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**Estoppel by Deed; Estoppel by Duhig—
The Indicators and Consequences of Estoppel in Land Titles**

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I. Shut-up!

Estoppel is an equitable “shut your mouth.” In other words, you may be right legally, but equity will not permit you to assert your legal rights under these circumstances. Typically, application of estoppel, like other equitable principles, is the result of a “facts and circumstances” determination involving both resolution of fact questions and assessments regarding the relative equities, e.g., cleanness of hands; expectations of parties; purchase price and basis for the computation; relative fairness. Equitable estoppel is typically a fact question, but whether estoppel by deed arises and the consequences of it are questions of law.

In the broadest sense, estoppel by deed stands for the general proposition that "all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest in the land if it be a deed of conveyance, and binding both parties and privies; privies in blood, privies in estate, and privies in law." *Freeman v. Stephens Prod. Co.*, 171 S.W.3d 651, 654 (Tex. App.—Corpus Christi 2005, pet. denied) (citing *Wallace v. Pruitt*, 20 S.W. 728, 728-29 (Tex. Civ. App.—Corpus Christi 1892, no writ)).

Estoppel by deed is not about legal technicalities and entity fictions; this is equity (as a matter of law). A grantor executing a deed in a representative capacity will be personally bound by the recitals and all terms contained therein. No hiding behind capacity. This has been applied to administrators, guardians, trustees and corporate representatives. A trustee signing only in that representative capacity on behalf of the Knights of Pythias was estopped to claim any portion of the land by virtue of his adverse possession of it in *Crump v. Sanders*, 173 S.W. 559 (Tex. Civ. App.-- Texarkana 1915, no writ). A guardian signing only in that capacity was estopped from asserting his inherited life estate against the grantee in the case of *Surtees v. Hobson*, 4 S.W.2d 245 (Tex. Civ. App.-El Paso 1928), aff'd, 13 S.W.2d 345 (Tex. Comm'n App.1929). A husband joining in a covenant of warranty in a partition deed involving his wife's separate property was held estopped from asserting subsequently acquired title in *Fikes v. Buckholts State Bank*, 273 S.W. 957 Tex. Civ. App.- Austin 1925, writ dismissed w.o.j.). “Privies in blood” may be surprised to learn of their ancestors’ deeds, yet will be bound by them. In *W.D. Cleveland & Sons v. Smith*, 156 S.W. 247 (Tex. Civ. App.- Galveston 1913, writ refused), a son who acquired property formerly owned by his father was held not to be bound (through estoppel by deed) to the warranty given by his father because his father died insolvent. But if the son had inherited anything from his father, he would “be bound by his father's warranty to the extent of the value of the property inherited by him from his father.” *Id.* at 250.

As powerful as estoppel by deed can be, the only beneficiaries are claimants with the deed in their chain of title. *Gilcrease Oil Co. v. Cosby*, 132 F.2d 790 (5th Cir. 1943). In *Gilcrease*, A acquired Blackacre by deed and X acquired Whiteacre by deed. A fence separated the tracts that did not track the boundary, so that a portion of Blackacre was fenced with Whiteacre. The deed

through which A acquired Blackacre used a land description that included " ... Thence following a fence on the North line of Whiteacre ... "

The owner of Whiteacre (the appellant) was not able to use the deed into A as evidence for the boundary line:

Appellant contends that defendants are estopped because of acquiescence in describing the tract as extending to the north line of the *** property on the south "as evidenced by a fence * * *" and that said fence "has been used and recognized as the dividing line between the Thad Snoddy 50 acre tract and the Arthur Christian tract on the north for more than thirty years."

As to this, it is well settled that title to real property can not be acquired by estoppel, especially where it is alleged to flow from deeds and transactions to which the one pleading it was not a party. [citations omitted]

Id. at 793-794. The owner of Whiteacre was not the beneficiary of the owner of Blackacre acknowledging the boundary as being where the owner of Whiteacre wanted the boundary.

Courts and title examiners are required to recognize and apply estoppel by deed as a "matter of law." Thus, we should know both the causes and the consequences of these recurring circumstances in Texas titles. While the principle is broad, there are recurring fact patterns where estoppel by deed is likely to be relevant, and thus the cases are susceptible to some categorization and grouping.

II. Estoppel by Deed

A. Estoppel to Deny Title of Grantor

The principle that a grantee is estopped to deny the title of his grantor is stated clearly in 77 Am. Jur. 2d §343:

It is a universally recognized rule that one who has entered into the possession of land under an executory contract of sale is estopped from denying or questioning his vendor's title for the purpose of defeating the agreement or the rights of the vendor thereunder. The principle upon which the rule rests is that the purchaser is estopped to deny the title of the vendor, because he acknowledged it and gained possession by his purchase, and he ought not then in conscience, as between them, be allowed to enjoy the fruits of his contract and not pay the full consideration. It is not the contract alone which estops the purchaser, but the estoppel arises from the purchaser's having obtained the possession of the land on the faith of the contract ... The doctrine of estoppel to deny title does not preclude the grantee from suing the granter for breach of warranty and to recover the cost of curing or perfecting the title, but the curative efforts of the grantee inure to the benefit of the one under whom he obtained possession. [citations omitted] The principle is applicable even though the granter had no title at all to convey and even though the granter claims through a void instrument. ...

The holding in *Greene v. White*, 153 S.W.2d 575 (Tex. 1941) is fundamental to the Texas jurisprudence on “estoppel to deny title.” The grantee in the *Greene* case accepted and took possession under a general warranty deed from a grantor who did not have record title and had not conclusively perfected a limitation title. This deed contained a mineral reservation. Successors to the grantee later challenged the reservation by questioning the effectiveness of the deed. Accepting the deed (even though the grantee did not sign it) meant that the grantee could not challenge the reservation. The deficiencies in the grantor’s title could not be used by the grantee or successors in interest to challenge or alter the terms of the deed:

The argument is made that the deed from Greene to Garrett neither conveyed the surface to Garrett nor reserved the minerals to Greene, because Greene had no title either to the land or to the minerals, the title being in Garrett by virtue of adverse possession and the land not being in the Davenport survey.*** [T]he question presented is not whether Greene had good title and conveyed good title to the surface to Garrett and reserved or excepted to himself good title to the minerals. It is: Are the parties to the deed and those claiming under them bound, as between themselves, by the recitals and provisions of the deed?

Id. at 584.

In *Greene v. White*, the deed that Garrett’s successors wanted to disavow was the basis for Garrett taking possession. What if the troublesome instrument is merely in the chain of title or a curative instrument? In the case of *Waco Bridge Company v. City of Waco*, 20 S.W. 137 (Tex. 1892) (which is cited and discussed in *Greene*), the owner of a tract denied that it was bound by the dedication of a street appearing in a deed conveying the respective tract into the owner’s predecessor in interest. The owner had acquired rights in the same tract through other deeds with separate chains of title and took the position that it “did not claim under said deed [containing the dedication], and had shown already by proof prior possession thereto, and a claim of title in itself in another right.” *Id.* at 139. The court held that claiming through an alternate chain of title that was not contaminated by the dedication did not allow the owner to deny the dedication:

The deed clearly reserved and dedicated a street, as was contended by the city. If the plaintiff had accepted it and held under it, or if it was a link in its chain of title, it was bound by it. Even if it was not a necessary link in its chain of title, if it acquired the title of those holding under it for the purpose of quieting its title, or removing clouds or conflicting claims, it must be held to have taken it with and become bound by its reservations. *** It was sufficient, for the purposes of this case, if it appeared that it was one of the sources under which the plaintiff claimed the land. We think that the evidence abundantly sustains the ruling of the court in that respect.

Id. at 140.

This holding that “one of the sources” contaminated the owner’s position should strike fear in the heart of any oil and gas title professional. The “protection lease” or other protective instrument is fundamental to title curative. Rather than require immediate litigation of every title dispute or discrepancy, “covering the bases” with protective instruments is standard operating procedure for curing many oil and gas title defects. There is a special place in “estoppel by deed” analysis for

the protective lease, but it is important to know the boundaries of the exception. The exception is so tied to unique attributes of oil and gas leases that it is difficult to extrapolate the exception to other property interests. As noted below in the discussion of *McMahon v. Christmann*, 303 S.W.2d 341 (Tex. 1957), oil and gas leases are unusual conveyances in that they typically have a general warranty and a "proportionate reduction" clause, the latter of which provides in effect that if the lessor owns less than all of the minerals, then the bonus, delay rentals, shut-in gas rentals and royalty fraction stated in the lease will be reduced in proportion to the lessor's ownership. When minerals are owned in undivided interests, the lessee may take separate leases from each owner, and obviously, if the first lessor did not own all the minerals, the lessee is not estopped from pointing out to the first lessor that his lease did not cover all of the minerals. If lessor and lessee originally thought that the lease covered all of the minerals, and bonus and delay rentals were paid on the basis of assumption, but the lessee later discovers or becomes concerned that the lessor did not own all of the minerals, the lessee can obtain a "protection lease" from an adverse claimant.

Generally, the protection lease will not inure to the benefit of the first lessor and the lessee will not be estopped to assert that the first lease did not cover all of the minerals. *Shell Oil Co. v. Howth*, 133 S.W.2d 253 (Tex. Civ. App.-Beaumont 1939), modified 159 S.W.2d 483, (Tex. 1942). The *Howth* case is the leading case on protection leases and merits some discussion. Howth had acquired the land from multiple heirs. There were defects in the instruments, including the fact that some of the deeds were signed by minors. Howth executed an oil and gas lease to Shell. Subsequently, Shell became aware of the deficiencies in Howth's title and took leases from the possible adverse claimants. The adverse claimants were not aware of their claims when they were approached by Shell, and the overture from Shell stirred up contestants against Howth, who then sued Shell to cancel the leases and for damages. The Court of Civil Appeals held that the existence of the proportionate reduction clause would relieve Shell from any liability to Howth for having taken leases from other claimants:

It had a perfect right to lease or purchase the interest of any co-tenant of appellee. What we have held is that it had no right to put in motion a claim which denied in toto its lessor's title and actively assert it against him, while at the same time claiming all rights, title and benefits acquired from him by his lease.

133 S.W.2d at 263. On appeal, the Texas Supreme Court further strengthened the "protection lease" exception to the "estoppel to deny title" doctrine by making it more difficult for the grantor, Howth, to recover from Shell:

Certainly it cannot be said, as a matter of law, under the state of this record, that the [adverse claimants], or some of them, did not have a claim to the land in controversy and that the Shell Company did not have the right to protect itself from such claim before drilling a well on the land. Therefore, in order for Howth to recover, he must allege and prove that Shell Company was not acting in good faith in purchasing what it believed to be an outstanding title; that the claim of the [adverse claimants] was wholly groundless; and that the Shell Company conspired with [lease brokers] to encourage [adverse claimants] to assert a spurious claim, and then purchased and placed of record an oil and

gas lease from them, in order to maliciously assert an adverse claim to Howth and repudiate Howth's perfect title to the land.

159 S.W.2d at 491.

Thus, with standard form leases containing proportionate reduction language, lessees should be safe in taking multiple leases on the same land even if some lessors have disputes among themselves. Arguably, even proportionate reduction clauses are not required under the supreme court's view. However, all curative instruments taken "for the purpose of quieting ... title, or removing clouds or conflicting claims," may not enjoy the same safe harbor as protection oil and gas leases do. *Waco Bridge*, 20 S.W. at 140. It is unclear how broadly to project the holding in *Waco Bridge* beyond the facts of that case.

Acquiring rights through a separate chain of title was an effective means of defeating restrictive covenants in the case of *Property Owners of Leisure Land Inc., Del Mar Properties Owners Assoc. v. Woolf & Magee, Inc.*, 786 S.W.2d 757 (Tex. App.-Tyler 1990, no writ). In that case, deed restrictions prohibiting certain oil and gas operations were imposed in a subdivision after a mineral severance in certain of the affected land. After taking oil and gas leases from the owners of the severed mineral interest, the oil and gas lessee bought, for its use in drilling and operating in the residential area, the surface estate in a couple of lots that were subject to the deed restrictions. When the oil and gas lessee began building a road across its lots in violation of the deed restrictions, the property owner association sought to enjoin the construction of the road. The court held that the oil and gas operator's acquisition of the surface estate in the two lots subject to the restrictions did not detract from its status as the lessee of a mineral interest that was severed prior to the imposition of the restrictions:

Woolf & Magee, as the surface owner of lots 67 and 110, may be subject to the restrictions, since the restrictions were in force at the time the surface estate was conveyed to it. But Woolf & Magee's use of the surface is not based on its rights as the surface owner. Rather, it derives from the right of the mineral owner to use the surface. Therefore Woolf & Magee is not limited by the restrictive covenants imposed subsequent to the severance of the mineral estate.

Id. at 761. Estoppel by deed was not part of the analysis in *Leisure Land* and the court did not base its reasoning on the sequence of the acquisition of unencumbered interests and the encumbered interests or whether the oil and gas lessee was in possession when the encumbered interest was bought.

Whether one can buy an interest that is encumbered by some burden and also buy through a separate chain of title the rights of an owner who is not bound by the encumbrance is not well developed. *Waco Bridge* holds that a separate chain of title from an unencumbered seller is not "safe harbor," at least if the encumbrance is a street dedication. The case of *Leisure Land* and the analysis employed would give hope that the owner of the unencumbered interest can transfer his interest for full value much like the beneficiary of the recording act can transfer his position for full value to a buyer even if the buyer cannot on his own qualify as a "subsequent purchaser for

value without notice.” *Hunley v. Bulowsky*, 256 S.W.2d 932, 934 (Tex. Civ. App.- Texarkana 1953, writ ref’d n.r.e.).

The supreme court gave additional comfort in *Bruni v. Vidaurri*, 166 S.W.2d 81, 87 (Tex. 1942) to any person buying a protective position, at least if that person has put himself in possession before buying the protective interest:

The purchase by a person in possession of land of another's claim to or interest in the land may or may not be a recognition of the validity or superiority of the claim or title purchased. In making the purchase the possessor may intend to recognize the adverse title and claim under it. On the other hand, he may buy in order to quiet his possession and protect himself from adverse litigation; he may “buy his peace”. The question is usually one of fact to be determined by the intention as disclosed by what was said by the parties and by the circumstances surrounding the transaction.

B. Estoppel to Claim After-Acquired Title.

One of the primary consequences of estoppel by deed is to preclude a grantor from asserting after-acquired title against his grantee. Ironically, one of the most cited cases regarding after-acquired title is *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (1940), which did not deal with any after-acquired title at all. It nevertheless provides an often quoted statement of the Texas view:

It is the general rule, supported by many authorities, that a deed purporting to convey a fee simple or a less definite estate in land and containing covenants of general warranty will estop the grantor from asserting an after-acquired title or interest in land, or the estate which the deed purports to convey, as against the grantee and those claiming under him.

Id. at 880.

While “a deed ...purporting to convey a fee simple or a less definite estate in land and containing covenants of general warranty will estop...,” so, apparently, will deeds purporting to convey fee simple without any express warranty. In the case of *Lindsey v. Freeman*, 18 S.W. 727 (Tex. 1892), Flora Lowery and her five daughters inherited a tract from E.J.W. Lowery in 1837. In 1860, the five daughters executed a deed to Graves. In 1883, Lindsay recovered a judgment from the daughters. Thus, Lindsay claims under a judgment and Freeman claims under the deed to Graves. There is some uncertainty about whether Flora was alive when her daughters signed the deed in 1860, but she was certainly dead before 1883, so that if the title inherited by the daughters upon Flora’s death passed automatically to Graves before 1883, then the judgment did not encumber any interest in the subject tract. The court held that the absence of a warranty in the deed did not preclude the passage of after-acquired title to Graves through estoppel:

[The deed] purports ‘to convey the lands and land certificates,’ and, purporting to convey them in fee-simple, it purports to convey an absolute, indefeasible title. It is such an instrument as would protect a *bona fide* purchaser. *Richardson v. Levi*, 67 Tex. 364, 3 S. W. Rep. 444. If the grantors the Lowery sisters did not possess the estate which the deed purports to convey, nevertheless, as it was their clear intention, shown by the deed, to

convey a fee-simple, they and their privies, whether in blood in an estate or in law, are estopped to claim by an after-acquired title though the deed contains no warranty. The language in the deed whereby the grantors convey the fee-simple estate in the land constitutes a recital which imports an assertion by them that they are the owners in fee-simple of the land; and, having thus asserted the fact of their ownership, the grantors are estopped to deny such fact. Root v. Crock, 7 Pa. St. 380; Jackson v. Parkhurst, 9 Wend. 209.

Id. at 264.

If the deed does not purport to convey a specific quantity of ownership, even a warranty will not invoke estoppel. In *Clark v. Gauntt*, 161 S.W.2d 270 (Tex. Com of Appeals, Section B, 1942), the court held that a mortgage containing a grant of “all right, title and interest” and a general warranty of title did not result in the mortgage covering rights in the described land that the mortgagor inherited after the delivery of the mortgage. See also *Halbert v. Green*, 293 S.W.2d 848 (Tex. 1956) regarding the inapplicability of estoppel to a quitclaim.

C. Ratification and Revivor by Estoppel.

The phrase “subject to” is a powerful incantation. In the case of *National Bank of Commerce of Houston v. Dunn*, 361 S.W.2d 654 (Tex. Civ. App.- Houston 1964, writ ref’d n.r.e.), the deed dated in 1957 was made “subject to an unrecorded net profit agreement dated October 12, 1937...” The net profit agreement was not enforceable against the grantor because it was barred by limitations. The grantee also contended that the agreement was personal to the original parties and did not “run with the land.” Both of those defenses were equally dispatched. Through the use of the “subject to” phrase, the grantee was bound as effectively as if the deed had express assumption language:

The rule is that where a person takes a conveyance of land and in the deed into him, which is accepted by him, it is recited that he takes it subject to some contract he thereby admits its existence and its validity as of that time. He cannot attack its validity because he has acknowledged its valid existence as of that time and as a part of the consideration has contracted to honor it. [citations omitted].

Id. at 656.

In *Loeffler v. King*, 236 S.W.2d 772, 773 (Tex. 1952), the following language in a royalty deed precluded the grantee from asserting that an oil and gas lease executed by the grantor had terminated prior to the deed: “It is distinctly understood and herein stipulated that said land is under an Oil and Gas lease providing for a royalty of 1/8 of the oil and certain royalties or rentals for gas and other minerals,” Even though the lease was not described in detail, the court held that the most recent lease signed by the grantor was identified and the “parties ratified and gave new life to the Horwitz lease, even if it had in fact theretofore terminated.” *Id.* at 774. Similarly, in *Morgan v. Fox*, 536 S.W.2d 644 (Tex. Civ. App. -- Corpus Christi 1976, writ ref’d n.r.e.) a deed dated March 8, 1974, that was made “subject to” a specific oil and gas lease precluded the grantee from challenging whether the lease was perpetuated up to the date of the deed:

Defendants, by the acceptance of the deed with the above-quoted recitation therein, ratified the Johnson lease and are estopped to challenge the validity of the lease as of March 8, 1974 and all times prior thereto. *Greene v. White*, 137 Tex. 361, 153 S.W.2d 575 (1941); *Hastings v. Pichinson*, 370 S.W.2d 1 (Tex.Civ.App.—San Antonio 1963, no writ).

Id. at 649.

The mother of all “subject to” cases is probably *Westland Oil Development Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982), even though the word “estoppel” does not appear in the case. The primary basis for the many citations to *Westland* is that constructive notice of unrecorded documents is communicated by a reference to them in recorded documents in one’s chain of title. In *Westland*, a subsequent purchaser was held to have notice of the provisions of an unrecorded farmout agreement that was referenced in an unrecorded operating agreement that was, in turn, referenced in an instrument in the purchaser’s chain of title. The court held that the covenants of the farmout regarding an area of mutual interest and the right of a party to receive overriding royalties in future acquisitions “ran with the land,” thus Gulf, a subsequent purchaser in the chain, was obligated to share future acquisitions with and convey overriding royalties in such acquisitions to beneficiaries of the covenants. *Id.* at 911. If the implication of *Dunn* that taking “subject to” a covenant was an assumption of the obligation without regard to whether the covenant runs with the land, the *Westland* court’s lengthy reasoning about why those covenants ran with the land was both wasted and confusing.

D. Estoppel by Overstating and Mischaracterizing Outstanding Interests.

If a grantor ignores an outstanding interest or understates the quantity of an outstanding interest, the grantor is at risk under the *Duhig* doctrine for the deduction of the shortfall from any attempted reservation. But mistakes do not always result in estoppel. For example, in *Canter v. Lindsey*, 575 S.W.2d 331, 334 (Tex. Civ. App.-El Paso 1978, writ ref’d n.r.e.), there was an outstanding non-participating royalty of 1/4 of 1/8, or 1/32 NPRI, owned by Lindsey. Roberts, who owned all minerals subject to the NPRI, sold to Mabee, conveying:

a three-fourths (3/4) interest, undivided, in and to all of the oil, gas and other minerals, on, in, and under the certain tracts, parcels and pieces of land * * *[and] by these presents do GRANT, SELL and CONVEY unto the said J. E. Mabee the right, privilege and authority to execute Oil and Gas Leases on the remaining one-fourth (1/4) interest in the oil, gas and other minerals in the above described land, and the right to receive all bonus monies and annual delay rentals accruing under any such lease covering such remaining 1/4th interest, as well as all other benefits accruing thereunder, save and except the royalty payable under any such lease covering such 1/4th interest, all royalty accruing under any such lease on such 1/4th interest being payable to M. C. Lindsey, his heirs and assigns, who owns an undivided one-fourth (1/4) non-participating royalty...

The quoted language mischaracterizes the outstanding 1/32 NPRI as a 1/4 non-participating mineral interest (perhaps stripped of bonus rights). Later, when the grantee (and owner of all executive rights) executed an oil and gas lease providing for a 3/16 royalty, the incorrect characterization of the NPRI set the scene for three-way litigation. Successors to the NPRI

claimed 1/4 of royalty, a step-up from their fixed 1/32 NPRI. The successors to Mabee, the grantee under the subject deed, claimed all royalty in excess of 1/32 NPRI because of the absence of a reservation to the grantor. Even though the subject deed did not contain an express reservation, the grantor claimed 1/4th of any royalty in excess of 1/8th by virtue of the limited grant: "...the right to receive only three-fourths (3/4) of the royalty accruing under any such lease, or leases, the remaining one-fourth (1/4) interest in such royalty being owned by M. C. Lindsey, his heirs and assigns." *Id.* at 334.

Lindsey, owner of the NPRI, did not benefit from the incorrect characterization of his interest. Because Lindsey was not a grantee under the deed, his rights were not expanded by the incorrect statement:

That 1941 deed does not in any way grant or convey, or purport to grant or convey, any interest in the oil, gas or other minerals to M. C. Lindsey. There is no granting language with regard to Lindsey. The reference to the 1/4th interest in the royalties supposedly owned by Lindsey are mere recitals in connection with the exception to the conveyance to Mabee. The grantor's then erroneous belief that Lindsey owned a 1/4th interest in any royalties, which would include those in excess of a 1/8th royalty, and the incorporation of this erroneous belief into a recital as to the reason for the exception from the grant cannot operate as a conveyance of such an interest. Pich v. Lankford, 157 Tex. 335, 302 S.W.2d 645 (1957).

Id. at 335.

Further, the court held that Lindsey could not benefit from any estoppel principle because he was not a party to the instrument that embodied the mischaracterization of his interest: "By the same token, strangers to the deed have no right to set up its recitals as estoppel." *Id.* Citing *Woldert v. Skelly Oil Co.*, 202 S.W.2d 706 (Tex. Civ. App. Texarkana 1947, writ ref'd n.r.e.); 28 Am.Jur.2d Estoppel and Waiver, Sec. 21 (1966). While the principle of "strangers have no right" is valid (see *Gilcrease Oil*, *supra* and the *Woldert* case), the application of that rule in *Canter* seems to be a misfire. In virtually every estoppel by deed case, the owner or claimant of rights previously created attempt to defend their rights by using subsequent acts in the chain as the basis for estoppel. The application of that principle to Mr. Lindsey would have had negative ramifications for the owner of the net profit interest in *Dunn*, the Bailey and Ellison successors in *Angell* and the owners of the mineral interest reserved in the 1904 Deed in *Nicolai*, etc. The test should be "stranger to the chain" rather than "stranger to the deed."

Lindsey's NPRI was not inflated. And the grantor (Roberts) prevailed with the "limited grant" argument, and therefore owns 1/4 of royalty subject to the 1/32 NPRI. The grantee's successors own all executive rights and 3/4 of royalty.

The mistake made in *Henderson v. Book*, 128 S.W.2d 117 Tex. Civ. App.- San Antonio 1939, writ ref'd) was in characterizing a 1/16 mineral reservation as a 1/16 royalty reservation, which means the difference between the owner receiving 1/16 of royalty or 1/16 of production as royalty. The deed from Graham to Tindel conveyed the land with the following reservation: "It is hereby agreed and understood that as a part of the consideration herein the grantor shall receive One-Sixteenth (1/16) interest of oil, gas or other minerals on the property described below,

should there be any..." In the chain of title from Tindel to the current owners of the land, there were references to the outstanding interest as a 1/16 mineral interest but there were also references to it as being a 1/16 royalty. The chain from Graham consistently treated it as a 1/16 royalty. The mineral interest of 1/16 was transformed to a 1/16 royalty by the mutual mischaracterization of it:

Graham construed his reservation in his deed to White, trustee, as "Our 1/2 Royalty Interest in and to all of the oil, gas and other minerals, etc." This recital binds Graham and those claiming under him, that the reservation described a royalty interest. The predecessors in title of Henderson, that is, Tindel, Whaley and Long, through the recitals in their deeds, construed the reservation of the Graham deed to be a royalty interest. Graham recognized such an interpretation of the interest through his deed to White, trustee, as aforesaid. Therefore, when Henderson came into the title, on March 11, 1936, all parties in the respective chains of title had theretofore recognized the Graham reservation to be a royalty interest. ****

Id at 120.

The court held that : "Henderson, through recitals in deeds of his predecessors in title and by his own solemn written instruments under seal, cannot be heard to say that the reservation contained in the Graham deed is other than a royalty interest. *Id*.

Thus, in *Canter*, the overly-charitable characterization of the outstanding interest did not inure to the benefit of the owner of the interest. But in *Henderson*, the overly-charitable characterization did inure to the benefit of the owner. If *Henderson* is good authority, owners of severed mineral interests should take every opportunity to puff their interests, because the obvious difference in the facts of the two cases is that even though the owner of the burdened interest was charitable in both, Lindsey, the owner of the outstanding interest in *Canter* did not get in a timely amen in order to claim the greater interest.

The grantor actually benefitted from overstating the outstanding burdens in the case of *Pich v. Lankford*, 302 S.W.2d 645 (Tex.1957) (cited in *Canter*), where there were two outstanding interests: (1) "one half of the full 1/8th Oil Royalty, or a 1/16th of all minerals produced on said land" *Id*. at 646, plus (2) "one fourth of all royalty, the same being 1/32 of all oil and gas produced from said land." *Id*. The critical deed contained the following reservation, which overstates the quantity of the outstanding interests: "[s]ave and [e]xcept an undivided three-fourths of the oil, gas and other minerals, on and under said land, which have been heretofore reserved."

The grantee contended that it received all of the minerals less and except only the outstanding interests and the grantor claimed the difference between three-fourths of oil, gas and other minerals and the outstanding interests. The court held that the reservation was valid notwithstanding the inaccurate statement regarding the outstanding interests:

There is no patent ambiguity The deeds do not except from the grants only such royalty interests or interests in the minerals as 'have heretofore been reserved' or that 'do not belong to the grantors herein'; they except an undivided three-fourths (3/4) interest in

the minerals in place in plain and unambiguous language. The quoted phrases are but recitals which purport to state why the exceptions are made. The chain of title conclusively negatives the recitals. It shows they are false. The giving of a false reason for an exception from a grant does not operate to alter or cut down the interest or estate excepted, nor does it operate to pass the excepted interest or estate to the grantee.

Id. at 340-341.

The grantor did not benefit from overstating the outstanding burden in the recent case of *Roberson v. El Paso Exploration & Prod. Co., L.P.*, 2012 WL 3805956 (Tex. App.-Texarkana Sep 04, 2012 no pet.), where the deed contained the following provision:

It being understood and agreed that all oil, gas, and other minerals, excluding coal, lignite and clay, in and under the above described tract have heretofore been reserved and excepted, together with the right to ingress and egress for the purpose of exploring and drilling for, producing[,] storing [,] and removing the same herefrom.

In fact there had been no prior reservations and the court held that this sentence reflecting the false assumption about outstanding mineral interests did not reserve any interest to the grantor. The court distinguished *Pich*:

In *Pich*, the deeds began with an unambiguous reservation, followed by a false recital concerning what was owned by the grantor. Here, the 1963 deed contains the false recital in the grant itself by stating that "all oil, gas, and other minerals, excluding coal, lignite and clay, in and under the above described tract have heretofore been reserved and excepted" and contains no reservation language. Here, because the 1963 deed does not except from the grant the mineral interests it says were previously reserved, *Pich* does not support the Nix Estates' proposition.

E. Estoppel by (Valid) Deed.

A grantor who signed a conveyance that did not have a land description was able to assert a limitation title without any estoppel arising from the deed in *Republic Nat'l Bank of Dallas v. Stetson*, 390 S.W.2d 257, 260 (Tex.1965). The conveyance contained the following provision: "the Undersigned does hereby grant, assign and convey all his right, title and interest in all lands owned or claimed by the Undersigned lying within the boundaries of the tract above identified. *Id.* at 261. There was no land description when the grantor signed and the grantor did not authorize any insertion of a land description, and this deficiency made the deed void: "There being no land described in the deed, it could not operate as a conveyance." *Id.* Thus, a grantor can assert his right to challenge an invalid deed.

However, just as an inapt "subject to" can revive a dead grant (see *Dunn*, et al, supra), an inapt reference to unenforceable rights, by shutting the mouth of the owner of the burdened interest through estoppel, can effectively confer enforceability on otherwise doubtful or disputed claims. The beneficiaries of the reference in *Angell v. Bailey*, 225 S.W.3d 834 (Tex. App.-El Paso 2007, no pet.), were the grantees under grants, which, if reflected by writings at all, were reflected by writings that were not recorded and not available for review. The *Angell* deed, dated 1936, conveyed 320 acres "save and except... 10 acres conveyed to Jack Ellison; 2 acres conveyed to

Lawrence Martin; 2 acres sold to S.A. Bailey; 2 acres sold to Norman Ellison and 2 acres sold to Mr. Anderson, all of said last mentioned 18 acres being out of the Southeast forty acres of said above mentioned section; making a total of 299.51 acres hereby conveyed.” *Id.* at 837. There were no recorded deeds to Ellison or Bailey; for the seventy intervening years since the deed with the “save and except” reference neither Bailey nor Ellison ever made any use of the property; the location and configuration of the respective 2-acre and 10-acre tracts were unknown as of the trial; and the heirs and successors of Bailey and Ellison were represented by an attorney *ad litem* because they were not locatable. *Id.* at 838. A successor to the grantee sued to remove the cloud on title represented by the reference to Ellison and Bailey, and appealed after the trial court held that the owner was estopped from asserting rights against Ellison and Bailey. The appellate court upheld the estoppel ruling and held that the deed was valid notwithstanding that there was no description for the exceptions:

***[W]e believe that the language of the deed, to wit, "except ... the following described tracts of land which have heretofore been sold and conveyed to ... 10 acres conveyed to Jack Ellison; ... 2 acres sold to S.A. Bailey ... all of said last mentioned ... acres being out of the Southeast forty acres of said above mentioned [parcel] ..." does sufficiently describe the excepted interests; they are two tracts previously conveyed by the grantors to Jack Ellison and Bailey, respectively. This dispute has arisen, not because of any imprecision in the grantors' exception language, but because Jack Ellison and Bailey never recorded their deeds.

Estoppel by deed is the product of a good and valid deed. [citations omitted]**** There has been no argument that this deed is invalid in any way. The deed recites that the exceptions were made because the acres had already been transferred to the parties referenced, including Jack Ellison and Bailey. Angell is estopped to deny the truth of the recitals in the instrument and therefore cannot deny the Jack Ellison and Bailey interests.

Id. at 842-843.

The deed was good; only the exceptions were bad, and of course, the exceptions were the issue. The “shut your mouth” effect of estoppel in *Angell* leaves title professionals with the metaphysical conundrum of the grantee being estopped to challenge the rights of Bailey and Ellison, but the deed not being useable by the unlocatable successors to Bailey and Ellison to establish their title. *Id.* at 840 footnote12. What are the boundaries on the ground for the 2-acre and 10-acre tracts? Because the 2-acre and 10-acre tracts cannot be identified, the court found the appellant and successors to Bailey and Ellison were cotenants in the larger tract. *Id.* at 842. There was no suggestion that the grants to Bailey and Ellison acknowledged in the *Angell* deed contemplated undivided interests in the larger tract.

We may get new guidance from the Texas Supreme Court on the requirement of a valid deed since petition has been granted in *XTO Energy Inc. v. Nikolai*, 357 S.W.3d 47 (Tex. App.—Fort Worth 2011, pet. pending). The most recent conveyance in this chain of title is a general warranty deed to Nikolai dated 1981 that did not contain any reservations or references to outstanding interests. There was a mineral reservation in a 1904 deed that did not have a legally sufficient land description (XTO is the oil and gas lessee from claimants to the reserved interest),

and a 1922 deed (the “Speer Deed”) in Nikolai’s chain of title made reference to the 1904 reservation. If the reservation was not valid to sever the minerals, then Nikolai should have perfected a limitation title to surface and unsevered minerals. The trial court granted summary judgment to Nikolai, but the court of civil appeals reversed on the basis that Nikolai was estopped to deny the mineral reservation. In so doing, the appellate court did not require the deed containing the reservation to be a valid conveyance:

The Nikolais' chain of title, by which the trial court determined that they owned the surface and mineral estates in their tract, contains the Speer Deed, which recites, "It is thoroughly understood that the Mineral Rights upon this tract of land are not transferred by this instrument, same having been retained by W.R. Madewell in deed to J.L. Goff said deed dated Oct. 5 1904, recorded in ... Deed Records of Denton County, Texas." Two other deeds in the Nikolais' chain of title, the Pippin Deed and the Brockie Deed, rely on the Speer Deed in their descriptions of the conveyed property.

We recognize that estoppel by deed "is the product of a good and valid deed." *Masgas v. Anderson*, 310 S.W.3d 567, 571 (Tex. App.-Eastland 2010, pet. denied) (citing *Angell*, 225 S.W.3d at 842). The Nikolais argue that estoppel by deed cannot apply here because the [1904] Deed is void for lack of a sufficient description of the land it conveys. The Nikolais rely, in part, on a case in which our supreme court held that estoppel by deed did not apply to an instrument that was signed in blank, without including any description of the property that the instrument related to. See *Republic Nat'l Bank of Dallas v. Stetson*, 390 S.W.2d 257, 260-61 (Tex.1965). But XTO did not base its estoppel by deed defense on the [1904] Deed. Rather, XTO based its defense on the subsequent deeds described above, in particular the Speer Deed, and the Nikolais never challenged the sufficiency of the property descriptions in those deeds.

Id. at 58-59.

The deed containing the reference from which the estoppel arises must be a valid deed, but under *Angell* and the appellate court’s opinion in *Nicolai*, the rights referred to and which benefit from the estoppel need not be valid and subsisting rights.

II. Estoppel By Duhig

A. What Has *Duhig* Wrought?

The case of *Duhig v. Peavy- Moore Lumber Co.* applies “estoppel by deed” to a very distinct fact pattern and has a narrow holding for that set of facts. But the volume of cases that cite and follow *Duhig* means both that the fact pattern is a common one and that the *Duhig* holding does not preclude repeated litigation under that fact pattern. For some reason Texas lawyers are not convincing their clients that *Duhig* has already decided their cases. The facts of *Duhig v. Peavy-Moore Lumber Co.* are simple. The holding is simple when applied to those facts. Things get complicated after that, but we start with the simple beginning.

Mr. Duhig owned the surface and a one-half mineral interest when he conveyed the subject tract through a general warranty deed, the other one-half mineral interest having been reserved earlier in the chain of title. The following provision was the last paragraph of the deed from Duhig, following the habendum and the general warranty: "But it is expressly agreed and stipulated that the grantor herein retains an undivided one-half interest in and to all mineral rights or minerals of whatever description in the land." *Id.* at 879. Duhig claimed that he reserved one-half of the minerals, and Peavy-Moore Lumber Co. (successor in title to the original grantee) claimed that the reservation was ineffective and, thus the deed from Duhig conveyed, rather than reserved, the one-half mineral interest. The court acknowledges that "retains" means reserve, but does not allow any reservation:

If controlling effect is given to the use of the word "retains", it follows that the deed reserved to Duhig an undivided one-half interest in the minerals. We assume that the deed should be given this meaning. When the deed is so interpreted the warranty is breached at the very time of the execution and delivery of the deed, for the deed warrants the title to the surface estate and also to an undivided one-half interest in the minerals. The result is that the grantor has breached his warranty, but that he has and holds in virtue of the deed containing the warranty the very interest, one-half of the minerals, required to remedy the breach.

Id. at 880.

If one stops reading here, *Duhig* is a breach of warranty case, implementing a self-correcting remedy for the breach; you breach your warranty and any reservation is ineffective until the shortfall in the warranty is made up. But the self-correction is couched in estoppel:

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

Id.

Even though the *Duhig* doctrine is intertwined with after-acquired title analysis and broader estoppel applications, *Duhig* did not hold that any after-acquired title passed—*Duhig* caused the **immediate passing** of title to property that was described in a reservation. So, while the analysis may be far reaching, the holding of *Duhig* is for a very specific fact pattern. The following discussion suggests that when faced with true *Duhig* facts, Texas courts, with one notable exception, have been narrowing and back-pedaling from *Duhig* rather than embracing it.

B. Refining *Duhig*- Look for a Multiple Grant.

While *Benge v. Scharbauer*, 259 S.W. 2d 166 (1953) was not the first supreme court case to cite *Duhig*, it was the first to apply the *Duhig* doctrine¹, and in so doing, the court applied it narrowly. In *Benge*, there was an outstanding (but unmentioned) one-fourth mineral interest when the grantor conveyed the land with a general warranty, reserving an undivided 3/8ths interest in the minerals. The deed further provided that the grantee would have the exclusive right to execute oil and gas leases "but said leases shall provide for the payment of three-eighths (3/8ths) of all the bonuses, rentals and royalties to the grantors". *Id.* at 168. The court construed the grant as conveying 5/8ths of the minerals because of *Duhig*, with the grantor's attempted reservation of 3/8 being reduced to cover the shortfall. *Id.* at 169. However, the custom language directed at future leases salvaged much of the value for the grantor because the court gave that "future lease" language effect under a "two grant" analysis. The *Benge* grantee received a 5/8 mineral interest by virtue of *Duhig* but only 3/8 of the benefits under future leases. *Id.*

C. Refining *Duhig*- Not For Oil and Gas Leases.

The *Duhig* doctrine will apply differently, if at all, to oil and gas leases. In *Gibson v. Turner*, 294 S.W.2d 781 (Tex. 1956), the Texas Supreme Court was asked to apply *Duhig* to an oil and gas lease where the lessors owned less than all of the minerals and had deleted the "proportionate reduction" clause. The lessor claimed royalty calculated by multiplying their undivided percentage ownership by the 1/8 royalty fraction, and the lessee (regretting the striking of the proportionate reduction provision) was relegated to arguing that the warranty in the lease invoked the *Duhig* doctrine to effectively substitute for the deleted proportionate reduction provision, i.e., because title had failed except as to the undivided percentage purported to be conveyed, the reserved royalty should be abated in proportion to the part of the title that had failed. A lessor owning a 1/40th should therefore be entitled to receive only 1/40th of the 1/8th royalty provided by the lease-- *voila*, the same result as if the proportionate reduction provision had stayed in. The court discussed *Duhig* but did not apply it because the lessee had the remainder of the minerals under lease and thus, suffered no loss from the breach of warranty:

"The case of *Duhig v. Peavy-Moore Lumber Co.*, [citation omitted], has been cited as sustaining the contention of respondents. The reservation in our lease covers 1/8th, or 5/40ths. The lessors having purported to convey 40/40ths, and having reserved only 5/40ths, their lease would be held to convey 35/40ths to the lessees. Under the doctrine of after-acquired title as set out in the *Duhig* case, lessors would be estopped to urge any interest they might have in the land against lessees until lessees had received 35/40ths of the minerals. However, in our case, the lessees owned all the balance of the mineral estate, except such as was conveyed to them by lessors; therefore, there can be no breach of warranty.

Id. at 786.

¹ The first use of the term "Duhig doctrine" was in a casenote on *Benge*. William Ingo Marschall, Jr., Comment, *Oil and Gas-Title Failure- Risk of Loss Between Grantor and Grantee, Benge v. Scharbauer*, 259 S.W. 2d 166 (Tex.1953), 32 Tex. L. Rev. 471(1954).

Obviously, this analysis fails to acknowledge that a reservation of 5/40ths as royalty is a different proposition than 5/40ths conveyed as leasehold working interest. Arguably, the fact that the lessee leased up the remainder of the mineral ownership through protective leases should not bear on the question of whether a warranty was breached in a leasing transaction or whether after-acquired title should pass subsequent to the leasing transaction.

The negotiated deletion of the proportionate reduction clause (by physically “running typewritten ‘x’ through it” on the preprinted form *Id.* at 782.) essentially decided *Gibson v. Turner*. Very soon thereafter, the supreme court had another chance to apply the *Duhig* doctrine to an oil and gas lease in the case of *McMahon v. Christmann*, 303 S.W.2d 341 (Tex. 1957). This lease reflected thoughtful use of the proportionate reduction provision in that it had the typical preprinted boilerplate provision:

If said lessor owns a less interest in the above described land than the entire undivided and fee simple estate therein, then the royalties and rentals herein provided for shall be paid the lessor only in the proportion which lessor's interest bears to the whole and undivided fee.

Id. at 406.

And attached to the printed lease form was a typewritten addendum that provided as follows:

The lessors herein reserve unto themselves their heirs and assigns, **without reduction**, as an overriding royalty, a net 1/32nd of 8/8ths of all oil or gas produced and saved from the above described premises, free of cost or expense to the credit of the lessors into the storage tank or tanks or into the pipeline to which the well or wells on said land may be connected. [emphasis added].

Id.

The lessors owned only 16/96th of the minerals and the lessee resisted paying the extra 1/32 royalty required by the addendum “without reduction” but instead wanted either to reduce it under the boilerplate proportionate reduction provision or, if that position did not prevail, the lessee wanted *Duhig* to reduce the extra 1/32 royalty. The court used the construction tenet of “typewritten matter in a contract ... given effect over printed” to allow the boilerplate proportionate reduction provision to reduce the boilerplate 1/8 but not to reduce the addendum 1/32 royalty. *Id.* at 344.

As a lead-in to the *Duhig* discussion, the court gives a less than glowing review of its own work in the *Duhig* decision:

We have examined the record on file in this court in the *Duhig* case. The rule announced was a novel one in the fact situation before the court. *** It is evident from the face of the court's opinion in the case (144 S.W.2d 879-880.) that able judges also differed on the wisdom of the adoption of the rule. None of the parties filing briefs cited any case in which the rule had been approved or applied. **** None of the cases cited [in *Duhig*] support the rule, except by analogy. Each of the cases cited involve an application of the

well-established rule of estoppel against the assertion by a grantor of an after-acquired title in contradiction of his covenant of warranty. In addition to citing the cases above noted the court quoted the opening sentence from 19 Am.Jur. 614, sec. 16, the language of which gives seeming support to the rule adopted, but no case is cited by the writer of the text and an examination of the remainder of the section and of the cases cited in the footnotes shows that the writer was dealing with the effect of the rule as applied to an after-acquired title.

Id. at 345.

The court (i) chooses to label the *Duhig* rule as “novel”; (ii) reminds that able judges leaned against the rule; (iii) notes no other court has adopted the rule, (iv) notes that none of the cases cited in *Duhig* really support the holding except by analogy, and (v) notes that the Am Jur compilation cited in the *Duhig* opinion also does not cite any supporting authority. This critique falls short of even “faint praise” and shows a distinct lack of enthusiasm for *Duhig*, but the court is quick to clarify the basis for distancing itself:

What has been said with reference to the history of the adoption of the rule of the *Duhig* case is not said in disparagement of the ultimate decision of the court to adopt and apply it. It is said, rather, in justification of our refusal to extend it to and apply it in the construction of oil, gas and mineral leases.

Id.

The reference to “oil, gas and mineral leases” is unequivocal and invites broad exclusion of oil and gas leases from any *Duhig* purview, but the reasoning is narrower:

They [lessee] knew, moreover, as did petitioners [lessor], that they themselves and third persons owned all interest in the minerals over and above the 16/96th interest. Respondents paid a cash bonus on a 16/96th interest; they paid no bonus on a greater interest. There was no occasion for respondents to exact from petitioners or for petitioners to furnish a warranty of title to any interest greater than the 11/96th interest which they undertook to convey. It is evident that the parties intended the covenant of warranty to extend only to the 11/96th interest in the minerals title to which passed to respondents under the lease, and we so hold on this record as a matter of law. So holding preserves the reserved royalty and preserves the warranty for its intended purpose. There has been no breach of the warranty as we have interpreted it and the warranty cannot, therefore, be used by respondents as a vehicle for obtaining or for cutting down the royalty reserved to petitioners in the lease.

Id. at 347-348.

This portrayal of the leasing transaction is generally the way it happens: lessor and lessee agree what percentage the lessor owns and the bonus is calculated on a net mineral acre basis, and maybe the warranty is deleted or tailored. Maybe the warranty is left alone. Under *McMahon*, the *Duhig* doctrine will not normally apply to an oil and gas lease, but beware of the leasing transaction that is distinguishable in some respect. It is the attributes of the transaction that

should match the *McMahon* reasoning rather than the title at the top of the page of the conveyance in question.

D. Refining *Duhig*- Role of Constructive Notice or Knowledge.

In *Duhig* and all of the cases following after it, the existence of the outstanding mineral interest that is not accounted for in the later deed is a matter of record. If the outstanding interest were not recorded or not in the chain of title, the cases would put the outstanding interest at risk and turn on “subsequent purchaser for value without notice” rather than allocating the shortfall in interest between the grantor and grantee in the later deed. The grantor and grantee have equal notice of the outstanding interest —it is in their common chain of title. In a typical equity/estoppel analysis, this factor could be part of the facts and circumstances evaluation, and the common knowledge of the parties was part of the *McMahon* court’s disavowal of *Duhig* in the context of an oil and gas leasing transaction: “They knew, moreover, as did petitioners, that they themselves and third persons owned all interest in the minerals over and above the 16/96th interest.” *McMahon* at 347. But outside of the oil and gas lease situation, the constructive notice afforded to the grantee of the existence of the outstanding interest does not play a role in *Duhig* analysis. The case of *Scarmardo v. Potter*, 613 S.W.2d 756 (Tex. App. – Houston [14th Dist.] 1981 writ ref’d n.r.e.) follows *Duhig* on similar facts and renders an attempted reservation (“Grantors retain an undivided 1/8th interest...” *Id.* at 757.) as ineffective. The *Scarmardo* court directly addresses the effect of the grantee’s knowledge:

Appellants in their third Point of Error contend that the trial court erred in finding that Potter was vested with title to the undivided one-eighth mineral interest by the terms of the Scarmardo to Easterling conveyance because it revealed knowledge on the part of Scarmardo of Frieling's previous reservation of an undivided one-half interest in the mineral estate. We agree. The estoppel by deed rule in *Duhig* emanates from the scope of the warranty clause and therefore the knowledge of the grantee is immaterial. If a grantee, after receipt of the deed, subsequently obtains knowledge of a prior outstanding interest not mentioned in the deed by his grantor, the grantee is not prevented from asserting any title to interests held by the grantor. *Body v. McDonald*, 79 Wyo. 371, 334 P.2d 513 (1959). *Id.* at 759.

The nature and extent of the grantee’s knowledge of the outstanding interest is not discussed. While *Scarmardo* accords no role to knowledge, it does couch that holding in the context of a warranty. Until *Blanton v. Bruce*, 688 S.W.2d 908 (Tex. App.-Eastland 1985, writ ref’d n.r.e.), the general consensus was that a general warranty was a condition to the application of *Duhig*. So, while *Blanton* would invite the application of *Duhig* to instruments that do not include a warranty of title, does the “knowledge is immaterial” tenet of *Scarmardo* apply equally to no-warranty instruments?

E. Refining *Duhig*- Warranty or Not.

The breach of warranty was an integral part of the facts and the holding in *Duhig*, and only a prescient title examiner would have contemplated applying the *Duhig* holding in the absence of a breach of warranty-- at least until the case of *Blanton v. Bruce*, *supra*. The deed (and the facts) in

Blanton are not materially different from the *Duhig* deed and facts, except for the absence of an expressed warranty in the *Blanton* deed. The court not only held that a general warranty is not required, but leaves the impression that any conveyance that is not a quitclaim will invoke the *Duhig* doctrine:

The Blantons argue that *Duhig* is not controlling because the deed does not contain a "general warranty." The deed uses the words "granted, sold and conveyed ... and by these presents do grant, sell and convey." **It is not a quitclaim deed.** The grantor in the deed purports to convey the property described. The deed is a deed of conveyance without an expressed warranty. [emphasis added]

Id. at 911.

“Not a quitclaim” is the equivalent of a representation of ownership, according to *Blanton*:

The estoppel in the after-acquired title cases arises from the assertion of ownership made by the grantor in the covenant of warranty, express or implied, or in other recitals in the deed. Such assertion is a representation that the grantor owns the land or the estate or interest to which it relates, and having thus represented the fact of ownership, the grantor is estopped to deny that fact..."

Id. at 912.

Blanton is “writ refused; no reversible error” and often is cited for having extended *Duhig* to instruments that do not have expressed warranties--but that warranty issue keeps coming up. As noted earlier, when in *Concord v. Pennzoil Exploration and Prod. Co.*, 966 S.W.2d 451(Tex.1998), the Texas Supreme Court declined to extend the “two-grant” theory of *Benge v. Scharbauer* outside of the *Duhig* context, it took the opportunity to restate the basis of the *Duhig* decision[****]:

Our decision in *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (1953), is sometimes cited as applying a two-grant theory. However, that case turned on the application of the *Duhig* doctrine. We held in *Duhig v. Peavy–Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878, 880–81 (1940), that **when a grantor represents and warrants** that it owns a particular interest, it is estopped from claiming that the deed granted less than the grantor owned.[emphasis added]

Concord at p. 456.

There is a difference between a representation and warranty of ownership per *Duhig* (as explained by *Concord*) and the implicit “assertion of ownership” arising under *Blanton*. When the deed has a warranty, that is the nail driven into the grantor with emphasis. See *Duhig; Scarmardo*. If there is not a warranty, a title examiner may acknowledge what the *Blanton* opinion holds regarding a “no warranty” conveyance and fortify that understanding with the instruction of *Lindsay v. Freeman* regarding after-acquired title passing without a warranty—but

rarely will a title examiner find instruments and facts sufficiently close to those cases to credit ownership “as a matter of law” based on estoppel without requiring curative action.

F. Refining *Duhig*- Reformation.

The case of *Miles v. Martin*, 321 S.W.2d 62 (Tex. 1959) emphasizes an important wrinkle in the *Duhig* fabric—the possibility of reformation. In *Miles*, there was an outstanding one-fourth non-participating mineral interest in a prior owner when Martin conveyed to Pratt in 1951, with this deed exhibiting all of the symptoms of the “*Duhig* syndrome”, i.e., (i) intent to reserve an additional one-fourth, (ii) failure to acknowledge the outstanding interest (iii) general warranty and (iv) reservation of only one-fourth mineral interest. In 1955, Pratt conveyed to Miles without any reservation, but this deed was made subject to “any outstanding mineral or royalty interest now owned of record by persons who are not parties to this conveyance***.” *Id.* at 71-72. While the application of the *Duhig* doctrine to the deed from Martin to Pratt (thus, no effective reservation to Martin) is not surprising, the court injects a couple of considerations not previously addressed with regard to *Duhig*.

First, the court specifically approves reformation as a remedy for the grantor who failed to properly navigate the *Duhig* reservation requirements:

The record suggests that the parties to the deed may have been mutually mistaken as to the legal effect of its provisions and believed that the instrument effectively reserved to respondent a one-fourth mineral interest in addition to that already owned by the Walls. Against such a mistake of law, equity will grant relief by way of reformation if the circumstances otherwise warrant an exercise of its power.

Id. at 67.

Every grantor who runs afoul of *Duhig* will believe there is a mutual mistake about the legal effect—that is the very essence of every disagreement arising in this area. There was actually no dispute that a mistake was made between the contract of sale between Martin and Pratt, which explicitly provided that Martin was to reserve an additional one-fourth mineral interest, and the deed. *Id.* The deed simply failed to properly address that term of the trade.

Often, the effect of *Duhig* is realized long after the misguided deed, and the statute of limitations for reformation of a deed is four years *Id.* at 69, effectively taking reformation out of the grantor’s arsenal. But the *Miles* court encourages grantors disappointed about the effect of the *Duhig* doctrine (and more than four years after the deed) to look carefully at how the discovery rule plays out for them. The *Miles* litigation was filed almost six years after the deed, but the grantor had been paid delay rentals under an oil and gas lease executed by Pratt. The acknowledgment by Pratt that Martin owned the right to one-fourth of the delay rentals and that Pratt owned only one-half may have lulled Martin sufficiently to invoke the discovery rule:

This testimony suggests that he may not have discovered the mistake more than four years before the suit was filed, and the evidence showing that he was paid one-fourth of the delay rentals for about five years indicates that there may be an issue of fact as to whether he should have done so. With the record in this condition, we think the justice of

the case requires that the cause be remanded for a trial of respondent's right to equitable relief.

Id. at 70.

The second important thrust of *Miles* is that the grantor who wants to reform his reservation to navigate *Duhig* must do so before any rights are created in a bona fide purchaser (“Respondent is not entitled to equitable relief against a bona fide purchaser, however, and he has the burden of showing that petitioner does not enjoy that status.” *Id.* at 67.). Pratt had executed a deed of trust that made express reference to Martin owning a mineral interest. This instrument was in Miles’s chain of title. While the court did not recognize the reference as affording constructive notice to Miles of the mistake (This statement is puzzling and should be viewed with skepticism after *Westland, supra*), the court referenced evidence that Miles had actual knowledge of the deed of trust and viewed the “bona fide purchaser” status as a question of fact:

Whether a person of ordinary prudence with knowledge of this recital would have been put on inquiry and whether a diligent search would have led to a discovery of the mistake are issues to be determined by the trier of fact under all the evidence. See *Gibson v. Morris*, Tex. Civ. App., 47 S.W.2d 648 (wr. ref.).

Id. at 69.

The case of *Bright v. Johnson*, 302 S.W. 3d 483, 490 (Tex. App.-Eastland 2009, no pet.) also allows reformation within the four-year limitation period to conform the reservation to avoid application of the *Duhig* doctrine based on "mutual mistake and a scrivener's error."

G. Drafting in the Shadow of *Duhig*.

Clearly, failing to reference the outstanding mineral interest was the root of the problem for the grantors under *Duhig*, *Benge*, *Scarmardo* and *Blanton* and a longer list of *Duhig* rule cases. Ignoring outstanding interests is a risky proposition when trying to reserve a mineral interest. But what is “best practice” for crafting conveyances that are meant to reserve to grantor a certain “hell or high water” reservation? Consider the “safe harbor” approach approved in *Harris v. Windsor*, 294 S.W.2d 798, 799 (Tex. 1956), where the deed contained this recital after the land description:

And being the same land described in Warranty deed from The Federal Land Bank of Houston to W. C. Windsor, recorded in Vol. X-2, Page 119, Deed Records of Marion County, Texas, reference to which is made for all purposes.

Following that reference, the deed contained this provision:

There is, however, Expressly Excepted from this conveyance and Reserved by the said W. C. Windsor, an undivided Three-Eighths (3/8ths) interest in and to all of the oil, gas and other minerals in and under and that may be produced from the above described premises, together with the right of ingress and egress for the purpose of mining, marketing and transporting the same.

The deed from the Federal Land Bank, referred to “for all purposes,” did not reserve any minerals but referred to a prior deed, that did reserve one-half of the minerals, with this notation: “to which said deed and the record thereof reference is hereby made for all legal purposes.” *Id.* at 800. Of course, if *Duhig* is applied, the grantors reservation of 3/8 becomes zero because there was a full one-half of the minerals outstanding. The difference for the grantee is between 1/8 if *Duhig* is applied and one-half if *Duhig* is not applied. Reference to the prior instrument “for all purposes,” which instrument in turn referred to the instrument that created the outstanding interest for “all legal purposes” warded off a shortfall in the grant that would have required invading the grantor’s reservation:

Much reliance was placed by petitioner in that case upon *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878, and *Sharp v. Fowler*, 151 Tex. 490, 252 S.W.2d 153. In the instant case those same authorities are relied upon by petitioner. In our opinion those cases do not rule the instant case. There was no reference in the deeds in those cases to prior instruments “for all purposes” or “for all legal purposes.”

Id. at 801.

The deed in *Sharp v. Fowler*, 252 S.W.2d 153, 154 (Tex. 1952) (cited in *Harris*) referred to the deed that created the outstanding interest, but followed that reference with “being the same land described in a deed from Frost Lumber Industries, Inc. of Texas...” The *Sharp* court treated that reference as merely incorporating the land description and thus, if avoiding application of the *Duhig* doctrine is the goal, “being the same land” is the wrong way to reference the prior deed and “reference to which is made for all purposes” and “reference is hereby made for all legal purposes” are better.

The deed that created an outstanding 1/4th of royalty interest was identified in the deed containing a reservation under the facts of *Helms v. Guthrie*, 573 S.W.2d 855, 856 (Tex. Civ. App. – Fort Worth 1978, writ ref’d n.r.e.), but the quantity of interest outstanding was understated (“Helms . . . under date of September 19, 1950, . . . conveyed to Henry Stern . . . an undivided 1/4th of the 1/8th oil, gas and mineral royalty . . .”). The reservation to the grantor was: “1/2 of the 1/8th royalty (same being a 1/16th of the total production) of oil, gas and minerals, same being a non-participating royalty interest here retained by grantors.” *Id.* Identification of the instrument creating the interest saved the grantor from his misstatement regarding the quantity of that outstanding interest:

We hold that by the language of the deed from Helms to Guthrie, with specific provision for notice of that which had earlier been conveyed to Sterns and with express provision that the conveyance to Guthrie was made subject thereto, there was excepted from the conveyance and from the warranty of that instrument whatever was shown by the earlier instrument, on record, as the Sterns' property interest.

Id. at 858.

But what if you are not sure about all of the outstanding interests? Can you still effectively reserve a certain “no doubt about it” mineral interest? This was the dilemma for the grantor in the case of *Gore Oil Co. v. Roosth*, 158 S.W. 3d 596, 599 (Tex. App.-Eastland 2005, no pet.),

who owned the land subject to an outstanding 1/16 royalty interest. The grantor tried, in a general warranty deed conveying the land, to shift the risk of shortfall to the grantee by use of two “subject to” provisions, neither of which specifically refer to the outstanding interest. The first “subject to” provision was in the reservation:

Grantor unto himself, his heirs and assigns, reserves free of all liens a full one-eighth (1/8) non-participating royalty interest in the Property subject to any previously conveyed or reserved mineral interest as may appear of record in Knox County, Texas.

The second “subject to” provision followed after the reservation:

This conveyance is made and accepted subject to all restrictions, reservations, covenants, conditions, rights-of-way and easements now outstanding and of record, if any, in Knox County, Texas, affecting the above described property.

Id. at 600.

The term “subject to” means “subordinate to,” “subservient to” or “limited by.” *Kokernot v. Caldwell*, 231 S.W.2d 528 (Tex. Civ. App. - Dallas 1950, writ. ref’d). The first “subject to” proviso, if left alone, would cause the grantor’s reservation to bear the outstanding interest. By making the reservation “subject to outstanding interests,” the reservation would be diminished by them. The second “subject to” standing alone would likewise cause the grantee’s interest to bear the outstanding interest. *Bass v. Harper*, 441 S.W. 2d 825 (Tex. 1969).

While *Duhig* and cases that follow it construe the instruments to be unambiguous and to vest title as a matter of law, the appellate court affirmed the trial court’s ruling that dueling “subject to” provisions made the *Roosth* deed ambiguous. If the instrument is ambiguous, no estoppel arises under *Duhig*. *Id.* at 601. The appellate court affirmed the trial court’s construction of the ambiguous deed as reserving the full 1/8 royalty to the grantor and shifting the “shortfall” resulting from the outstanding 1/16 to the grantor. The probative evidence regarding the proper construction of the ambiguous document was the same as would be relevant in a reformation claim and the result for the grantor was essentially the same, but reformation was not pled and was not granted. *Id.* at 602. There was no discussion of the date of the instrument or whether limitations had run on a reformation action.

Similarly, in *Philipello v. Taylor*, 2012 WL 1435171(Tex. App.-Waco Apr 25, 2012, no pet.), this “subject to” exception: “subject to all leases, easements, restrictions, covenants, encroachments and ordinances of record and actually affecting the property on the ground” was sufficient to protect the grantor’s reservation from being diminished to cover an outstanding severed mineral interest that was not identified with specificity. However, the length of the court’s discussion of the Farm and Ranch Earnest Money Contract’s treatment of the allocation of minerals and additional evidence regarding the parties’ redundant expressions of intent outside the deed leaves the impression that the grantor benefitted from a reformation even though reformation was time barred and ambiguity was not an issue.

IV. Conclusion.

Estoppel in land titles is weird equity. This estoppel fabric reflects an attempt to impose rules that, while reflecting equitable principles, are susceptible to application by parties dealing with the deed records without reference to extrinsic evidence. This “legalistic equity” plays out like the Lord Chancellor dispensing equity with his back turned and his ears covered. What results is neither absolutely equitable nor absolutely predictable.