d 387 (Tex. 1967) (Steakley, J., Calvert, C.J., Greenhill, J., and Norvell, J., dissenting). *See also Kelly v. Womack*, 153 Tex. 371, 268 S.W.2d 903 (1954) (holding that an instrument equally open to two constructions will be rendered valid by one construction rather than void).

304. *See generally* 6A POWELL, *supra* note 7, § 901(1)(a) (discussion of the general focus today on determining the true intent of the grantor); 7 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 3136 (1962) (discussion of the progression of deed theories to the modern approaches now followed).

305. Tevis Herd treats the four corners canon and the “harmonization” canon as essentially the same. Herd, *supra* note 62, at 643. The “four corners” canon has been applied to validate a deed where the actual description was unclear, but where the parameters of the description could be ascertained from looking to the entire document. *See Davis v. Field*, 222 S.W.2d 697, 699 (Tex. Civ. App.—Fort Worth 1949, writ ref’d n.r.e.). Likewise, courts look to the entire language of a reservation in order to ascertain the meaning of the reservation. *Easley v. Brookline Trust Co.*, 256 S.W.2d 983, 987 (Tex. Civ. App.—Amarillo 1952, writ ref’d n.r.e.).

phrases or other individual parts of a deed. The “four corners” approach does not necessarily require the reader to “harmonize” all parts once read, but with the widespread adoption of the “harmonizing” canon, such has been the result. The four corners canon is infrequently used alone, but is often combined with other canons to assist the court in interpreting a deed. It is a canon that reflected a change in the court’s overall treatment of deed interpretation issues; however, once the canon became widely accepted as the norm, it lost its persuasive punch. This canon is frequently cited today, but rarely is it outcome determinative. The real battle in modern caselaw is between the harmonizing canon and those canons that tend to give preemptive weight to certain parts of deeds where “harmonizing” is not possible.

*Acklin v. Fuqua*³⁰⁶ exemplifies how the four corners canon is used, while remaining subordinate to other canons.³⁰⁷ The dispute was whether a deed conveyed a 1/8 royalty or a 1/8 mineral interest. The granting clause appeared to describe a royalty interest, but it was followed by a clause that clearly described a mineral interest. The court cited the four corners canon and used the canon to consider language indicative of describing a mineral interest. The court used several other canons to support the conclusion that the description of the interest as “all of the royalty” contained in the granting clause should not control the language describing the interest as a mineral estate.³⁰⁸

One of the earliest cases to apply a true four corners canon was *Cook v. Smith*.³⁰⁹ The *Cook* court tried to determine whether the instrument was a deed or merely a quitclaim of the grantor’s interests. The court stated:

306. 193 S.W.2d 297 (Tex. Civ. App.—Amarillo 1946, writ ref’d n.r.e.).

307. *See id.* at 300; *see also* *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818, 824–25 (Tex. Civ. App.—Houston [1st Dist.] 1957, writ ref’d n.r.e.) (referring to *Acklin* and its application of canons of construction).

308. *See* 193 S.W.2d at 299–300. The court applied the “unequal weight” canon and the “particular controls the general” canon to support its conclusion that a mineral estate was conveyed. *See id.*; *see also* *Fleming v. Ashcroft*, 142 Tex. 41, 48–49, 175 S.W.2d 401, 406 (1943) (holding that the intention of the deed is determined from the whole instrument and the terms of the deed should be harmonized); *Sun Oil Co. v. Burns*, 125 Tex. 549, 557, 84 S.W.2d 442, 446 (1935) (holding that the real intent of the deed is gathered from the general and the particular description).

309. 107 Tex. 119, 174 S.W. 1094 (1915). Although the “four corners” canon was used in *Roswurm v. Sinclair Prairie Oil Co.*, 181 S.W.2d 736, 743–44 (Tex. Civ. App.—Fort Worth 1944, writ ref’d w.o.m.) where the same issue was involved, the *Roswurm* court also cited the “construe against the grantor” canon. *Id.* at 743. Courts use the canon to find that an instrument was merely a contract for sale rather than a deed, even though conveying language was included. In *Continental Royalty Co. v. Marshall*, 239 S.W.2d 837, 840–41

The intention of the instrument is to be confined, of course, to that which its terms reveal; but it should be considered in its entirety, and if, taken as a whole, it discloses a purpose to convey the property itself, as distinguished from the mere title of the grantor, such as it may be, it should be given the effect of a deed. . . .³¹⁰

Many of the early cases combined the four corners and harmonizing canons.³¹¹ In *Bumpass v. Bond*³¹² the Texas Supreme Court distilled the “four corners” canon to a more “pure” form when the court stated: “It is the rule that the intention of the parties must be gathered from the entire instrument and not from some isolated clause or paragraph. The entire instrument must be construed as a whole in order to arrive at the intention of the parties.”³¹³ This canon requires the court to look not at isolated terms,

(Tex. Civ. App.—Texarkana 1951, no writ) the court looked at the instrument as a whole to discover the parties’ intent to prepare a later instrument that would constitute the actual conveyance. *See also* *Crumpton v. Scott*, 250 S.W.2d 953 (Tex. Civ. App.—Fort Worth 1952, writ ref’d n.r.e.) (discussing that a general description prevails over a particular description when the parties’ intent is determined to be general, and a particular description prevails when repugnance between a general and a particular description exists).

310. 107 Tex. at 120, 174 S.W. at 1095. For other early cases, see *Scheller v. Groesbeck*, 231 S.W. 1092 (Tex. Comm’n App. 1921, judgment adopted); *Stevens v. Galveston, H. & S.A. Ry.*, 212 S.W. 639 (Tex. Comm’n App. 1919, judgment adopted); *Martin v. Rutherford*, 153 S.W. 156 (Tex. Civ. App.—Fort Worth 1912, no writ); *Morse’s Heirs v. Williams*, 142 S.W. 1186 (Tex. Civ. App.—El Paso 1911, writ ref’d); *Lauchheimer v. Saunders*, 27 Tex. Civ. App. 484, 485, 655 S.W. 500, 501 (1901, no writ).

311. In the fountainhead of deed canon cases, the court in *Hancock v. Butler*, 21 Tex. 804, 806 (1858) announced: “The governing rule is that every part of the instrument should be harmonized and given effect to, if it can be done.” *See also* *Pugh v. Mays*, 60 Tex. 191, 193 (1883) (giving effect to the deed by harmonizing all the parts). In both *Hancock* and *Pugh*, the court limited the harmonization canon by admitting that conflicts could still exist. If the conflicts did exist, the court admitted that it would have resorted to other canons. By 1890, the Texas Supreme Court moved away from the harmonization canon to the four corners canon. In *Smith v. Westall*, 76 Tex. 509, 13 S.W. 540 (1890), the court said: “It is a general rule that a deed must be construed so as to give effect to all its parts, if it can be done.”

312. 131 Tex. 266, 114 S.W.2d 1172 (1938).

313. *Id.* at 271, 114 S.W.2d at 1174. In *Reynolds v. McMan Oil & Gas Co.*, 11 S.W.2d 778, 781 (Tex. Comm’n App. 1928, holding approved), the court stated: “In determining the legal effect of a deed, whether as to grant, exception, reservation, consideration or other feature, the inquiry is not determined alone from a single word, clause, or part but from every word, clause, or part that is pertinent.” *See also* *Gibbs v. Barkley*, 242 S.W. 462 (Tex. Comm’n App. 1922, holding approved) (holding that the grantor’s intent is obtained from the entire instrument, not an isolated paragraph). The four corners canon has been cited in a

phrases, and clauses, but to the “four corners” of the entire instrument before the court can ascertain the intent of the parties.

One use of the four corners canon has been in interpreting “Mother Hubbard” clauses. In *Holloway’s Unknown Heirs v. Whatley*,³¹⁴ the court attempted to determine whether a severed mineral estate owned by the grantor would be conveyed to the grantee when the “Mother Hubbard” clause only referred to “lands” owned by the grantor. The court predominantly used the “four corners” canon to ascertain that the grantor and grantee must have intended the term “lands” to refer to all property interests, including the severed mineral interest. Therefore, the court found that the grantee received the severed mineral estate.³¹⁵ The court rejected the older rule that specific descriptions control general descriptions in favor of the “four corners” canon.³¹⁶ Rather than looking solely at one part of the deed, the court examined the entire instrument to ascertain the intent of the parties.³¹⁷

Recognizing a break from the early use of technical rules, *Sun Oil Co. v. Burns*³¹⁸ utilized the “four corners” canon approach. The court, in trying to determine whether acreage was conveyed through the “Mother Hubbard” clause contained in the lease, applied the “four corners” canon.

case determining whether groundwater was included in a grant of minerals. *See Fleming Found. v. Texaco*, 337 S.W.2d 846, 850–51 (Tex. Civ. App.—Amarillo 1960, writ ref’d n.r.e.). The definition of the term minerals cannot be determined by the use of the four corners canon unless there was an express reference to groundwater elsewhere in the deed. *See id.*

314. 133 Tex. 608, 613–14, 131 S.W.2d 89, 91–92 (1939); *see also* *Citizens Nat’l Bank v. Texas & Pac. Ry.*, 150 S.W.2d 1003, 1006 (Tex.) (discussing well established rules of construction to be applied), *cert. denied*, 314 U.S. 656 (1941).

315. *See* 133 Tex. at 613–14, 131 S.W.2d at 91–92. The grantor urged that the specific description should control over the general description. The court rejected that argument and stated that “ ‘all parts of a deed shall be given effect if possible, . . . [t]he real intent must be gathered from the whole description, including the general, as well as the special.’ ” *Id.* at 614, 131 S.W.2d at 92 (quoting *Scheller v. Groesbeck*, 231 S.W. 1092, 1093 (Tex. Comm’n App. 1921, judgm’t adopted) (emphasis omitted)).

316. 133 Tex. at 614, 131 S.W.2d at 92.

317. *Id.*

318. 125 Tex. 549, 84 S.W.2d 442 (1935); *see also* *Rutherford v. Randal*, 593 S.W.2d 949, 953 (Tex. 1980) (limiting the determination of the grantor’s intent to the four corners of the deed); *Smith v. Liddell*, 367 S.W.2d 662, 666 (Tex. 1963) (construing the instrument to give effect to the parties’ intent by looking to the instrument alone); *McMahon v. Christmann*, 157 Tex. 403, 407–08, 303 S.W.2d 341, 344 (1957) (conflicting provisions regarding fractions did not render the lease ambiguous); *SMK Energy Corp. v. Westchester Gas Co.*, 705 S.W.2d 174, 176 (Tex. App.—Texarkana 1985, writ ref’d n.r.e.) (determining the parties’ intent by examining the lease as a whole).

[I]t is now well settled that all parts of the instrument will be given effect when possible, and the intention of the parties will be gathered from the whole without reference to matters of mere form, relative position of descriptions, technicalities or arbitrary rules. . . .

. . . .

. . . The intention of the instrument is to be confined, of course, to that which its terms reveal; but it should be considered in its entirety³¹⁹

Looking at the four corners of the instrument, the court concluded that the “Mother Hubbard” clause should be given effect to include non-specifically described acreage.

In *Watkins v. Slaughter*,³²⁰ the “four corners” canon was the only canon used by the court to resolve the constructional problem of whether the grantor reserved a 1/16 mineral interest or a 1/16 royalty interest. The initial sentence of the granting clause clearly indicated that a mineral interest was reserved, but later language referred to the reserved interest as a royalty interest. The court stated that “[t]he whole of the material part of the deed must be considered in order to ascertain its meaning.”³²¹ While the court was correct in looking at the entire granting clause, the court failed to clarify that the later language evinced an intent to convey a royalty interest rather than a stripped-down mineral estate.

On the contrary, in *Elick v. Champlin Petroleum Co.*,³²² the court used the “four corners” canon to find that the grantor had reserved a royalty and not a mineral interest. In *Elick*, the granting clause referred to a royalty interest, but later language reserved the executive power and the right to

319. 125 Tex. at 552–53, 84 S.W.2d at 444 (quoting *Cook v. Smith*, 107 Tex. 119, 122, 174 S.W. 1094, 1095 (1915)); see also *Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co.*, 340 S.W.2d 548 (Tex. Civ. App.—El Paso 1960, writ ref’d n.r.e.) (disregarding technicalities, the intent of the parties is obtained from the four corners of the deed).

320. 144 Tex. 179, 189 S.W.2d 699 (1945); see also *Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co.*, 340 S.W.2d 548, 553–54 (Tex. Civ. App.—El Paso 1960, writ ref’d n.r.e.); *Miller v. Speed*, 259 S.W.2d 235 (Tex. Civ. App.—Eastland 1952, no writ) (finding the deed reservation unambiguous).

321. 144 Tex. at 182, 189 S.W.2d at 700. While the court was correct in looking at the entire granting clause, the result in *Watkins* is probably inconsistent with the modern view that a grantor can transfer a mineral estate stripped of many of its component parts. See, e.g., *Altman v. Blake*, 712 S.W.2d 117 (Tex. 1986).

322. 697 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).

bonus. The results in *Watkins* and *Elick* are hard to reconcile. One involved a grant and the other involved a reservation; however, neither court used the construe the instrument against the scrivener canon. In both situations, the initial part of a granting clause indicated one type of interest while the later language indicated another.

The “four corners” canon can be used in cases when more than one instrument is involved, such as a situation when a prior contract for sale is incorporated by reference into the deed. By looking at all of the relevant language, the court of civil appeals, in *City of Stamford v. King*,³²³ found that the deed conveyed a fee simple absolute. In addition to the classic definition of the four corners canon, the *Stamford* court stated that “Each paragraph and clause of the contract must be construed with every other clause and paragraph therein.”³²⁴

Another variation of the four corners canon suggests that only in rare cases are parts of a deed to be treated as surplusage. In *Williams v. J. & C. Royalty Co.*,³²⁵ the court determined whether a reservation in an existing lease was a royalty interest or both a royalty interest and a mineral interest if the lease terminated. The court, in reading the reservation clause, stated:

We may not needlessly reject the wording placed in a written instrument by the parties thereto, nor delete a clause of a contract as surplusage unless judicially mandatory, but must ascertain the intention of the parties from the entire instrument by giving effect if possible to all the phrases and words therein contained.³²⁶

The use of the canon allowed the court to look at the language of the entire reservation. The language indicated that after the initial reference to a royalty interest, the reservation of a mineral estate existed.

The four corners canon has appeared in combination with the harmonizing canon in many recent cases. For example, in *Luckel* the supreme court stated: “The primary duty of a court, when construing such a

323. 144 S.W.2d 923 (Tex. Civ. App.—Eastland 1940, writ ref’d).

324. *Id.* at 927. For other cases applying this variation of the four corners canon, see *Germany v. Turner* 132 Tex. 491, 497, 123 S.W.2d 874, 877 (1939); *Gibbs v. Barkley*, 242 S.W. 462, 464 (Tex. Comm’n App. 1922, holding approved); *Bailey v. Mullens*, 313 S.W.2d 99, 102 (Tex. Civ. App.—San Antonio 1958, writ ref’d n.r.e.); *Tipps v. Bodine*, 101 S.W.2d 1076, 1078 (Tex. Civ. App.—Texarkana 1936, writ ref’d).

325. 254 S.W.2d 178, 179 (Tex. Civ. App.—San Antonio 1952, writ ref’d); *see also* *Minchen v. Hirsch*, 295 S.W.2d 529, 533 (Tex. Civ. App.—Beaumont 1956, writ ref’d n.r.e.) (explaining the analysis and holding in *Williams*).

326. 254 S.W.2d at 179.

deed, is to ascertain the intent of the parties from all of the language in the deed by a *fundamental* rule of construction known as the ‘four corners’ rule.”³²⁷ The court followed this canon with four other canons, including two versions of the harmonizing canon and some variations of the four corners canon. It should not be surprising to note that *Alford* also cited the four corners canon although the results were quite different.³²⁸ It is now *de rigueur* for most courts to lead off their laundry list of canons with some reference to the four corners canon.

The essence of the four corners canon was given in a lease case in which the court determined whether the royalty owner was entitled to payment for gasoline manufactured from production of casinghead gas.³²⁹ The court said:

In determining the legal effect of a deed, whether as to grant, exception, reservation, consideration, or other feature, the inquiry is not to be determined alone from a single word, clause, or part but from every word, clause, and part that is pertinent. The relative positions of the different parts of the instrument are not necessarily controlling; the modern and sounder reason being to ignore the technical distinctions between the various parts of the deed, and to seek the grantor’s intention from them all without undue preference to any, for the plain intention of the grantor as disclosed by the deed as a whole controls the construction. These rules are elementary.³³⁰

327. *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991) (emphasis added). For other recent cases using the four corners canon, see *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 896 (Tex. 1986) (Kilgarlin, J., dissenting on rehearing); *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986); *Peveto v. Starkey*, 645 S.W.2d 770, 772 (Tex. 1982); *Neel v. Alpar Resources, Inc.*, 797 S.W.2d 361, 363 (Tex. App.—Amarillo 1990, no writ); *Ray v. Truitt*, 751 S.W.2d 205, 207 (Tex. App.—El Paso 1988, no writ); *Harlan v. Vetter*, 732 S.W.2d 390, 392 (Tex. App.—Eastland 1987, writ ref’d n.r.e.); *Stag Sales Co. v. Flores*, 697 S.W.2d 493, 495 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.); *Elick v. Champlin Petroleum Co.*, 697 S.W.2d 1, 3 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.); *Mayfield v. de Benavides*, 693 S.W.2d 500, 503 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.).

328. *Alford v. Krum*, 671 S.W.2d 870, 872 (Tex. 1984).

329. *See Reynolds v. McMan Oil & Gas Co.*, 11 S.W.2d 778 (Tex. Comm’n App. 1928, holding approved).

330. *Id.* at 781.

*VI. To Harmonize or Not To Harmonize;
That is the Question*

As *Alford*, *Luckel*, and *Snow* illustrate, it is not always possible to give effect to all language in a deed without either preempting or ignoring other parts of a deed. The following section describes the basic harmonizing canon and its development from the earliest days of deed interpretation and the parallel development of exceptions to the harmonizing canon. Because both “harmonizing” and “anti-harmonizing” canons appear in the same case, it is only through the court’s result that practitioners can tell which canon the court applied. But as a general matter, courts take the position that they should initially attempt to harmonize the deed language within the four corners of the instrument. Only upon their inability to harmonize within the four corners, should the courts resort to anti-harmonizing canons.

A. The Harmonizing Canon

In *Hancock v. Butler*,³³¹ the fountainhead of deed construction cases in Texas, the court announced a rule that required a court to harmonize all parts of a written instrument. However, the court also recognized that it may not be possible to harmonize under all circumstances. According to the court:

The governing rule is, that every part of the instrument should be harmonized and given effect to, if it can be done. If that cannot be done, and it is found that the deed contains inherent conflict of intentions, then the main intention, the object of the grant being considered, shall prevail.³³²

331. 21 Tex. 804, 806 (1858).

332. *Id.* at 806. Another early formulation of the harmonizing canon was given in *Johnston v. McDonnell*, 37 Tex. 595, 601 (1872). The court construed a written instrument to determine if it was a gift deed. The court said:

In the construction of all instruments the intention of the parties must be carried out, when it can be done without doing violence to the plain import of the language used. And in arriving at the intent of the parties, the whole instrument must be consulted, and if, after a comparison of each clause with every other, one unambiguous, consistent, and legal conclusion is arrived at, that may be regarded as the intent and purpose of the parties, which must govern and control each clause when regarded separately.

Id. at 601. In *Johnston* the court found the instrument to be a gift deed, but a deed that was conditional on the donee using the property as her homestead. *Id.* at 602. Because the donee was not living on the land in question, the court concluded she was not entitled to the

This basic conundrum has led to many of the problems we see today in the multiple fraction area.

As with the four corners canon, the harmonizing canon was a break from many of the common-law rules that were intent defeating.³³³ *Associated Oil Co. v. Hart*³³⁴ illustrates this change from prior practice. In *Hart*, a grantor conveyed the surface estate, but reserved the minerals and a right of way easement. The court of civil appeals applied the common law repugnancy rule to invalidate the reservation of the minerals.³³⁵ The Commission of Appeals reversed, applying a combination four corners and harmonizing canon. The court said:

In construing a deed, like any other written instrument, the primary and all-important consideration is the intention of the parties as gathered from the instrument. . . . Even where different parts of the instrument appear to be uncertain, ambiguous, or contradictory, yet, if possible, the court will harmonize the parts and construe the instrument in such [a] way that all parts may stand, and will never strike down any portion except [where]

interest. *Id.* at 602–03; *see also* *Smith v. Westall*, 76 Tex. 509, 511, 13 S.W. 540, 540 (1890) (citing the *Hancock* court’s use of the harmonizing canon).

333. *See* *Herd*, *supra* note 62, at 643–47 (describing the background of the harmonizing and four corners canons); *see also* *Benskin v. Barksdale*, 246 S.W. 360, 363 (Tex. Comm’n App. 1923, holding approved) (holding that a lease did not grant merely a quitclaim interest when the granting clause conveyed all the lessor’s right, title, and interest in the premises, but the habendum clause was to the lessee, “his heirs and assigns forever”); *Cartwright v. Trueblood*, 90 Tex. 535, 537–38, 39 S.W. 930, 931 (1897) (finding the phrase “one-half” in a deed should have been disregarded as merely words of description, thus conveying all the land in the deed); *Risien v. Brown*, 73 Tex. 135, 141, 10 S.W. 661, 662 (1889) (determining that a clause granting exclusive riparian rights was without meaning if the clause was interpreted to only convey that interest which would be coincidental with ownership); *Smith v. Brown*, 66 Tex. 543, 545, 1 S.W. 573, 574 (1886) (holding that a grant to a grantee as an agent for his minor children should have been construed as creating a trust for the use and benefit of the children, because to do otherwise would have rendered the language restricting the rights of the grantee void); *Pugh v. Mays*, 60 Tex. 191, 193 (1883) (finding that where deeds in an exchange of land transaction contained provisions for the right of re-entry if ousted from possession, and also a covenant of general warranty, grantee had the right to choose between re-entry or reliance on the warranty); *Urquhart v. Burleson*, 6 Tex. 502, 511 (1851) (holding that both course and distance should have been disregarded when they were inconsistent with calls in a deed for natural or widely known artificial objects).

334. 277 S.W. 1043 (Tex. Comm’n App. 1925, holding approved).

335. 277 S.W. at 1043.

there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part.³³⁶

The court found the meaning of the reservation clear. The grantor did not intend to convey, and the grantee did not intend to receive, the mineral estate underlying the surface estate. Instead of applying the “repugnant to the grant” rule, the court harmonized both provisions and concluded that a deed can independently transfer the surface estate while reserving the mineral estate.³³⁷

The Texas Supreme Court uses the harmonizing canon in a variety of contexts. The use of the canon, however, does not mean that a court’s decision can be predicted with any degree of certainty. The multiple fraction cases exemplify uncertainty because the supreme court cited the harmonizing canon in both *Alford* and *Luckel*.³³⁸

Another example of inconsistent results is shown by comparing the court of civil appeals’ decision in *Duhig* and the Texas Supreme Court’s decision

336. 277 S.W. at 1044; *see also* *Cravens v. White*, 73 Tex. 577, 579, 11 S.W. 543, 544 (1889) (holding that an express exemption in a deed of a 120 acre parcel within a 190 acre tract was not so repugnant as to render the exception void).

Another formulation of the canon is as follows: “The intention must be gathered primarily from a fair consideration of the whole instrument, and the language employed therein, and the construction given it should harmonize with the terms of the deed, including its scope, subject-matter, and purpose.” *Fleming v. Ashcroft*, 142 Tex. 41, 49, 175 S.W.2d 401, 406 (1943); *see also* *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 583, 136 S.W.2d 800, 805 (1940) (using the harmonizing canon to hold that the preposition “on” did not limit a mineral reservation to those minerals on the surface); *Sun Oil Co. v. Burns*, 125 Tex. 549, 552, 84 S.W.2d 442, 444 (1935) (finding that a provision to lease described tracts, in addition to any and all other land in the applicable surveys, expanded the granting clause to include an adjoining tract); *Pitts v. Camp County*, 120 Tex. 549, 552, 39 S.W.2d 608, 616 (1931) (holding that land granted for use as a courthouse and other public buildings, under condition that the county seat not be removed, did not revert upon the abandonment of the lot as a courthouse so long as the county seat remained within the territorial limits of the city).

337. 277 S.W. at 1045. The concept of severing the mineral estate by reservation or exception had been approved only recently when *Hart* was decided. *See* *Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 255, 254 S.W. 296, 299 (1923); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 170, 254 S.W. 290, 293 (1923).

338. *See supra* part III (complete discussion of how the harmonizing canon has been used in multiple fraction cases); *see also* *Stag Sales Co. v. Flores*, 697 S.W.2d 493, 495 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.) (using the harmonizing canon to hold that when there was an irreconcilable conflict between the granting clause and a future lease clause, the granting clause prevailed).

in *Benge v. Scharbauer*.³³⁹ In *Duhig* and *Benge*, the courts were concerned with the fractional amount of the mineral estate conveyed while outstanding mineral interests existed. The court of civil appeals, in *Duhig*, combined the “four corners” and “harmonizing” canons. But the court relied principally on the “construe against the grantor” canon in finding that the parties intended to transfer the fractional interest that remained after subtracting the expressly reserved fractional interest.³⁴⁰ In *Duhig*, the deed reserved a 1/2 mineral interest. Consequently, the court interpreted the deed as intending to transfer a 1/2 mineral interest, notwithstanding the existence of an outstanding 1/2 mineral interest owned by a third party.³⁴¹

In *Benge*, a similar deed reserved a fractional mineral interest and specifically provided for the grantor to receive 3/8 of “all the bonuses, rentals and royalties.”³⁴² The grantor previously conveyed a 1/4 mineral interest to third parties. The court applied the *Duhig* rule to the mineral interest conveyance. Thus, the grantee was deemed the owner of a 5/8 mineral interest. However, the court then used the harmonizing canon to attempt to give effect to the specific language reserving a fractional share (3/8) of bonus, rentals and royalties.³⁴³ The *Benge* court did not find an

339. 152 Tex. 447, 259 S.W.2d 166 (1953); see *Peavy-Moore Lumber Co. v. Duhig*, 119 S.W.2d 688 (Tex. Civ. App.—Beaumont 1938), *aff'd on other grounds*, 135 Tex. 503, 144 S.W.2d 878 (1940); see also *Burns v. Audas*, 312 S.W.2d 417, 421 (Tex. Civ. App.—Eastland 1958, no writ) (holding that although the granting clause taken alone indicated the grantors attempted to convey an undivided 3/4 mineral interest, the intention of the grantors, each owners of a 2/12 interest, was to convey merely a 1/12 interest).

340. 119 S.W.2d at 690.

341. *Id.* The supreme court agreed with the result, but did not use canons of construction to determine the intent of the parties. Instead, the supreme court relied on an estoppel by deed theory to adopt a rule of law that would apply even if it was intent-defeating. 135 Tex. at 507, 144 S.W.2d at 879–80.

342. 152 Tex. at 452, 259 S.W.2d at 168.

343. *Id.* at 451, 259 S.W.2d at 167. The court said:

Even though different parts of the deed may appear to be contradictory and inconsistent with each other—if possible, the court must construe the language of the deed so as to give effect to all provisions thereof and will harmonize all provisions therein, and not strike down any part of the deed, unless there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part thereof.

Id.; see also *Fleming v. Ashcroft*, 142 Tex. 41, 49, 175 S.W.2d 401, 406 (1943) (finding that a fifteen year limitation in the deed was not repugnant to the use of the word “forever” in the habendum clause); *Hester v. Weaver*, 252 S.W.2d 214, 215 (Tex. Civ. App.—Eastland 1952, writ ref'd) (holding that a reservation of a 1/2 mineral interest was not void merely because it was not mentioned in the granting, habendum, or warranty clause).

irreconcilable conflict between the grantee receiving a 5/8 mineral estate and only a 3/8 share of the rents, royalties, and bonus. The court applied the general rule that the owner of a mineral interest is free to divide the interest into various component elements and either grant or reserve any or all of the elements in the same or different amounts.³⁴⁴ The court noted that, absent the specific clause, the grantor would only be entitled to 1/8 of the leasehold benefits.³⁴⁵ Choosing instead to harmonize, the *Benge* majority gave effect to the reference, notwithstanding the court's application of the *Duhig* rule, to the same fractional reservation of the mineral estate. The decision, in effect, followed the *Hoffman* approach of creating multiple fractional interests in a single deed. As noted earlier, the likelihood that the parties to a single deed expected to create two different interests, especially as in *Benge* where the fractions were the same, is reasonably remote.³⁴⁶

As the dissent pointed out, the real issue was whether the *Duhig* rule should apply to both the mineral interest and the separately mentioned component elements.³⁴⁷ If the practitioner follows the court of civil appeals intent-based analysis in *Duhig*, I believe the result in *Benge* would have been different. But because the *Duhig* rule, as adopted by the supreme court, is considered to be intent-defeating, the *Benge* court sought to avoid *Duhig*'s application. The court did so by engaging in a "legalistic" interpretation of the deed.³⁴⁸ Having avoided the application of the *Duhig* rule, the majority then concluded that the parties' expressed intention was to have the grantor receive 3/8 of the economic benefits under the existing lease. The parties expressed that same intention to the mineral estate, but the intention-defeating application of the *Duhig* rule only affected the mineral estate reservation. *Benge* and *Hoffman* are really twins. Rather than finding a conflict, the courts created multiple grants to give effect to language that describes at least two different quantities of estates.

The "harmonizing" canon has also been described as follows: "[a]ll provisions of the instrument will be given effect and construed in such way

344. 152 Tex. at 451, 259 S.W.2d at 168. At the time *Benge* was decided, *Schlittler v. Smith*, 128 Tex. 628, 631, 101 S.W.2d 543, 544 (1937) was the leading case authorizing such a division. The rule in *Schlittler* was reaffirmed in *Altman v. Blake*, 712 S.W.2d 117, 118-19 (Tex. 1986).

345. 152 Tex. at 453, 259 S.W.2d at 168.

346. See *supra* notes 70-74 and accompanying text.

347. See 152 Tex. at 456, 259 S.W.2d at 170 (Garwood, J., dissenting).

348. *Id.* Justice Garwood stated that "the proper approach to the instant case would seem to be, '[w]hat good reason do the respondent-grantors show to escape an otherwise ordinary equitable construction of their written instrument in a situation closely resembling that in the *Duhig* case?' " *Id.*

as to avoid inconsistencies and conflicts between them insofar as the language of the instrument, and the intention of the parties as disclosed thereby, will permit.”³⁴⁹ This formulation of the canon reflects how courts should proceed in interpreting a deed. Initially, the court should attempt to give effect to all provisions of the instrument. If, after a first reading, some provisions appear to conflict with others, an attempt should be made to construe those provisions to avoid any conflicts. This step should be taken in light of the intent of the parties as evidenced by the overall language contained in the instrument. Finally, the courts may use an anti-harmonizing canon when doubt still exists as to the proper construction of the deed.³⁵⁰

When the court tries to give effect to all parts of the deed, the court may harmonize the deed even though there may be no real conflict or inconsistency in the deed’s language. In *Coastal States Crude Gathering Co. v. Cummings*,³⁵¹ the court applied the harmonizing canon to construe two easement deeds. The issue was whether the deed authorized the dominant owner to build a second pipeline and expand the use of the servient estate. The court had no difficulty finding such a right because the deed referred both to the right to operate and to remove pipelines. The deed also contained a provision requiring the payment of additional monies should more than one pipeline be laid.³⁵² There was no conflict. The court was merely giving effect to the plain intent of the parties as expressed in several different provisions of the deed.³⁵³

349. *Bryan v. Thomas*, 359 S.W.2d 131, 133 (Tex. Civ. App.—Texarkana 1962), *aff’d on other grounds*, 365 S.W.2d 628 (Tex. 1963). It is interesting to note that the citation given for this quote is not to a deed case but to a Corpus Juris Secundum section on Contracts. 17 C.J.S. *Contract* § 309; *see also* *Neel v. Maurice*, 223 S.W.2d 690, 693 (Tex. Civ. App.—El Paso 1941, no writ) (holding that every provision of a deed must be given effect, if possible).

350. This was the approach taken by the court in *Bryan* as it interpreted a deed that had conflicting language regarding the fractional share of the mineral estate that had been conveyed. The court found that a 1/12 rather than a 1/96 mineral estate was conveyed, applying the “construe against the scrivener” and “greatest estate” canons, rather than trying to give effect to the language suggesting that only a 1/96 mineral interest was conveyed. 359 S.W.2d at 133–34; *see generally infra* part VI.B (complete discussion of when courts will find that the language cannot be harmonized).

351. 415 S.W.2d 240, 243 (Tex. Civ. App.—Waco 1967, writ ref’d n.r.e.).

352. While I state that the court had no difficulty interpreting the deed, the trial court found no right to use the easement for a second pipeline. *Id.* at 241.

353. *Hancock v. Butler*, 21 Tex. 804, 806 (1858) was cited to support the court’s application of the harmonizing rule. *See also* *Phillips Petroleum Co. v. Lovell*, 392 S.W.2d 748 (Tex. Civ. App.—Amarillo 1965, writ ref’d n.r.e.) (holding that a court has a duty to construe a deed pursuant to the intentions of the parties as spelled out in the deed); *Moore v.*

Courts have used the harmonizing canon to give effect to a variation of a “Mother Hubbard” clause. In *Holloway’s Unknown Heirs v. Whatley*,³⁵⁴ a grantor conveyed three specifically described tracts of land in Liberty County. The deed contained the following clause: “If there is any other land owned by me in Liberty County, Texas, or any land, the title to which stands in my name, it is hereby conveyed, the intention of this instrument being to convey all land owned by me in said County.”³⁵⁵ The grantor reserved a 1/2 mineral interest in three tracts in Liberty County in a prior conveyance. The court applied the harmonizing canon to defeat the grantor’s claim that the specific descriptions in the deed restricted the general description which followed. If the language of the deed is “agreeable,” it should be given effect. Had the grantor wanted to reserve his mineral interest, he obviously knew how to include the appropriate language in a deed, having done so with the first transfer. Here the court properly gave meaning to the “Mother Hubbard” clause that clearly evinced an intent to transfer all the grantor’s interests in Liberty County.³⁵⁶

There are some instances, however, when the harmonizing canon is cited and used with an anti-harmonizing canon. Such was the case in *Fleming v. Ashcroft*.³⁵⁷ The court interpreted a deed that created a fixed term royalty interest of 15 years, but which also made the deed subject to an existing lease that contained a standard habendum clause. The lease terminated, and the grantor re-leased to a third party. The supreme court used the harmonizing canon to find that the term royalty deed was a defeasible term deed, but only insofar as production was achieved under the lease in existence at the time of the conveyance.³⁵⁸ The court harmonized the fixed

Proctor, 234 S.W.2d 479, 483 (Tex. Civ. App.—Waco 1950, no writ) (holding that when construing a written instrument, every part of the instrument should be harmonized and given effect to, if possible).

354. 133 Tex. 608, 610, 131 S.W.2d 89, 90 (1939); *see also* *Smith v. Allison*, 157 Tex. 220, 227, 301 S.W.2d 608, 613 (Tex. 1956) (holding that a deed must be considered in its entirety to determine whether an ambiguity exists).

355. 133 Tex. at 610, 131 S.W.2d at 90 (emphasis omitted).

356. *See also* *Bumpass v. Bond*, 114 S.W.2d 1172, 1175 (Tex. 1938) (finding that after consideration of all parts of the deed, the intention of the parties to attach a lien to the entire interest in the land was clearly expressed); *Scheller v. Groesbeck*, 231 S.W. 1092, 1093 (Tex. Comm’n App. 1921; judgment adopted) (stating that “all parts of a deed shall be given effect if possible, and where there is a particular description followed by a general description the latter shall yield, though where it is possible the real intent must be gathered from the whole description”).

357. 142 Tex. 41, 175 S.W.2d 401 (1943).

358. *See id.* at 49, 175 S.W.2d at 406.

term limit and the subject to language to create a “limited” defeasible term interest.³⁵⁹ It did not find an intent, however, to create a “general” defeasible term interest even though there was some language in the deed which suggested that result. In rejecting that language, the court stated the following about the “harmonizing” canon: “This rule (of construction) does not demand that every part of the deed shall be treated as of equal weight in the solution of every question that may arise.”³⁶⁰ Thus, the *Fleming* court ignored certain language that detracted from the clear intent of the parties as perceived by the court. While the court appropriately applied the “anti-harmonizing” canon to the *Fleming* deed, this statement could be taken out of context. Potentially, courts could ignore certain deed language or apply an anti-harmonizing canon without making a substantial effort to harmonize. Nonetheless, courts must be given some flexibility when dealing with deed language that appears to detract from an otherwise clear intent expressed in the body of the instrument.

In many situations, the harmonizing canon is cited even though the court applies an anti-harmonizing canon, or another canon or rule to interpret a deed. For example, in *Averyt v. Grande, Inc.*,³⁶¹ the court cited the harmonizing canon and applied the *Hooks/King* rule as to the meaning of the words “lands described” or “lands conveyed.”³⁶² Because the court used a rule, rather than a canon, there was no need to apply the harmonizing canon. The rule required the court to reach a definite result unless it opted to overturn the rule.

The harmonizing canon is frequently cited along with the four corners canon.³⁶³ As a reflection of the “modern” approach, which attempts to

359. *See id.* at 48, 175 S.W.2d at 405–06.

360. *Id.* at 49, 175 S.W.2d at 406.

361. 717 S.W.2d 891, 893 (Tex. 1986); *see also* *Gex v. Texas Co.*, 337 S.W.2d 820, 824 (Tex. Civ. App.—Amarillo 1960, writ ref’d n.r.e.) (applying both the four corners and the greatest estate canons).

362. *See infra* part VIII (discussion of the *Hooks/King* rule).

363. *See, e.g.*, *Alford v. Krum*, 671 S.W.2d 870, 872 (Tex. 1984); *Cockrell v. Texas Gulf Sulphur Co.*, 157 Tex. 10, 17, 299 S.W.2d 672, 676 (1956); *Woods v. Sims*, 154 Tex. 59, 64, 273 S.W.2d 617, 620–21 (1954); *Watkins v. Slaughter*, 144 Tex. 179, 182, 189 S.W.2d 699, 700 (1945); *Ogletree v. Abrams*, 67 S.W.2d 227, 228 (Tex. Comm’n App. 1934, judgment adopted); *Enserch Exploration, Inc. v. Wimmer*, 718 S.W.2d 308, 310 (Tex. App.—Amarillo 1986, writ ref’d n.r.e.); *Smith v. Graham*, 705 S.W.2d 705, 706 (Tex. App.—Texarkana 1985, writ ref’d n.r.e.); *Elick v. Champlin Petroleum Co.*, 697 S.W.2d 1, 3 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.); *Phillips Petroleum Co. v. Lovell*, 392 S.W.2d 748, 759 (Tex. Civ. App.—Amarillo 1965, writ ref’d n.r.e.); *Gex v. Texas Co.*, 337 S.W.2d 820, 824 (Tex. Civ. App.—Amarillo 1960, writ ref’d n.r.e.); *Bailey v. Mullens*, 313 S.W.2d

avoid giving specified parts of a deed greater weight than other parts, it is quite appropriate. But the statement that a court is harmonizing, does not answer the more difficult questions that may arise in deed construction cases. Deeds may contain clauses that conflict with other clauses, or that muddy a court's attempt to discern the intent of the parties. In those situations, the harmonizing canon should instruct the court to harmonize and give effect to every part of the deed, but if that is too difficult, then an appropriate anti-harmonizing canon may be used to determine the intent of the parties.

B. The Anti-Harmonizing Canons

1. The Condition Precedent - Irreconcilable Conflict or Repugnancy

As noted in the harmonizing canon discussion, before a court applies an anti-harmonizing canon, it must first determine that the deed cannot be harmonized after a review of the four corners of the instrument. Once that finding is made, the court may choose from a long list of canons that will give controlling weight or preemptive authority to one part of the deed.³⁶⁴ Such was the clear intent of the court in *Hancock v. Butler*,³⁶⁵ the case which first pronounced the harmonizing canon. The court stated:

The governing rule is, that every part of the instrument should be harmonized and given effect to, if it can be done. If that cannot be done, and it is found that the deed contains inherent conflict of intentions, then the main intention, the object of the grant being considered, shall prevail.³⁶⁶

Thus, as a condition precedent to the use of an anti-harmonizing canon the court should make every effort to harmonize. The legal standard for using an anti-harmonizing canon, however, has not been clearly articulated.

99, 102 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.); *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818, 824–25 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.); *Hester v. Weaver*, 252 S.W.2d 214, 215 (Tex. Civ. App.—Eastland 1952, writ ref'd); *Acklin v. Fuqua*, 193 S.W.2d 297, 299 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.); *First Nat'l Bank of Snyder v. Evans*, 169 S.W.2d 754, 756 (Tex. Civ. App.—Eastland 1943, writ ref'd).

364. For example, once the court decided to use an anti-harmonizing canon, it could choose from several, including the “granting clause prevails,” “the granting and habendum clause prevails over recitals,” or a more generic unequal weight clause that allows the court to make an ad hoc decision as to which clause prevails. See *infra* part VI.B.2.

365. 21 Tex. 804, 806 (1858).

366. *Id.* at 806. See generally *Herd*, *supra* note 62, at 640–43 (discussing a line of cases dealing with resolving irreconcilable conflicts in grants).

For example, two articulated standards are “irreconcilable conflict” and “necessary repugnance.” But what constitutes such a conflict or repugnance is the subject of substantial disagreement. The *Alford/Luckel* disparate treatment of the multiple fraction deed is illustrative of that difficulty.

The Texas Supreme Court, in *Benge v. Scharbauer*,³⁶⁷ gave the following definition of when anti-harmonizing canons should be used:

All parts of the instrument must be given effect if possible to do so without violating any legal principles. Even though different parts of the deed may appear to be contradictory and inconsistent with each other - if possible, the court must construe the language of the deed so as to give effect to all provisions thereof and will harmonize all provisions therein, and not strike down any part of the deed, unless there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part thereof.³⁶⁸

This approach makes it difficult for the court to find that a conflict exists. It places a heavy burden on those seeking to have the court place greater weight on one part of a deed than another.

Any generalization concerning when courts find and do not find an irreconcilable conflict, is difficult to make. The supreme court has consistently used language, such as in *Benge*, to avoid applying anti-harmonizing canons. For example, in *Cockrell v. Texas Gulf Sulphur Co.*,³⁶⁹ the supreme court attempted to reconcile a deed that reserved royalty from a designated parcel. The existing lease covering the parcel contained an entirety clause so that the grantor received apportioned royalties prior to the conveyance. The deed was made subject to the existing lease. The grantee claimed that the grantor was not entitled to any royalty because production did not occur on the acreage that was conveyed. The court disagreed, giving effect to the deed’s subject-to clause. The court found that the subject-to clause incorporated the lease’s entirety clause into the royalty deed.³⁷⁰ Consequently, the deed entitled the grantor to royalties on an apportioned

367. 152 Tex. 447, 259 S.W.2d 166 (1953).

368. *Id.* at 451, 259 S.W.2d at 167, For other similar definitions, see *Watkins v. Slaughter*, 144 Tex. 179, 182, 189 S.W.2d 699, 700 (1945); *Fleming v. Ashcroft*, 142 Tex. 41, 48–49, 175 S.W.2d 401, 405–06 (1943); *Associated Oil Co. v. Hart*, 277 S.W. 1043 (Tex. Comm’n App. 1925, holding approved).

369. 157 Tex. 10, 15, 299 S.W.2d 672, 675, (1956).

370. *Id.* at 16, 299 S.W.2d at 676.

basis.³⁷¹ While the *Cockrell* decision gave effect to, and harmonized, all the language in the deed, I believe that the dissent is correct in concluding that the overall intent of the parties, as expressed in the instrument, was to only reserve the non-apportioned royalty under the acreage described in the deed.³⁷² Nonetheless, the *Cockrell* court construed the deed in a way that avoided a potential conflict by creating two grants. Apportioned royalties were reserved under the existing lease, but non-apportioned royalties were reserved under future leases. As with *Hoffman* and *Benge*, any interpretation that concludes that the parties intended multiple grants by reference to a boilerplate provision is somewhat suspect. Yet, the supreme court realized that conflicts can and do occur. In those cases, use of the appropriate anti-harmonizing canons will be necessary.

2. The Specific Canons

a) The “Unequal Weight” Canon

One generic anti-harmonizing canon that courts have applied is the unequal weight canon. Once a court fails in its attempt to harmonize, it need not give equal weight to all parts of the deed. To which part of the deed the courts give greater weight depends on the individual deed language.³⁷³

The origin of this canon again reflects the difficulties Texas courts have had in applying canons of construction. In *Moore v. City of Waco*,³⁷⁴ the issue was whether the grantor owned, by herself, either a life estate or a fee simple absolute, or whether she owned a fee simple absolute estate as a tenant in common with her children. The language between the habendum and granting clauses was inconsistent. Attempting to resolve the inconsistencies, the court cited the harmonizing canon and several anti-harmonizing canons. The *Moore* court first applied the unequal weight canon and ignored the habendum clause.³⁷⁵ This canon application supported the court’s conclusion that a fee simple absolute estate was

371. *Id.* at 19, 299 S.W.2d at 678. Justices Smith and Culver, in dissent, argued that the intent of the parties to the deed was clear: royalty was to be reserved for production from the described acreage and not from apportioned production under the lease. *Id.* at 21, 299 S.W.2d at 680.

372. *Id.* at 23–24, 299 S.W.2d at 680 (Smith, J., dissenting).

373. As discussed *infra* part VI.B.2.(b–e), many courts use specific anti-harmonizing canons such as the “granting clause prevails” or “the habendum clause can be ignored” after they have cited the unequal weight canon.

374. 85 Tex. 206, 210, 20 S.W. 61, 63 (1892).

375. *Id.* at 211, 20 S.W. at 63.

conveyed. As a result, the court gave the granting clause effect at the expense of the habendum clause.³⁷⁶

In *Fleming v. Ashcroft*,³⁷⁷ the Texas Supreme Court interpreted a royalty deed that contained several inconsistent phrases relating to the length of the interest granted. The supreme court stated: “This rule [harmonizing] (of construction) does not demand that every part of the deed shall be treated as of equal weight in the solution of every question that may arise.”³⁷⁸ Because the court did not find an irreconcilable conflict between the various clauses, the unequal weight canon was not required to determine which language would have prevailed.

Sometimes the courts use the unequal weight canon as a means of determining whether a conflict exists. In those cases, as part of its requirement to first harmonize, the court might eliminate the conflict by minimizing the impact of the clause that contains the inconsistent language. For example, in *Acklin v. Fuqua*,³⁷⁹ multiple fractions created inconsistencies and confusion regarding whether a mineral or royalty interest was transferred. The court used the canon to ignore the specific language that created the conflict.³⁸⁰ The grantees claimed that they received a 1/8 royalty interest, not a 1/8 mineral interest. The court used the “unequal weight” canon to discount language referring to “all the royalty”

376. *Id.* The court’s inconsistent use of these canons was reflected in the following excerpt:

The governing rule in the construction of written instruments is ‘that every part of the instrument should be harmonized and given effect to if it can be done. . . .’ But this rule does not demand that every part of the deed shall be treated as of equal weight in the solution of every question that may arise. ‘The *habendum* may be entirely rejected if repugnant to the other clauses of the conveyance.’ . . . ‘If, however, there is a clear repugnance between the nature of the estate granted and that limited in the *habendum*, the latter yields to the former; but, if they can be construed so as to stand together by limiting the estate . . . , the court always gives that construction in order to give effect to both.’

Id. Parts of this quote have been used in *Coastal Crude Gathering Co. v. Cummings*, 415 S.W.2d 240 (Tex. Civ. App.—Waco 1967, writ ref’d n.r.e.); *Moore v. Proctor*, 234 S.W.2d 479 (Tex. Civ. App.—Waco 1950, no writ).

377. 142 Tex. 41, 48, 175 S.W.2d 401, 405 (1943).

378. *Id.* at 49, 175 S.W.2d at 406.

379. 193 S.W.2d 297, 300 (Tex. Civ. App.—Amarillo 1946, writ ref’d n.r.e.).

380. *Id.* at 299. The granting clause conveyed “one-eighth of all the natural gas, oil, . . . being all the royalty in, on or under. . . .” There was also a subject-to clause that referred to an existing lease. *Id.*

and instead emphasized the language clearly granting a 1/8 mineral interest.³⁸¹

A minor variation of the unequal weight canon was expressed in the early case of *Cartwright v. Trueblood*.³⁸² The court stated that “it is not permissible to give controlling effect to that which creates an ambiguity, and destroys the certainty which is expressed by other language, and thus overthrow the clear and explicit intention of the parties.”³⁸³ This canon is tautological. If the intent of the parties is clear and explicit, it is unlikely that conflicting language would be contained in the deed. It does, however, reflect the common sense approach that if a court can define the clear intent of the parties, the court should not deviate from the parties’ intent merely because provisions exist that conflict with the overall intent.³⁸⁴

b) “Specific Clauses Prevail” Canons

The following cases applied canons that gave preemptive weight to one or more clauses. Because each deed potentially has a different combination of clauses in conflict, I have placed them within this general subsection. However, even within this subsection, no general agreement exists that under all circumstances certain designated clauses always prevail over other designated clauses. The following two cases illustrate this inconsistency.

First, in addition to applying the “specific clause” canon, the case of *Germany v. Turner*³⁸⁵ provides another good illustration of when an irreconcilable conflict or repugnancy exists. The issue in *Germany* was whether a deed conveyed the widow’s fractional interest or the entire interest of certain described realty.³⁸⁶ The court looked at the entire deed. The parties who claimed that a fractional interest was conveyed, argued that references in the deed to the widow as a “widow” and to “surviving children” evinced an intent to pass only that part of the realty the widow received as her share of the community property. In resolving the dispute in

381. *Id.* at 300.

382. 90 Tex. 535, 39 S.W. 930 (1897).

383. *Id.* at 539, 39 S.W. at 932. This quote was cited in *Alford v. Krum*, 671 S.W.2d 870, 873 (Tex. 1984).

384. Although not mentioned by name, this canon can be used to explain the result in *Robison v. Murrell*, 184 S.W.2d 529 (Tex. Civ. App.—Amarillo 1944, writ ref’d w.o.m.). See *infra* part VI.B.2.b (discussion of *Robison*).

385. 132 Tex. 491, 123 S.W.2d 874 (1939).

386. *Id.* at 495, 123 S.W.2d at 875–76. There were allegations that some of the children’s signatures had been forged. The court ultimately determined that a conveyance of the entire tract could be accomplished through the doctrines of equitable partition or after-acquired title. *Id.* at 498, 123 S.W.2d at 877.

favor of finding the instrument conveyed the widow's entire interest, the court stated:

While it is of course the duty of the Court to consider all parts of a deed, and if possible determine the intention of the grantors from a consideration of all its parts, giving effect to all parts if that can be done, yet it is not infrequent that a situation arises where it becomes necessary to resolve a conflict between certain portions of the deed.³⁸⁷

This is an appropriate standard that should be used in interpretational issues before applying a canon which favors one clause of a deed over another. In *Germany*, the court applied a canon that gave controlling weight to the granting, habendum, and warranty clauses over the premises and recitals clauses. The court, however, suggested that rather than using the anti-harmonizing canon, it merely read the premises clause as *descriptio personae*. In effect, the court treated the clause as surplusage. If treated as surplusage or merely repetitive of the names of the grantors, the language, in theory, is harmonized. In reality, if the language is treated as surplusage, it is being preempted by the other parts of the deed.

Second, the *Germany* holding may be contrasted with *Robison v. Murrell*.³⁸⁸ In *Robison*, the granting and habendum clauses evinced an intent to transfer a fee simple absolute estate. Other recitals, however, indicated an intent to convey a life estate.³⁸⁹ Because of the difficulty in reconciling the conveyance of a life estate and a fee simple absolute, the court appeared to use the *Germany* anti-harmonizing canon. However, instead of holding that the granting and habendum clause prevailed, the *Robison* court treated the specific language of the recitals clause as more indicative of the parties' intent.³⁹⁰ The *Robison* court tried to distinguish

387. *Id.* at 497, 123 S.W.2d at 877. The court cited *Kynerd v. Hulen*, 5 F.2d 160 (5th Cir.), *cert. denied*, 269 U.S. 560 (1925); *Moore v. City of Waco*, 85 Tex. 206, 20 S.W. 61 (1892) and *Burgess v. McCommas*, 29 S.W. 382 (Tex. Civ. App.—Dallas 1910, writ ref'd) to support the irreconcilable conflict standard. This quote was later cited in *Kokernot v. Caldwell*, 231 S.W.2d 528, 531 (Tex. Civ. App.—Dallas 1950, writ ref'd). *See also* *Gulf Oil Corp. v. Shell Oil Co.*, 410 S.W.2d 260 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.) (following the *Germany* approach).

388. 184 S.W.2d 529 (Tex. Civ. App.—Amarillo 1944, writ ref'd w.o.m.). *Robison* is discussed at length in *Herd*, *supra* note 62, at 643–45.

389. 184 S.W.2d at 530–31.

390. *Id.* at 531.

Germany by treating the “irreconcilable conflict” or “repugnancy” canon as an ancient rule of construction that courts no longer use.³⁹¹ The court said:

The trend for many years has been to get away from the strictness of the ancient rule as to repugnancy in deeds so that . . . it is now held that if clauses or parts of a deed appear to be conflicting or repugnant, the intention of the grantor will be gathered from the entire instrument, where that can be done, without regard to the relative values of the various conventional clauses.³⁹²

What this appears to say is that a court must make every reasonable effort to harmonize, and if a court can find an overriding intent located in the deed, it is not to apply one of the anti-harmonizing canons. I agree with the conclusion that courts should apply anti-harmonizing canons only after determining that a true conflict exists, and that no singular clause should be given greater weight merely because the clause has a particular label. Nonetheless, a court hides its head in the sand if it denies that it is giving preemptive authority to one part of the deed when a true conflict exists. When such a conflict exists, the harmonizing canon becomes irrelevant. The court’s choice is then based on which language best reflects the intent of the parties. The *Robison* court should have stated that a reading of the entire instrument evinced a clear intent to create a life estate, notwithstanding other language to the contrary. The court should have recognized that the instrument, by its own terms, destroyed the provisions of the deed which indicated that a fee simple absolute was to be conveyed.³⁹³

The *Robison* court, in effect, did not harmonize, but instead gave greater weight to, what the court believed, was the clear intent of the parties.³⁹⁴

391. *Id.* At one time the repugnancy canon was a rule of law, but certainly since the late nineteenth century most Texas courts have treated it as a canon which may or may not be applied. *Id.*

392. *Id.*

393. The court did express concern about destroying the expressed intent to create a life estate and defeating the intent of the grantor. *Id.*

394. In *Herd*, *supra* note 62, at 644–45 the author approves of the result in *Robison* as being more in tune with the harmonization canon. The court acknowledged the existence of the conflict between the life estate and fee simple absolute language. The court then chose the life estate option because it was more consistent with the overall tenor of the instrument. However, the court really did not harmonize, but actually looked at the four corners of the instrument. The court was really arguing that there was no irreconcilable conflict or

Substantially, the court rejected the second part of the anti-harmonizing canon used in *Germany*, the granting, habendum and warranty clauses prevail over general recitals. The resulting *Robison* decision is clearly inconsistent with *Germany*, but may be justified by the somewhat unique nature of the deed.³⁹⁵ *Robison* illustrates the uncertainty that arises by the court's application of discretionary standards in determining whether or not to apply harmonizing or anti-harmonizing canons.

In *Waters v. Ellis*,³⁹⁶ the court applied the "granting clause prevails" canon in a fairly unusual set of circumstances. Waters was the grantee of two separate deeds. Each deed conveyed a 1/4 mineral interest through the granting clauses. In each deed, however, an intention clause followed the granting clause and specified that the grantor owns a 3/4 mineral interest and the grantee owns a 1/4 mineral interest. The first deed had no conflict. But, in the second deed, the intention clause created an inconsistency with the second grant of a 1/4 mineral interest because the grantee would in toto own a 1/2 share.³⁹⁷ The court found a clear repugnance in the intention clause of the second deed because of the existence of the first deed. Consequently, the *Waters* court applied the "granting clause prevails" canon to give the grantee a 1/2 mineral interest.³⁹⁸

*Alford v. Krum*³⁹⁹ and its progeny are the leading modern examples of courts finding an irreconcilable conflict between clauses, and then applying several anti-harmonizing canons to interpret the deed.⁴⁰⁰ In resolving the

repugnancy. Given the deed's two clear signals, one to pass a fee simple absolute and one to pass a life estate, it would be disingenuous to claim that no true conflict existed.

395. A similar result to *Robison* was reached in *Smith v. Smith*, 305 S.W.2d 198, 200 (Tex. Civ. App.—El Paso 1957, writ ref'd n.r.e.).

396. 158 Tex. 342, 347, 312 S.W.2d 231, 234 (1958).

397. *Id.* at 345–46, 312 S.W.2d at 233. The supreme court did not treat the second deed as a correction deed because on the record before it there was no evidence that the deed had such a limited purpose. *Id.* at 346, 312 S.W.2d at 233. The court of appeals applied the harmonizing canon and found that the clear import of both deeds was to leave the grantor with a 3/4 mineral interest. *Ellis v. Waters*, 308 S.W.2d 169, 173 (Tex. Civ. App.—Amarillo 1957), *rev'd*, 158 Tex. 342, 312 S.W.2d 231 (1958).

398. *See* 158 Tex. 342, 312 S.W.2d 231; *see also* *Germany v. Turner*, 132 Tex. 491, 497, 123 S.W.2d 874, 877 (1939) (ruling that references in a deed to individual interests did not affect the intentions of the parties expressed in the granting clause); *Graham's Estate v. Stewart*, 15 S.W.2d 72, 76 (Tex. Civ. App.—Fort Worth 1929, writ ref'd) (construing a concluding clause in a deed as surety for rights that were not specifically given by the terms of the preceding clause).

399. 671 S.W.2d 870 (Tex. 1984); *see supra* part III (lengthy discussion of *Alford*).

400. *Alford* was cited as controlling in *Hawkins v. Texas Oil & Gas Corp.*, 724 S.W.2d 878, 886 (Tex. App.—Waco 1987, writ ref'd n.r.e.) and *Stag Sales Co. v. Flores*, 697

conflict between the granting, subject-to, and future lease clauses, the *Alford* court concluded that harmonizing would not work. It determined that an irreconcilable conflict existed in the disparate fractions, thus making the deed “impossible to harmonize.”⁴⁰¹ To resolve this conflict, the *Alford* court applied several different anti-harmonizing canons.

The first anti-harmonizing canons used was fairly general: “The court must give effect to the ‘controlling language’ of the deed and not allow ambiguities to ‘destroy the key expression of intent’ included within the deed’s terms.”⁴⁰² The controlling language canon merely instructs a court to determine which language prevails because the language cannot be harmonized. The canon itself, however, does not say what is the key expression of intent. As such, this canon should be discarded. However, the analytical process used in applying the anti-harmonizing canon should continue to be used.

In *Alford*, the court selected the “granting clause prevails” canon over all other canons to resolve the conflict. The court said:

The “controlling language” and the “key expression of intent” is to be found in the granting clause, as it defines the nature of the permanent mineral estate conveyed. . . . It logically follows that

S.W.2d 493, 494–95 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.). The Texas Supreme Court also applied the “granting clause prevails” canon used in *Alford*, in *Veltmann v. Damon*, 701 S.W.2d 247 (Tex. 1985).

401. 671 S.W.2d at 872. The court said: “We realize that irreconcilable conflicts do exist; therefore, when it is impossible to harmonize internally inconsistent expressions of intent, the court must give effect to the ‘controlling language’ of the deed.” *Id.*; see *Herd*, *supra* note 62, at 637–39 for a criticism of *Alford*. In *Etter v. Texaco, Inc.*, 371 S.W.2d 702, 705 (Tex. Civ. App.—Waco 1963, writ ref’d n.r.e.), the court refused to give controlling effect to the title of the deed and found that the body of the deed conveyed a mineral estate, notwithstanding the use of a royalty deed form.

402. 671 S.W.2d at 872 (citing *Texas Pac. Coal & Oil Co. v. Masterson*, 160 Tex. 548, 553, 334 S.W.2d 436, 439 (1960)). *Masterson* involved a conflict in the description clause of a deed which stated that the grantor was conveying “all the unsold portion containing 186.4 acres out of the 640 acres known as the Manuel Tigerino Survey.” 160 Tex. 551, 334 S.W.2d at 438. The issue was whether minerals located within the Tigerino Survey, but outside of the 186.4 acres, were included in the conveyance. The Texas Supreme Court concluded that the phrase “all the unsold portion” controlled the acreage phrase. *Id.* at 552, 334 S.W.2d at 439. The court also used the greatest estate canon to reach its conclusion. See *infra* part VII.D.

when there is an irreconcilable conflict between clauses of a deed, the granting clause prevails over all other provisions.⁴⁰³

The *Alford* court chose the “granting clause prevails” canon over several alternatives.⁴⁰⁴ As noted by Tevis Herd, the court had four options: (1) treat the deed as ambiguous and admit extrinsic evidence; (2) reform the deed upon a showing of mutual mistake; (3) apply the *Hoffman/Garrett* multiple grant approach; or (4) apply the “construe against the grantor/scrivener” canon.⁴⁰⁵ The court itself mentioned a fifth option: apply the canon that ignores language that creates ambiguity.⁴⁰⁶

This last canon was used to resolve a mineral/royalty issue in *Acklin v. Fuqua*.⁴⁰⁷ The court found that the language describing the conveyed interest as a mineral interest was clear and explicit and should not be affected by a later reference to the interest as a royalty interest.⁴⁰⁸

403. 671 S.W.2d at 872. The court cited *Lott v. Lott*, 370 S.W.2d 463, 465 (Tex. 1963); *Waters v. Ellis*, 158 Tex. 342, 347, 312 S.W.2d 231, 234 (1958) and *Kokernot v. Caldwell*, 231 S.W.2d 528, 531–32 (Tex. Civ. App.—Dallas 1950, writ ref’d) as applying the “granting clause prevails” canon. For other cases supporting this canon, see *Kynerd v. Hulén*, 5 F.2d 160 (5th Cir.), cert. denied, 269 U.S. 560 (1925); *McBride v. Hutson*, 157 Tex. 632, 306 S.W.2d 888, 894 (Tex. 1957); *Davis v. Andrews*, 361 S.W.2d 419, 425 (Tex. Civ. App.—Dallas 1962, writ ref’d n.r.e.); *Gibson v. Watson*, 315 S.W.2d 48, 54, 56 (Tex. Civ. App.—Texarkana 1958, writ ref’d n.r.e.); *Sebastian Indep. Sch. Dist. v. Ballenger*, 297 S.W.2d 238 (Tex. Civ. App.—San Antonio 1956, no writ); *Graham’s Estate v. Stewart*, 15 S.W.2d 72 (Tex. Civ. App.—Fort Worth 1929, writ ref’d).

In *Gibson*, a classic multiple fraction issue was resolved, in part, by using the “granting clause prevails” canon. The granting clause indicated that a 1/32 mineral interest was conveyed. Later clauses indicated that 1/32 royalty in the existing lease and a 1/4 mineral estate in the possibility of reverter was conveyed. 315 S.W.2d at 50–51. The court applied numerous canons, but emphasized the “rule of favoring the granting clause at the expense of later clauses which contain repugnant language.” *Id.* at 56.

404. See 671 S.W.2d at 873–74. In *Kokernot v. Caldwell*, 231 S.W.2d 528 (Tex. Civ. App.—Dallas 1950, writ ref’d), the court also applied the “granting clause prevails” canon after determining that an irreconcilable conflict existed because the deed at different points referred to the conveyed interest as a term for years and as a life of the lease interest. The court found that because the purpose of the granting clause is to define the estate being conveyed, the language of that clause which limits the estate to a 20 year term for years must be given controlling authority over later language denoting a longer estate.

405. Herd, *supra* note 62, at 650–56.

406. 671 S.W.2d at 873.

407. 193 S.W.2d 297 (Tex. Civ. App.—Amarillo 1946, writ ref’d n.r.e.).

408. *Id.* at 300. Several other canons were used in *Acklin* including the unequal weight canon, the “specific controls the general” canon and the harmonizing canon.

c) “General Versus Particular Language” Canon

While this canon has its origin, and its greatest use, in tract description situations, courts have applied it to general lease and deed terms. The “general versus particular language” canon is also an example of a canon or canons, which in its various forms, can be used to support diametrically opposed positions. The Texas Supreme Court reflects this conundrum by stating in *Gibson v. Watson*:

It is well settled law that ‘a general description may be looked to in aid of a particular description that is defective or doubtful, but will not control or override a particular description about which there can be no doubt.’ . . . ‘And, if a general and particular description are obviously intended to refer to the same land, and the two cannot be reconciled, the particular description is preferred to the more general.’⁴⁰⁹

The first part of this canon states that if a particular description is not in doubt, then the particular description will prevail over a general description. But if the particular description is in doubt, the general description is relevant. The second part of the canon requires that courts give the particular description preference when both descriptions refer to the same land and are irreconcilable. This application creates the same difficulty as the harmonizing canon and the repugnant canon. The court gives no guidelines as to when the descriptions can or cannot be reconciled. Therefore, a court’s choice of when to give preference to the specific or particular description may be inconsistently applied depending upon the court’s threshold determination of what is reconcilable.

The “general versus particular language” canon is another canon that has its origin in basic contract law. One of the earliest uses of the canon occurred in *Cullers v. Platt*.⁴¹⁰ *Cullers* was a classic description case in which a specific grant used metes and bounds descriptions and a more general grant encompassed a much larger area. The grantee argued that the more general language controlled. The court rejected the use of the general canon and instead stated: “The rule is that where there is a repugnance between a general and a particular description in a deed the latter will

409. 315 S.W.2d 48, 57 (Tex. Civ. App.—Texarkana 1958, writ ref’d n.r.e.).

410. 81 Tex. 258, 16 S.W. 1003 (1891). Some authorities have cited *Cromwell v. Holliday*, 34 Tex. 463 (1870) as the origin of this canon. *Cromwell* actually applied a different canon that allowed restrictive words in the latter part of a particular description to control the grant. 34 Tex. at 468.

control . . . , although, whenever it is possible, the real intent must be gathered from the whole description, including the general as well as the particular.”⁴¹¹ This statement requires a court to find a “repugnance” between the specific and the general terms before giving controlling weight to the specific clause. In addition, the court shall not easily find a repugnance, but must make every effort to ascertain the intent from the entire instrument. The *Cullers* court’s holding, however, makes short shrift of its statement that one must attempt a reconciliation of the general and the specific. When both a specific metes and bounds description and a general description of tracts exist, the metes and bounds description will control, and only the specifically described tracts will be conveyed.⁴¹²

*Hoffman v. Magnolia Petroleum*⁴¹³ further expanded this canon to cover more than descriptions. In *Hoffman*, the court stated that the specific and restricted intent of the parties controlled over the general intent, but added that the court must attempt to have the entire instrument speak consistently as a whole.⁴¹⁴ The *Hoffman* court determined that the grantor made two grants: therefore, the court attempted to reconcile the more specific language with the language of the subject-to clauses.⁴¹⁵

In many cases involving this canon, the specific language follows the general language. When the general language follows the specific language, should a different canon apply? In *Holloway’s Unknown Heirs v. Whatley*,⁴¹⁶ Holloway owned a 1/2 mineral estate in three tracts in Liberty County. He then conveyed to Baldwin, using specific descriptions, several other parcels of land. However, on the end of the granting clause, Holloway added the following statement: “If there is any other land owned by me in Liberty County, Texas, or any land, the title to which stands in my name, it is hereby conveyed, the intention of this instrument being to convey all land owned by me in said County.”⁴¹⁷

411. 81 Tex. at 263–64, 16 S.W. at 1005.

412. See also *Southern Pine Lumber Co. v. Hart*, 161 Tex. 357, 364, 340 S.W.2d 775, 781 (1960) (ruling that a person claiming title by limitation under his own deed is limited to the unambiguous language of that deed); *Regan v. Hatch*, 91 Tex. 616, 616, 45 S.W. 386, 387 (1898) (treating the words “more or less” as a misdescription not affecting the grant). In *Duke v. Calfee*, 533 S.W.2d 839 (Tex. Civ. App.—Beaumont 1976), *rev’d on other grounds*, 544 S.W.2d 640 (Tex. 1976), the court stated without citation, “It is settled law in this state that a particular description controls a general description.”

413. 273 S.W. 828 (Tex. 1925).

414. *Id.* at 830.

415. *Id.*

416. 133 Tex. 608, 131 S.W.2d 89 (1939).

417. *Id.* at 610, 131 S.W.2d at 90.

One of the grantor's claims was that the canon giving controlling effect to the specific language should apply to defeat the general language contained at the end of the granting clause. The court noted the existence of the canon, but refused to apply it upon a reading of the entire instrument and a determination that both the general and specific language could be carried out.⁴¹⁸ As a result, the *Holloway* court found that the mineral estates were conveyed under the "general intent" clause even though they were not within the boundaries of the tracts specifically conveyed earlier in the granting clause.⁴¹⁹

*Sun Oil Co. v. Burns*⁴²⁰ illustrates the difficulty in applying one or more variations of this canon. In *Burns*, an oil and gas lease contained a specific description of a 100 acre tract. A "Mother Hubbard" clause was also included in the lease. A 3.736 acre tract located adjacent to the specifically described tract was the subject-matter of the litigation. In resolving the issue of whether the 3.376 tract was included in the lease, the court applied several canons. The lessor argued that a "particular description which is clear and distinct will control or override general words of description added thereto."⁴²¹ Nevertheless, the court chose not to apply the canon without first finding that a conflict or repugnance existed between the general and particular descriptions.⁴²² This condition precedent was a part of the canon since its initial use in *Cullers*. However, the court muddied the waters by stating that under certain circumstances a mirror-image canon existed. The court stated: "A general description will prevail over a particular description when it is apparent from the instrument that the parties intended that the general should control."⁴²³

418. See *id.* at 614, 131 S.W.2d at 92; see also *Winters v. Slover*, 151 Tex. 485, 489, 251 S.W.2d 726, 728 (1952); *Scheller v. Groesbeck*, 231 S.W. 1092, 1093 (Tex. Comm'n App. 1921, judgm't adopted) for cases in which the court followed the canon that a general description will not be disregarded when it can be harmonized.

Another exception to the canon that "the particular description prevails" occurs when the court determines that only one of the descriptions is legally adequate. Thus, in *Sharp v. Fowler*, 151 Tex. 490, 494, 252 S.W.2d 153, 155 (1952), the court found that if only one of the descriptions is adequate, it obviously prevails and there is no need to resort to any of the canons relating to the reconciliation of competing descriptions.

419. 273 S.W. at 830.

420. 125 Tex. 549, 84 S.W.2d 442 (1935).

421. *Id.* at 555, 84 S.W.2d at 445. For cases applying this general rule, see *Sanger v. Roberts*, 92 Tex. 312, 316, 48 S.W. 1, 2 (1898); *Tucker v. Angelina County Lumber Co.*, 216 S.W. 149, 150 (Tex. Comm'n App. 1919, judgm't adopted); *McFaddin v. Johnson*, 180 S.W. 306, 308 (Tex. Civ. App.—Beaumont 1915, no writ).

422. 125 Tex. at 557, 84 S.W.2d at 447.

423. *Id.* at 555–56, 84 S.W.2d at 446.

Instead of stating this opposite canon, the court should have relied on its finding that no conflict existed. Furthermore, the court should have attempted to reconcile potentially conflicting language before applying the “specific controls the general” canon. However, the court’s final judgment is undoubtedly correct. The reason for a lease to contain a “Mother Hubbard” clause is to cover small parcels of land that may be owned by the lessor, but which are somehow left out of the description of the lands to be leased. No repugnancy or conflict exists between a “Mother Hubbard” clause and a specific description of other lands. The clauses serve different purposes that evince a clear intent to cover lands that are not specifically enumerated within the terms of the instrument.

*Thomas v. Texas Osage Co-Op Royalty Pool, Inc.*⁴²⁴ clarified the distinction the *Burns* opinion sought to make between situations in which the specific controls and situations in which the general controls. In *Thomas*, the court interpreted two deeds. Each deed purported to transfer a 1/2 undivided mineral estate. The first deed purported to transfer the minerals under approximately 276-1/2 acres while the second deed purported to transfer the minerals under a 83-1/2 acre tract. Both deeds contained a clause which stated that “the conveyance is to cover all lands now owned by the grantors in the above stipulated surveys whether herein properly described or not and containing [276-1/2 or 83-1/2] acres of land more or less.”⁴²⁵ The first grantee claimed the mineral estates under both tracts by virtue of this general clause.

The court found *Burns* and its interpretation of the leasehold “Mother Hubbard” clause inapplicable to these deeds. The court applied the canon that when a general and particular description refer to the same land, which cannot be reconciled, the particular description prevails.⁴²⁶ The court stated the rule as follows:

[A] particular description in a deed does not override a general description of the land where it appears that the property covered by the words of particular description is not the whole of the property intended to be conveyed and that the words of general description are intended to have an enlarging effect.⁴²⁷

424. 248 S.W.2d 201 (Tex. Civ. App.—Eastland 1952, writ ref’d n.r.e.).

425. *Id.* at 202. Both of the deeds covered lands in the same survey.

426. *Id.* at 204.

427. *Id.*

Thus, in the leasehold “Mother Hubbard” clause, the parties clearly intended to convey all of the mineral estate owned by the lessor. However, in *Thomas*, the court read the grant as intending to convey only the acreage that was specifically described in the metes and bounds descriptions given in the respective deeds.⁴²⁸

The difficulty in applying this canon to the “Mother Hubbard” clause situation is shown in *Smith v. Allison*.⁴²⁹ The deed particularly described an undivided 1/2 mineral interest underlying the southeast 1/4 and the northwest 1/4 of Section 124. The grantor also owned a 1/4 mineral interest in the northeast 1/4 of Section 124 as well as other mineral interests in adjacent sections. The grantee argued that the “Mother Hubbard” clause in the deed acted as a conveyance of the minerals underlying the northeast 1/4.

The supreme court found that the “Mother Hubbard” clause was ambiguous because it could be interpreted to include the surface estates, which were otherwise not included in the specific description, as well as the mineral estates located in the adjacent sections.⁴³⁰ The court found a “material inconsistency” between the specific description and the “Mother Hubbard” clause. Thus, parol evidence was admissible to ascertain the intent of the parties.⁴³¹

The court struck a proper balance between the use of canons to decide cases and the use of common sense and reason. While citing several canons, including the canon that the objective of the court is to ascertain the intent of the parties, the *Smith* court looked to the purpose of these standard clauses and interpreted the clauses in a manner consistent with that purpose.⁴³² The purpose of the clauses is to prevent narrow strips of land

428. *Id.* at 204–05. The court also treated the deeds as ambiguous and admitted extrinsic evidence, including the subsequent actions of the parties, to confirm its interpretation that the parties only sought to deal with description errors and not to enlarge the grant beyond the tracts that were specifically described. *Id.* at 205; *see also* *Gulf Prod. Co. v. Spear*, 125 Tex. 530, 84 S.W.2d 452 (1935) (holding that a lease which clearly shows from its language that it was the lessor’s intention to lease all his land in a survey, included excess land that the lessor did not know was in the tract belonging to him).

429. 157 Tex. 220, 301 S.W.2d 608 (1956).

430. *Id.* at 225, 301 S.W.2d at 612.

431. *Id.* In the court’s first opinion, the majority said that the purpose of admitting parol evidence was to ascertain the grantor’s intent. On its motion for rehearing, the majority opinion said its primary objective was to ascertain the intent of both parties to the deed. *Id.* at 232, 301 S.W.2d at 617.

432. *Id.* at 229, 301 S.W.2d at 614. The court looked at the history of “Mother Hubbard” clauses, which had their start in oil and gas leases, but gradually moved into some standard deed forms. The court identified that the primary objectives of these clauses was to pick up small strips of land. The grantor or lessor may have owned this land by virtue of the doctrine

from remaining unleased or un conveyed, when it is clear that the parties intended to transfer the acreage owned. The *Smith* decision coincides with the public policy goal of discouraging ownership of narrow strips of land when there is no clear intent.⁴³³ The majority thus limited the application of the “Mother Hubbard” clause to the conveyance of narrow strips of adjacent land that were mistakenly omitted, or obtained by limitations title, and which were supplemental to the description of the specific tract or tracts. Thus, without having to resort to the specific controls canon, the court reached a result consistent with the language and the purpose of the “boiler-plate” clause.⁴³⁴

d) “Non-Printed Prevails Over Printed” Canon

One of the first uses of the “non-printed prevails over printed” anti-harmonizing canon appeared in the early oil and gas lease case of *Producers Oil Co. v. Snyder*.⁴³⁵ The issue was whether the lease treated the nineteen quarter sections covered as an entirety or as the equivalent of nineteen separate leases. The printed form lease had numerous written and typewritten additions. The printed matter suggested that the leasehold acreage was to be treated as an entirety. The added material suggested that

of adverse possession, or was unaware or mistaken as to their lack of ownership. 157 Tex. at 229–30, 301 S.W.2d at 614–15. See generally *Sun Oil Co. v. Bennett*, 125 Tex. 540, 543, 84 S.W.2d 447, 449 (1935) (holding that when the language of an oil and gas lease unmistakably shows the lessor’s intention to include the land in controversy, the court should include the land in the lease); *Sun Oil Co. v. Burns*, 125 Tex. 549, 552, 84 S.W.2d 442, 444 (1935) (holding that in the construction of a deed, the ultimate purpose is to ascertain the intention of the parties, and that intention should be procured from the whole instrument).

433. See *State v. Arnim*, 173 S.W.2d 503, 508 (Tex. Civ. App.—San Antonio 1943, writ ref’d w.o.m.).

434. The *Smith* treatment of “Mother Hubbard” clauses was applied to leases and accepted as the general rule in *Jones v. Colle*, 727 S.W.2d 262, 263 (Tex. 1987). For further analysis of “Mother Hubbard” clauses, see Bruce Kramer, *The “Mother Hubbard” or “Cover All” Clauses in Mineral Deeds and Leases*, 13 EASTERN MIN. L. INST. 12-1 (1992).

435. 190 S.W. 514, 515–16 (Tex. Civ. App.—Fort Worth 1916, no writ). There are cases in which the parties incorporate this canon into the deed or lease. In those cases, the court does not apply the canon, but merely applies the express language contained in the instrument. See, e.g., *SMK Energy Corp. v. Westchester Gas Co.*, 705 S.W.2d 174, 176 (Tex. App.—Texarkana 1985, writ ref’d n.r.e.). Situations also arise in which parties have crossed out parts of the printed form. The crossed out material should not be considered by the court in interpreting the deed. See *Mineral Investing Corp. v. Bishop Cattle Co.*, 49 S.W.2d 532, 533 (Tex. Civ. App.—San Antonio 1932), *aff’d on other grounds*, 124 Tex. 387, 78 S.W.2d 174 (1935).

each quarter section was to be treated separately. The court stated the canon as follows:

It is a well-recognized rule of construction that where a part of a contract is written, or typewritten, and part is printed, and the written and printed parts are apparently inconsistent, or there is reasonable doubt as to the sense and the meaning of the whole, the words in writing will control the construction of the contract.⁴³⁶

The canon should not be used unless the court makes a determination that there is an irreconcilable conflict, or a repugnancy between the typewritten and printed material.

The *Snyder* court further provided the rationale for the canon's use.⁴³⁷ The court's decision, based on common sense and practical experience, concluded that the parties may not always read and understand what is contained in the printed form. Additionally, each party may have a different understanding of the meaning of the printed language. Yet with handwritten or typewritten additions, both parties immediately become aware of the specific language and usually have discussed the meaning of the language before it was included in the instrument. As the court noted, "the printed form is intended for general use without reference to particular objects and aims."⁴³⁸

While the *Snyder* court presented a clear and readily understandable canon, the canon itself was not used to resolve the textual inconsistency. The trial court found that the instrument was ambiguous, and subsequently admitted parol evidence to explain the ambiguity.⁴³⁹ The appellate court did not disturb the legal finding of ambiguity, although it might have relied on the canon rather than parol evidence to reach its conclusion.⁴⁴⁰

On the other hand, in *McMahon v. Christmann*,⁴⁴¹ the court applied the same canon used in *Snyder* and refused to admit extrinsic evidence. *McMahon* involved a lease that contained a printed form proportionate reduction clause and a typewritten rider which provided that the lessor would retain, without reduction, an additional 1/32 of 8/8 overriding

436. 190 S.W. at 515. This canon originated with contract interpretation cases as evidenced by the headnote that accompanies the canon statement.

437. *See id.* at 515–16.

438. *Id.* at 516.

439. *Id.*

440. *Id.*

441. 157 Tex. 403, 407–08, 303 S.W.2d 341, 344–45 (1957).

royalty. The lessor owned only a 1/6 mineral interest. The lessee claimed that the lessor was entitled to a payment consisting of 1/6 of 1/8 base royalty plus a 1/32 of 1/6 overriding royalty. The lessor contended that the overriding royalty was a full 1/32 interest.

The court substantially relied on the canon that “typewritten matter in a contract [is to] be given effect over printed matter.”⁴⁴² Stating that the rule is peculiarly applicable to the facts, the court concluded that the proportionate reduction clause was to be given effect on the leasehold royalty.⁴⁴³ However, the typewritten rider’s inclusion of the term “without reduction” would insulate the overriding royalty from a proportionate reduction.⁴⁴⁴ Furthermore, as long as the total amount of reserved interest did not exceed the total amount of mineral estate owned by the lessor, the parties were free to enter into whatever arrangements they agreed to regarding the payment of royalty. In *McMahon*, the lessor who owned a 16/96 interest was found to have retained a 5/96 royalty, an effective royalty rate of 30 percent.⁴⁴⁵

In *Newport Oil Co. v. Lamb*,⁴⁴⁶ the grantee sought to apply the canon to a situation similar to that in *McMahon*. Newport had leased its 1/8 interest to

442. 157 Tex. at 407, 303 S.W.2d at 344. The court cited *Richardson v. Richardson*, 270 S.W.2d 307, 311 (Tex. Civ. App.—Dallas 1954, writ ref’d) and *J.K. Hughes Oil Co. v. Mayflower Inv. Co.*, 193 S.W.2d 971, 973 (Tex. Civ. App.—Texarkana 1946, writ ref’d). The *Hughes Oil* decision related to a mineral deed with inconsistently named parties. The court stated that “[t]he written and printed parts of a deed are equally binding, but if they are inconsistent, the former will control the latter.” 193 S.W.2d at 973 (quoting 26 C.J.S. *Deeds* § 85). For other cases citing this canon see *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 57 (Tex. 1964); *Black v. Shell Oil Co.*, 397 S.W.2d 877, 886 (Tex. Civ. App.—Texarkana 1965, writ ref’d n.r.e.).

443. 157 Tex. at 407, 303 S.W.2d at 344.

444. *Id.* at 408, 303 S.W.2d at 344; *see also* *Finder v. Nyegaard*, 367 S.W.2d 217, 218–19 (Tex. Civ. App.—Waco 1963, writ ref’d n.r.e) (refusing to apply the canon to the typewritten rider phrase; “notwithstanding anything to the contrary in the foregoing lease,” so as to nullify the printed proportionate clause as it applied to an overriding royalty provision).

Although the canon was not mentioned, the Texas Supreme Court applied similar reasoning in *Gibson v. Turner*, 156 Tex. 289, 292–93, 294 S.W.2d 781, 785–86 (1956) when the parties struck the proportionate reduction clause from the printed form lease.

445. 157 Tex. at 408, 303 S.W.2d at 345; *see also* *Shell Oil Co. v. Stansbury*, 401 S.W.2d 623, 632 (Tex. Civ. App.—Beaumont 1966, writ ref’d n.r.e.) (canon is cited, but does not appear critical to the court’s decision); *Kidd v. Hickey*, 237 S.W.2d 389, 396 (Tex. Civ. App.—El Paso 1950, writ ref’d n.r.e.) (canon used to assist in the interpretation of a Texas Relinquishment Act lease).

446. 352 S.W.2d 861, 862 (Tex. Civ. App.—Eastland 1962, no writ).

the owner of the remaining 7/8. The lease contained a printed proportionate reduction clause. The parties, however, added a typewritten overriding royalty clause reserving a 1/8 of 7/8 interest. Newport claimed that the canon and *McMahon* supported its position that the override was not to be reduced. Nevertheless, the court did not apply the canon. The *Lamb* court found no conflict between the overriding royalty clause and the proportionate reduction clause.⁴⁴⁷ Because the parties had not included the term “without reduction,” the overriding royalty clause was part of the lease and was not inconsistent. Therefore, the court determined that the canon should not apply.⁴⁴⁸ *Lamb* harmonized the language in the deed. The canon could not apply because Newport had in effect reserved its entire interest that it had leased. If one adds up the proportionately reduced lease royalty of 1/64 with the unreduced overriding royalty of 7/64, the lessor had not conveyed any interest to the lessee. In effect, the lessee agreed to pay a 100 percent royalty interest for the 1/8 interest owned by Newport. Canons of construction should never be used to reach absurd results. The court properly refused to apply the canon in *Lamb*.

One of the first cases to use this canon in the context of interpreting a mineral deed was *J.K. Hughes Oil Co. v. Mayflower Investment Co.*⁴⁴⁹ In *Hughes Oil*, a printed form deed of trust misidentified the grantor/creditor of a mineral interest. In one part of the trust deed, however, the parties had stricken the erroneous name and typed in the proper party. In concluding that the deed sufficiently identified the proper parties, the court applied the typewritten prevails canon because it found an inconsistency between the printed form’s misidentification and the typewritten proper identification.⁴⁵⁰

The “subject-to” clause and the multiple fraction problem have caused its share of grief for lawyers. It has also spawned many cases where courts have used different canons to reach inconsistent results.⁴⁵¹ In *Gibson v. Watson*⁴⁵² the “typewritten prevails” canon was used to reach a result that, on its face, was inconsistent with results reached in *Garrett v. Dils*.⁴⁵³ The granting clause conveyed a 1/32 mineral interest. The subject-to clause provided for the conveyance of 1/4 of the royalties. The future lease clause conveyed a 1/4 mineral interest. In the blank space of the subject-to clause,

447. *See id.* at 862.

448. *See id.*

449. 193 S.W.2d 971, 973 (Tex. Civ. App.—Texarkana 1946, writ ref’d).

450. *Id.* at 973.

451. *See supra* part III (discussion of the use of canons in multiple fraction cases).

452. 315 S.W.2d 48 (Tex. Civ. App.—Texarkana 1958, writ ref’d n.r.e.).

453. 157 Tex. 92, 299 S.W.2d 904 (1957).

“Not leased” was written. The trial court admitted extrinsic evidence to show that the land was under lease. But the court of civil appeals reversed by applying the canon and stating that the deed was not ambiguous.⁴⁵⁴ Consequently, the court reasoned that both the subject-to and future lease clauses should be ignored. This eliminated all references to the conveyed interest being 1/4 of the royalty.⁴⁵⁵ Perhaps the court made too much of the canon here since it would have been just as easy for the parties to have eliminated the entire subject-to clause if they so intended. Treating the words “not leased” as negating the provisions of the subject-to and future interest clauses overextended the usual logical basis for applying the canon.⁴⁵⁶

In another inappropriate use of the canon, the court in *Minchen v. Hirsch*⁴⁵⁷ construed a royalty deed in which a “perpetual one-sixteenth (1/16) fee mineral royalty/out of our interest therein” was conveyed to the grantee.⁴⁵⁸ The term “out” was handwritten. The grantor owned only a 7/96 interest. In earlier parts of the deed, the interest was described as a 1/16 of a 1/4 interest, or a 1/64 royalty. The grantee claimed that the grantor conveyed a full 1/16 royalty out of his 7/96 mineral interest. The grantor claimed that he conveyed only a 1/64 royalty out of his 7/96 interest. The court found that the “typewritten prevails” canon, when applied to the term “out,” favors a finding that the 7/96 is the source of the grant and is not to

454. 315 S.W.2d at 52. The minerals had been leased, but the lease was not acknowledged until after the deed had been executed.

455. *Id.* at 55.

456. See 2 WILLIAMS & MEYERS, *supra* note 157, § 340.2 n.11.1 (other criticisms of *Gibson v. Watson*); see also *Hasty v. McKnight*, 460 S.W.2d 949 (Tex. Civ. App.—Texarkana 1970, writ ref’d n.r.e.). The *Hasty* court, in another multiple fraction clause case, did not actually cite the canon, however, it is clear that the court favored the handwritten intention clause over inconsistent provisions of the granting clause. See *id.* at 953. The granting clause ostensibly gave a 1/2 mineral interest, while a future lease clause reserved all of the executive power and the right to receive bonus to the grantor. The court, wishing to impart meaning to the intention clause, found that the parties conveyed a perpetual 1/2 of royalty interest. *Id.* The result seems to be at odds, not only with the clear language of the granting, subject-to, and future lease clauses, but also with the modern view that a mineral estate can be stripped of many of its constituent elements and still be considered a mineral estate. See *Altman v. Blake*, 712 S.W.2d 117, 118–19 (Tex. 1986).

457. 295 S.W.2d 529 (Tex. Civ. App.—Beaumont 1956, writ ref’d n.r.e.). *Minchen* was cited in *Black v. Shell Oil Co.*, 397 S.W.2d 877, 886 (Tex. Civ. App.—Texarkana, 1965, writ ref’d n.r.e.).

458. 295 S.W.2d at 532. This provision was in the intention clause. Neither the granting nor the habendum clauses included the word “out.”

be used as a reducing fraction.⁴⁵⁹ Practitioners might think that common sense would lead to a contrary result. The owner of a small fractional mineral interest transferred the equivalent of a 90 percent royalty interest. It is unlikely that the 7/96 mineral interest would be leased given the outstanding royalty of 6/96. The *Minchen* court also applied the canon that “intent prevails over technical rules of construction.”⁴⁶⁰ Yet, the court applied a canon leading to the creation of a 90 percent royalty interest.⁴⁶¹

The canon that gives greater weight to inserted matter over inconsistent printed matter is grounded in common sense and logic. By and large, the canon has been used widely in cases in which it is appropriate. However, in certain circumstances the courts have utilized the canon to interpret instruments in a way that the parties could never have intended. Nevertheless, the canon’s continued use should be encouraged because of the increasing dependence on printed forms.⁴⁶²

e) “Earlier Provisions Prevail Over Later Provisions” Canon

Courts have stated this infrequently cited canon as follows: “Wherever the first part of a deed is definite and certain and irreconcilable with later parts, the first part must prevail.”⁴⁶³

One reason why this canon never caught on is reflected in the early case, *Wallace v. Crow*.⁴⁶⁴ The *Wallace* court treated this canon as a “well-known rule.” However, the court did not apply the canon because it chose to apply the harmonizing canon.⁴⁶⁵ Even when an anti-harmonizing canon is used the fact that one term or phrase occurs earlier should not be accorded any weight by the courts. Given the conflict between the harmonizing canon and the “greatest weight to the earliest provision” canons, the courts have

459. *Id.* at 533.

460. *Id.*

461. See 1 WILLIAMS & MEYERS, *supra* note 157, § 319 n.2 (further criticism of *Minchen*).

462. In *Friedrich v. Amoco Prod. Co.*, 698 S.W.2d 748, 751 (Tex. App.—Corpus Christi 1985, writ ref’d, n.r.e.), the court cited the canon, but did not apply the canon under the circumstances. The issue was whether the typewritten Pugh clause added to a “printed form lease” covered both horizontal and vertical severances. Because the issue was internal to all of the typewritten material, the *Fredrich* court held that no inconsistency existed between the typewritten material and the printed material. *Id.* at 754. While the canon was noted, it did not affect the court’s interpretation of the Pugh clause.

463. *Benskin v. Barksdale*, 246 S.W. 360, 363 (Tex. Comm’n App. 1923, holding approved).

464. 1 S.W. 372 (Tex. 1886).

465. *Id.* at 374.

justifiably refrained from using this canon, and in no case has this canon appeared important in the court's ultimate resolution of an interpretational issue.⁴⁶⁶

The "earlier provisions prevail" canon seemingly would apply to the "subject to" cases involving different fractions or mineral/royalty mischaracterizations. Yet, the canon appears to have been cited in only one such case, *Kokernot v. Caldwell*.⁴⁶⁷ In *Kokernot*, the granting clause conveyed a fractional mineral interest for a twenty-year fixed term. The mineral estate was previously leased, and the deed contained a "subject-to" clause. The grantee argued that as long as the lease was alive, the conveyed interest continued because the interest was made subject to the existing lease. Finding the granting clause provision limited the interest to twenty years and the subject-to clause apparently created a potentially longer-lived interest, the court invoked the "earlier clause prevails" canon to support its conclusion that the interest lasted twenty years.⁴⁶⁸ Under these circumstances, I concur in the court's use of the canon. While the typical subject-to litigation involves disparate fractions or confusion as to minerals or royalties, this case involved a clear statement that the parties intended to transfer a term for years. *Kokernot* is another example of why subject-to clauses should probably be eliminated from most form deeds. The clauses are no longer necessary to convey the economic benefits of the lease, or to prevent the grantee from claiming a breach of warranty.

VII. "Party" Canons

The following canons are based upon a party's status in relation to the written instrument. The canons, however, can be redundant when, for example, the lessee is the scrivener of the instrument. The courts could apply either the "construe against the scrivener" canon and the "construe against the lessee" canon. The Texas Supreme Court identified some of the

466. See also *Witt v. Harlan*, 66 Tex. 660, 662, 2 S.W. 41, 42 (1886) (applying the "construe the entire instrument" canon with the "earlier clause controls" canon to interpret a deed). But cf. *Cromwell v. Holliday*, 34 Tex. 463, 468 (1870) (holding that restrictive language in the latter part of the deed controlled over the general language in the earlier part of the deed).

467. 231 S.W.2d 528, 532 (Tex. Civ. App.—Dallas 1950, writ ref'd).

468. *Id.* at 532. The court also supported its decision with the canon that one cannot give controlling effect to language in a deed that creates an ambiguity by destroying the previously written plain and clear language. *Id.* at 532 (quoting *Cartwright v. Trueblood*, 90 Tex. 535, 39 S.W. 930 (1897)).

reasons for these types of canons in the context of rejecting the application of the *Duhig* rule to an oil and gas lease. The supreme court said:

We know as a matter of common knowledge and experience that deeds are usually prepared by the grantor or by a scrivener of his choice under his direction. . . . If through carelessness or otherwise he executes a deed which purports to convey and which warrants title to an interest in property greater than he owns there is some moral justification for taking from him as much of the interest which he does own. . . . We also know as a matter of common knowledge and experience that mineral leases are usually prepared, or standard forms completed, by the lessee. . . . [The lessee] prepares and insists upon a lease which purports to convey the entire fee. . . . It is unthinkable and contrary to all modern experience . . . to suppose that one owning an interest in the mineral fee would lease that interest . . . with no intention of receiving any of the returns from production. . . .⁴⁶⁹

A. “*Construe Against the Scrivener*” Canon

The “construe against the scrivener” canon of construction has its roots in basic contract law.⁴⁷⁰ The canon is an allocation of the burden of uncertainty caused by the use of inapt language in a written instrument. To the extent the court can identify a party who has either drafted an instrument or has provided the particular form used, the canon requires that the uncertainty be resolved against that party.

*McBride v. Hutson*⁴⁷¹ is an excellent example of why the canon to construe “against the scrivener” should be used as opposed to the canons that “construe against lessees” or “grantors.” Coleman was the common source of the mineral estates claimed by the parties. McBride received a 1/3 mineral estate upon the rendering of legal services to Coleman. The deed contained an unusual provision that, according to Hutson, made the mineral interest defeasible upon the execution of a five year primary term lease. A second issue was whether McBride received a 1/3 of 7/8 or 1/3 of 8/8 interest. Both the trial court and the court of appeals concluded that a defeasible interest in 1/3 of 7/8 was conveyed.

469. *McMahon v. Christmann*, 157 Tex. 403, 410, 303 S.W.2d 341, 346 (1957).

470. See cases cited in 14 TEX. JUR. 3d *Contracts* § 189 (1981).

471. 157 Tex. 632, 306 S.W.2d 888 (1957).

If the “normal” canon of “construing against the grantor” or “in favor of the grantee” was applied, the court would have found that a full 1/3 mineral estate had been conveyed. Instead, the court applied the more appropriate canon that the instrument be construed against the party who drafted the deed. The court stated: “Despite the general rule of construction favoring grantees, the grantors should be favored in this instance, where the instrument was obviously drawn by the grantees, who not only were lawyers but were actually representing the grantors in respect of the general subject matter.”⁴⁷² Because the language describing the quantum of estate passed was unclear and capable of two reasonable constructions, the court used this canon to decide that the smaller of the interests actually passed. Thus, in this situation, the use of the canon was both outcome determinative and properly applied because the language created substantial doubt as to the intention of the parties.

The contractual basis for the “construe against the scrivener” canon was shown in *Investors Utility Corp. v. Challacombe*.⁴⁷³ In *Challacombe*, the parties entered into an option contract. The mineral owners agreed to lease to Investors, if Investors, within specified time frames, hired a geologist to survey the tract, filed a report showing the probability of finding oil, and commenced the drilling of a well. In resolving the issue of whether the time limits were dependent or independent covenants, and consequently whether the option contract had terminated, the court identified Investors as the scrivener. Therefore, the *Challacombe* court applied the canon that the instrument is to be construed most strongly against the party preparing it.⁴⁷⁴ Because the contract did not clearly state whether the time covenants were dependent or independent, the court used the canon to interpret the covenants as dependent.⁴⁷⁵ Upon the breach of a dependent covenant, the

472. *Id.* at 891–92.

473. 39 S.W.2d 175 (Tex. Civ. App.—Waco 1931, no writ); *see also* United N. & S. Oil Co. v. Tiller, 283 S.W. 676 (Tex. Civ. App.—Austin 1926, writ ref’d). The *Tiller* court, in interpreting an assignment contract for a lease, said: “[I]t is admitted by appellant that the contract which it seeks to specifically enforce was drawn by its own attorney in its own office and for its own benefit. Under such circumstances . . . , the contract should be strictly construed against appellant. *Id.* at 678. *Challacombe* was also followed in a contract for mineral deed situation. *See* Campbell v. Barber, 272 S.W.2d 750 (Tex. Civ. App.—Fort Worth 1954, writ ref’d n.r.e.).

474. 39 S.W.2d at 179; *see* Phillips v. Western Union Tel. Co., 69 S.W. 63 (1902) (an earlier application of this canon in a contracts case).

475. *See* 39 S.W.2d at 179.

contractual obligations terminated. Therefore, the promise by the mineral owner to execute a lease was unenforceable.⁴⁷⁶

In *Hinson v. Noble*,⁴⁷⁷ the court required that the language be deemed ambiguous before applying the “construe against the scrivener” canon, or any other canon. However, when the instrument is ambiguous: “[I]t will be construed most strongly against the party who drew or wrote it, and was responsible for the language used, especially where it provides for exemptions from liability in his favor.”⁴⁷⁸

At issue in *Hinson* was the effective base date that triggered a time period by which the lessee had to elect to participate in the drilling of a second well. The court applied the “construe against the scrivener” canon, as well as several others, and found that the scrivener’s interpretation would not apply because the scrivener could have more clearly stated that the final acknowledgement date was the critical date.⁴⁷⁹ Again, the use of the canon was very appropriate because the scrivener was the party who could have designated the later date as the date against which the time limit would run.

This same theme was also used in *Gulf Production Co. v. Taylor*⁴⁸⁰ to defeat a lessor’s claim that he was entitled to recover as royalty 1/8 of the market value of the casinghead gas produced under the lease. The lease expressly stated that on casinghead gas, the royalty was limited to four cents per MCF. Shortly after the lease was executed, the value of casinghead gas increased substantially because it could be converted into gasoline. In rejecting the claim that the royalty clause was to be “construed against the scrivener/lessee,” the court said: “We are of opinion that the provisions of the lease . . . are so plain and certain as not to require any

476. *See id.* In *Texas Co. v. Parks*, 247 S.W.2d 179, 185 (Tex. Civ. App.—Fort Worth 1952, writ ref’d n.r.e.), the court would have applied the canon, but the record did not show who prepared the instrument or furnished the printed form. In *Parks*, the issue was whether the proportionate reduction clause would apply to the delay rental obligation. The court found that because the delay rental clause referred to “said lands,” the obligation was not to be reduced even though the lessor owned only a 1/2 mineral interest. *Id.* at 183. The *Parks* court also suggested another reason for applying the “construe against the scrivener” canon rather than one that designates a particular party. In traditional landlord/tenant situations, the canon used was “construe against the lessor,” because the lessor was also the grantor. *Id.* at 185. However, in most landlord/tenant situations, the landlord is the scrivener of the lease. This canon was appropriately discarded in the oil and gas lease case because in most situations it is the lessee, not the lessor, who is the scrivener of the instrument.

477. 122 S.W.2d 1082, 1087 (Tex. Civ. App.—Fort Worth 1938, no writ).

478. *Id.* at 1087 (quoting 10 TEX. JUR. *Contracts* § 162).

479. *See id.*

480. 28 S.W.2d 914, 915 (Tex. Civ. App.—Eastland 1930, writ dism’d w.o.j.).

resort to the rule of strict construction against the lessee and in favor of the lessor. . . .”⁴⁸¹

B. “Construe Against the Lessee” Canon

From an early date, Texas courts realized that the oil and gas lessee was usually the provider of the lease form, or the scrivener of the lease. Thus, in *Emery v. League*,⁴⁸² the court differentiated the usual rule for leases, which is to construe against the lessor, and applied the rule that oil and gas leases were to be “construed most favorably for the lessor.”⁴⁸³ In *Emery* the court interpreted an early oil and gas lease as a type of option contract, whereby the lessee was obligated to faithfully perform the express developmental covenants within the designated time frame or lose his opportunity to become a lessee.⁴⁸⁴

This canon has also been used to overcome a more general equitable maxim that “equity abhors forfeitures.” Again, in early lease forms, notice and cure provisions were often included. In *Stephenson v. Calliham*,⁴⁸⁵ the lessee ceased operations in the secondary term. The lessor filed suit seeking a decree of cancellation without providing the necessary sixty-day notice. While noting that “equity abhors forfeitures,” the court relied on the “construe in favor of the lessor” canon to support its view that upon the cessation of drilling operations in the secondary term, the lease automatically terminated under its express terms.⁴⁸⁶

481. *Id.* at 916.

482. 72 S.W. 603, 31 Tex. Civ. App. 474 (1903, writ ref’d).

483. *Id.* at 607, 31 Tex. Civ. App. at 480. The Texas Supreme Court continued to treat and oil and gas leases differently, insofar as this canon is concerned. *See Sirtex Oil Inc. v. Erigan*, 403 S.W.2d 784, 788 n.2 (Tex. 1966).

484. 72 S.W. at 606, 31 Tex. Civ. App. at 479.

485. 289 S.W. 158 (Tex. Civ. App.—San Antonio 1926, no writ). Four years later, in *Gulf Prod. Co. v. Taylor*, 28 S.W.2d 914, 916 (Tex. Civ. App.—Eastland 1930, writ dismissed w.o.j.), the court found that the “construe against the lessee” canon was not applicable because the language of the lease was plain and unambiguous and suggested that the canon’s general acceptance was still an open question.

486. 289 S.W. at 159. This view was followed in *Frick-Reid Supply Corp. v. Meers*, 52 S.W.2d 115, 119 (Tex. Civ. App.—Amarillo 1932, no writ). In an earlier case, *Masterson v. Amarillo Oil*, 253 S.W. 908, 914–15 (Tex. Civ. App.—Amarillo 1923, writ dismissed w.o.j.), the court decided that even though the lease terms were to be construed “most strongly against the lessee,” a termination of the estate would not be issued because the lessor was estopped by his actions in accepting royalties and allowing development to continue from terminating the lease.

For other early cases applying this canon, see *Grubstake Inv. Ass’n v. Coyle*, 269 S.W. 854, 855 (Tex. Civ. App.—San Antonio 1925, writ dismissed w.o.j.); *Stephenson v. Stitz*, 255

A proper use of this canon was additionally made in *Zeppa v. Houston Oil Co. of Texas*.⁴⁸⁷ At dispute was a small tract of land that was included in the description of two oil and gas leases. After carefully reading the respective descriptions, the court found that both of the interpretations proposed by the respective parties were reasonable.⁴⁸⁸ Therefore, in resolving the dispute, the court concluded that “it appears to be the settled rule in this state that of two or more equally reasonable constructions of which an oil and gas lease is susceptible the one more favorable to the lessor will be allowed to prevail.”⁴⁸⁹ The court supported this result with several other canons and the use of extrinsic evidence of post-lease behaviour. Having found two reasonable interpretations, the language was ambiguous. Therefore, extrinsic evidence was admissible.

In *Colby v. Sun Oil Co.*,⁴⁹⁰ however, the court rejected the application of this canon in the interpretation of a dry hole clause. The lessee drilled a dry hole that was capped within one month of the beginning of the last year of the primary term. The dry hole clause provided that, upon the drilling of a dry hole during the primary term, the lease would not terminate “on or before any rental paying date next ensuing after the expiration of three months from the date of completion of dry hole” if lessee commenced additional drilling or re-working operations or commenced or resumed the payment or tender of rentals.⁴⁹¹ On the anniversary date, the lessee failed to make any delay rental payment, and no drilling or re-working operations began within three months of either the completion of the dry hole or the anniversary date. The lessee did, however, commence the drilling of a new well prior to the end of the primary term.

S.W. 812, 813 (Tex. Civ. App.—San Antonio 1923, writ *dism'd w.o.j.*); *Moore v. West*, 239 S.W. 710, 714 (Tex. Civ. App.—San Antonio 1922, writ *dism'd w.o.j.*); *Bailey v. Williams*, 223 S.W. 311, 313 (Tex. Civ. App.—Austin 1920, no writ).

487. 113 S.W.2d 612 (Tex. Civ. App.—Texarkana 1938, writ *ref'd*).

488. *Id.* at 615.

489. *Id.* The court only cited 31 Tex. Jur. 613 for that proposition. In *Schwartz v. Prairie Producing Co., Inc.*, 727 S.W.2d 289, 293 (Tex. App.—Houston [1st Dist.] 1987, writ *ref'd n.r.e.*), the court used the canon to choose an interpretation of a royalty clause that favored the lessor. The canon was used to deflect some earlier case law which found that under certain circumstances a gas well could be considered a mine for purposes of calculating royalty. *Id.*

490. 288 S.W.2d 221, 225 (Tex. Civ. App.—Galveston 1956, writ *ref'd n.r.e.*).

491. *Id.* at 223.

In rejecting the application of the canon, the *Colby* court took a diametrically opposed position to *Stephenson*.⁴⁹² The court refused to extend the canon to reach situations involving the “construction of special limitations or forfeiture provisions.”⁴⁹³ Yet, an unless lease, and its delay rental features, including dry hole clauses, created a fee simple determinable estate that automatically terminated. Consequently, a forfeiture was not involved. *Colby* clearly interpreted the dry hole clause as not creating a limitation that would automatically terminate the lessee’s interest. Furthermore, the court applied the general equitable maxim that “equity abhors forfeitures” to interpret the lease as not requiring either a payment or new operations if the dry hole was completed within three months of the last anniversary date in the primary term.

C. “*Construe Against the Grantor*” Canon (sometimes referred to as “*construe in favor of the grantee*” canon)

One of the earliest uses of the “construe against the grantor” canon occurred in *Curdy v. Stafford*.⁴⁹⁴ *Curdy* was a deed description case in which the court interpreted a deed executed as a substitute for a prior deed. The court stated: “The language of a deed is the language of the grantor, and, if there be a doubt as to its construction, it should be resolved against him.”⁴⁹⁵

When the deed is drafted by the grantor, which is the usual case, constructional problems caused by inadequate drafting should not inure to

492. *Id.* at 225. *Stephenson* applied the canon even when it meant that the lease had terminated.

493. *Id.* For other cases following the *Colby* rationale relating to the forfeiture issue and the non-applicability of the “construe against the lessee” canon, see *York v. McBee*, 308 S.W.2d 951, 956 (Tex. Civ. App.—Waco 1957, writ ref’d n.r.e.); *Bouldin v. Gulf Prod. Co.*, 5 S.W.2d 1019 (Tex. Civ. App.—Fort Worth 1928, writ dism’d w.o.j.).

494. 88 Tex. 120, 30 S.W. 551 (1895); see also *City of Stamford v. King*, 144 S.W.2d 923, 926 (Tex. Civ. App.—Eastland 1940, writ ref’d) (finding that a deed conveyed a fee simple absolute rather than a fee simple determinable or an incorporeal hereditament). This canon can take many different forms. See generally *Herd*, *supra* note 62, at 653–54 (discussing different forms of the canon).

The “construe against the grantor” canon is another canon that was developed in the contract arena and borrowed by the courts to apply in deed construction cases. The canon was often stated to resolve contract construction cases in which there were two reasonable constructions of the contract. See 3 A. CORBIN, CORBIN ON CONTRACTS § 559 (1960 & Supp. 1971); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979).

495. 88 Tex. at 123, 30 S.W. at 552. The court also applied the “construe to validate” canon to find that the second deed’s description was adequate to pass title. *Id.*; see *supra* part IV.D.

the grantor's benefit. The *Curdy* court used the term "doubt" to describe the condition precedent to the use of this canon. In later cases, the courts have unfortunately substituted the term "ambiguous," which might suggest that the canon would apply only when the court made a determination of legal ambiguity, to allow the admission of extrinsic evidence.⁴⁹⁶

One prominent example of this change in language is *Hoffman v. Magnolia Petroleum Co.*⁴⁹⁷ In *Hoffman*, the Commission of Appeals stated: "This deed, if its intention be ambiguous, is to be construed against grantors rather than against grantee."⁴⁹⁸

496. In *Cartwright v. Trueblood*, 90 Tex. 535, 39 S.W. 930 (1897), the court changed the term doubtful to ambiguous when it said: "If the language cannot be harmonized, from which an ambiguity arises in the deed so that it is susceptible of two constructions, that interpretation will be adopted which is most favorable to the grantee." *Id.* at 538, 39 S.W. at 931; see also *Citizens Nat'l Bank in Abilene v. Texas & Pac. Ry.*, 136 Tex. 333, 338-39, 150 S.W.2d 1003, 1006-07 (considering the contract as a whole and construing it in favor of the grantee), *cert. denied*, 314 U.S. 656 (1941); *Heirs & Unknown Heirs of Barrow v. Champion Paper & Fibre Co.*, 327 S.W.2d 338, 364 (Tex. Civ. App.—Beaumont 1959, writ ref'd n.r.e.) (holding that the use of the "construe against the grantor" canon was not sufficient to make a contract for sale valid when the description contained in the written instrument was insufficient to locate the parcel on the ground; *Murphy v. Jamison*, 117 S.W.2d 127, 132 (Tex. Civ. App.—Beaumont 1938, writ ref'd) (using general rules of construction to resolve ambiguity in the deed in favor of the grantee); *Crawford v. Spruill*, 187 S.W. 361, 364 (Tex. Civ. App.—San Antonio 1916, writ ref'd) (holding that the construction most unfavorable to the grantor will be adopted when the intention is doubtful).

497. 273 S.W. 828 (Tex. 1925); see *Humble Oil & Ref. Co. v. Harrison*, 146 Tex. 216, 224, 205 S.W.2d 355, 360 (1947) (citing *Hoffman* in dealing with a deed that made reference to an earlier mineral deed); see also *King v. First Nat'l Bank of Wichita Falls*, 144 Tex. 583, 586-87, 192 S.W.2d 260, 262-63 (1946) (finding that the intention of the parties concerning a reservation in a deed was clearly expressed, therefore, construing the deed in favor of the grantor).

498. 273 S.W. at 829. The two opinions in *Richardson v. Hart*, 183 S.W.2d 235 (Tex. Civ. App.—Texarkana 1944), *aff'd as reformed*, 143 Tex. 392, 185 S.W.2d 563 (1945) illustrate the two different approaches that may apply if one requires the court to find the document ambiguous before applying the "construe against the grantor" canon. The court of civil appeals found the deed ambiguous because a conflict existed between the subject-to and future lease clauses. 183 S.W.2d at 235. The court then used the canon, as well as the conduct of the parties, to find that the future lease clause fraction controlled. *Id.* at 236. The supreme court, on the other hand, treated the deed as unambiguous and, without the use of any canons, found that *Hoffman* applied to create two different fractional grants. 143 Tex. at 396, 185 S.W.2d at 564. The *Richardson* court affirmed the judgment because the original lease had expired; therefore, the fraction in the future lease clause was the fractional mineral interest reserved by the grantor. *Id.* at 396, 185 S.W.2d at 565; see also *First Nat'l Bank in Dallas v. Kinabrew*, 589 S.W.2d 137, 149 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (holding that when the terms of the instrument are unambiguous, the question is merely one of law); *Chestnut v. Casner*, 42 S.W.2d 175, 178 (Tex. Civ. App.—Austin 1931, writ ref'd)

To further confuse the proper application of this canon, the court in *West v. Hermann*,⁴⁹⁹ while interpreting a deed, argued that the “construe against the grantor” canon should not be used when the language is ambiguous. The court stated: “The rule that a deed must be construed most strongly against the grantor can have no application when its terms are ambiguous, and there is allegation that the parties to the contract used the language in a permissible but special sense.”⁵⁰⁰ In this case, the term “estate” caused the difficulty. Complicating the issue was the allegation that a bona fide purchaser was involved. The court’s findings were supportable without the court’s obfuscatory statements about the canon. If the language of the deed is clear, and specialized terms are used, no canons of construction are necessary. The “construe against the grantor” canon should only be employed when the language cannot be harmonized. The canon should never be used when the language is clear.⁵⁰¹

This restriction on the use of the “construe against the grantor” canon was expressed quite clearly in *Arnold v. Ashbel Smith Land Co.*⁵⁰² The issue was whether a deed reserved a 1/4 royalty or a 1/4 of royalty. A blind application of the “construe against the grantor” canon would lead to a conclusion that a 1/4 of royalty was reserved. The court instead found that a 1/4 royalty interest was reserved and made the following statement about the use of the “construe against the grantor” canon:

The rule of strict construction against the grantor is resorted to only to resolve ambiguity and as an aid by legal presumption to arriving at intent. It is not applicable in the absence of ambiguity,

(declining to apply any rules of construction when the “intention [of the parties] appears from the language of the deed”).

While the *Hoffman* court had changed the term doubtful to ambiguous, the Texas Supreme Court, in *Bumpass v. Bond*, 131 Tex. 266, 271, 114 S.W.2d 1172, 1174 (1938), continued to use the original language in *Curdy* when it applied the canon. The court applied the canon to determine if an entire or a fractional share of a mineral interest was conveyed to the grantee.

499. 104 S.W. 428, 431, 47 Tex. Civ. App. 131 (1907, no writ).

500. *Id.* at 431–32, 47 Tex. Civ. App. at 139.

501. For example, in *Gex v. Texas Co.*, 337 S.W.2d 820, 822–23 (Tex. Civ. App.—Amarillo 1960, writ ref’d n.r.e.), a modification of a mineral deed increased the grantor’s royalty interest in exchange for the grantor giving the grantee the right to communitize the grantor’s reserved interest. While noting the existence of the “construe against the grantor” canon, the court found that the modification deed clearly made the increased royalty dependent on the communitization of the grantor’s interest. *Id.* at 827. Because no communitization occurred, no increase in royalty payments was due. *Id.*

502. 307 S.W.2d 818, 824 (Tex. Civ. App.—Houston 1957, writ ref’d n.r.e.).

and even in its presence is never used as a hypercritical and overly literal tool to override the manifest object and purpose of the language of writings. The rule is but a canon of construction and is subordinate to the requirement that every part of a deed should be harmonized and given effect where possible so as to effectuate the intention of the parties.⁵⁰³

Other than the confusion with the use of the term “ambiguous,” the Houston court was right on point in dealing with the problems of relying on canons to replace rational thought when reading a written instrument. The *Arnold* court also clearly subordinated the use of the “construe against the grantor” canon to the “harmonizing” canon. This prioritization, while probably appropriate, has not received widespread judicial support.⁵⁰⁴

In some cases, the courts described the canon so that the construction “most favorable to the grantee” was to be given to the language.⁵⁰⁵ For example, in a deed that contained conflicting signals as to whether the grantee was to receive 1/2 of the 1/8 royalty for the life of an existing lease or a perpetual 1/16 royalty, the court found that the “general rule . . . requires that the deed be construed in the light most favorable to the grantee.”⁵⁰⁶

503. *Id.* at 824 (citing *Alexander Schroeder Lumber Co. v. Corona*, 288 S.W.2d 829, 833 (Tex. Civ. App.—Galveston 1956, writ ref’d n.r.e.)); *see also* *Citizens Nat’l Bank in Abilene v. Texas & Pac. Ry.*, 136 Tex. 333, 338, 150 S.W.2d 1003, 1006 (stating that “it is the intention and purpose of the contracting parties, as disclosed by the instrument, which should control”), *cert. denied*, 314 U.S. 656 (1941).

504. In addition to the cases cited *supra* note 503, this prioritization is only evident in *Hedick v. Lone Star Steel Co.*, 277 S.W.2d 925, 928–29 (Tex. Civ. App.—Texarkana 1955, writ ref’d n.r.e.).

505. *See* *Tenneco Oil Co. v. Alvord*, 416 S.W.2d 385, 389 (Tex. 1967) (following the “construe in favor of the grantee” canon in interpreting a release of certain leasehold interests); *Right of Way Oil Co. v. Glayds City Oil, Gas & Mfg. Co.*, 106 Tex. 94, 103, 157 S.W. 737, 739 (1913) (deciding whether a possessory or non-possessory interest was conveyed by the grantor); *see also* *Settegast v. Foley Bros*, 114 Tex. 452, 455, 270 S.W. 1014, 1016 (1925) (using the “construe in favor of grantee” canon to construe restrictive clauses in favor of free and unrestricted use of the leasehold); *Collier v. Callaway*, 140 S.W.2d 910, 913 (Tex. Civ. App.—Beaumont 1940, writ ref’d) (applying the “construe in favor of grantee” canon to reservations in oil and gas deed).

506. *McGuire v. Bruce*, 332 S.W.2d 110, 111–12 (Tex. Civ. App.—Beaumont 1959, writ ref’d). *McGuire* cited the following cases to support the use of the “construe in favor of the grantee” canon: *Humble Oil & Ref. Co. v. Harrison*, 146 Tex. 216, 205 S.W.2d 355 (1947); *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828 (Tex. 1925); *Cartwright v. Trueblood*, 90 Tex. 535, 39 S.W. 930 (1897).

This canon is often used with the greatest estate canon. For example, in *Young v. Rudd*,⁵⁰⁷ the issue was whether the language was sufficient to convey an interest in land. The court found that the use of the word “give” evinced sufficient intent to have the described interest pass to the grantee. The *Young* court noted first that if the language of a deed is doubtful, the court will read the deed to pass the greatest estate. The court then followed with the “construe against the grantor” canon to justify its holding that an instrument giving “ten percent of all future payments of rentals or royalties . . . on any of said land” transferred a 10 percent royalty interest.⁵⁰⁸

The use of the greatest estate and “construe against the grantor” canons created confusion for the courts where the grantors reserved or excepted mineral interests by referring to non-existent or “phantom” prior reservations. In *Pich v. Lankford*,⁵⁰⁹ the grantees argued that, under the greatest estates and “construe against the grantor” canons, they were entitled to receive a fractional share of the mineral estate. The deeds referred to reserving all of the minerals because the minerals did “not belong to the grantors herein.” The prior reservations were actually royalty instead of mineral interests. Therefore, the grantors did own part of the mineral estate. The supreme court rejected the use of these two canons and concluded, without the use of any canon, that the language of the

507. 226 S.W.2d 469, 472 (Tex. Civ. App.—Texarkana 1950, writ ref’d n.r.e.).

508. *Id.* at 470. For other cases using both the greatest estate and “construe against the grantor” canon, see *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828, 829 (Tex. 1925); *Fleming Found. v. Texaco, Inc.*, 337 S.W.2d 846, 851 (Tex. Civ. App.—Amarillo 1960, writ ref’d n.r.e.); *Allen v. Creighton*, 131 S.W.2d 47, 50 (Tex. Civ. App.—Beaumont 1939, writ ref’d); *Clemmens v. Kennedy*, 68 S.W.2d 321, 323 (Tex. Civ. App.—Texarkana 1934, writ ref’d).

An analogous situation arises when the deed is unclear as to whether the interest being conveyed is corporeal or incorporeal. A number of early decisions used the “construe against the grantor” and greatest estate canons to find that deeds from individuals to railroad companies conveyed a corporeal interest rather than an incorporeal easement. *See, e.g.*, *Stevens v. Galveston, H. & S.A. Ry.*, 212 S.W. 639, 643 (Tex. Comm’n App. 1919, judgment adopted). *But see* *Lockwood v. Ohio River Ry.*, 103 F. 243 (4th Cir. 1900) (granting only an easement), *cert. denied*, 180 U.S. 637 (1901).

These two canons were also used in early cases to find that an instrument was an effective deed conveying a property interest, rather than a mere quitclaim or other instrument. *See, e.g.*, *Roswurm v. Sinclair Prairie Oil Co.*, 181 S.W.2d 736, 743–44 (Tex. Civ. App.—Fort Worth 1944, writ ref’d w.o.m.); *Hunt v. Evans*, 233 S.W. 854, 857 (Tex. Civ. App.—Austin 1921, writ ref’d); *see also* *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, 106 Tex. 94, 103, 157 S.W. 737, 739 (1913) (using “construe against the grantor” canon to hold that only an easement was granted).

509. 157 Tex. 335, 339, 302 S.W.2d 645, 648 (1957).

reservation clause clearly showed an intent to reserve a 3/4 mineral interest, even if the grantors did own it at the time of the conveyance.⁵¹⁰

Notwithstanding the *Pich* decision, the combination of greatest estate and “construe against the grantor” canons was used in *Ladd v. DuBose*⁵¹¹ to deal with a mineral deed that referred to an erroneous prior reservation of a 1/4 mineral interest. The grantor reserved an additional 1/4 mineral interest and the intention clause referred to the conveyed interest as a 1/2 mineral interest. The court used these two canons to support its conclusion that, notwithstanding the reference to a 1/2 mineral interest being granted, the deed actually conveyed a 3/4 mineral interest.⁵¹² The *Ladd* court distinguished *Pich* because of the different language in the reservations. While the clauses are different, they both have the same effect of referring to prior reserved interests, not then owned by the grantor. It is hard to reconcile the use of the two canons in *Ladd* with the *Pich* court’s rejection of the canons’ use.

In a recent case, *Large v. T. Mayfield, Inc.*,⁵¹³ the court of appeals seemed to follow the *Pich* rejection of the “construe against the grantor” canon. The grantors conveyed a tract of land described as being “all the Surface Rights . . . (The Mineral Rights thereunder being reserved and now owned by . . .)” to the Veterans Land Board. The grantor previously conveyed royalty, not mineral interests. Following *Ladd* and applying the “construe against the grantor” and greatest estate canons the result favors the grantee. The *Large* court, however, mentioned the greatest estate canon, but relied on the four corners canon to limit the grant to the surface, even though there were no previously conveyed mineral estates.⁵¹⁴

510. *Id.* at 340, 302 S.W.2d at 650.

511. 344 S.W.2d 476, 480 (Tex. Civ. App.—Amarillo 1961, no writ).

512. *Id.* The court’s major emphasis was on the need for the grantor to clearly state any reservation. The court said: “A reservation of minerals, to be effective, must be by clear language. Courts do not favor reservations by implication.” *Id.* at 479 (citing *Sharp v. Fowler*, 151 Tex. 490, 494, 252 S.W.2d 153, 154 (1952)). This position is clearly in accord with the greatest estate and “construe against the grantor” canons. *See also* *Chestnut v. Casner*, 42 S.W.2d 175, 178 (Tex. Civ. App.—Austin 1931, writ ref’d) (finding that when confronted by an ambiguity in a deed capable of two constructions, a court will adopt the one most favorable to the grantee). *But cf.* *Mathews v. Myers*, 42 S.W.2d 1099, 1101 (Tex. Civ. App.—Austin 1931, no writ) (finding, without the use of the twin canons, that when a “phantom” reservation was mentioned in the deed, the grantor, not the grantee, owned the fractional interests).

513. 646 S.W.2d 292, 294 (Tex. App.—Eastland 1983, writ ref’d n.r.e.).

514. *Id.* at 294.

In *Miller v. Melde*,⁵¹⁵ a recent phantom reservation case, the court distinguished *Pich*. Miller, who owned the entire surface and minerals conveyed to Bergstrom, reserving a fifteen year term for years in 1/2 of the minerals and referring erroneously to a prior like reservation. Bergstrom then conveyed to Melde and reserved a similar term for years and an additional 1/4 of royalty interest. The intention clause provided that the grantee was to receive a 1/2 interest in the minerals and a 1/4 of royalty interest. No mention was made of the reversion following the end of the term for years.⁵¹⁶ Relying on the greatest estate canon, the court found that Melde received all of the mineral interest and 3/4 of the royalty interest, notwithstanding the intention clause's reference to a grant of a 1/2 mineral interest.⁵¹⁷ The court distinguished *Pich* based on the language referring to the phantom interest. In *Pich*, the phantom interest was saved and excepted in the deed. In *Miller*, the grant was made subject-to the phantom interest. In *Miller*, the grantor purported to transfer the entire interest, while in *Pich* the grantor did not so purport. As Professor Ed Horner correctly stated: "This is another apt illustration that in a conveyance it is not so much what you write, but how it is written."⁵¹⁸

In *Farmers Canal Co. v. Potthast*,⁵¹⁹ the tendency to mix and match canons was evident as the court attempted to resolve a multiple fraction problem. The issue was whether a deed conveyed a 1/4 of royalty interest or a fixed 1/4 of 1/8 royalty interest. The granting clause language evinced an intent to give a 1/4 of royalty, but following clauses evinced an intent to convey a 1/4 of 1/8 royalty. The court cited at least seven different canons,

515. 730 S.W.2d 12, 13 (Tex. App.—Corpus Christi 1987, no writ).

516. *Id.* at 12. In a case involving what happens to the possibility of reverter following a defeasible term royalty interest, the court in *Monroe v. Scott*, 707 S.W.2d 132, 134 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.), concluded that it was conveyed in a partition deed that did not specifically reserve or except that interest. The court cited the greatest estate canon in support of the holding. The deed expressly reserved the defeasible term royalty interest. The grant of an interest subject-to a defeasible term interest transfers the possibility of reverter to the grantee. *See also* *Bagby v. Bredthauer*, 627 S.W.2d 190, 197 (Tex. App.—Austin 1981, no writ) (including the possibility of reverter in any conveyance that does not expressly exclude or except it).

517. 730 S.W.2d at 13.

518. Discussion Notes, 96 Oil & Gas Rep. 156, 157 (Matthew Bender 1988). For a case which found that the term "save and except" was not sufficient to reserve an interest, see *Moore v. Rotello*, 719 S.W.2d 372, 376 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

519. 587 S.W.2d 805 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

but in one sentence, the *Potthast* court combined the “construe against the grantor” clause with three other canons. The court said:

It is also well settled that should there be any doubt in ascertaining the intention of the parties as their intention is expressed in the deed in its entirety, that doubt, after considering the deed from its four corners, should be resolved against the grantors, whose language it is, and the deed must be construed most favorably to the grantee, as conveying to him the largest estate permissible within the language of the deed.⁵²⁰

Without much explanation as to which of the cited canons was to be controlling, the court gave controlling weight to the granting clause and found the deed conveyed a 1/4 of royalty interest.⁵²¹ The *Potthast* result is certainly consistent with the “construe against the grantor” canon, but it is also consistent with the “repugnant to the grant” canon that was later adopted in *Alford*.⁵²²

The “construe against the grantor” canon has a checkered history in cases involving multiple fraction issues.⁵²³ As discussed above, the canon was used in *Hoffman*. For example, both the “construe against the grantor” and greatest estate canons were used in *Garrett v. Dils Co.*⁵²⁴ to support the conclusion that a larger fractional mineral estate was transferred to the grantee.⁵²⁵

Yet, in *Davis v. Andrews*,⁵²⁶ the same two canons were used to give greater weight to the granting clause because of a conflict between the granting and warranty clauses. The language in the granting clause did not

520. *Id.* at 808.

521. *Id.* at 808–09.

522. For other cases combining the “construe against the grantor” and “repugnant to the grant” canons, see *Lott v. Lott*, 370 S.W.2d 463, 465 (Tex. 1963); *Waters v. Ellis*, 158 Tex. 342, 347, 312 S.W.2d 231, 234 (1958); *Mercer v. Bludworth*, 715 S.W.2d 693, 701 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.).

523. See generally *supra* part III (discussing the use of canons in multiple fraction cases).

524. 157 Tex. 92, 95, 299 S.W.2d 904, 906 (1957); see also *Gibson v. Watson*, 315 S.W.2d 48, 53, 56 (Tex. Civ. App.—Texarkana 1958, writ ref’d n.r.e.) (citing the “construe against the grantor” canon but disagreeing with *Garrett* and agreeing with *Alford* in dealing with a multiple grant deed).

525. The Texas Supreme Court said: “[S]hould there be any doubt as to the proper construction of the deed, that doubt should be resolved against the grantors, whose language it is, and be held to convey the greatest estate permissible under its language.” 157 Tex. at 95, 299 S.W.2d at 906. A conflict between the granting and future lease clauses created the differing fractional mineral estates.

526. 361 S.W.2d 419, 425 (Tex. Civ. App.—Dallas 1962, writ ref’d n.r.e.).

limit the extent of the conveyed estate, yet, the warranty limited the estate to a twenty-year term for years. The court gave precedence to the granting clause, relying primarily on the “construe against the grantor” and greatest estate canons.⁵²⁷ The result is consistent with the canons, but not the two grant theory that underlies the majority opinion in *Garrett*.⁵²⁸

The underlying rationale for this canon is that the scrivener, who is usually the grantor, should be responsible for the lack of clarity in the use of the language. As noted earlier, that is why I prefer the use of the “construe against the scrivener” canon.⁵²⁹ In cases where the grantee is the scrivener, or both parties are equally responsible for the drafting of the instrument, this canon should not apply.⁵³⁰ Unfortunately, in several Texas cases, the courts acknowledged that the grantee was the scrivener, but nonetheless, construed the instrument against the grantor.⁵³¹ *Allen v. Creighton*⁵³² is sometimes cited for the proposition that courts construe in favor of the grantee in all cases. While it was clear that the grantee’s father-in-law, who was an attorney, drafted the instrument, the facts suggested that the grantor was the attorney’s client. Although a familial relationship existed between the scrivener and the grantee, the scrivener was the attorney for the grantor.⁵³³ Thus, even with a potential conflict of interest, *Allen* did not support the general proposition that where the scrivener is

527. *Id.* at 423. *Davis* is one of those cases in which the court cites too many canons, most of which are unnecessary to support the court’s conclusion. At one point, the court lists four different variations of the “construe against the grantor” and greatest estate canons. *See id.* at 423; *see infra* note 538.

528. The “construe against the grantor” canon was used in the court of appeals decision in *Alford*, but was not mentioned in the supreme court decision. *Krum v. Alford*, 653 S.W.2d 464, 465–66 (Tex. App.—Corpus Christi 1982), *rev’d*, 671 S.W.2d 870 (Tex. 1984). Likewise, the court of appeals decision in *Luckel* used the canon, but it was not mentioned in the supreme court decision. *Luckel v. White*, 792 S.W.2d 485, 488 (Tex. App.—Houston [14th Dist.] 1990), *rev’d*, 819 S.W.2d 459 (Tex. 1991).

529. *See supra* text accompanying note 471.

530. *See, e.g.*, *McBride v. Hutson*, 157 Tex. 632, 637, 306 S.W.2d 888, 891 (1957).

531. *See, e.g.*, *McGuire v. Bruce*, 332 S.W.2d 110, 113 (Tex. Civ. App.—Beaumont 1959, writ ref’d). In *McGuire*, the court said: “And the cases are legion in which it has been *unqualifiedly* said that the language of a deed is to be construed in the light most favorable to the grantee.” *Id.* (emphasis added).

532. 131 S.W.2d 47 (Tex. Civ. App.—Beaumont 1939, writ ref’d).

533. *Id.* at 49. There were some allegations of fraud and failure of consideration because the royalty deed was allegedly in exchange for the father-in-law’s provision of legal services for the grantor. *Id.*

known to be the grantee, the “construe against the grantor” canon applies.⁵³⁴

In *Clemmens v. Kennedy*,⁵³⁵ an attorney for the grantee was the scrivener of a deed. The grantor owned only a 1/2 mineral interest. The granting clause of the deed conveyed a 1/2 mineral interest. The grantor argued that he intended to transfer a 1/4 interest or 1/2 of his 1/2 interest to pay off a note to the grantee.⁵³⁶ While not necessarily supporting the result, the *Clemmens* court cited the “construe against the grantor” canon to find that a full 1/2 mineral interest was conveyed.⁵³⁷

D. Greatest Estate Canon

As noted in the previous subsection, many courts apply the “construe against the grantor” canon and the greatest estate canon.⁵³⁸ The canons

534. *See id.* at 50. The dispute in *Alien* was whether a deed conveyed a 1/64 royalty or a 1/64 of 1/8 royalty. The granting clause clearly described the conveyed interest as 1/8 of 1/8 while the subject-to clause described the interest as “one-eighth (1/8) of the 1/8 of each, any and all other royalties.” The court used only the greatest estate and “construe in favor of the grantee” canons to support its conclusion that the language of the granting clause should prevail. *Id.* at 49–50; *see also* *Arnold v. Ashbel Smith Land Co.*, 307 S.W.2d 818, 824 (Tex. Civ. App.—Houston 1957, writ ref’d n.r.e.) (stating that nothing was in the record to show that the trial court did not use the “construe in favor of the grantee” or greatest estate canon).

535. 68 S.W.2d 321, 322 (Tex. Civ. App.—Texarkana 1934, writ ref’d).

536. *Id.* at 322–23. The grantor also sought reformation of the deed to reflect a 1/2 of 1/2 transfer. The court found that mutual mistake was not proven by the grantor. *Id.* at 323–24.

537. *Id.* at 323. In *McGuire v. Bruce*, 332 S.W.2d 110, 113 (Tex. Civ. App.—Beaumont 1959, writ ref’d) the court “assumes” that the grantee’s attorney in *Hoffman* was probably the scrivener of the deed. In *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828, 829 (Tex. Comm’n App. 1925, holding approved), the Texas Commission of Appeals did not recognize that fact in its opinion, but clearly used the “construe against the grantor” canon. *McGuire* is also supportive of the “construe against the grantor” canon, even when it is alleged that the grantee is the scrivener. 322 S.W.2d at 112–13.

538. In *Davis v. Andrews*, 361 S.W.2d 419, 423 (Tex. Civ. App.—Dallas 1962, writ ref’d n.r.e.) the court listed four different iterations of the “construe against the grantor” canon. They were:

- (1) A deed will be construed to convey upon the grantee the greatest estate that the terms of the instrument will permit.
- (2) It is a principle of universal application that grants are liberally, exceptions strictly, construed against the grantor.
- (3) Another applicable rule is that should there be any doubt as to the proper construction of the deed, that doubt should be resolved against the grantors, whose language it is, and be held to convey the greatest estate permissible under its language.
- (4) Where a deed is capable of two constructions the one most favorable to the grantee and which conveys the largest interest the grantor could convey will

favor the grantee so that the largest estate, both in terms of duration and area, will be conveyed when the language is in doubt. As with many other canons, the origin of the greatest estate canon is *Hancock v. Butler*.⁵³⁹ In determining whether the grantor conveyed a life estate or a fee simple absolute, the court said: “The rule, then, that courts will confer the greatest estate on the grantee that the terms of the grant will permit, must necessarily be subordinate to the rule that every part of the deed should be harmonized and given effect to, if it can be done.”⁵⁴⁰ In the context of determining the duration of the estate, the court established a canon that would apply only after an attempt was made to harmonize all of the language within the four corners of the instrument.

*Cartwright v. Trueblood*⁵⁴¹ cited *Hancock* as authority for a case involving the quantum and area of a conveyance.⁵⁴² The result was

be adopted.

Id. at 423 (quoting *Ladd v. Dubose*, 344 S.W.2d, 480 (Tex. Civ. App.—Amarillo 1961, no writ). This list clearly constitutes canon overkill. The issue in *Davis* was fairly simple. Did the grantors convey a twenty-year term for years or a fee simple absolute? The twenty-year term language appeared in the warranty clause while the granting and habendum clause had no such limitations. *Davis* is an example of a court not relying on the statutory presumption in TEX. PROP. CODE ANN. § 5.001 (Vernon 1984) that the grantor intended to pass a fee simple absolute. *See infra* note 540. The court concluded that the twenty-year term language applied only to the warranty and not to the estate that was conveyed. 361 S.W.2d at 425.

539. 21 Tex. 804 (1858).

540. *Id.* at 816. It is interesting to note that in more recent cases, when the issue has been the duration of the estate, the statutory presumption that a fee simple absolute is conveyed unless there is express language to the contrary, is rarely cited. TEX. PROP. CODE ANN. § 5.001 (Vernon 1984). The statutory antecedents of this presumption date back to 1839.

541. 90 Tex. 535, 39 S.W. 930 (1897). For other early cases embracing the greatest estate canon, see *Davis v. Skipper*, 125 Tex. 364, 83 S.W.2d 318 (1935); *Stanbery v. Wallace*, 45 S.W.2d 198 (Tex. Comm’n App. 1932, holding approved); *Arden v. Boone*, 187 S.W. 995 (Tex. Civ. App.—Fort Worth 1916), *aff’d*, 221 S.W. 265 (Tex. Comm’n App. 1920, holding approved); *Merriman v. Blalack*, 121 S.W. 552, 56 Tex. Civ. App. 594 (1909, writ ref’d).

542. 90 Tex. at 538, 39 S.W. at 931. In *Spell v. Hanes*, 139 S.W.2d 229, 230 (Tex. Civ. App.—Texarkana 1940, writ dism’d judgm’t cor.), the court interpreted a deed to determine if it conveyed a 1/4 interest in all of the minerals or merely a 1/4 interest in the 5/8 minerals owned by the grantors. The court, without stating that it was applying the harmonizing canon, attempted to harmonize and concluded that a 1/4 interest in all of the minerals was conveyed. *Id.* at 230–31. The court then stated that even if the court had determined that the deed was ambiguous, a different result would not be warranted because the court would then apply the greatest estate canon. *Id.* at 230. The use of the greatest estate canon should not be predicated on a finding that the deed is legally ambiguous, but only on a finding that after trying to harmonize, the language is still unclear. *See also* *Curdy v. Stafford*, 88 Tex. 120, 124, 30 S.W. 551, 552 (1895) (holding that a part owner’s interest in part of a certificate means all interest in the part owned by him); *Hasty v. McKnight*, 460 S.W.2d 949, 953 (Tex.

consistent with the use of the greatest estate canon, but the court stated that it only harmonized the conflicting descriptions within the deed.⁵⁴³ Thus, *Cartwright* followed the *Hancock* lead in requiring a court to harmonize first, and then if there remained some doubt, utilize the greatest estate canon.

The Texas Supreme Court continued to require harmonizing as a condition precedent to the use of the greatest estate canon. For example, in *Texas Pacific Coal & Oil Co. v. Masterson*,⁵⁴⁴ a deed containing a call for acreage was more restrictive than other parts of the granting clause. By using the greatest estate canon the court construed the deed to ignore the call for acreage and transfer the larger quantum of mineral interests.⁵⁴⁵

When a deed used language indicating that it conveyed either a vested remainder with a retained life estate, or merely a trust for the benefit of the grantors, the court applied the greatest estate canon to support the conclusion that the grantees received a vested remainder.⁵⁴⁶ Likewise, when the conflicting language was between the conveyance of a mineral and a leasehold estate, the courts have used the greatest estate canon to conclude that a mineral, rather than a leasehold estate, has been transferred.⁵⁴⁷ When a deed can be construed to pass either a corporeal estate subject-to an easement, or an easement, only the court in *Bolton v. Dyck Oil Co.*⁵⁴⁸

Civ. App.—Texarkana 1970, writ ref'd n.r.e.) (concluding that when provisions of a deed can not be harmonized and the language leaves the grantor's intention unclear, the deed will be construed to convey the greatest estate).

543. 90 Tex. at 538, 39 S.W. at 931. While the court said it was harmonizing, it really looks as if the court was giving greater weight to the granting clause. The granting clause described the subject matter of the conveyance as two parcels, one containing 640 acres and the other 320 acres. The conflicting language later in the deed described the parcels as being 1/2 of two parcels which would have been only 320 and 160 acres respectively.

In some later cases the language of the greatest estate canon was slightly changed to: "The rule is too well established to admit of debate that a deed must be construed most favorably to the grantee so as to confer the largest estate which a fair interpretation of its terms will admit." *Gladewater County Line Indep. Sch. Dist. v. Hughes*, 59 S.W.2d 351, 353 (Tex. Civ. App.—Texarkana), *aff'd*, 124 Tex. 190, 76 S.W.2d 471 (1933).

544. 160 Tex. 548, 551–52, 334 S.W.2d 436, 438–39 (1968).

545. *See id.*

546. *See, e.g., Clark v. Wisdom*, 403 S.W.2d 877, 882 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.). The greatest estate canon has also been used to find that a conveyance is a fee simple absolute with a covenant rather than a fee simple subject to a condition subsequent with a power of termination. *See Dilbeck v. Bill Gaynier, Inc.*, 368 S.W.2d 804, 806 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

547. *See, e.g., Gex v. Texas Co.*, 337 S.W.2d 820 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

548. 114 S.W.2d 299, 301 (Tex. Civ. App.—Beaumont 1938, writ dism'd).

applied the greatest estate canon to support the conclusion that the grantor received a corporeal estate.

The canon was inappropriately used by the court in *Fleming Foundation v. Texaco, Inc.*⁵⁴⁹ when it determined that a reservation of oil, gas, and other minerals did not include the subsurface water. The issue of what is or is not a mineral within either a grant or reservation should not be resolved through the use of the greatest estate canon. The court supported the holding that subsurface water was not a mineral under various tests, including the “ordinary and plain meaning” test, thus making the use of the canon surplusage.⁵⁵⁰ As with the multiple grant case, the outcome of whether subsurface water is or is not a mineral should not depend on whether it was granted or reserved.

The greatest estate canon also has been used to resolve problems relating to the transfer of royalty interests. For example, in *Allen v. Creighton*,⁵⁵¹ a granting clause referred to the interest as a 1/8 of 1/8 royalty, while subsequent clauses referred to the interest as 1/8 of 1/8 of the 1/8 royalty. The court applied a combination of the greatest estate and “construe against the grantor” canons to find that a 1/64 royalty was conveyed, after finding that a harmonizing of the conflicting fractional signals was unsuccessful.⁵⁵² However, when a court can harmonize conflicting signals, the court is not required to use the greatest estate canon.

In *Arnold v. Ashbel Smith Land Co.*,⁵⁵³ the reservation was either a 1/4 of royalty or 1/4 of 1/8 royalty. If the greatest estate canon was used, the reservation should have been the smaller fraction. However, the court found that by harmonizing the provisions of the reservation, it was clear that the parties intended to reserve a 1/4 of royalty interest.⁵⁵⁴

Discrepancies between fractions can also arise because textual language, on its face, modifies a clear fractional grant. In *Bryan v. Thomas*,⁵⁵⁵ the granting clause provided in part that: “Grantor . . . do grant, bargain . . . unto said Grantee an undivided one-twelfth (1/12th) (same being a 1/12th of

549. 337 S.W.2d 846, 851 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

550. *Id.* at 852.

551. 131 S.W.2d 47, 48–59 (Tex. Civ. App.—Beaumont 1939, writ ref'd); see *Farmers Canal Co. v. Potthast*, 587 S.W.2d 805, 808 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (reaching a similar result as *Allen*); *supra* notes 520-523 and accompanying text.

552. 131 S.W.2d at 50–51.

553. 307 S.W.2d 818, 820–21 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.).

554. *Id.* at 824.

555. 359 S.W.2d 131 (Tex. Civ. App.—Texarkana 1962), *aff'd on other grounds*, 365 S.W.2d 628 (Tex. 1963).

the customary 1/8th royalty, or 1/96th of total production) interest in and to all the oil, gas and other minerals in and under. . . .”⁵⁵⁶ The heirs of the grantor argued that a 1/96 mineral interest was conveyed, while the grantee argued that a 1/12 mineral interest was conveyed. The court found that the fractions used in the deed were consistent with the grant of a 1/12 mineral estate, except for the parenthetical cited above, which might be construed to give only a 1/96 royalty.⁵⁵⁷ The court found no support for the grantor’s reading that a 1/96 mineral interest was conveyed and subsequently used the greatest estate canon to resolve any potential doubts against the grantor’s interpretation.⁵⁵⁸

The greatest estate canon also has been used by courts to deal with the multiple grant problem. While *Hoffman* did cite the “construe against the grantor” canon, it did not cite the greatest estate canon.⁵⁵⁹ The greatest estate canon was cited, however, in *Garrett v. Dils Co.*⁵⁶⁰ as additional support for the conclusion that the grantee received the larger fraction contained in the future lease clause. The multiple fraction problem is probably an inappropriate forum for the use of the greatest estate canon. If the canon were used, the outcome would depend on whether the larger or smaller fraction was in the granting, subject-to, or future lease clauses and whether the fractional interest was reserved or granted. Because widespread use of the multiple grant form exists, a more uniform approach to resolving these issues should be taken rather than resorting to the greatest estate canon. Neither *Alford*, *Luckel*, or *Snow* used the greatest estate canon.⁵⁶¹

556. 359 S.W.2d at 132.

557. *Id.* at 133.

558. *Id.*

559. See *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828, 829–30 (Tex. 1925). In *Clemmens v. Kennedy*, 68 S.W.2d 321, 323 (Tex. Civ. App.—Texarkana 1934, writ ref’d), the court inferred that *Hoffman* used the greatest estate canon. *Clemmens* involved a deed in which the grantor claimed that he intended to transfer only 1/2 of his 1/2 mineral interest. The language of the deed was read as transferring the entire 1/2 mineral interest owned by the grantor, in part, supported by the court’s use of the “greatest estate” canon. *Id.*

560. 157 Tex. 92, 95, 299 S.W.2d 904, 906 (1957); see also *Waters v. Ellis*, 158 Tex. 342, 347, 312 S.W.2d 231, 234 (1958) (citing *Garrett* in stating that “[a] deed will be construed to confer upon the grantee the greatest estate that the terms of the instrument will permit”).

561. See *Jupiter Oil Co. v. Snow*, 819 S.W.2d 446 (Tex. 1991); *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991); *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984). In a somewhat unusual use of canons of construction the court of appeals in *Richardson v. Hart*, 183 S.W.2d 235 (Tex. Civ. App.—Texarkana 1944), *aff’d as reformed*, 143 Tex. 392, 185 S.W.2d 563 (1945), found the deed ambiguous and admitted extrinsic evidence, namely the conduct of the parties, to interpret the deed. 183 S.W.2d at 236–37. The grantee was

As with the “construe against the grantor” canon, courts have used the greatest estate canon to support findings that when the grantor refers to “phantom” reserved interests, the grantee receives the largest estate possible under the terms of the deed.⁵⁶² Likewise, courts have combined the greatest estate canon with the “construe to validate” canon to conclude that an estate in land was conveyed in an instrument whose validity was questioned.⁵⁶³

In an unusual use of the greatest estate canon, the court in *Extraction Resources, Inc. v. Freeman*⁵⁶⁴ interpreted 366 separate, but identical, deeds. The deeds, on their face, conveyed a 1/64 mineral interest.⁵⁶⁵ The grantor, however, owned a 1/16 royalty interest. Successors in interest to the grantors argued that the grantees should receive 1/64 of the 3/16 leasehold royalty, leaving the successors with 13/16 of the royalty. The court concluded that the grantor intended to transfer a 1/64 royalty interest to each of the 366 grantees.⁵⁶⁶ Each of the deeds, while describing the conveyance of a mineral interest, was entitled “Royalty Deed.” If the court

claiming, in effect a 1/16 mineral interest, but the court interpreted the deed as conveying a 1/128 mineral interest notwithstanding its use of the “greatest estate” canon. The supreme court affirmed the holding, but not the treatment of the deed as ambiguous. 143 Tex. at 395, 185 S.W.2d at 564. It read all of the fractions of the multiple grant deed as consistently conveying a 1/128 mineral estate, entitling the grantee to a 1/1024 royalty upon production. *Id.* at 396, 185 S.W.2d at 565.

562. *See, e.g.,* Sharp v. Fowler, 248 S.W.2d 322, 324 (Tex. Civ. App.—Texarkana), *aff’d*, 151 Tex. 490, 252 S.W.2d 153 (1952); *see also* Ladd v. DuBose, 344 S.W.2d 476 (Tex. Civ. App.—Amarillo 1961, no writ) (refusing to recognize an implied reservation of a mineral interest and holding that the instrument conveyed the greatest estate possible).

563. *See, e.g.,* Young v. Rudd, 226 S.W.2d 469, 473 (Tex. Civ. App.—Texarkana 1950, writ ref’d n.r.e.); *see also* Texas Creosoting Co. v. Hartburg Lumber Co., 298 S.W. 645, 648–49 (Tex. Civ. App.—Beaumont 1927) (stating that “the instrument should be construed so as to confer upon the grantee the greatest estate that the terms of the instrument will permit”), *aff’d*, 12 S.W.2d 169 (Tex. Comm’n App. 1929, judgment adopted); Summit Place Co. v. Terrell, 207 S.W. 145 (Tex. Civ. App.—San Antonio 1918), *aff’d*, 232 S.W. 282 (Tex. Comm’n App. 1921, judgment adopted) (retaining the clause that gave the greatest estate when clauses could not be reconciled).

In *Roswurm v. Sinclair Prairie Oil Co.*, 181 S.W.2d 736, 743 (Tex. Civ. App.—Fort Worth 1944, writ ref’d w.o.m.) the court used the canon to support its finding that the instrument in question was a conveyance of the property interest and not merely a quitclaim, which would only convey the chance or right of title.

564. 555 S.W.2d 156, 157 (Tex. Civ. App.—El Paso 1977, writ ref’d n.r.e.).

565. All of the deeds provided that the grantee was to receive “one sixty-fourth interest in and to all of the oil, gas and other minerals in and under and that may be produced from . . .” *Id.* at 158.

566. *Id.* at 159.

would have applied the “construe to validate” canon,⁵⁶⁷ it would have given effect to the grantor’s obvious intent to convey something to each of the 366 grantees. The grantor, as the owner of a royalty interest, could not convey a mineral interest which was owned by others.⁵⁶⁸ While the grantors were only seeking the residue of the royalty interest, if successful, they would own the entire royalty because the grantors did not have the power to convey a mineral estate.

Another variation of the greatest estate canon that has developed is: “[A] warranty deed will pass all of the estate owned by the grantor at the time of the conveyance unless there are reservations or exceptions which reduce the estate conveyed.”⁵⁶⁹ This canon is often accompanied by the further requirement that reservations must be in clear language because courts do not favor reservations by implication.⁵⁷⁰ Courts have used this canon in phantom reservation cases and other cases in which the grantor has not explicitly reserved or excepted the claimed interest.⁵⁷¹

567. *See supra* part IV.D.

568. There is a rule of law that one cannot convey a “greater estate” than one possesses. That is a rule of law and not a canon of construction. 555 S.W.2d at 159. *See generally* Cockrell v. Texas Gulf Sulfur Co., 157 Tex. 10, 299 S.W.2d 672 (1956) (stating that a “deed can pass no greater estate than that owned by grantor”).

In Barrett v. Patrick, 724 S.W.2d 418, 419 (Tex. App.—Beaumont), *rev’d*, 734 S.W.2d 646 (Tex. 1987), the court of appeals applied the greatest estate canon so that a mineral interest that had been reserved was burdened by its proportionate share of the outstanding royalty interest. On appeal, the Texas Supreme Court reversed, finding that the grantor rebutted the presumption that royalty interests are borne in proportion to the mineral interests granted. 734 S.W.2d at 648. The supreme court showed an express exception of the outstanding royalty interest from the deed. *Id.*; *see also* Klein v. Humble Oil & Ref. Co., 67 S.W.2d 911, 913 (Tex. Civ. App.—Beaumont 1934) (construing to whom an exception was meant to benefit), *aff’d on other grounds*, 126 Tex. 450, 86 S.W.2d 1077 (1935).

569. Cockrell v. Texas Gulf Sulphur Co., 157 Tex. 10, 15, 299 S.W.2d 672, 675 (1956); *see also* Harris v. Currie, 142 Tex. 93, 176 S.W.2d 302 (1943) (stating that “[w]hen the owner of the entire estate in land conveys it by ordinary form of deed containing no exception or reservation his grantee acquires the same title which his grantor had, and such title includes all minerals”).

570. *See* Monroe v. Scott, 707 S.W.2d 132, 133 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.); *see also* Ladd v. Dubose, 344 S.W.2d 476, 479 (Tex. Civ. App.—Amarillo 1961, no writ) (stating that a reservation of mineral interests must be in clear language); Commerce Trust Co. v. Lyon, 284 S.W.2d 920, 921 (Tex. Civ. App.—Fort Worth 1955, no writ) (stating that to be effective reservation of minerals “must be by clear language”).

571. *See, e.g.*, Day & Co. v. Texland Petroleum Inc., 786 S.W.2d 667 (Tex. 1990); Monroe v. Scott, 707 S.W.2d 132 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.).

In *Day & Co. v. Texland Petroleum Inc.*,⁵⁷² the greatest estate canon was stretched to include the executive power that attached to an otherwise reserved mineral interest. Keaton and Young reserved a 1/2 mineral interest in an eighty-acre parcel, but specifically conveyed the executive power to Day. Day then conveyed the east ten acres to Shoaf, reserving the 1/2 minerals owned by Keaton and Young, and an additional 1/4 mineral interest. The issue was whether the executive power granted to Day, covering the Keaton and Young 1/2 interest in the entire eighty acres, was conveyed to Shoaf. The court of appeals specifically used the *Cockrell* canon, which stated that a warranty deed passed all of the estate owned by the grantor.⁵⁷³ The supreme court affirmed the use of the canon to transfer the executive power.⁵⁷⁴ Yet, it was unclear from the supreme court opinion whether the executive power covering the ten acres was transferred, or whether the entire executive power covering the non-conveyed seventy acres was transferred. The transfer of the executive power over the ten acres can be supported not only by the use of the greatest estate or the *Cockrell* canons, but also by the general rule that a transfer of a mineral interest will convey all of that interest's constituent elements unless specifically reserved.⁵⁷⁵ Nevertheless, extending either canon to include the executive power over non-conveyed interests gives the canons an effect inconsistent with the purposes of the canon. For example, if A owned Blackacre and Whiteacre, and by warranty deed conveyed all of her interests in Blackacre, it would be foolish to say that because A did not reserve Whiteacre, B also receives Whiteacre. If *Texland* is interpreted so that Shoaf received the executive power over the non-conveyed seventy acres, the decision would require grantors to reserve unrelated interests they happen to own. Hopefully, the courts will restrict the *Texland* holding to transfers of executive powers over the conveyed mineral interests.

VIII. *The Transformation of a Canon into a Rule: Lands Described versus Lands Conveyed*

This article has focused on canons of construction, not rules of law. The choice and use of the canons is discretionary. Consequently, the results are

572. 786 S.W.2d 667, 669 (Tex. 1990).

573. 718 S.W.2d 384, 389 (Tex. App.—Amarillo 1986) (citing *Cockrell v. Texas Gulf Sulphur Co.*, 157 Tex. 10, 15, 299 S.W.2d 672, 675 (1956)), *aff'd*, 786 S.W.2d 667 (Tex. 1990).

574. 786 S.W.2d at 669.

575. *See Altman v. Blake*, 712 S.W.2d 117, 118–19 (Tex. 1986).

not always consistent. Canons of construction are designed to carry out the intent of the parties as expressed in the written instrument. In contrast, rules of law, if applicable, are mandatory and the result certain. In many situations, rules are intent defeating. A good example is the Rule Against Perpetuities. The Rule Against Perpetuities destroys contingent future interests which would vest or fail to vest beyond a life in being plus twenty-one years.⁵⁷⁶

The rule of *Hooks v. Neill*⁵⁷⁷ was not originally proclaimed as a rule of law. The grantor reserved a 1/32 interest in oil under the “said land and premises herein described and conveyed.”⁵⁷⁸ The grantor owned a 1/2 mineral interest. The grantor claimed that he reserved an unreduced 1/32 mineral interest. In *Hooks*, the court disagreed and found that the key term was “land conveyed.”⁵⁷⁹ Because the grantor could only convey a 1/2 mineral interest, the 1/32 was reduced by 1/2.⁵⁸⁰ The court did not resort to any traditional canons of construction, although one could have arguably used the “construe against the scrivener” or greatest estate canons to reach the same result. Thus, the result in *Hooks* is that when the description of the fractional reserved interest refers to lands or premises described and conveyed, the reserved interest is reduced again by multiplying the reserved interest times the interest actually owned by the grantor.

576. Another classic rule was the Rule in Shelley’s Case, which has since been abolished in many jurisdictions, including Texas. A more recently developed rule came out of *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940). Thus, when a warranty deed purports to convey an entire interest, and an outstanding interest exists in a third party, the grantor will be estopped from claiming any reserved interest until the grantee can be made whole. While the case could have been decided using canons of construction, the court adopted its holding as a rule that will always be applicable. *Id.* at 507, 144 S.W.2d at 880.

577. 21 S.W.2d 532 (Tex. Civ. App.—Galveston 1929, writ ref’d); see Wilmer D. Masterson, Jr., *Double Fraction Problems in Instruments Involving Mineral Interests*, 11 Sw. L.J. 281, 282 (1957); Ernest E. Smith, *Oil and Gas*, 29 Sw. L.J. 109, 115–16 (1975).

578. 21 S.W.2d at 534.

579. *Id.* at 538.

580. The court said:

Now, it is clear, from all the facts and circumstances confronting the parties . . . , that the premises conveyed was at most not more than a one-half undivided part of the land in controversy. . . . The clear import and meaning of the words . . . [was] such deed passed the title . . . to [the grantee], subject only to the reservation of a one thirty-second of one-half of the oil on and under the tract of land, . . . or a one sixty-fourth of all the oil on and under the entire tract. . . .

Id. at 538–39.

The issue in *King v. First National Bank of Wichita Falls*⁵⁸¹ was similar to *Hooks* except that the deed reserved a royalty interest in production “from the hereinabove described land.”⁵⁸² The conveyed interest was a 1/2 mineral interest. If the court treated the term “described land” the same as “conveyed and described,” as in *Hooks*, the reservation of the fractional royalty interest would be reduced by 1/2. The court, however, distinguished *Hooks* and found that the term “lands described” referred to the undivided interest; therefore, the court would not further reduce the reserved fractional royalty interest by 1/2.⁵⁸³ Obviously, if the “construe against the scrivener” or greatest estate canons were applied, the result would have been the same as in *Hooks*. Thus, after *King* and *Hooks*, arguably two rules, which deal with reservations of fractional interests, exist when the grantor owns less than 100 percent of the interest. The determinative feature arises when the granting clause uses the terms “lands conveyed and described” or merely “lands described.”

The canonization of the rule came with the Texas Supreme Court decision in *Middleton v. Broussard*.⁵⁸⁴ The deed conveyed a 1/64 royalty in various *described* lands. The grantor owned only fractional shares of each of the described lands and the descriptions included those fractions. The supreme court set out a rule depending on whether the parties used the term *lands described* or *lands conveyed*.⁵⁸⁵ The rule, which the court stated as “well entrenched in Texas oil and gas law,” is:

581. 144 Tex. 583, 192 S.W.2d 260 (1946).

582. *Id.* at 584, 192 S.W.2d at 261.

583. *Id.* at 186, 192 S.W.2d at 262. Professor Masterson questioned the validity of the court distinguishing between the two different terms which were undoubtedly part of a form deed. Masterson, *supra* note 577, at 282–83. He said: “It is submitted that at best this distinction is a tenuous one.” *Id.* at 282. He also argued that the *King* result was probably a closer reflection of the actual intention of the parties.

584. 504 S.W.2d 839 (Tex. 1974). As Ernest Smith noted, the court was applying the *King* case and not *Hooks v. Neill*. Smith, *supra* note 577, at 115. The rule, until recently, was generally labeled the *Hooks* rule, not the *King* rule. *See, e.g.*, Clack v. Garcia, 323 S.W.2d 468, 469 (Tex. Civ. App.—San Antonio 1959, no writ); Dowda v. Hayman, 221 S.W.2d 1016, 1018 (Tex. Civ. App.—Fort Worth 1949, writ ref’d). This is now changing. *See, e.g.*, Averyt v. Grande, Inc., 717 S.W.2d 891, 893 (Tex. 1986).

585. 504 S.W.2d at 842. The court ignored the fact that in the *Hooks* deed, the term was “lands described and conveyed.” 21 S.W.2d at 534; *see* Smith, *supra* note 577, at 115–16. As noted by the court of civil appeals, the distinction between a fractional interest in lands described in the deed, and a fractional interest in lands described and conveyed in the deed is not obvious. *Middleton v. Broussard*, 496 S.W.2d 766, 769 (Tex. Civ. App.—Beaumont 1973), *rev’d*, 504 S.W.2d 839 (Tex. 1974). In fact, the court of civil appeals treated the term “lands described” and “lands described and conveyed” as the same, so it applied the *Hooks*

‘Where a fraction designated in a deed is stated to be a mineral interest in land described in the deed, the fraction is to be calculated upon the entire mineral interest;’ conversely, ‘[W]here a fraction designated in a reservation clause is stated to be a mineral interest in land conveyed by the deed, the fraction is to be calculated upon the grantor’s *fractional* mineral interest. . . .’⁵⁸⁶

No support is given for this new rule of law. It hopefully reflects the practice of attorneys in carefully drafting instruments with the knowledge of the *Hooks/King* holdings. Thus, the choice of words is critical. There is no room for applying any canons of construction. The words described or conveyed are the sole factor to determine whether the fractional interests should be reduced by the fractional share owned by the grantor.

If the court had used either, or both, of the “construe against the scrivener” and greatest estate canons, a different result would have been reached depending on whether the interests were granted or reserved. In *Middleton*, the interests were granted, but the supreme court determined that the rule would operate regardless of whether the interests were reserved or granted.⁵⁸⁷ While the canon approach would create different results depending on whether the fractional interest was granted or reserved, the *Hooks/King* rule requires different results depending on the inclusion or exclusion of a single word, “conveyed,” in the granting clause. Many times the deed used will be a form deed.

The *Hooks/King* “rule of construction” was applied by the Texas Supreme Court in *Averyt v. Grande, Inc.*⁵⁸⁸ The grantor reserved a 1/4 of royalty interest in two tracts. On one tract, the grantor owned a 1/2 mineral interest. The grantor’s reserved royalty interest was from “lands above described.” Falling under the *King* side of the rule, the court found the reserved 1/4 interest was in the entire second tract.⁵⁸⁹ While the court had

rule to conclude that the grantee only received a 1/64 royalty in the fractional shares owned by the grantor. *Id.* at 769.

586. 504 S.W.2d at 842 (quoting Will G. Barber, *Duhig to Date: Problems in the Conveyancing of Fractional Mineral Interests*, 13 Sw. L.J. 320, 322–23 (1959).

587. 504 S.W.2d at 842.

588. 717 S.W.2d 891, 893 (Tex. 1986).

589. *Id.* at 894. The grantee tried to argue that under *Bass v. Harper*, 441 S.W.2d 825 (Tex. 1969) the location of the “lands described” phrase in the subject-to clause made it part of the description of the land. Because the 1/2 mineral estate was specifically excepted from the grant, the grantee argued that the land described did not include that 1/2 interest. *Id.* at 894.

some misgivings about the *Hooks/King* rule, it felt constrained by the doctrine of stare decisis and longstanding reliance on the rule to change it. The court said:

Since then, numerous cases have relied on the *King* rule to apportion ownership of minerals. . . . Undoubtedly, numerous deeds, in addition to the one in this case, were prepared according to these rules. We should be loathe to change longstanding rules in the oil and gas field when doing so would alter the ownership of minerals conveyed in deeds which rely on the law established by this court, and followed by lower courts, commentators, and especially lawyers advising their clients.⁵⁹⁰

Thus, the *Hooks/King* rule is now a seemingly immutable part of the mineral deed construction arena.

IX. Conclusion

As with a typical encyclopedia, there is a beginning and an end. At times I felt that an alphabetical discussion of the cases starting with A and ending with Z might be as helpful as attempting to classify the canons. In the end, however, while I was unable to discern the “big picture,” I was able to begin the process of categorizing and rationalizing the myriad canons of construction that have been used and abused in Texas caselaw.⁵⁹¹

590. 717 S.W.2d at 895. The *Hooks/King* rule has been followed in a number of cases, however, neither *Hooks* nor *King* has been as extensively cited as for example, *Duhig*. See, e.g., *Middleton v. Broussard*, 504 S.W.2d 839, 842–43 (Tex. 1974); *Gibson v. Turner*, 156 Tex. 289, 294, 294 S.W.2d 781, 783–84 (1956); *Humble Oil Co. v. Harrison*, 146 Tex. 216, 224, 205 S.W.2d 355, 360 (1947); *Clack v. Garcia*, 323 S.W.2d 468, 469 (Tex. Civ. App.—San Antonio 1959, no writ); *McElmurray v. McElmurray*, 270 S.W.2d 880, 882 (Tex. Civ. App.—Eastland 1954, writ ref’d); *Miller v. Speed*, 259 S.W.2d 235, 237 (Tex. Civ. App.—Eastland 1952, no writ); *Dowda v. Hayman*, 221 S.W.2d 1016, 1018–19 (Tex. Civ. App.—Fort Worth 1949, writ ref’d); *R. Lacy, Inc. v. Jarrett*, 214 S.W.2d 692, 693 (Tex. Civ. App.—Texarkana 1948, writ ref’d).

591. To continue the Sisyphian analogy, the boulder has been pushed to the top of the hill several times, only to become dislodged and roll back over me on its headlong journey back down the hillside. I hope, that by exposing the difficulties encountered in the jurisprudence of deed interpretation, to have others join me in the task of pushing the boulder until it comes to rest at the top of the hill. In writing about Sisyphus, Albert Camus said: “The lucidity that was to constitute his torture at the same time crowns his victory. There is no fate that cannot be surmounted by scorn.” ALBERT CAMUS, *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 121 (1955).

Canons of construction can be useful in assisting a court in making “good sense” of inartful drafting. They should not be used as a substitute for common sense and an understanding of the English language. When used consistently they assist those in the conveyancing industry trying to carry out the intent of individuals who seek to transfer real property. That should be the guiding principle for the use of canons.

What I have learned in this adventure through the “looking glass” is that good drafting can resolve many of the problems that have plagued the Texas conveyancing jurisprudence. The continued adherence to outdated forms as well as the continued confusion as to the nature of the interests owned by the parties after an oil and gas lease has been executed have created difficult interpretational issues. These difficulties have led to a jurisprudence with little predictability and doctrinal upheaval. The long and tortured history of dealing with the multiple fraction issue as reflected in *Hoffman, Garrett, Alford, Luckel* and *Jupiter Oil* has added to the hidden transaction costs in conveying mineral interests.

In the future I would hope that the courts and the practicing bar join together to eliminate some of these hidden costs through better drafting and more consistent use of canons of construction. The existence of conflicting or inconsistent canons encourage litigation. The listing of canons without reference to the issues being litigated should be discouraged. Canons, when appropriate, should be analyzed in terms of their resolution of the issues before the court. They should be intertwined with the court’s decision, not merely appended to it at the beginning.

To repeat the words of Karl Llewellyn, “The good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means*,”⁵⁹² should be the guiding principle. Canons when used as a tool in the interpretational process are useful. Canons when used as a substitute for the interpretational process are counter-productive.

592. LLEWELLYN, *supra* note 6, at 521.