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UNITED STATES OF AMERICA

This publication is designed to help identify the prevailing guidelines that surround the disposition of the subject matter covered. It is, however, not intended to substitute for any specific legal advice or opinion. Since state rulings in the matter of law are defined by the courts and can change at any time, no portion of this publication is a substitute for legal advice. Since state statutes are voluminous and vary from state to state, this course does not purport to be a complete or definitive volume on the subject. In many cases, topics covered have been summarized in order to relate to the layperson. As with all condensed statements, they are incomplete in their substance. Where these statements are expressed, they are designed only as a guideline and not as a legal opinion on any one specific matter. The publisher and/or authors are not engaged in rendering any legal, accounting, or other professional service and do not purport to offer any legal opinion on any one specific matter. If legal advice or other expert assistance is required, the service of a competent professional person should be sought.

The Essentials to Conveying and Chaining Title

Conveyances

A chain of title can simply be defined as the succession of historical transfers of ownership in the property. As with any chain, the separate links in the chain connect to one another to form the completed chain. The links in the chain of title are simply those entities that have held ownership to the property throughout time or that have attached a claim against the property. One by one, from the original owner to the present owner, they connect with one another forming an unbroken chain of ownership. Chains of title start with patent (the grant from a sovereign such as the United States or a state. The chain will include notations of deeds, judgments and distribution from estates, certificates of death, foreclosures, judgments of quiet title, easements and other recorded conveyances of title to the property.

The purpose of chaining title is to show that present day title to a tract of land is Marketable and free to transfer to another party. When dealing with real property, the significance of this chain of title is considerable. Much more so than the chain of title to an old automobile or antique clock.

Usually title companies or abstractors are the professionals who search out the chain of title and provide a report so that a purchaser will be sure the title is clear of any claims. An Abstract of Title contains a condensed history of the title to a piece of land in addition to a summary of conveyances. This history appears in the public record so that title to land can be checked.

Conveying Deeds

Property deeds or conveyances are legal instruments that are used to assign ownership in real property or to transfer title to the land another. Words that are often used to convey property are grant, assign, convey or warrant, but they basically all do the same thing, they transfer the interest of the person selling the land (grantor) to the person buying the land (grantee).

To be valid, a deed must contain six essential elements.

- It must be a written document.
- It must contain a clause that transfers title, called “a granting clause”.
- It must provide the names of the Grantor and the Grantee.
- It must give a “legally sufficient” description of the property.
- It must be executed by a competent grantor.
- It must contain the Grantor's signature.

Terms Relevant to Deeds

Grantor - The grantor is the person or entity that owns an interest in the property and executes a conveyance to another party. This can be one or more persons, a corporation, a partnership, or another entity.

Grantee - The grantee is the person or entity that receives title to the property.

Consideration - Consideration refers to the dollars or value given to a grantor in exchange for receiving title to property. Many states do not require that the amount shown on the conveyance be the exact selling price of the land. In some cases, deeds will include words such as:

"$10.00 and other good and valuable consideration"
"love and affection and other good and valuable consideration"

Words of Conveyance - In order for a conveying document to transfer title, there must be certain words of granting. These granting words vary somewhat between states. Examples would include:

- "grant, bargain, sell and convey"
- "transfer, set over, or assign"
- "convey and warrant"
- "convey and quitclaim"

Subject to Clause - Often property ownership is subject to previously reserved or conveyed rights. In such cases, the conveyance will contain a clause setting out these rights. An example might be:

- "Subject to all rights of way, easements, and covenants of record"

Exception Clause - The exception clause refers to portions of the ownership that are excluded from the conveyance. Such a deed might read:

- "Less and except the northwest quarter of the southeast quarter (NW4SE4)"
- "Less and except any prior reservations of all oil, gas and mineral rights in the property conveyed"

Execution - In order for a conveyance to be valid, it must be in writing and signed by the grantor.

Acknowledgment - In order for a conveyance to be recorded and placed in the public record, the execution of the conveyance must be

acknowledged by a valid notary public. Acknowledgment forms vary from state to state; however, generally, the certificate of acknowledgment must be completely filled out at the time the notary public's signature and seal are affixed. Documents requiring acknowledgments do not need to be signed in the Notary's presence in most states. However, the signer must *appear before* the Notary at the time of notarization to acknowledge that he or she freely signed for the purposes stated in the document.

What defects are fatal to an acknowledgment?

- failure to include acknowledging party's name in Certificate of Acknowledgment;
- significant variance in acknowledging party's name in the Certificate versus the instrument being acknowledged;
- omission of the word "acknowledged" in the Certificate;
- failure of officer taking acknowledgment to sign the Certificate;
- absence of the officer's official seal when its use is applicable; or, officer taking acknowledgment was disqualified, and his/her disqualification is evident on the face of the instrument.

The effect of a missing or defective acknowledgment

The General Rule is…

1. The validity of the instrument, as between the parties, is not affected by the absence of or defect in the acknowledgment.
2. As against third parties, unacknowledged or defectively acknowledged instruments *do not serve as constructive notice* to third parties. *Thus, the instrument can be denied the benefit of recordation.*

In other words, even though the instrument physically appears in the real estate records, it will, as a matter of law, be treated as unrecorded.

Some states, such as Oklahoma, now have placed a statute of limitations upon the invalidating effect of defective acknowledgment. In Oklahoma, if an instrument which contains a defective acknowledgement has been recorded for a period of five (5) years, the instrument is considered valid, notwithstanding the omission or defect, and will not impact marketability.

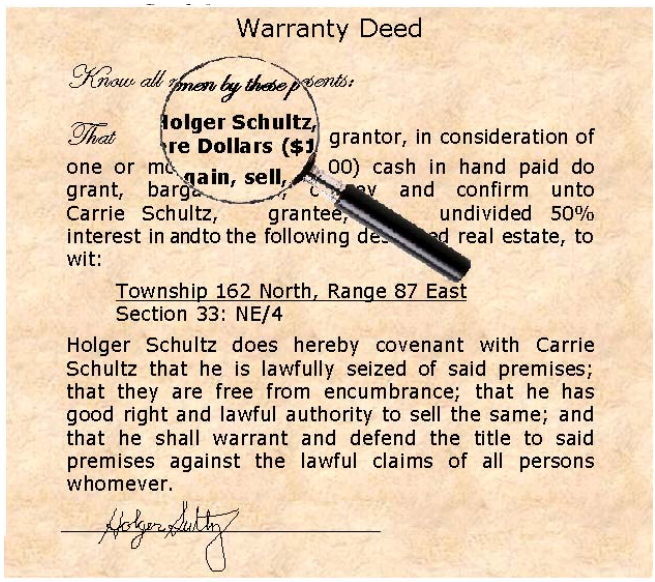
There are generally three options available when an acknowledgment must be cured. They are:

1. The correction of the acknowledgment is made by the original notary public, followed by the re-filing of original instrument.
2. The Grantor re-acknowledges the original instrument before a different notary public, followed by the re-filing of original instrument.
3. A new acknowledgment if provided by a different notary.

Six Elements of a Valid Conveyance

Property ownership carries with it certain privileges. One of those privileges is the right to sell, grant, or give away the property to another party (*grantee*). When title is conveyed by the *grantor,* certain requirements must be met, and the land professional who examines recorded copies of these conveyances must be aware of the guidelines surrounding the transfer of ownership.

A conveyance must be in writing



Warranty Deed

Know all men by these presents:

That **Holger Schultz,** grantor, in consideration of **Five Dollars ($5**.00) cash in hand paid do grant, **bargain, sell,** convey and confirm unto Carrie Schultz, grantee, the undivided 50% interest in and to the following described real estate, to wit:

Township 162 North, Range 87 East
Section 33: NE/4

Holger Schultz does hereby covenant with Carrie Schultz that he is lawfully seized of said premises; that they are free from encumbrance; that he has good right and lawful authority to sell the same; and that he shall warrant and defend the title to said premises against the lawful claims of all persons whomever.

Holger Schultz

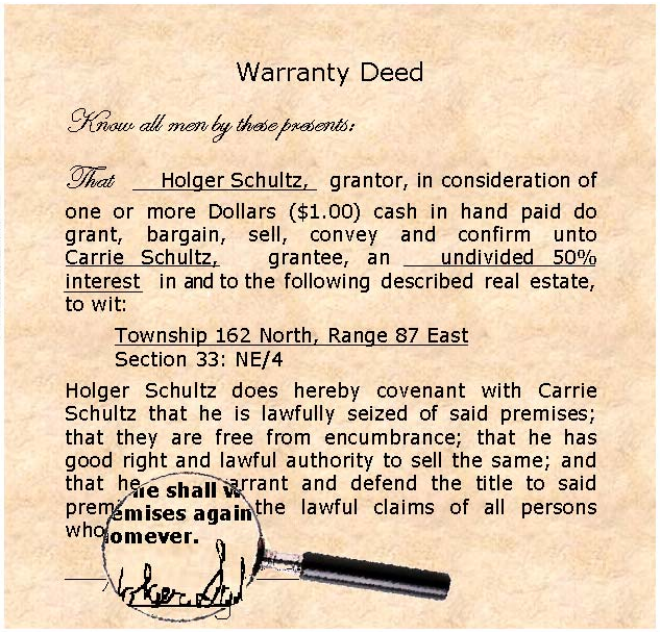
In 1920, William Payson Richardson, professor at the Brooklyn Law School, St. Lawrence University, authored the "Principles of Law of Contract." Herein he wrote, "The most important statute ever promulgated, either in England or in this country, is the celebrated Statute of Frauds." The statute originated in England in 1677 and was originally entitled "An act for Prevention of Frauds and Perjuries."

The purpose of the statute was to prevent loss caused from fraudulent behavior, particularly associated with false testimony (perjury), regarding the sale or transfer of lands or property wherein no written deed was ever secured. In an attempt to reduce this type of fraud, England enacted a statute that required certain contracts be in writing.

Because of the predisposition of certain people to use fraud and deceit for personal gain, the statute of frauds requires that all contracts involving the sale or transfer of real property be in writing and be signed by the grantor.

A conveyance must contain both a grantor and grantee

Generally, the statute of frauds also requires the identification of both a valid grantor and grantee.



Warranty Deed

Know all men by these presents:

That Holger Schultz, grantor, in consideration of one or more Dollars ($1.00) cash in hand paid do grant, bargain, sell, convey and confirm unto Carrie Schultz, grantee, an undivided 50% interest in and to the following described real estate, to wit:

Township 162 North, Range 87 East
Section 33: NE/4

Holger Schultz does hereby covenant with Carrie Schultz that he is lawfully seized of said premises; that they are free from encumbrance; that he has good right and lawful authority to sell the same; and that he shall warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

Valid Grantors

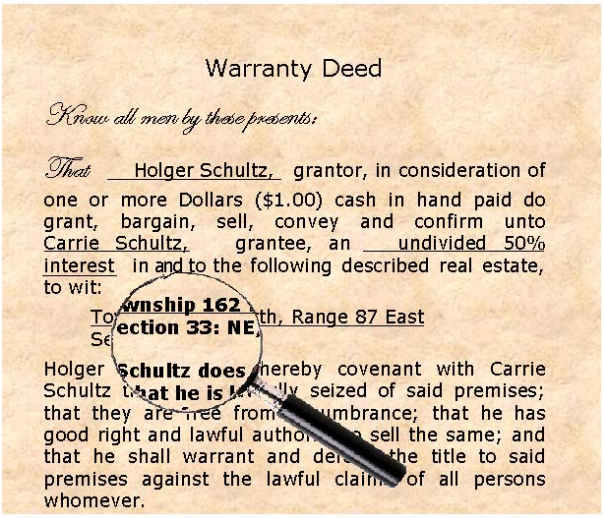
1. When someone other than the grantor is placed in a position to act on his or her behalf, the *capacity* and *authority* of the person acting in such an office must be accurately described. For instance, an Attorney-in-Fact may execute an oil and gas lease if the Power of Attorney expressly grants the authority to do so. In some states, such as Pennsylvania, a personal representative of a minor child, or a guardian for an incompetent, has no authority to execute an oil and gas lease without consent from the court.
2. If the grantor is known by more than one name in the chain of title, each of those names should be listed.
3. The grantor must have the ability to convey and must be competent.
4. The grantor must be other than a minor.
5. Homestead property or tenancy by the entirety requires the signature of both spouses.

Valid Grantees

1. Unborn children cannot receive title to property.
2. A deceased person cannot receive title to property.
3. A legal entity, such as a corporation, that did not exist at the time of the conveyance cannot receive title to property.
4. Oil and gas leases should be styled exactly as title was vested.
5. A “Stranger in Title” is not generally entitled to ownership rights.

A conveyance must properly describe the lands being conveyed

The statute of frauds also requires that a *legally sufficient* description of the property be used when describing the lands. Legal sufficiency requires a higher degree of specificity than a normal street address.


Warranty Deed

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That Holger Schultz, grantor, in consideration of one or more Dollars ($1.00) cash in hand paid do grant, bargain, sell, convey and confirm unto Carrie Schultz, grantee, an undivided 50% interest in and to the following described real estate, to wit:

Township 162 North, Range 87 East
Section 33: NE/4

Holger Schultz does hereby covenant with Carrie Schultz that he is lawfully seized of said premises; that they are free from encumbrance; that he has good right and lawful authority to sell the same; and that he shall warrant and defend the title to said premises against the lawful claims of all persons whomever.

Although 3162 Simpson Creek Road, Wry, Wyoming might be sufficient for someone to find the designated house, it is not precise enough to be used as a sufficient legal description for making a conveyance in real property.

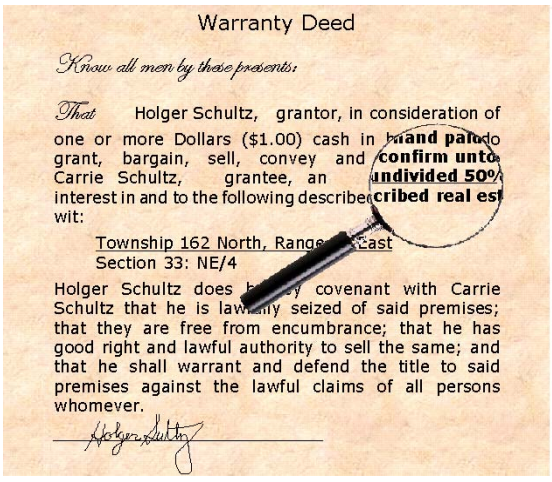
A description meets the standard of *legal sufficiency* if a competent surveyor can locate the parcel using the description. Locate means that the surveyor can define the exact boundaries of the property. A legal description will describe the piece of land giving all pertinent information such as land lot, subdivision name, block, parcel, acreage, etc. that comprises a legal and *sufficient description* of a particular property. In Texas, words conveying "all lands owned by the Grantor" are satisfactory to convey the lands in the particular county where they are located.

A conveyance must properly describe the interest being conveyed

"Words" can alter the outcome. Words and the meaning of words can alter the meaning or lead to ambiguities. For instance, assume that a deed conveyed…

"a 25% interest."

One must ask, is the deed conveying a full 25% interest in the entire tract of land, or just 25% of the grantor's interest in the tract of land? From the granting language, the land professional could not clearly make a determination. Such language is ambiguous.


Warranty Deed

Know all men by these presents:

That Holger Schultz, grantor, in consideration of one or more Dollars ($1.00) cash in hand paid do grant, bargain, sell, convey and confirm unto Carrie Schultz, grantee, an undivided 50% interest in and to the following described real estate, to wit:

Township 162 North, Range 87 East
Section 33: NE/4

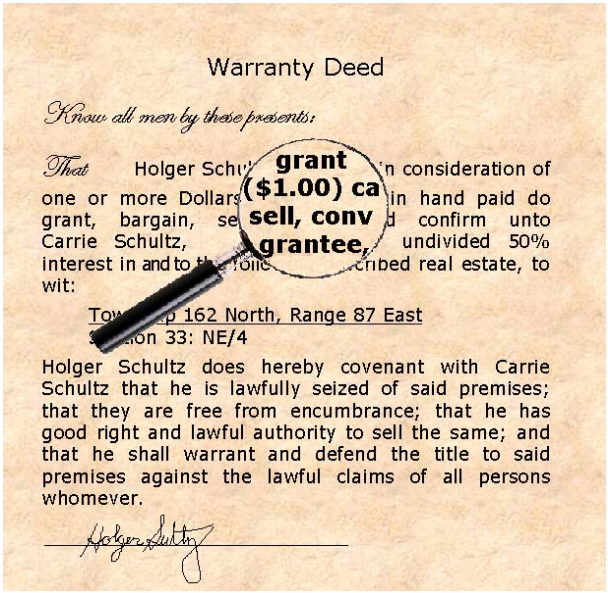
Holger Schultz does hereby covenant with Carrie Schultz that he is lawfully seized of said premises; that they are free from encumbrance; that he has good right and lawful authority to sell the same; and that he shall warrant and defend the title to said premises against the lawful claims of all persons whomever.

A conveyance must contain proper words of grant

In order for a conveying document to transfer title, there must be certain words of granting. The language most often used is “grant, bargain, sell, and convey.” Other words that can have the same effect include “transfer, set over, or assign.” Not all types of documents that might seem to transfer real property contain appropriate granting language. In other words, assume a document contained the following,

“I do hereby offer to…”

Such language would not be enough to transfer real property in the United States.



Warranty Deed

Know all men by these presents:

That Holger Schu… in consideration of one or more Dollars … in hand paid do grant, bargain, se… confirm unto Carrie Schultz, … undivided 50% interest in and to th… following described real estate, to wit:

grant
($1.00) ca
sell, conv
grantee,

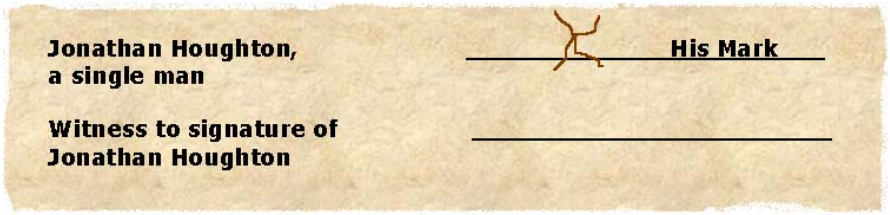
To…p 162 North, Range 87 East
S…tion 33: NE/4

Holger Schultz does hereby covenant with Carrie Schultz that he is lawfully seized of said premises; that they are free from encumbrance; that he has good right and lawful authority to sell the same; and that he shall warrant and defend the title to said premises against the lawful claims of all persons whomever.

It is also important to note other language that might appear in certain types of deeds. For example, a Warranty Deed might read: *“Grantor does hereby covenant that he is lawfully seized of said premises; that they are free from encumbrance; that he has good right and lawful authority to sell the same; and that he shall warrant and defend the title to said premises against the lawful claims of all persons whomever.”*

A conveyance must be properly signed by the grantor.

There are times when a conveying party cannot sign their own name. Many years ago, as a result of illiteracy, this was more common than it is today. In other cases, an inability on the part of the conveying party might hinder them from signing a conveyance. In situations like this, the person has the authority to make some sort of a mark (most commonly used is an “X”). In order for this sign to be legitimate it must be attested to by witnesses.



Jonathan Houghton,
a single man _____ **His Mark**

Witness to signature of
Jonathan Houghton _____

"Intent" Based on Words

"Words" in a deed can alter the outcome of the interest either being conveyed or reserved. One aspect of contract law is that if the court is attempting to determine the meaning and effect of a conveyance they must restrict themselves to the document itself. The restriction does not allow the court to look at other extrinsic evidence (parol evidence) such as prior agreements, side agreements, or verbal interactions either before or after the creation of the contract. If terms or conditions in the contract appear to be clear and unambiguous, the court must accept the *"plain meaning"* of the terms and will not be influenced by outside evidence. This strict view bases the outcome on the *words* and the *words* alone. This basic rule of law will only consider parol evidence if the instrument is ambiguous. Over the years, court decisions based on certain words or phrases have become the "law of the land" in the states where the decisions have been made. The general rule in construing a deed is to ascertain the intention of the parties from language used and to give effect to that intend to the fullest extent of the law. *Henningson v Stromberg*, 221 P.2d 438, 442 (MT 1950).

For instance, in most states, if a grantor reserved a subsurface interest *in what was being conveyed,* the grantor's reserved interest would be proportionately reduced by the interest he conveyed.

On the other hand, if the grantor reserved a subsurface interest *in the lands that were described* in the conveyance, the grantor's reserved interest would not be proportionately reduced by the interest being conveyed. *Averyt v. Grand, Inc.*, 717 S.W.2d 891 (Tex. 1986).

This can be confusing, especially if the grantor owns less than 100% of the surface or minerals at the time of the conveyance or reservation. One must determine if the grant or reservation is a percentage of what was owned at the time, or out of the entire tract of land. In such cases, the wording in the conveyance or reservation becomes paramount as to what is being conveyed or reserved.

From time to time, words such as, "I convey a 25% interest," can lead to ambiguities. In a case like this, the land professional should ask if the conveyance is conveying a full 25% interest in the entire tract of land or just 25% of the grantor's interest in the tract of land. In most states, courts have determined that when an ambiguity exists the court will try and determine the intent of the parties based on the words in light of the circumstances that existed at the time of the conveyance.

Intent Clauses

Often, language will be added to the granting clause with the intent of clearing up any potential ambiguities or confusion about what is being granted or reserved. This language would be considered the "Intent Clause" of the document. Intent clauses can be found in every state but seem to be more popular in a handful of states.

The following would be an example of intent clause language:

"It is my intent to convey to Ben a full 25% mineral interest in the tract of land."

Scenario 1:

Assume Abe owned an undivided 50% interest in both the surface and minerals in a 160-acre tract of land and conveyed the land to Ben using this language...

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS THAT

Abe hereinafter called Grantor, for and in consideration of the sum of Ten and no/100 --------Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto **Ben**, hereinafter called Grantee,

"I hereby grant to Ben all my right, title, and interest in and to the described lands reserving unto myself an undivided 50% interest in and to all the oil, gas, and other minerals in and under said lands.

***It is my intent* to reserve a full undivided 50% interest in and to all of the oil, gas, and other minerals in and under said lands."**

This intent language clears up any type of ambiguity.

When an ambiguity exists in granting language but the conveyance has intent language added, the courts have often placed greater weight on the intent language because they see it as language added in an attempt to make a clear statement of reservation or conveyance.

Scenario 2:

Assume Abe's conveyance to Ben covers a 150-acre tract of land. Read as follows and determine how many net mineral acres are being conveyed to Ben:

- **37.5 net mineral acres (150 gross X 40/160)**
- **40 net mineral acres**

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS THAT

Abe hereinafter called Grantor, for and in consideration of the sum of Ten and no/100 --------Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer, and deliver unto **Ben**, hereinafter called Grantee,

"I hereby grant to Ben 40/160th mineral interest in and to the said lands described.

It is my intent to convey 40 net mineral acres to Ben."

ANSWER: It appears from the granting clause that Abe is conveying 40/160ths X 150 gross acres or 37.5 acres. However, with the intent language, the outcome would be different granting 40 mineral acres to Ben.

Types of Conveying Instruments

Land Patents

At the outset of the granting phase of our history, nearly 1.4 billion acres of the western frontier were primarily unoccupied. During this time, the government continued to promote the westward movement and began to grant lands through a conveyance called a *land patent.* Patents were given to those individuals who met the criteria for the following categories:

1. Residence requirements
2. Land improvement requirements
3. Requirements for actual settlement and cultivation for 5 years

The significant patenting of western lands began with *The Homestead Act of 1862*. It allowed ownership in 160-acre tracts of land. The land was free, except for filing fees, hence the origination of the term *Fee Lands*. Homesteads were available on any land where Indian title was deemed non-existent. Between 1862 and 1900, over 80 million acres of land were granted to settlers under this act. At the conclusion of the federal land grants in our country's early history, close to 1.1 billion acres of land were owned by individuals.

For lands patented by the United States of America, it is incumbent upon the title examiner to obtain a copy of the patent to determine whether all or any portion of the mineral estate was reserved to the United States.

In and around 1908, things began to change as to how the United States government granted these lands.

The first automobile was invented in 1889, but not mass-produced in the United States until 1901. Prior to this time, petroleum products had little known value in the world and when *The General Land Ordinance of 1785* was written, few men dreamed of the wealth that would eventually come from the development of oil and gas minerals.

Prior to the invention of the automobile, when granting tracts of lands, the United States usually would reserve only *"ditches, canals or coal"*. The result was simple, the surface owner became the proud owner of the surface estate and everything else attached to the surface. After 1908, Congress, realizing the value of oil began to develop what they called the "multiple use concept." Simply put, they began to reserve the minerals under lands.

This 1908 land patent, issued by Theodore Roosevelt, President of the United States, reserved “a right of way thereon for ditches and canals.”

(RECORD OF PATENTS.)

4-405a-tyr.

The United States of America,

To all to whom these presents shall come, Greeting:

Homestead Certificate No. 1275.
Application 1714.

WHEREAS, There has been deposited in the GENERAL LAND OFFICE of the United States a Certificate of the Register of the Land Office at Sundance, Wyoming, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of

WALTER B. WILLIAMS

has been established and duly consummated, in conformity to law, for the southeast quarter of the southwest quarter, the west half of the southeast quarter, and the southeast quarter of the southeast quarter of Section thirty-one in Township forty-seven north of Range sixty-seven west of the Sixth Principal Meridian, Wyoming, containing one hundred sixty acres,

according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said Walter B. Williams the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto th

"...a right of way thereon for ditches or canals constructed by the authority of the United States."

and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

(SEAL)

GIVEN under my hand, at the City of Washington, the first day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

By the President: Theodore Roosevelt

By M. W. Young, Secretary.

J. Hazard, Recorder of the General Land Office.

95108

This 1929 land patent, issued by Herbert Hoover, President of the United States, reserved to the United States all coal and other minerals in the land.

Denver 028275 and 030626 4—1007-R.

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at Denver, Colorado,

has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of James J. Conklin

has been established and duly consummated, in conformity to law, for the south half of the southeast quarter, the southeast quarter of the southwest quarter, the northwest quarter of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of Section eight, the southwest quarter of the southwest quarter and the northeast quarter of the northwest quarter of Section nine, the northeast quarter of Section seventeen, and the southeast quarter of Section eighteen in Township one south of Range se

taining six

according to the Offi

"Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented". "

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat., 862).

IN TESTIMONY WHEREOF, I, Herbert Hoover,

President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the TWENTY-NINTH day of NOVEMBER in the year of our Lord one thousand nine hundred and TWENTY-NINE and of the Independence of the United States the one hundred and FIFTY-FOURTH

By the President: Herbert Hoover

By Viola B. Pugh, Secretary.

M. P. LeRoux
Recorder of the General Land Office.

143709

(SEAL.)

RECORD OF PATENTS: Patent Number 1032465

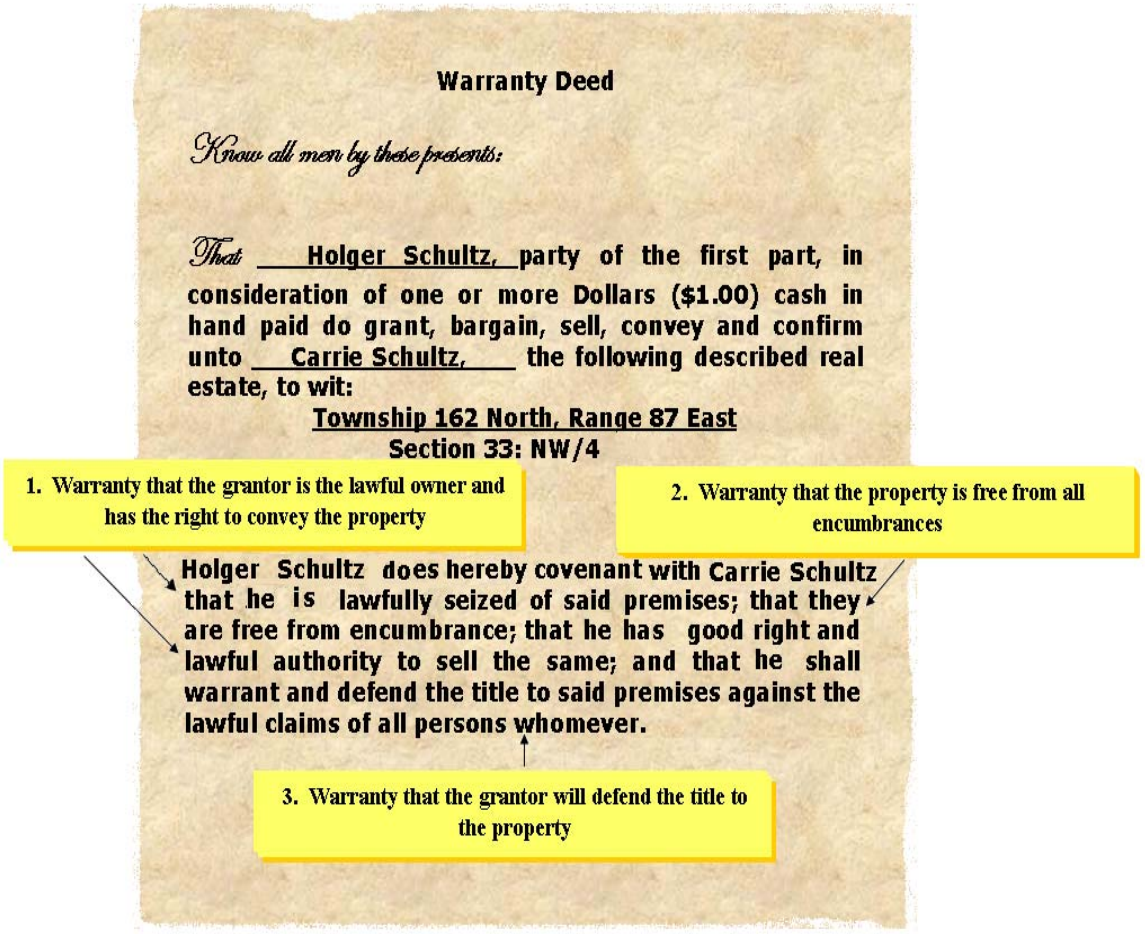
Warranty Deeds

The word *warranty* defines this type of conveyance. In a warranty deed, the grantor is *warranting* certain guarantees to the grantee. In some areas of the country, this conveyance is also known as a grant deed. There are two types of warranty deeds.

1. General Warranty Deed

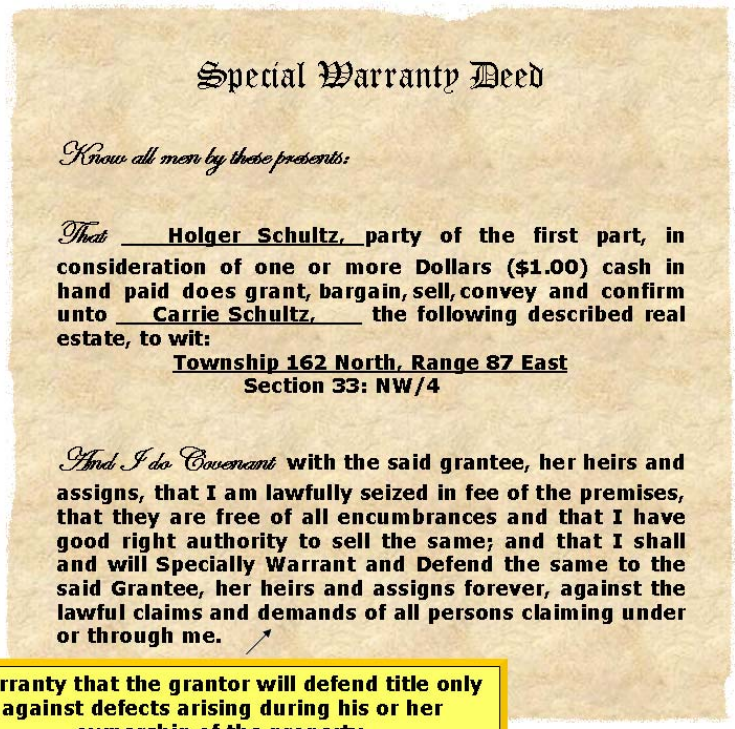
A general warranty deed will contain words such as "conveys and warrants," along with other language. *Examine the following and determine what guarantees are being offered to the buyer.*

"Grantor does hereby covenant that he is lawfully seized of said premises; that they are free from encumbrance; that he has good right and lawful authority to sell the same; and that he shall warrant and defend the title to said premises against the lawful claims of all persons whomever."



2. Special Warranty Deed

A *special warranty deed* is similar to a general warranty deed, except it limits the guarantees made by the grantor. This type of deed offers guarantees only against defects that might arise from the time period in which the grantor owned the property and not against any issues that existed before that time.



Special Warranty Deed

Know all men by these presents:

That Holger Schultz, party of the first part, in consideration of one or more Dollars ($1.00) cash in hand paid does grant, bargain, sell, convey and confirm unto Carrie Schultz, the following described real estate, to wit:

Township 162 North, Range 87 East
Section 33: NW/4

And I do Covenant with the said grantee, her heirs and assigns, that I am lawfully seized in fee of the premises, that they are free of all encumbrances and that I have good right authority to sell the same; and that I shall and will Specially Warrant and Defend the same to the said Grantee, her heirs and assigns forever, against the lawful claims and demands of all persons claiming under or through me.

Warranty that the grantor will defend title only against defects arising during his or her ownership of the property.

Corporations or individuals might use a special warranty deed in order to sidestep liability issues that could be valid under a general warranty deed. Special warranty deeds need not be titled as a special warranty deed. The language in the deed holds the key. Such language might be “conveys and specially warrants,” or “by, through, or under the grantor, but not otherwise.”

Scenario 1:

By way of a warranty deed, Courtney Freeman conveyed all of her right, title, and interest in a certain tract of land to Charles Wilson. At the time of the deed, Courtney Freeman owned an undivided 75% of the surface and an undivided 25% of the minerals, which she had received from her grandfather years earlier. The warranty deed made no mention of the minerals. All that was referenced in the deed was the surface acreage. Did the deed convey all of her surface acreage and all of her mineral acreage to Charles Wilson?

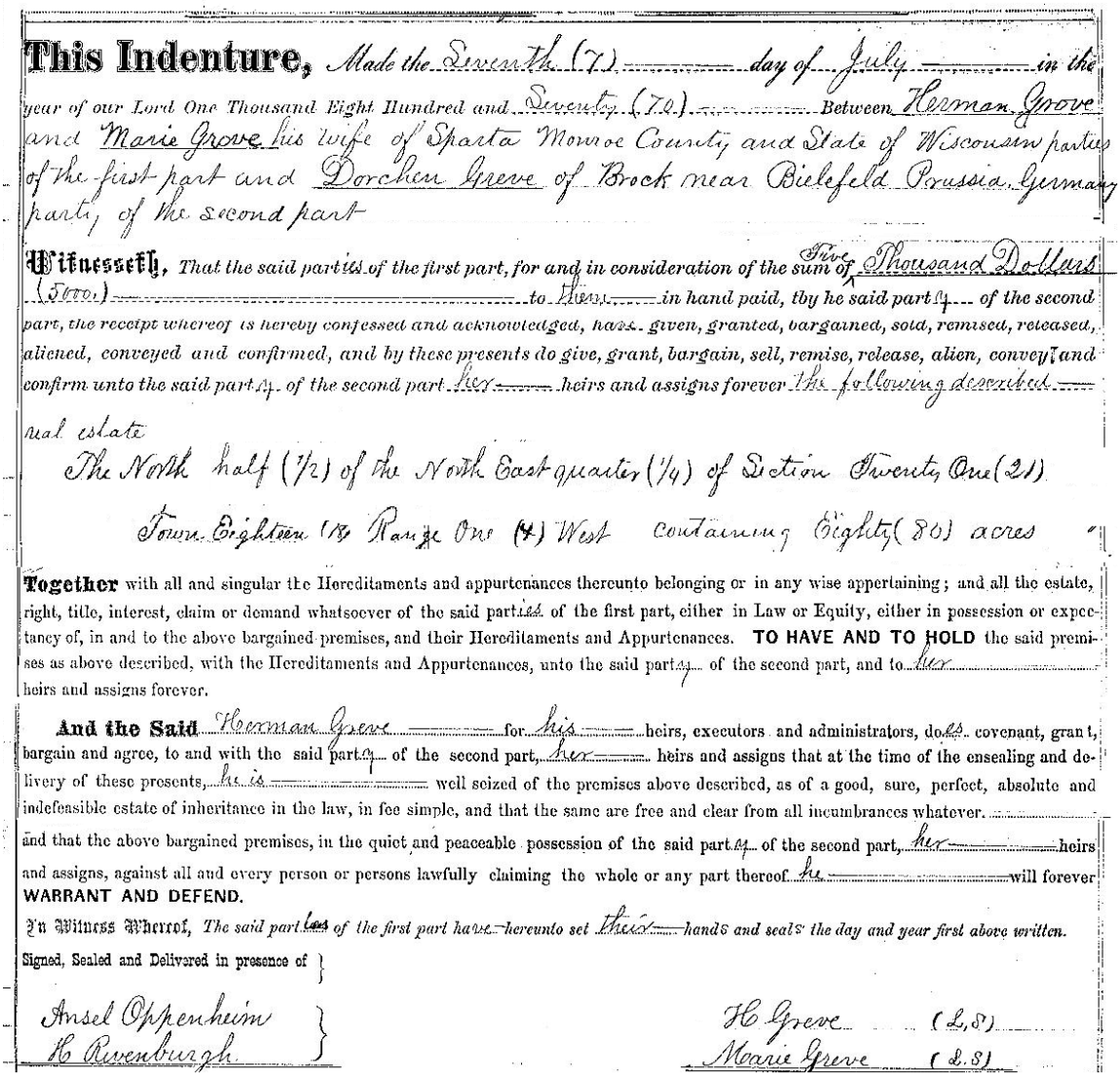
- ☐ Yes
- ☐ No

Answer: Yes, the deed did convey all of her minerals because there was no exclusion or reservation of the minerals in the deed.

Scenario 2:

Examine the following 1870 Indenture, and then answer the following question: Is the 1870 Indenture seen below a

- ☐ Quitclaim Deed
- ☐ General Warranty Deed
- ☐ Special Warranty Deed



This Indenture, Made the Seventh (7) day of July in the year of our Lord One Thousand Eight Hundred and Seventy (70) Between Herman Grove and Marie Grove his wife of Sparta Monroe County and State of Wisconsin parties of the first part and Dorchen Greve of Brock near Bielefeld Prussia, Germany party of the second part

Witnesseth, That the said parties of the first part, for and in consideration of the sum of Five Thousand Dollars (5000.) to them in hand paid, thy he said part y of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, sold, remised, released, aliened, conveyed and confirmed, and by these presents do give, grant, bargain, sell, remise, release, alien, convey and confirm unto the said part y of the second part her heirs and assigns forever The following described real estate

The North half (1/2) of the North East quarter (1/4) of Section Twenty One (21) Town Eighteen (18) Range One (1) West containing Eighty (80) acres

Together with all and singular the Hereditaments and appurtenances thereunto belonging or in any wise appertaining; and all the estate, right, title, interest, claim or demand whatsoever of the said parties of the first part, either in Law or Equity, either in possession or expectancy of, in and to the above bargained premises, and their Hereditaments and Appurtenances. **TO HAVE AND TO HOLD** the said premises as above described, with the Hereditaments and Appurtenances, unto the said part y of the second part, and to her heirs and assigns forever.

And the Said Herman Grove for his heirs, executors and administrators, do es covenant, grant, bargain and agree, to and with the said part y of the second part, her heirs and assigns that at the time of the ensealing and delivery of these presents, he is well seized of the premises above described, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law, in fee simple, and that the same are free and clear from all incumbrances whatever.

and that the above bargained premises, in the quiet and peaceable possession of the said part y of the second part, her heirs and assigns, against all and every person or persons lawfully claiming the whole or any part thereof he will forever **WARRANT AND DEFEND.**

In Witness Wherrof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in presence of

Ansel Oppenheim
H Rivenburgh

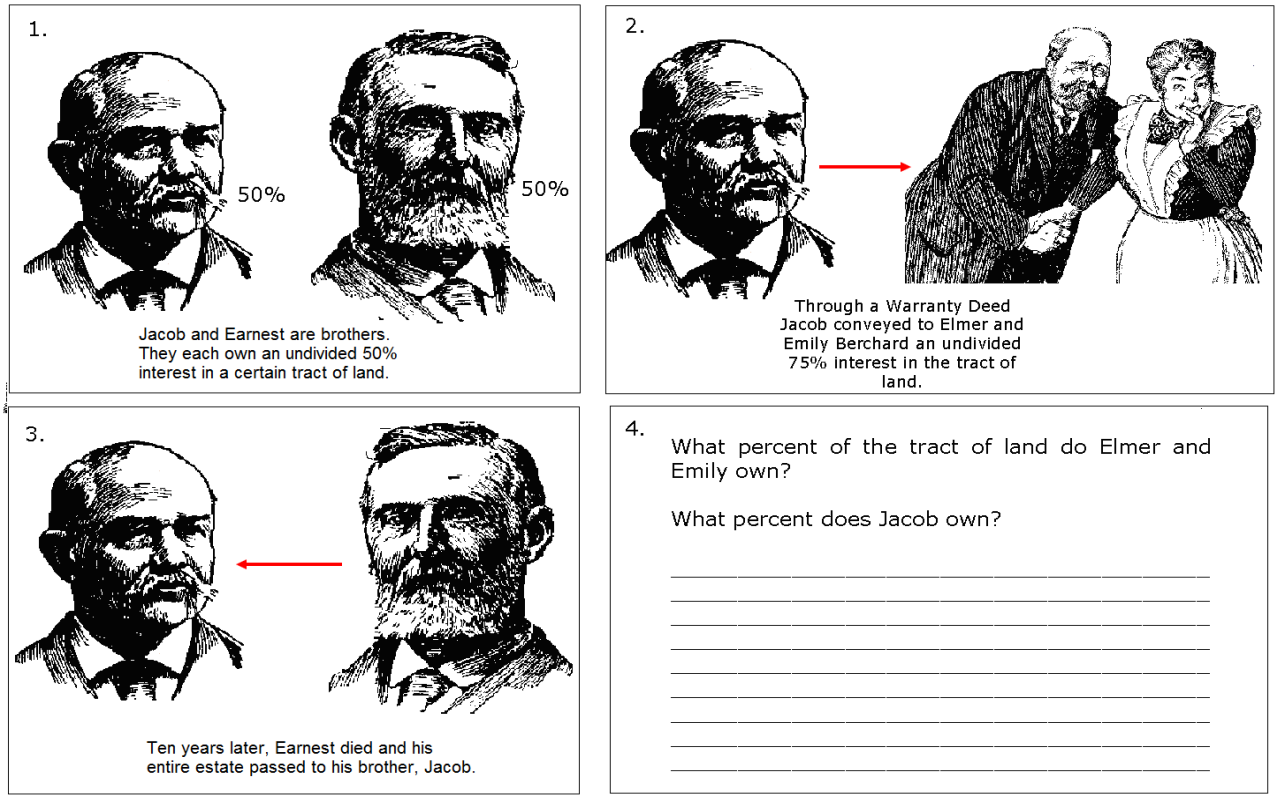
H Greve (L.S.)
Marie Greve (L.S.)

Answer: A General Warranty Deed

Deeds that can create After Acquired Title

A Warranty Deed might read: *"Grantor does hereby covenant that he is lawfully seized of said premises; that they are free from encumbrance; that he has good right and lawful authority to sell the same; and that he shall warrant and defend the title to said premises against the lawful claims of all persons whomever."*

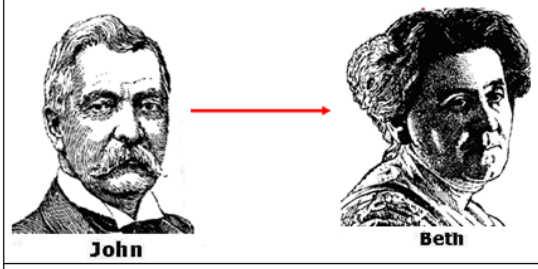
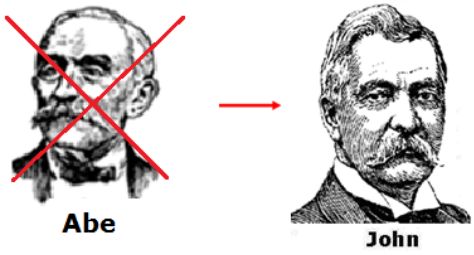
In the following example, Jacob, the Grantor covenanted to convey the property with warranty language to Elmer and Emily. Follow the story line below and then answer the question.



Caution must always be exercised with respect to this issue. Statutes vary from state to state; however, generally, since the original deed from Jacob was a *warranty deed* and Jacob *covenanted to convey title,* if at all possible, he must make Elmer and Emily whole. When Earnest died and Jacob inherited his brother's interests, that interest would automatically pass to Elmer and Emily Berchard without the need for any type of corrective instrument.

This is an example of how interests would pass through what is called "after-acquired title." In general, only grant deeds such as *warranty deeds* and special warranty deeds will transfer after-acquired interest. Quitclaim deeds

are another matter. They will pass title to any and all interest owned at the time of the conveyance; but, since they do not contain any covenant of warranty, most states do not hold that quitclaim deeds can pass after-acquired title. In North Dakota, however, Title Standards 1-05 and 1-06 states, a quit claim deed can be used to convey after acquired interests if the word "grant" is used. Assume the following story line below occurs in North Dakota. Follow the story line and then answer the question.

Through a Quit Claim Deed, dated August 29, 1997, John granted to Beth an undivided 25% of the mineral interests in said lands. The deed contained the following language, "Including any and all after acquired right, title and interest."  John Beth	**Typically quit claim deeds do not convey after acquired interests. In North Dakota, Title Standards 1-05 and 1-06, a quit claim deed can be used to convey after acquired interests if the word *"grant"* is used but no such word was used in this deed.** **Nonetheless, the intent is shown to convey after acquired interests to the grantee.**
On May 21, 2005, Bk 107, Pg 753, John received an undivided 35% mineral interest from the estate of his deceased brother, Abe.  Abe John	Who do you think is the owner of the undivided 35% minerals that came out of Abe's estate? ☐ Beth ☐ John

ANSWER: As to the undivided 35% interest passing to John from the estate of Abe, because of the restrictive language found in the Title Standards, there would not be an automatic passing of this interest to Beth, but arguably Abe had provided for that occasion by the inclusion of this additional language. At this point, it would appear that John is the rightful owner of the undivided 35% of the minerals.

Quitclaim Deeds

Sometimes called a *quit deed* or *quick claim deed*, a *quitclaim deed* is different from a warranty deed in that there are no warranties or guarantee of title being offered to the grantee. It has been said that a person owning no property in the state of California could sell, under a quitclaim deed, all right, title, and interest in and to the Golden Gate Bridge. Since there is no guarantee of title under this type of deed, the buyer is buying at their own risk. Selling such an item under a warranty deed is another matter.

A quitclaim deed does, however, transfer all legal rights in the property that the grantor possessed or *may* have possessed at the time of the conveyance. This type of deed is often used between married couples going through a divorce, or children wishing to transfer to one parent all interests they have received from a deceased parent's estate. Because the deed conveys all rights either owned or that may have been owned at the time of conveyance, no guarantee or warranty is offered. Quitclaim deeds will contain words such as "convey and quitclaim."

Scenario

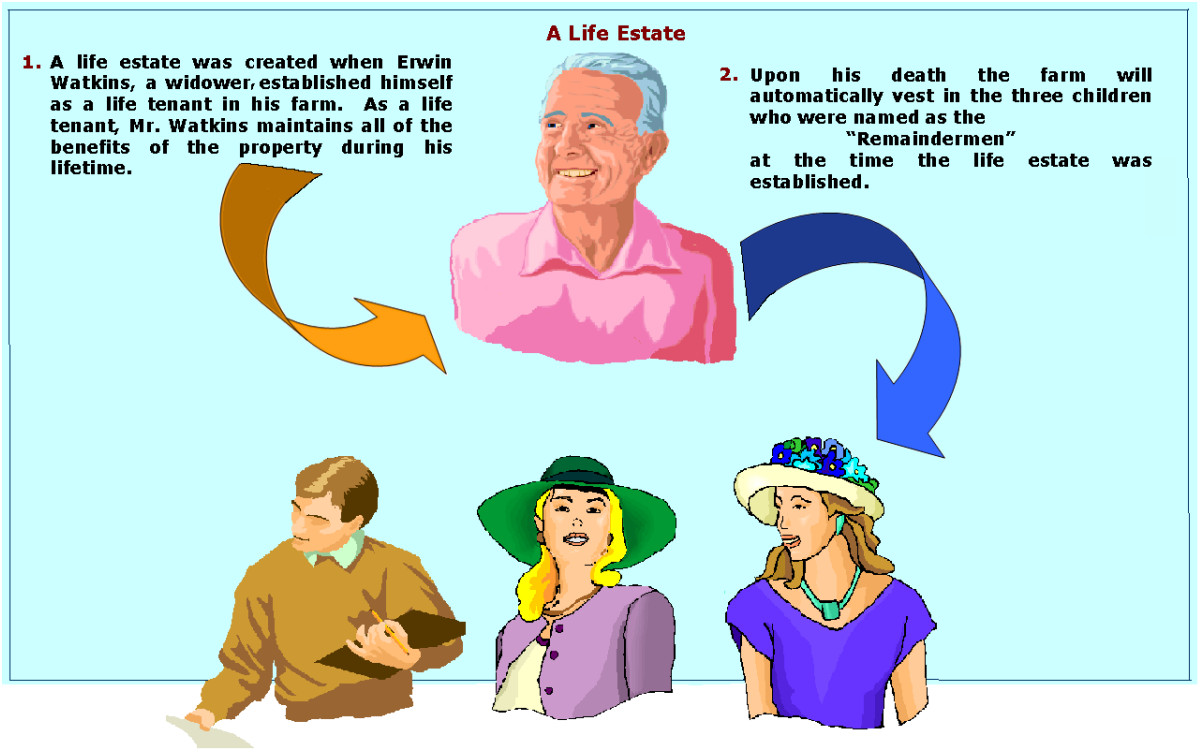
Six months ago, you purchased a 50% interest in a tract of land from Marcus Bradley for $2,000. After you gave Bradley the total sum of money, he handed you a deed. The deed was signed and notarized. The deed also stated that Marcus Bradley, a single man, was conveying and quitclaiming to you all of his right, title, and interest in and to the described tract of land. Last week you found out that Marcus Bradley only owned a 25% interest in the tract of land at the time he deeded it to you. What recourse do you have?

- ☐ Since a quitclaim deed offers no guarantee or warranty, you are most likely out of luck.
- ☐ Since the verbal intent was to convey a 50% interest, Bradley must refund $1,000.
- ☐ If this were taken to court the judge most likely would find in your favor.

ANSWER: Since the quitclaim deed offers not guarantee or warranty, you are most likely out of luck.

Life Estate Deeds

A life estate is established through a "life tenancy" conveyance. This deed will grant all the benefits of ownership in the property to a life tenant during his or her life, and will establish who the owners are at the time of the life tenant's death. These parties are called remaindermen.



Life Tenant

Through a life estate, the life tenant receives the rights of possession to the property during their lifetime, the right to receive income from the property, and the obligation not to destroy the property.

During the term of the life estate, the life tenant can convey the property to a third party; however, the third party will only own the property during the term of the life estate. At that point in time, the property will pass to the remaindermen. The life tenant can also convey the property to the remaindermen, who would then own the property in fee.[3]

Generally, a life tenant does not have the authority to enter into any oil and gas lease without signatures of the remaindermen. A general rule is to have the life tenant, remaindermen, and their respective spouse sign any oil and gas lease. For land administration purposes, those receiving bonuses, annual delay rentals, or royalty payments must be clearly established.

Remaindermen

The life estate deed must establish those persons named as remaindermen at the same time the life tenancy is created. As long as the life tenant is alive, the remaindermen do not have the right of possession to the property; however, title will vest in those named as remaindermen upon the death of the life tenant.

The "Open Mine Doctrine"

Picture a mine that is actively conducting business. The doors are open and valuable ore is being brought to the surface. Or picture an oil well pumping valuable hydrocarbons out of the ground. This concept impacts life estates, life tenants, and remainderman. For instance, if the mine was *open* and doing business *prior* to the creation of the life estate, payments will be made one way. If the life estate had been created prior to any mine being *open*, payments will be made another way.

The theory is simple: if the life estate is created first, prior to a mine being open or an oil and gas lease being taken, the remainderman would have a vested interest in the future ore from the land. Since the life tenant does not own all of the resources of the land, they should not have complete authority to explore for and develop a mine without the consent of the remainderman. In this case, and in many states, neither the life tenant nor the remainderman can act alone in developing the property for oil and gas purposes. Therefore, an oil and gas lease would not be effective unless all parties joined in the execution of the lease. *Davis v. Bond*, 158 S.W.2d 297 (Tex. 1942), Nutter v. Stockton, 1981 OK 30, 626 P.2d 861, 69 O&GR 497. Both life tenant and remainderman can sign the same lease or have one lease ratified by the other parties.

Payments will be made differently to the owners depending on the state and the status of an open or closed mine.

Texas - For instance, in Texas, payments will be made in the following way if the life estate was created prior to the mine being opened or the oil and gas lease being taken:

Delay Rental Payments (considered income or rent) = to the life tenant
Signing Bonus (considered the principal or capital sum, as opposed to interest or income) unless otherwise agreed upon = to both the life tenant and remainderman jointly
Royalty (considered the principal or capital sum, as opposed to interest or income) unless otherwise agreed upon = to both the life tenant and remainderman jointly

Oklahoma - In Oklahoma, payments will be made in the following way if the life estate was created prior to the mine being opened or the oil and gas lease being taken: *Franklin v. Margay Oil Corp.,* 194 Okla. 519, 153 P.2d 486 (1944).

Delay Rental Payments (considered income) = to the life tenant
Signing Bonus (considered income) = to the life tenant
Royalty (considered the principal or capital sum, as opposed to interest or income) = to the remainderman

If a producing well existed on the property prior to the life estate, the mine would be open and the life tenant would be entitled to all royalties in both. In most states, if such a lease expired or terminated during the life estate, the mine has been considered to be "closed."

Pennsylvania - If a non-producing lease was established prior to the life estate, the life tenant would have the right to enter into new leases once the prior lease expired, even though the new leases were subsequent to the life estate. *Cronan v. Castle Gas Co.,* 354 Pa.Super 381, 512 A.2d 1 (1986), 90 Oil & Gas Rep. 111 (1986).

Arkansas – Under the open mine doctrine, if the mine was closed at the time an oil and gas lease was executed…

Signing Bonus and **Delay Rental Payments** are considered income and thus payable to the life tenant;
Royalty would be considered corpus and would be payable to the remainderman. If the mine had been opened prior to the creation of the life estate, the life tenant would be entitled to the royalty. If the life estate involves property that is subject to dower or curtesy rights of a spouse, the life tenant is only entitled to receive their fractional percentage of royalty.

Montana – It appears likely that Montana would follow the majority rule concerning the open mine doctrine as recognized by the courts in Texas. *Ayotte v Nadeau*, 81 P.145, 149 (MT 1905), *Danielson v Danielson*, 560 P.2d 893, 895 (MT 1977).

Michigan – If an oil and gas lease was executed prior to the establishment of a life estate, unless limits have been established, the life tenant can "work the mines even to exhaustion and take the profits." *Poole* v *Union Trust Co*, 191 Mich 162; 157 NW 430 Mich (1916). If the oil and gas lease was executed after the establishment of the life estate, unless otherwise directed, it appears that minerals produced should be allocated to the remainderman.

North Dakota – A life tenant and remainderman must both execute an oil and gas lease for the lease to be effective. If the instrument creating the life estate fails to specify how income shall be shared, the life tenant shall be entitled to all rentals. Any bonus, royalty, and all income derived from actual production constitutes corpus and must therefore be retained for the remainderman; however, the life tenant is entitled to any interest derived from such corpus during the life tenant's life; and, the remainderman is not entitled to receive any of the income during the life tenant's life. North Dakota Mineral Title Standard 7-03. The North Dakota courts have not specifically recognized the "open mine doctrine."

The following is an example of a Life Estate Royalty Deed. However, there is a slight twist in this deed. Normally, the owner of a tract of land will set themselves up as the "life tenant" naming a third party as "remainderman." In this deed, the owner of the minerals sets a third party up as the "life tenant" and named themselves as the "remainderman."

LIFE ESTATE ROYALTY DEED

KNOW ALL MEN BY THESE PRESENTS

That _____ hereinafter called Grantor, for and in consideration of love and affection has granted, sold conveyed and assigned unto _____, hereinafter called Grantee, an undivided _____ royalty interest in to all oil, gas and other minerals produced saved and made available for market from the following described lands situated in Burke County, North Dakota, to-wit:

For and during the natural lifetime of said grantee.

WITNESS our hand this _____ day of _____, _____.

Transfer on Death Deeds

One of the issues regarding survivorship deeds (joint tenancy, life estates) is that once they are filed of record, all named survivors become co-owners of the property. This has been known to create problems. Assume you and your two siblings inherit the family farm from your parents as joint tenants with the right of survivorship. Also assume that your younger brother has a history of bad credit, bankruptcy, and liens filed against previous properties. In this scenario, your co-ownership of the family farm may now be subject to creditors and claims. Creditor actions have resulted in the forced sale of the property.

A Transfer-on-Death Deed, "TODD," is a deed that could alleviate this type of problem. It would essentially transfer all right, title, and interest to a designated grantee-beneficiary at the time of death, thus avoiding probate. Since the grantee-beneficiary would have no present interest in the real estate until the death of the grantor, the grantor would be protected from bankruptcy, divorce, lawsuits, judgments, and/or liens that might arise against the beneficiaries prior to the grantor's death. Generally, the grantor has full power to transfer and revoke the deed at any given time.

Before 2007, nine states (Arizona, Arkansas, Colorado, Kansas, Missouri, Nevada, New Mexico, Ohio, and Wisconsin) had enacted laws that allowed homeowners to use TODDs, thus avoiding probate and the expenses of a Trust. Since 2007, Minnesota, Montana, North Dakota, and Oklahoma have also passed such laws. It is assumed that more states will follow.

Mineral Deeds

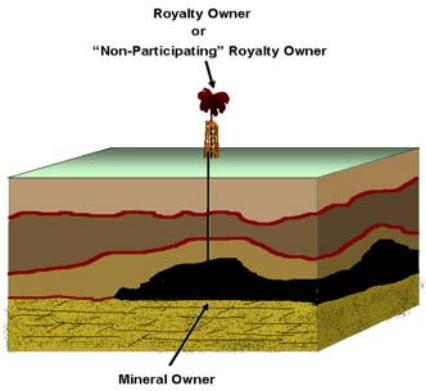
The mineral rights in and to land can be sold. This often takes place through a mineral deed. At the time of conveyance, the grantee to the minerals would also receive the right to execute leases and receive bonus and rental payments.

A *mineral deed* is most commonly used when conveying a mineral interest, but oil and gas land personnel must be aware that this is not the only type of deed used when conveying minerals.

Royalty Deeds

Royalty ownership is different from mineral ownership. Royalty can be defined as the monetary benefit that one would receive out of the production of a commercial oil and gas well. When royalty ownership is severed from the mineral owner, it is also referred to as *nonparticipating royalty.*

The person who owns the minerals under a given tract of land most generally owns the royalties; however, it is not uncommon to see a mineral owner convey either all or a portion of his or her royalty to another party. Because such a royalty owner would own no minerals, they would not have the right to execute leases, receive bonus, or rental payments.



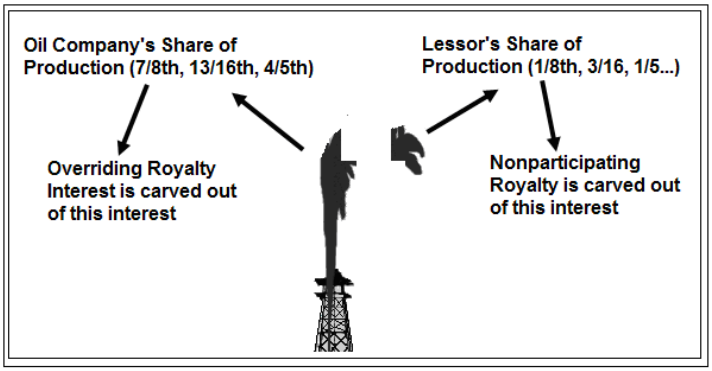
A *royalty deed* is commonly used when conveying a royalty interest, but oil and gas land personnel must be aware that this is not the only type of deed used when conveying royalty.

The picture depicts
mineral versus royalty ownership

Nonparticipating means that the royalty owner does not participate in or maintain certain types of rights. The nonparticipating royalty owner has:

1. No right to sign an oil and gas lease
2. No right to receive bonus money
3. No right to receive delay rental money

If the language in all deeds that created a nonparticipating royalty interest described these distinguishing characteristics similarly, there would be no confusion. However, deeds are often difficult to interpret. There have been times that a deed designated as a "mineral deed" actually conveyed royalty and times when a deed entitled "royalty deed" actually conveyed minerals. Such royalty conveyances or reservations are often deemed to be ambiguous; therefore, the land professional must look to the



intent of the parties as found on the face of the deed. *Mitchell v Hannah*, 208 P.2d 812 (MT 1949). *Stokes v Tutvet*, 328 P.2d 1096 at 1101-1104 (MT 1958) and *Proctor v Werk*, 714 P.2d 171, 173 (MT 1986).

Oklahoma courts have ruled that any such conveyance made prior to an oil and gas lease, unless the conveyance is stated as a specific percentage of production (1/24th of 3/16th royalty), would create a mineral interest. *John S. Lowe, Oil and Gas Law in a Nutshell (4th ed. 2003; H. Williams & C. Meyers, Oil and Gas Law (13th ed. 2006).*

Montana – The Montana Supreme Court drew a distinction between a royalty conveyed prior to leasing, described as a "non-participating royalty," which is not reducible by a later lease royalty, and the conveyance of a royalty after leasing, defined as a "landowners royalty," which is reducible by the lease royalty rate. The prior conveys a much larger share of production than the latter.

West Virginia – *Davis v. Hardman*, 148 W. Va. 82, 133 S.E.2d 77, 81-82 (1963) this West Virginia court held that a conveyance including "royalties, incomes, and rentals" would convey the entire mineral estate, unless additional language were added to state otherwise.

Kentucky - A Kentucky court ruled that when a conveyance containing a reservation of royalty, "1/16 royalty interest in all the oil and gas now being produced or which may hereafter be produced," would be a full 1/16th royalty out of 8/8th production and not 1/16th of the lease royalty. They further found that this interest would be consistent on any current or future oil and gas leases. *Kavanaugh v. Clay,* 275 S.W.2d 938, 939 (Ky. Ct. App. 1955).

Types of nonparticipating interests

Nonparticipating interests can be created for …

1. ***Perpetual nonparticipating royalty*** – this royalty continues to apply under any oil and gas lease, and will continue to transfer perpetual royalty interests in the described lands forever into the future unless somehow changed. This royalty is applicable to both existing and subsequent leases of the underlying mineral interests.

2. ***Non-perpetual nonparticipating royalty*** – this royalty may expire at the end of a particular term, such as a lease term, the end of production from a producing well, or on a given date.

3. ***For Life*** – this type of conveyance or reservation is similar to a life estate.

Scenario 1:

KNOW ALL MEN BY THESE PRESENTS:

That Helen Anderson, "Grantor," for and in consideration of love and affection, has granted, sold, conveyed and assigned, to my three children,

RAYMOND ANDERSON, an undivided 1 ½% royalty;

to DONALD ANDERSON, an undivided 1 ½% royalty;

and to JACKIE TALLMAN, an undivided 1 ½% royalty interest

In and to the oil and gas from the following lands:

Township 38 North, Range 55 West, 6th P.M.
Section 35: NWNW, W2SW

For and during the natural lifetime of each grantee.

In this case, Helen Anderson is conveying a non-perpetual nonparticipating royalty interest to her three children. The conveyance limits the term on ownership "during the natural lifetime" of each grantee.

Question: If Helen Anderson signed a five-year lease which expired last month, would her children still own their royalty interest?

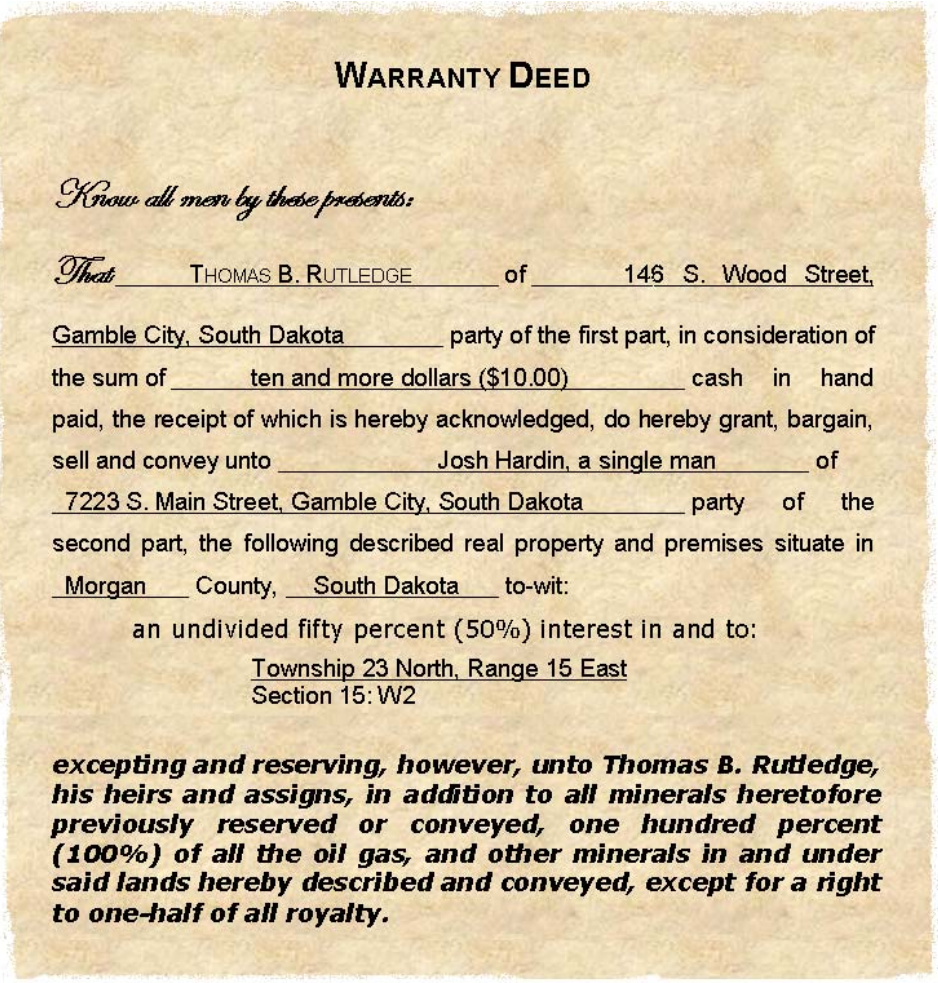
Yes _____
No _____

ANSWER: Yes

It is also important to note that a conveyance of nonparticipating interests can take place prior to the execution of any oil and gas lease; therefore, the children would still own their royalty interest.

Scenario 2:

Examine the following warranty deed and the reservation language at the bottom of the deed. At the time of the deed, Thomas Rutledge owned an undivided 50% interest in the surface and the minerals. If he later signed an oil and gas lease with your company that contained a 3/16th royalty, what royalty would he receive under the tract of land?



WARRANTY DEED

Know all men by these presents:

That THOMAS B. RUTLEDGE of 146 S. Wood Street, Gamble City, South Dakota party of the first part, in consideration of the sum of ten and more dollars ($10.00) cash in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto Josh Hardin, a single man of 7223 S. Main Street, Gamble City, South Dakota party of the second part, the following described real property and premises situate in Morgan County, South Dakota to-wit:

an undivided fifty percent (50%) interest in and to:

Township 23 North, Range 15 East
Section 15: W2

excepting and reserving, however, unto Thomas B. Rutledge, his heirs and assigns, in addition to all minerals heretofore previously reserved or conveyed, one hundred percent (100%) of all the oil gas, and other minerals in and under said lands hereby described and conveyed, except for a right to one-half of all royalty.

- ☐ 3/16 or 18.75%
- ☐ 3/16 x ½ or 9.375%
- ☐ 3/16 x ½ x ½ or 4.6875%

Answer:
3/16 x ½ x ½ or 4.6875%

Personal Representative's Deed

Upon death, a person's estate will often be possessed with both personal and real property.

A personal representative is appointed by the probate judge in order to properly distribute both personal and real property from the deceased's estate.

Assume that the deceased owned real property in the form of land, homes, and mineral rights. In many states, the probate court does not have the authority to convey this property to the designated heirs or future owners. The court's power rests with establishing who the heirs are, who is entitled to receive the property, and the value of the property.

The court also possesses the authority to appoint a personal representative. This personal representative would then have the right and power to distribute the property through a "Personal Representative's Deed."

Sheriff's Deed

A Sherriff's Sale is the name of an event that can occur in every county. The sale properties are listed and then auctioned, normally, on the steps of the county court house. These properties are sold as a result of foreclosure under a mortgage.

A Sheriff's Deed is the deed issued by the county sheriff, through order of the court, to the highest bidder, in order to pay off the debt owed. Normally, there is a "redemption period" associated with the sale, whereby the previous owner has the right to claim ownership to the property if proper redemption payment is made. In many states, the redemption period is six months and only a Sheriff's Certificate is issued until the statutory six-month period of redemption has cleared.

Assume you were the successful bidder on property sold at a Sheriff's Sale. Your interest in the property is strictly for investment purposes and you wish to turn the property as soon as possible. The redemption period in your state is six-months. You know for a fact that the person who lost the property through foreclosure has a terminal illness and has less than three months to live.

Two months into the redemption period you received a substantial offer to sell the property. If the deal goes through you would double your money! The buyer is looking for immediate occupation and will look to buy elsewhere if they cannot make a deal with you within the next fifteen days.

Can you sell the property to the potential buyer? Answer: Under this scenario, it would appear, the successful bidder of the property only has a "promise" of ownership during the redemption period. Clear title to the property would not take place until the redemption timeframe has cleared.

Also, keep in mind that a sheriff's deed is not a Warranty Deed. The sheriff is not guaranteeing title and has no personal obligation if, for some reason, title fails.

Sherriff's Deed

THIS INDENTURE, Made this 14th day of September in the year 1991, by and between T.J. Jenkins as Sherriff, party of the first part and Nolan Williams, party of the second part, witnesseth:

WHEREAS, heretofore on the 5th day of August, 1991, in an action duly commenced and there pending in the District Court in and for the County of Blaine in the State of North Dakota, wherein Lawrence Dover was mortgagor...

WHEREAS, it was and is ordered, adjudged and decreed, among other things, as follows:

That all real estate and premises described in that certain mortgage executed by Lawrence Dover, as mortgagor, to 1st State Bank as mortgagee, dated March 26, 1980, and recorded in the office of the Register of Deeds in and for said Blaine County, North Dakota, in Book 105 on page 333, and being the same premises ...

AND WHEREAS, T.J. Jenkins, Sheriff, in pursuance of said judgment of said Court, did sell at public auction, at the front of the Court House...

THEREFORE, the said T.J. Jenkins as Sheriff, party of the first part... in consideration of the premises and of the said sum of money so bid as aforesaid having been duly paid by said Nolan Williams, party of the second part...has bargained, sold, granted and conveyed...unto the party of the second part the following described piece of land lying and being in the County of Blaine and Sate of North Dakota, to-wit:

Trusts

Trusts are agreements whereby two parties, a grantor (settler) and a trustee, contract with each other to place certain property or goods into a trust, which will be managed by the trustee.

When individuals form a trust, they will name the beneficiaries of the trust and also designate either an individual or a trust company to act as the trustee of the trust.

One of the main functions of the trustee is to hold or grant assets from the trust to the beneficiaries.

Often individuals will place their assets in a trust in order to avoid paying estate taxes. The federal government places an estate tax, sometimes called a "death tax" on a person's estate when he or she dies. This tax can far exceed the normal income tax on a person's income. For example:

- Estate taxes range from 37% for taxable estates to 55% or more, and are based on the deceased person's entire property and or goods.
- Normal income taxes range from 15% to no more than 39.6%, and are placed on the person's taxable income for a given year.

A Living Trust or Revocable Trust

The trustee(s) in a Living Trust or Revocable Trust are usually the same person or persons as the grantor(s) of the trust.

The grantors will often be a husband and wife who, together, will act as the trustees of the trust until one or both of the parties die, become incompetent, or give notice of resignation as trustee of the trust.

There are three chief purposes for either a Living Trust or a Revocable Trust:

1. If the grantors are one and the same as the trustees, they remain in a position of administrating or having control over their property or goods in the same manner as they did prior to the creation of the trust.
2. The trustees have the ability to keep, sell, accumulate, invest, borrow against, or give the property or goods away.
3. When the trustees die, provision is made for the distribution of the property placed into the trust

Living Trusts or Revocable Trusts act much the same as a will would act.

Just as a will can designate beneficiaries for an estate, a trust can also designate how property will be distributed when the trustees die. Just as a will distributes property that was previously titled in the name of the deceased, so too, a trust can distribute property that has been placed into the trust.

At the time a trust is drawn up, a successor trustee should be established. This person's roll is to handle the trust's affairs when the trustees die and then make distribution of the property to the beneficiaries.

Both trusts and wills can be terminated at any time.

Whereas a will must pass through the probate process in order to become valid, a trust, containing all of the deceased person's assets, avoids the probate process.

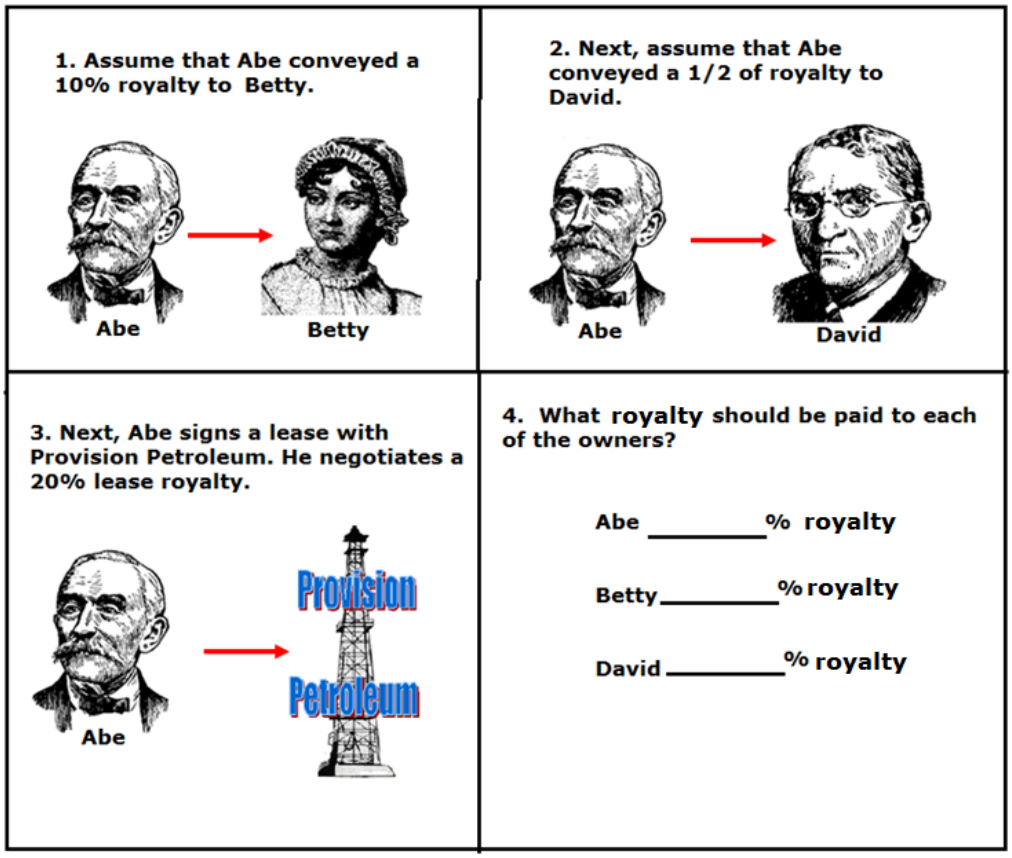
Deeds of Trust

A deed of trust also involves a trustee, or one who has been appointed to act on behalf of a lender. Usually this trustee is a title insurance company, or a public trustee, in rural areas.

When Bill and Marilyn Henderson borrowed a large sum of money on their farm, they entered into a deed of trust with a certain trust company. In doing this, the Henderson's, in essence, gave the trustee title or ownership to their farm. They still had the rights of occupation to the farm and the rights to the use of the farm, but the trustee held the original deed to the property until the loan was paid in full. The trustee also possessed the power to foreclose on the Henderson's farm without first taking them to court.

Conveyances or Reservations

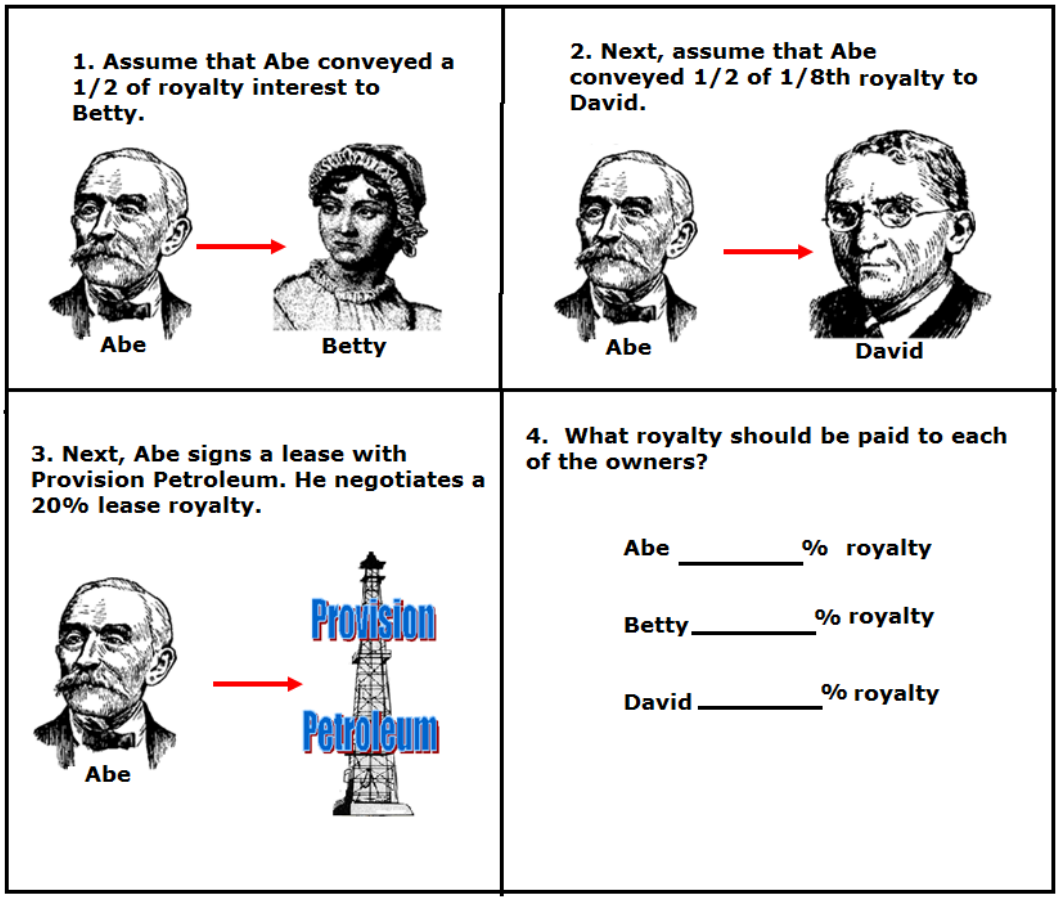
When the grantor conveys "1/2 of Royalty"



ANSWER: Abe negotiated a great royalty rate of 20%; however, he will receive none of that royalty. He conveyed a full 10% royalty to Betty, leaving him with 10%. When he conveyed ½ *of* royalty to David, David would have received ½ of the royalty negotiated in the lease, leaving Abe with nothing.

Oklahoma courts have ruled that any such conveyance made prior to an oil and gas lease, unless the conveyance is stated as a specific percentage of production (1/24th of 3/16th royalty) would create a mineral interest. *John S. Lowe, Oil and Gas Law in a Nutshell (4th ed. 2003; H. Williams & C. Meyers, Oil and Gas Law (13th ed. 2006).*

When the grantor conveys "A 1/2 of 1/8th royalty interest"

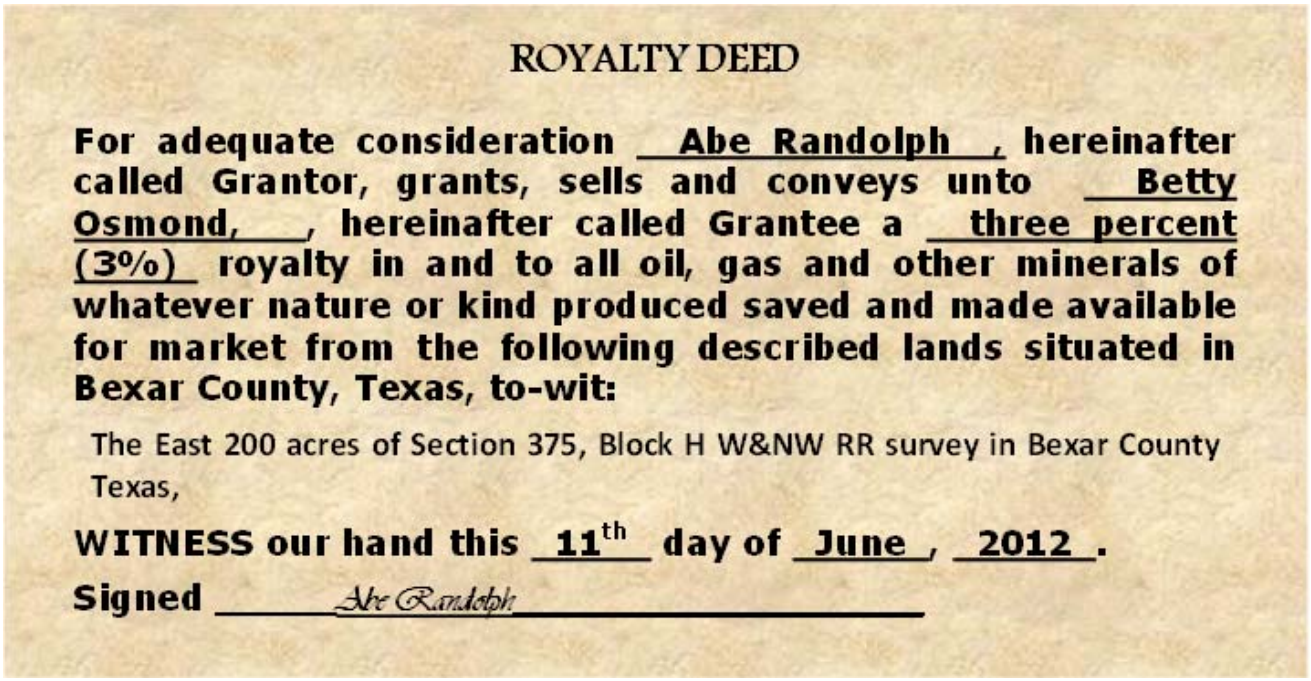


ANSWER: Several courts have ruled that the grant was 1/2 of 1/8th of the amount negotiated in the lease or ½ of 1/8th of the 20% royalty rate. *Harriss v. Ritter*, 279 S.W.2d 845 (Tex.1955), *Palmer v. Lide*, 567 S.W2d 295 (Ark.1978), *Corbin v. Moser*, 403 P.2d 800 (Kan.1065). It would appear that Betty would receive a full 10% royalty or ½ of the negotiated 20% royalty. David would receive ½ of 1/8th (1/16th) of the 20% negotiated royalty or 1/2 X 1/8th X 20% = 1.25% royalty. Abe would receive what is left over or 8.75% royalty.

Royalty Conveyed from the Land Described

Assume that Abe Matthews owned an undivided 50% of the minerals in the 200 acre tract of land. He leased his mineral interest to Provision Petroleum and negotiated a 3/16th lease royalty. Subsequently, he conveyed an NPRI to Betty Osmond in the following Royalty Deed. After examining the deed determine what interest Betty is receiving?

- **a full 3% NPRI**
- **3% X 50% (Abe only owned 50% of the minerals in the land)**
- **3% X 3/16th lease royalty**
- **3% X 50% X 3/*16th***



ROYALTY DEED

For adequate consideration Abe Randolph, hereinafter called Grantor, grants, sells and conveys unto Betty Osmond, , hereinafter called Grantee a three percent (3%) royalty in and to all oil, gas and other minerals of whatever nature or kind produced saved and made available for market from the following described lands situated in Bexar County, Texas, to-wit:

The East 200 acres of Section 375, Block H W&NW RR survey in Bexar County Texas,

WITNESS our hand this 11th day of June, 2012.

Signed Abe Randolph

ANSWER: Abe gave Betty a 3% royalty interest "from the *following described lands*." He DID NOT give her a 3% royalty out of his 50% mineral interest. This 3% would not be reduced by his royalty rate; therefore, the answer is a full 3% NPRI. Abe would receive (3/16th X .50) – 3% NPRI = 6.375 Royalty.

Montana appears to draw a distinction between a royalty conveyed prior to leasing and one that was conveyed subsequent to leasing. The Montana Supreme Court ruled that a royalty conveyed prior to leasing (defined as a "nonparticipating royalty") is not reducible by a later lease royalty, and a conveyance of royalty after leasing (defined as a "landowners royalty"), is reducible by the lease royalty rate. The prior conveys a much larger share of production than the latter.

Minerals that are burdened by previous Royalty Interests

Scenario 1: Assume that after conveying the 3% NPRI to Betty, Abe conveyed a 50% mineral interest to David Davis on the following Mineral Deed. After examining the deed, determine what royalty David should receive out of the 3/16th royalty negotiated in Abe's lease with Provision Petroleum.

MINERAL DEED

KNOW ALL MEN BY THESE PRESENTS THAT

Abe Randolph hereinafter called Grantor, for and in consideration of the sum of One and no/100 --------Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto David Davis, , hereinafter called Grantee an undivided fifty percent (50%) interest in and to all of the oil, gas, casinghead gas, coal, clay, uranium, potash and other minerals, known or unknown, in and under and that may be produced from the following described lands situated in Bexar County, Texas, to-wit:

The East 200 acres of Section 375, Block H W&NW RR survey in Bexar County Texas,

WITNESS our hand this 10th day of August, 2012 .

Signed *Abe Randolph*

- **18.75%**
- **18.75% X 50% (50% of Abe's royalty)**
- **18.75% X an undivided 50% interest in the lands**
- **18.75% X an undivided 50% interest less a 3% NPRI**

ANSWER: David received a full 50% of the mineral estate because the conveyance was granting the interest from the described lands rather than 50% of Abe's interest. The interest David received is also burdened by the previous NPRI owned by Betty; therefore, his royalty interest would be 18.75% X an undivided 50% interest in the lands less Betty's 3% NPRI.

Scenario 2: Instead of the language used previously, Abe conveyed the following to David from this Mineral Deed. Prior to this deed, Abe had conveyed the 3% NPRI to Betty but HAD NOT negotiated an oil and gas lease. Six months after receiving this interest from Abe, David negotiated his own lease with Provision Petroleum and received a 3/16th royalty rate. What royalty would David be entitled to from the entire tract of land?

MINERAL DEED

KNOW ALL MEN BY THESE PRESENTS THAT

Abe Randolph hereinafter called Grantor, for and in consideration of the sum of One and no/100 --------Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto David Davis, , hereinafter called Grantee an undivided twenty-five percent (25%) interest in and to all of the oil, gas, casinghead gas, coal, clay, uranium, potash and other minerals, known or unknown, in and under and that may be produced from the following described lands situated in Bexar County, Texas, to-wit:

The East 200 acres of Section 375, Block H W&NW RR survey in Bexar County Texas,

WITNESS our hand this 10th day of August, 2012.

Signed *Abe Randolph*

- ☐ **A full 18.75%**
- ☐ **18.75% X 25%**
- ☐ **18.75% X 50% X 25%**
- ☐ **18.75% X 25% less 3%**
- ☐ **18.75% X 25% less 1.5%**

ANSWER: David received a full 25% of the mineral estate. The interest David received is also burdened by the previous NPRI owned by Betty but since David only received half of Abe's interest he is only burdened by half of the NPRI. The other half of the NPRI burdens Abe. (18.75% X 25% less 1.5%)

Nonparticipating Royalty Owners (NPRI) in Texas Pose a Particular Problem:

In Texas, a nonparticipating royalty owner's interest is covered by the oil and gas lease *except* if the lease is pooled with other leases and becomes a part of a pooled unit.

This situation could prove disastrous to an oil and gas company, especially if the drill site location is to be located on the nonparticipating royalty owner's tract of land. The Texas Supreme Court's decision in *Brown v. Smith* states that a mineral owner with executive rights to lease does not have the right to pool any interest owned by the nonparticipating royalty owner without his or her approval. Courts in Texas have consistently upheld this principal in law.

In Texas, if this royalty owner fails to ratify the lease or sign some sort of unit designation, his or her interest cannot be pooled in the unit. There are two different outcomes for this scenario:

First, if the drill site is located on this tract of land, the nonparticipating royalty owner will receive his or her royalty in whole and not proportionately reduced by the other acreage in the unit.

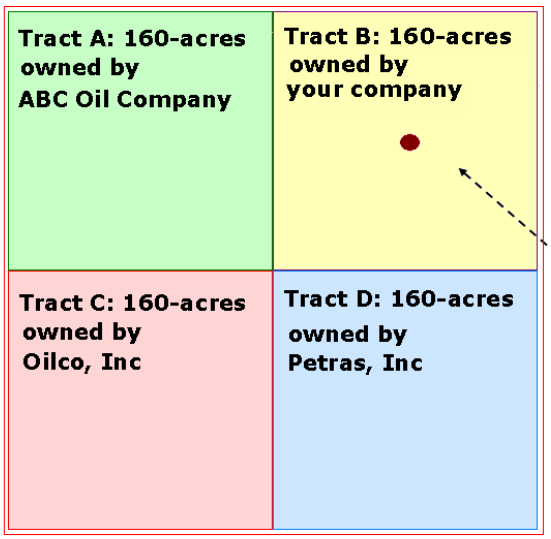
Secondly, if the drill site is located on another tract of land, the nonparticipating royalty owner is not entitled to receive any royalty benefits from production. This royalty owner does have the right, however, to sign a ratification or unit designation, even after the well is drilled and completed. At this point, the royalty payment would be based on his or her proportionate part of the unit.

NOTE: One court allowed a nonparticipating owner to collect royalty payments from a well that was drilled 13 years before he signed the ratification to the lease.

Another court granted a nonparticipating royalty owner the right to ratify only portions of a lease. In this case, the lease covered a larger tract of land, and the nonparticipating royalty owner could pick and choose what portions of the lease he wished to ratify. On wells that were not located on lands burdened by his royalty interest, the owner received royalty payments based on his proportionate part of the unit. On wells that were located on lands burdened by his royalty interest, the owner received his full royalty interest.

Scenario 1:

Study the scenario below as it relates to a unit boundary in Texas.



Your company has leased this tract of land offering an 18.75% royalty on the lease. All of the royalty in this tract belongs to a non-participating royalty owner who has not ratified the lease or the unit.

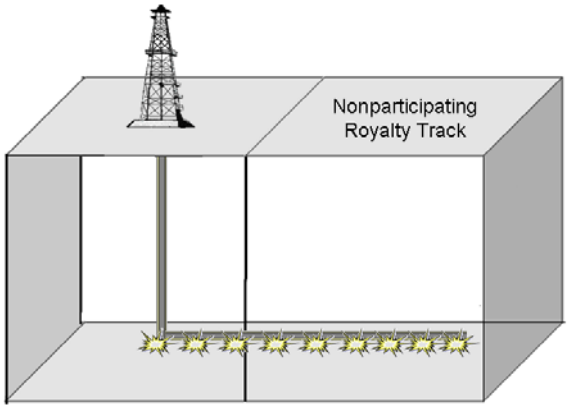
This is the proposed drillsite location for the initial well.

Since your company owns 25% of the unit, they would be responsible to pay 25% of the costs for drilling the well. If the well was drilled and completed in the NE/4 of the section, according to what you have learned, what percent of the revenue would your company be able to keep?

*A full **25%***
25% - 4.6875% royalty burden = ***20.3125%***
25% - 18.75% royalty burden = ***6.25%***

Scenario 2:

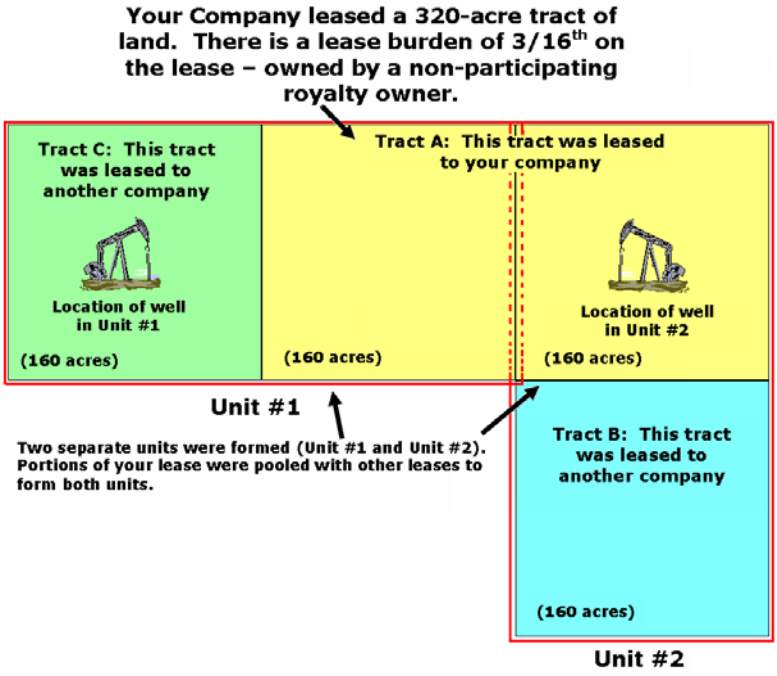
Assume in this scenario that the NPRI owner has not signed a ratification or some sort of unit designation. In a case like this, would the NPRI owner be entitled to receive royalty on a unit basis or a leasehold basis?



Scenario 3:

Review the diagram and then answer the following questions:

If your nonparticipating royalty owner ratified that portion of your lease that was pooled to form Unit #1, what portion of the production would he receive?



160 / 640 x 3/16th = 4.687%
160 / 320 x 3/16th = 9.375%
160 /160 x 3/16th = 18.75%

Scenario 4:

If your nonparticipating royalty owner failed to ratify that portion of your lease that was pooled to form Unit #2, what portion of the production would he receive?

160 / 640 x 3/16th = 4.687%
160 / 320 x 3/16th = 9.375%
160 / 160 x 3/16th = 18.75%
0%

ANSWERS: Scenario 1: 25% - 18.85% = 6.25%; Scenario 2: Even though the well is not located on the nonparticipating owner's land, portions of the horizontal lateral have been completed under his tract of land and the owner is entitled to royalty on a leasehold basis; Scenario 3: 160/320 X 3/16th = 9.375%; Scenario 4: 160/160 X 3/16th = 18.75%.

Deeds that Create Future Ownership

When the fee owner conveys property for either a limited time or a potential limited time, it might appear that 100% of the property has passed to the new owner; however, the future interest or potential future interest has *not* passed to the new owner. It has been maintained by the fee owner. *Understanding this concept becomes important for the land professional. For instance, assume that the fee owner has conveyed a tract of land to another for a term of ten years. Does the new owner have the right to encumber the ownership of the land past the ten years of ownership?*

Fee Simple Defeasible refers to ownership that is transferred with conditions attached and can be terminated by the grantor if certain specified events take place or the conditions are not met. A transfer in "fee simple" would have no such conditions and could be referred to as an "indefeasible estate". Because a fee simple defeasible grants less than 100% of the full fee simple, future interests or potential future interests are always established.

There are three types of fee simple defeasible conveyances:

Fee Simple Determinable Fee refers to ownership that will end automatically if certain conditions of ownership as set out by the grantor are either broken or fail to be met.

Fee Simple Subject to Condition Subsequent refers to ownership that is very similar to simple determinable with this exception: any failure to meet the condition will not automatically cause the ownership to revert back to the grantor.

Fee Simple Subject to Executory Limitation refers to ownership that is very similar to simple determinable with this exception: the property will not revert back to the original grantor rather to a third party set forth in the conveying document.

Term Mineral or Royalty interests are a type of fee simple determinable estate which can create future ownership. *Terry v. Humphreys*, 27 N.M. 564, 203 P. 539 (1922). From time to time, a reservation of minerals or a conveyance of minerals will be tied to a certain term, thus creating temporary ownership for a period of years with the interest reverting back to a future party. Such ownership creates a *defeasible fee* ownership in the party. When this occurs through a term conveyance or reservation, the present, temporary owner has ownership for a *tenancy of years.*

When a fee owner conveys the real property for either a limited time or a potential limited of time, the future reversionary interest has been maintained by the fee owner. Although the new owner has the right to encumber his or her ownership in the land, generally, states have concluded that the holder of a term interest can sign an oil and gas lease, but that lease, or portions thereof, *will not continue* beyond the expiration date of the term mineral interest. This issue can create a challenge for oil and gas personnel. Unless the conveying document provides for the continuation of the lease past the expiration date, a lease will not transfer to the reversionary mineral owner and two leases should be taken; one from the holder of the term interest and the other from the holder of the reversionary interest.

The Oklahoma Supreme Court found that unless language in the deed expressly gives the term mineral interest holder the right to encumber both the term mineral interest and the future reversionary interest with an oil and gas lease or unless the lease had been ratified or joined in by the holders of the reversionary interest, the oil and gas lease will terminate upon the expiration of the term mineral interest. *RLM Petroleum Corp. v. Emmerich*, 896 P.2d 531 (okl. 1995)

In Texas the term mineral interest holder has the right to encumber the term mineral interest with an oil and gas lease; however, it is presumed that unless the future interest is covered by the lease or the future interest owner has ratified the lease, the lease would be lost at the reversion of the minerals. *Andrews v. Brown*, 283 S.W. 288 (Tex. Civ. App.1926

Conveying or reserving minerals and/or royalty can be done in one of three manners:

No reversion of the interest

First, both minerals and royalties can be conveyed or reserved without any specified term attached to the conveyance. In this case, the one party has given up any and all future or reversionary rights to what is being conveyed or reserved.

A specific time period with a reversion of interest

Second, both minerals and royalties can be conveyed or reserved for a specified time period. This is called a *term-mineral* or *term-royalty interest.* In this case, upon the expiration of the specified term, the minerals or royalty will revert back to the other party.

A specific time period with “as long thereafter” language

The ownership of minerals can be conveyed or reserved for a specified term (i.e. 5 years or 10 years) with the following language: “conveyed or reserved for a fixed term and as long thereafter as oil or gas is produced.” When language such as “conveyed or reserved for a fixed term and as long thereafter as oil or gas is produced” appears, in order for this option to take effect and move the term mineral into a “secondary term,” there must be either oil or gas production in paying quantities, not only during the term of the deed, but at the date of expiration of the term, or there must be diligent operations in place. If not, the minerals will revert back to the other party.

Violet Faith

On March 1, 2002, Violet gave her daughter Faith, a 10-year mineral deed covering subsurface mineral rights she had inherited from her mother years ago. On April 1, 2005 an oil company leased Faith and promptly drilled a successful well.

On March 1, 2012, the minerals will revert back to Violet.

If the deed covered lands in Texas, what would be the status of the lease?

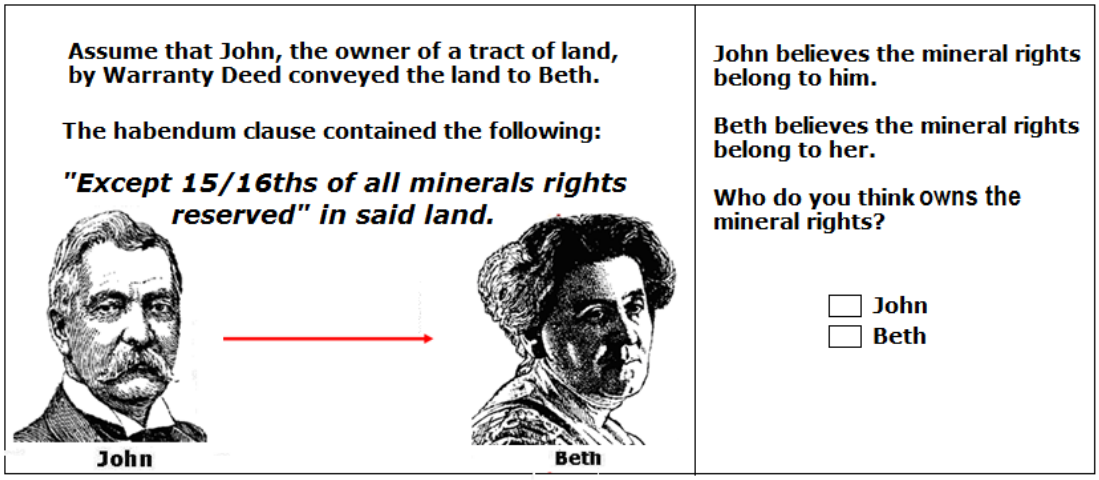
If the deed covered lands in Oklahoma, what would be the status of the lease?

ANSWER: The holder of a term interest can sign an oil and gas lease, but that lease, or portions thereof, *will not continue* beyond the expiration date of the term mineral interest. A lease will not transfer to the reversionary mineral owner and two leases should be taken, one from the holder of the term interest and the other from the holder of the reversionary interest.

Reservation, Exception or Subject to Language

A reservation must contain a clear intention to reserve

Example 1: If a conveyance contains both a grant and a reservation, the granting language will be interpreted prior to the interpretation of the reservation. Both would be interpreted in sequence and independently of the other. If the two are in conflict with one another, generally, the granting language will take priority. When reservation language appears in the habendum clause of a conveyance and it appears that there is intention on the part of the grantor to reserve minerals, that language will hold precedence over the granting clause in the deed. *Abbott v. Woods*, 295 P.2d 793 (Okla. 1956).



ANSWER: With the language as cited above, an Oklahoma court concluded, "The reservation of mineral rights appearing in the habendum clause of a deed will control over the granting clause where the intention of the grantor to create such reservation is clearly expressed." Notice the word, “reserved” in the language. The court held that there was a clear intention to reserve the 15/16ths mineral interest; that the language "except 15/16ths of all mineral rights reserved," ***expressed a clear intention by the grantor not to include this mineral interest under the general granting clause in the deed.*** In this case, it appears that John is the owner of the minerals. *Wescott v. Bozarth*, 202 Okla. 149, 211 P.2d 258. (Emphasis ours)

Example 2:

Assume that Abe, the fee owner, granted to Betty a ten year mineral deed.

Abe

Betty

Eight years later, by warranty deed, Abe conveyed the land to David. The warranty deed contained the provision that the premises conveyed were unincumbered

"except all oil and gas rights and mineral rights held by Betty."

Abe

David

Abe believes that at the end of the ten year term, the minerals will revert to him.

David believes that at the end of the ten year term, the minerals will revert to him

Who do you think will own the minerals?

☐ Abe
☐ David

ANSWER: Again, an Oklahoma court ruled, to create a reservation it must appear from the instrument that ***the grantor intended to and by appropriate words expressed the intent to reserve an interest in himself***, otherwise, the exception must be construed as an exception to the warranty. The court found that no such intention was expressed and found in favor of the defendant, in this case, David. *Jarrett v. Moore*, 159 Okla. 93, 14 P.2d 390 (1932).

Example 3: A statement that does not rise to a reservation cannot retroactively create a reservation when referenced in a later deed.

1.

Abe

Abe filed of record a Dedication and Restriction for the Land in Texas. The following restriction was set forth:

"No oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or on any lot. All mineral rights shall belong and shall continue to belong to Abe."

2.

Ben

Sometime later, Abe sold the land to Ben. The conveying warranty deed stated:

"This conveyance is made subject to any and all easements, restrictions, and mineral reservations affecting said property that are filed for record..."

3.

Carl

Later, Abe purported to convey all oil, gas and minerals rights to Carl via a special mineral deed.

4. Who do you believe owns the minerals?

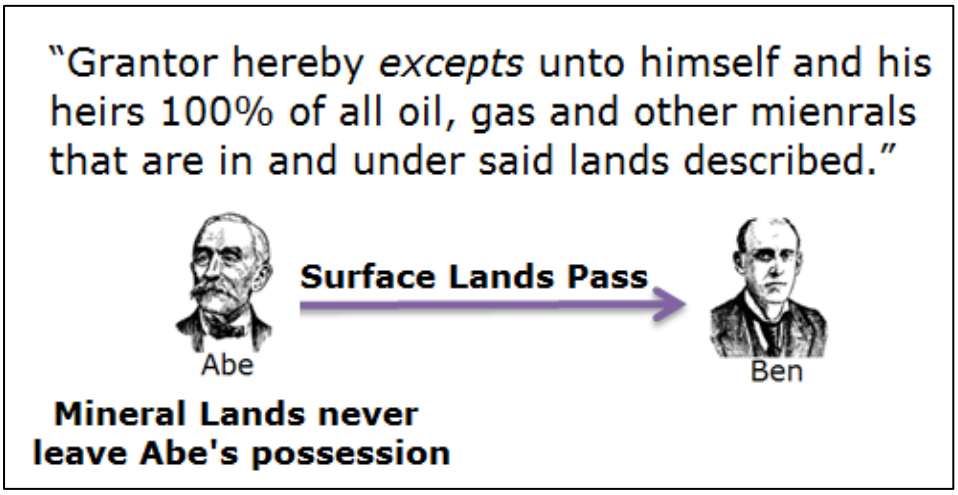
- ☐ Abe
- ☐ Ben
- ☐ Carl

ANSWER: On May, 17, 2012, a Texas Court ruled over a very similar case. They determined that Ben was the legitimate mineral owner. The court concluded that Abe's restriction language in the Dedication and Restriction for the Land was attempting to reserve minerals to himself but since Abe did not convey any surface or minerals in this instrument he could not; therefore, reserve to himself an interest that he already owned; that *a statement that does not rise to a reservation cannot retroactively transmute into a reservation when referenced in a later deed;* that *a reservation must be made at the time of the conveyance* and that the *"subject to"* language in Ben's deed was not null, but merely served to protect Abe's warranty. Even though Abe may have intended to reserve the mineral rights in the deed to Ben, he did not effectively do so because the restrictions were insufficient to reserve the mineral interests. *Farm & Ranch Investores, LTD. V. Titan Operating, LLC., et al.*

“Exception” Language

Very often reservation language added to a conveyance will contain both the words “excepting and reserving”. From time to time, deeds will only contain “excepting” language.

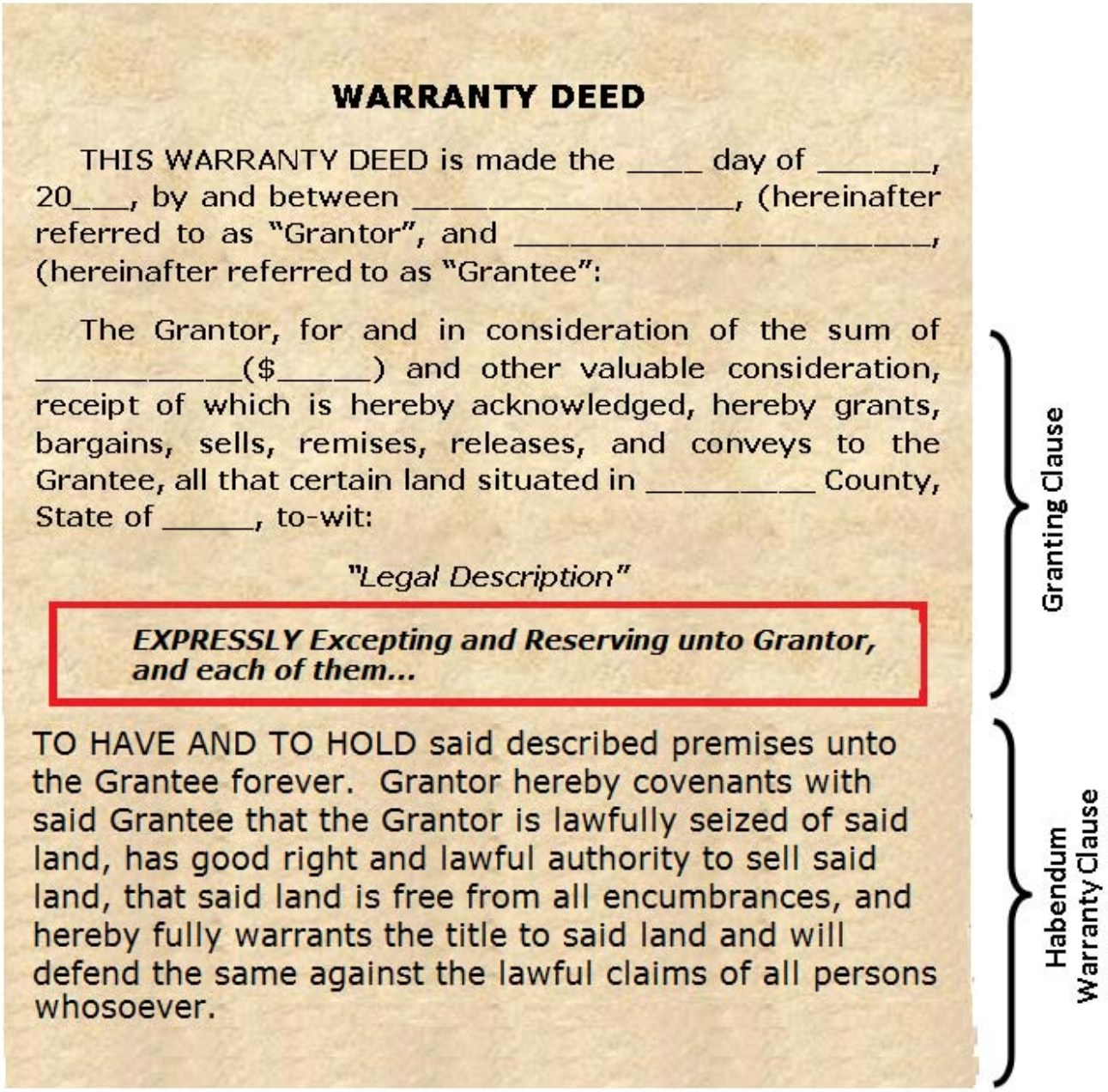
Example 1: Assume that in the following, the excepting language immediately followed the Granting Clause. Abe, the grantor conveys the land to Ben but *immediately following the granting clause*, he adds the following language:



The term “excepting” refers to Abe’s intention of keeping the mineral interest from Ben that he already owns. The surface lands would pass to Ben but the minerals would never leave Abe’s possession.

The Placement of Exception Language in a Warranty Deed

Courts are often called upon to determine the "intent" of a deed. In many cases they will look at the construction of the words and where they are placed within the four corners of the document. For instance, examine the following Warranty Deed that contains both excepting and reserving language. Notice that the words are placed within the granting portion of the document.



Exception Language used in the Habendum Clause in a Warranty Deed

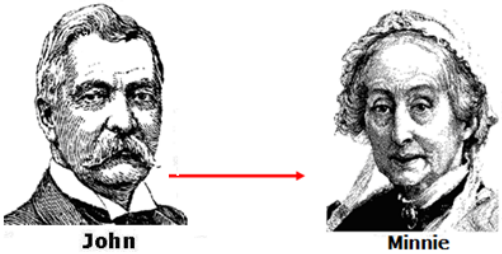
The General Rule: No part of the mineral estate will be reserved by a grantor who uses only "*exception language*" in a habendum clause of a warranty deed, unless the grantor expressly reserves the minerals to himself. This exception language is interpreted only as excepting from the covenant of warranty**.**

Example 1:

<table>
<tr>
<td>Assume John owned, in fee simple, 100% of a 10-acre tract of land. Using a Warranty Deed he conveyed the land to Beth using the following language.
 
John Beth</td>
<td>John hereby Grants, Bargains, Sells and Conveys unto Beth, party of the second part, the following described real property and premises,

Proper legal description

To Have and To Hold Said described premises unto the said party of the second party his heirs and assigns forever, free and clear of all former grants, charges, taxes, judgments, mortgages, other liens and incumbrances of whatsoever nature

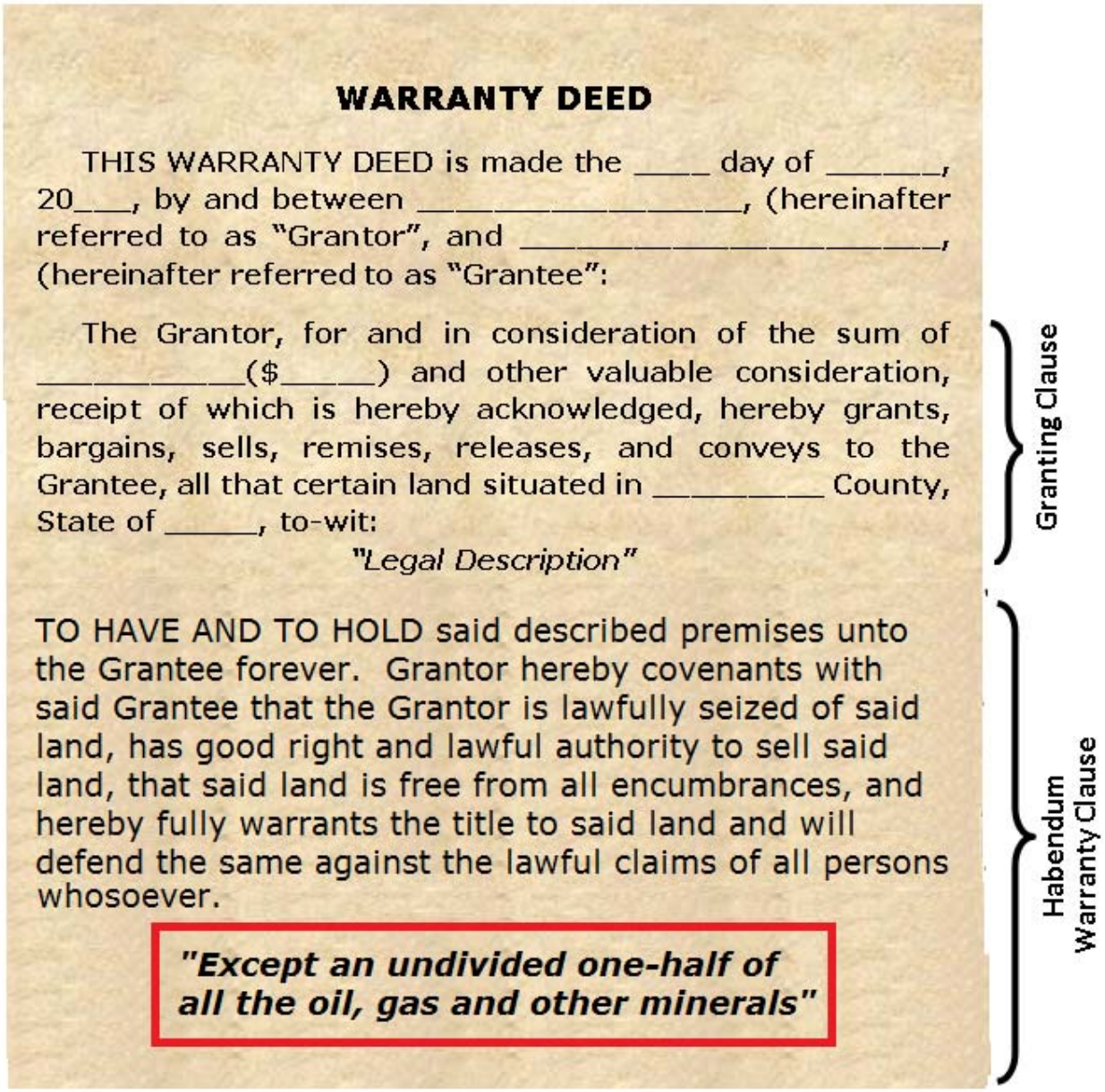
<u>Except an undivided one-half of all the oil, gas and other mineral rights.</u></td>
</tr>
<tr>
<td>Three years later, John conveyed an undivided 50% of the minerals under the tract of land to Minnie.
 
John Minnie</td>
<td>Beth believes that she owns 100% of the mineral rights.

Minnie believes that she owns 50% of the mineral rigths.

Who do you think owns the mineral rights?

☐ Beth
☐ Minnie</td>
</tr>
</table>

Examine the construction of the deed on the following page and notice where the excepting language is placed in the conveyance. Because the language is not a part of the granting clause, rather a part of the habendum clause, courts have construed the language as excepting from the covenant of warranty rather than the grant.

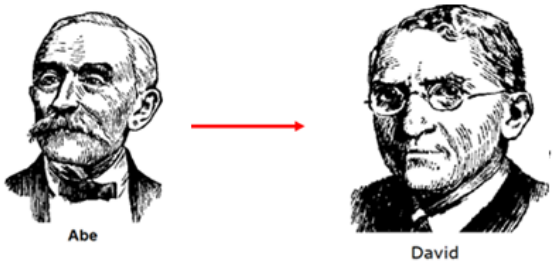


ANSWER: If no language is used in the deed indicating that it was *the intention of Abe to reserve the minerals to himself*, the exception contained in the deed should not be construed as a reservation of the mineral rights but must be construed as excepting them from the covenant of warranty. *Jarrett v. Moore,* 159 Okla. 93, 14 P.2d 390. Notice that, in this case, John does not use the word "reserve". With this Oklahoma case, since John did not expressly reserve the minerals to himself, Beth would own 100% of the minerals. (Emphasis ours)

Example 2:

1. Assume that Abe, the fee owner, granted to Betty a 10-year mineral deed.

2. Eight years later, by Warranty Deed, Abe conveyed the land to David.



3. The warranty language read...

"TO HAVE AND TO HOLD said described premises unto the Grantee forever. Grantor hereby covenants with said Grantee that the Grantor is lawfully seized of said land, has good right and lawful authority to sell said land, that said land is free from all encumbrances, and hereby fully warrants the title to said land and will defend the same against the lawful claims of persons whosoever.

Except all oil and gas rights and mineral rights held by Betty."

4. Abe believes that at the end of the 10-year term, the minerals will revert to him.

David believes the minerals will revert to him.

Who do you think will own the minerals?

ANSWER: Examine the construction of the deed. Notice where the excepting language is placed in the conveyance. An Oklahoma court ruled that, to create a reservation, it must appear from the instrument that ***the grantor intended to, and by appropriate words, expressed the intent to reserve an interest in himself***, otherwise, the exception must be construed as an exception to the warranty. The court found that no such intention was expressed and found in favor of the defendant, in this case, David. J*arrett v. Moore*, 159 Okla. 93, 14 P.2d 390 (1932).

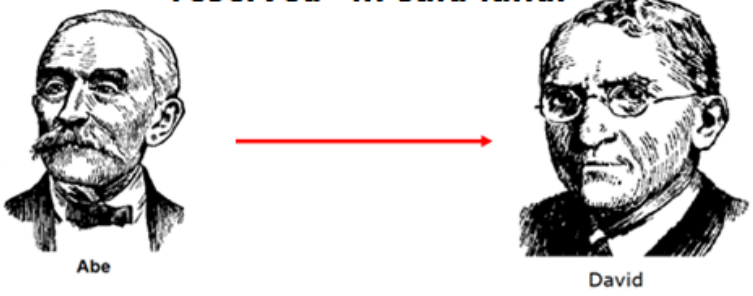
Example 3:

General Rule: When reservation language appears in the habendum clause of a conveyance and it appears that there is intention on the part of the grantor to reserve minerals, that language will hold precedence over the granting clause in the deed. *Abbott v. Woods*, 295 P.2d 793 (Okla. 1956).

Assume Abe, the owner of a tract of land, by Warranty Deed conveyed the land to David.

The habendum clause contained the following:

"Except 15/16ths of all minerals rights reserved" in said land.



Abe David

Abe believes the mineral rights belong to him.

David believes the mineral rights belong to him.

Who do you think owns the mineral rights?

☐ Abe
☐ David

The Grantor, for and in consideration of the sum of _____($_____) and other valuable consideration, receipt of which is hereby acknowledged, hereby grants, bargains, sells, remises, releases, and conveys to the Grantee, all that certain land situated in _____ County, State of _____, to-wit:

"Legal Description"

Granting Clause

TO HAVE AND TO HOLD said described premises unto the Grantee forever. Grantor hereby covenants with said Grantee that the Grantor is lawfully seized of said land, has good right and lawful authority to sell said land, that said land is free from all encumbrances, and hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons whosoever.

Except 15/16th of all mineral rights reserved in said land

Habendum Warranty Clause

ANSWER to Example 3: With the language as cited, an Oklahoma court concluded, "The reservation of mineral rights appearing in the habendum clause of a deed will control over the granting clause where the intention of the grantor to create such reservation is clearly expressed." The court held that there was a clear intention to reserve the 15/16ths mineral interest; that the language "except 15/16ths of all mineral rights reserved," ***expressed a clear intention by the grantor not to include this mineral interest under the general granting clause in the deed.*** In this case, it appears that Abe is the owner of the minerals. *Wescott v. Bozarth*, 202 Okla. 149, 211 P.2d 258. (Emphasis ours)

Subject to Language

"Subject to" refers to a conveyance of property to a grantee when there exists a prior mortgage, deed of trust, mineral reservation, right of way, or easement. When there is an existing mortgage, the conveyance becomes an acquisition *subject to* the liabilities attached to the property. This conveyance may require the consent of the lender.

When there is a prior mineral reservation, the conveyance becomes *subject to* the reservation that is attached to the tract of land.

Assume that Abe, the owner of a tract of land, conveys the land to Ben, but immediately following the granting clause, he adds the following language,

"such conveyance is subject to 100% of all oil, gas, and other minerals in and under said lands previously conveyed to Carl."

Also assume that no such mineral conveyance to Carl has been made.

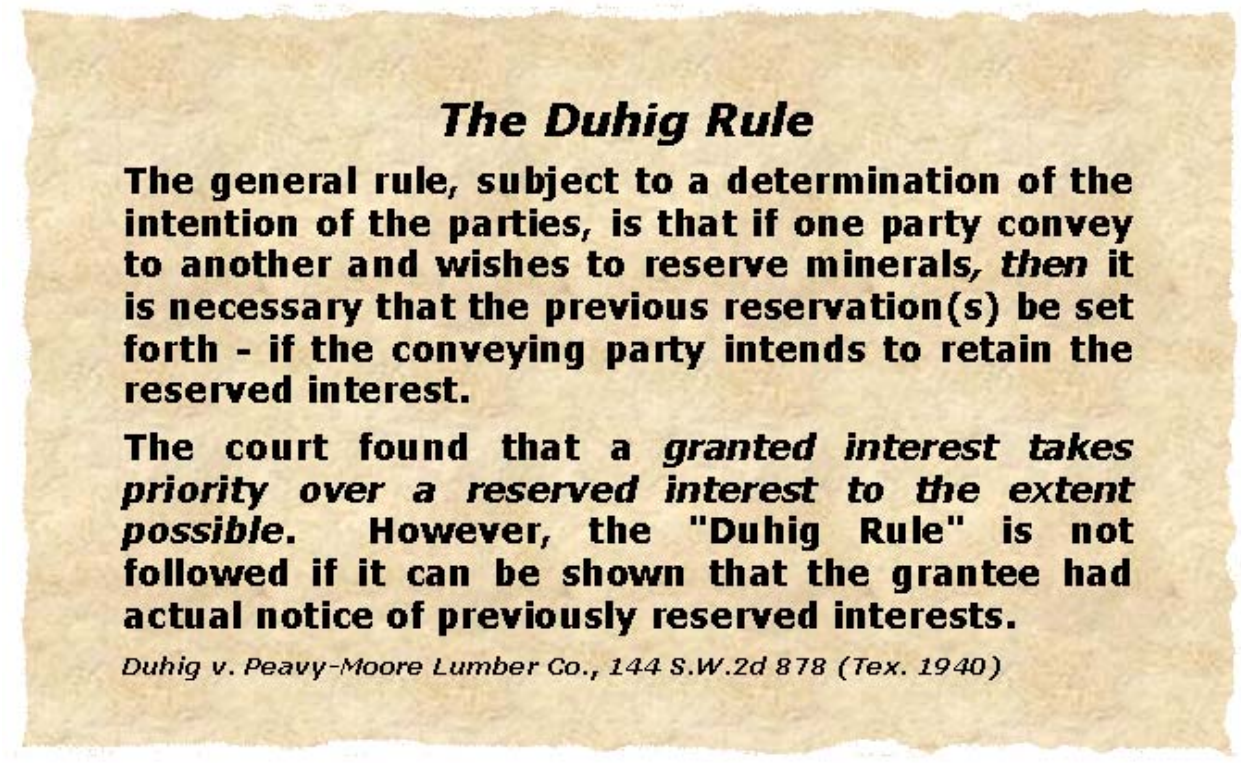
Because there was no prior mineral conveyance to Carl would the minerals automatically pass to Ben? Would they pass to Carl? Would Abe still be the owner of the minerals? If your company wanted to lease the minerals, which party should you lease from?

ANSWER: Since the *subject to* language contains no words of grant to Carl, he would not be able to claim any ownership in the minerals. Since the *subject to* language would make it appear that Abe's intent was not to grant any of the minerals to Ben, many courts might determine that no minerals would pass to him, thus leaving the minerals in Abe's possession.

The Duhig Rule

In Texas, the court fashioned a rule referred to as the *Duhig Rule*. Alabama, Colorado, Louisiana, Oklahoma, Mississippi, North Dakota, New Mexico, Texas, Arkansas, and Wyoming are states that have adopted the Duhig rule.

The rule says that if one party conveys to another through a warranty deed, and that party wishes to reserve minerals, then it is necessary that all prior reservations of record be set forth, if the conveying party intends to retain the reserved interest. The court has found that *the granted interest* on the face of the conveying deed *will take priority over any reserved interest to the extent possible*.



The Duhig Rule

The general rule, subject to a determination of the intention of the parties, is that if one party convey to another and wishes to reserve minerals, *then* it is necessary that the previous reservation(s) be set forth - if the conveying party intends to retain the reserved interest.

The court found that a *granted interest takes priority over a reserved interest to the extent possible*. However, the "Duhig Rule" is not followed if it can be shown that the grantee had actual notice of previously reserved interests.

Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940)

Trying to understand the Duhig rule for the first time may be hard to wrap your arms around. Try to see it in light of the following illustration:

Assume I am selling a car on Craig's List. The ad says, "$3,000 or best offer." You see the ad, call me up, come over to my house to look at the car, and are now negotiating a price for the car.

You make me an offer of $2,500. I accept your offer but with this one caveat. I tell you that I had just bought two of the tires on the car, they cost me a lot of money and I want to keep them. You agree and tell me that you will come back later to pick up the car.

When you arrive at my house, you see the car but notice that there are no tires on the car. You say, "What happened to the tires? You told me you were only taking two of them." I respond, "I did only take two of them just like I said, but the other two tires belonged to someone else."

What would you be thinking? How would you feel? Wouldn't it have been appropriate to tell you about the other two tires? Would you feel cheated or taken advantage of? Wouldn't you be thinking that the $2,500 agreed-upon price was the car less only two tires, not four? Of course you would.

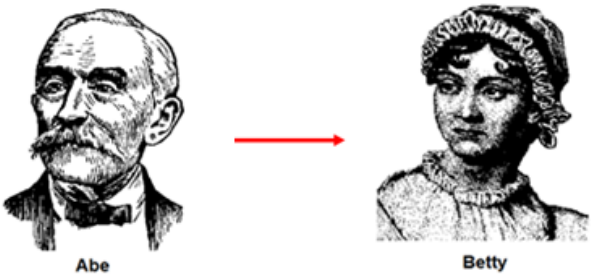
If this same scenario were dealing with surface and mineral lands, in a Duhig state, the law would find in the buyer's favor. In other words, it is incumbent upon the seller to let the buyer know what they are paying for. Turn the car scenario into a purchase of a farm. The cost to the buyer is $2,500,000. The warranty deed given to the buyer says the seller is reserving an undivided 50% of the minerals. If you were the buyer, you would believe that the purchase price you are paying comes with the surface lands and 50% of the minerals. If the seller is keeping 50% of the minerals, would it not appear that the other 50% are being conveyed? In essence that is the Duhig rule.

Scenario 1 – Assume that Abe is the original owner of a tract of land. He owns 100% of both surface and minerals. In 1973, Abe conveys the land to Betty but he reserves 50% of the minerals at the time of the conveyance.

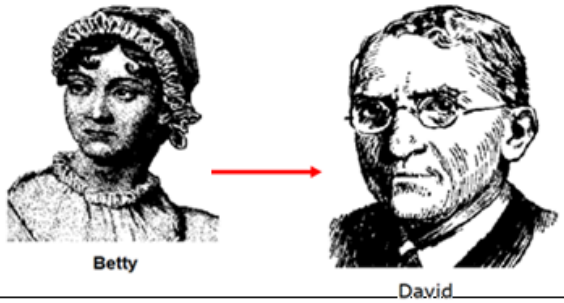
Twenty years later, Betty, through a warranty deed, sells 100% of the same tract of land to David. In the deed, Betty reserves 50% of the minerals but did not mention the prior reservation in the 1973 conveyance.

Since the prior reservation was not set out, you must ask yourself, "What mineral interest *appears* to be granted to David?" Clearly he is receiving 100% of the surface land. However, if you were David and knew nothing about the previous 50% mineral reservation, from the *face of your deed,* what mineral interest would appear to be *granted:* 50%? 25%? none?

Abe conveys the land to Betty but he reserves 50% of the minerals



20 years later, Betty, through a WD sells 100% of the same land to David. Betty reserves 50% of the minerals but does not mention Abe's prior reservation.



Who owns what percent of the minerals under this tract of land?

- ☐ **Abe 50%, Betty 50%, Carl 0%**
- ☐ **Abe 50%, Betty 25%, 25%**
- ☐ **Abe 50%, Betty 0%, Carl 50%**

ANSWER: If David knew nothing about the previous reservation, the conveyance would appear to be granting 100% of the surface rights and 50% of the mineral rights to him. The Duhig rule would protect him, making it incumbent upon Betty to make the previous reservation known. In this case, Betty would receive no mineral interest in the tract of land because *the granted interest* on the face of the conveying deed has taken *priority over the reserved interest to the extent possible.*

Scenario 2

In 1973, Abe sold a 640-acre tract of land to Betty. The deed contained the following provision:

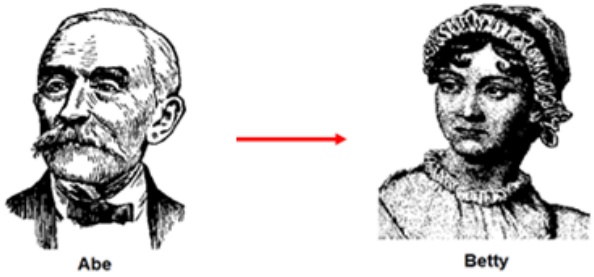
"Reserving an undivided one-half interest in and to all oil, gas, and associated minerals under said lands hereby described."

Twenty years later, Betty through a warranty deed, sold the 640-acres to David. Betty had forgotten all about the previous reservation and thought that she owned all of the minerals. In the deed, Betty included the following reservation language:

"Reserving an undivided seventy-five (75%) interest in and to all oil, gas, and associated minerals under said lands hereby described."

Your company wishes to lease all mineral ownership in the 640 acres. Who owns what portion of the minerals? From whom do you lease?

Abe conveys the land to Betty but he reserves 50% of the minerals



20 years later, Betty, through a WD sells 100% of the same land to David. Betty reserves 75% of the minerals but does not mention Abe's prior reservation.

Your company wishes to lease all mineral ownership in the 640-acres.

Who owns what portion of the minerals? From whom do you lease?

Abe _____%

Betty _____%

Carl _____%

ANSWER: Since Betty did not make known the previous reservation, it would appear from the face of the deed that David is being granted 25% of the minerals, and the granted interest would take priority over the reserved interest only to the extent possible. In this case, your company would need to lease Abe = 50%, Betty = 25% and David = 25%.

Alabama – In Alabama, the courts have not mentioned the Duhig rule, but their findings appear to align with the Duhig rule. *Morgan v. Roberts*, 434 So.2d 738 (Ala. 1983).

Arkansas – Arkansas has adopted the Duhig rule; however, Duhig cannot be applied to reservations found in quitclaim deeds. *Hill v. Gilliam,* 284 Ark. 383, 682 S.W.2d 737 (1985). The Supreme Court also ruled that *Duhig* would apply only to warranty deeds, and then only when the parties to the deed are not parties involved in the dispute. *Peterson v. Simpson*, 286 Ark. 117, 690 S.W.2d 720 (Ark. 1985).

Colorado – Although a Colorado Supreme Court expressed some reservations concerning the logic of the Duhig Rule, the court did not reject it. In the Supreme Court Case *O'Brien v. Village Land Co*., the court's rulings were consistent with Duhig. *O'Brien v. Village Land Co*., 794 P.2d 246, 249-251 (Colo. 1990). *Dixon v. Abrams*, 145 Colo. 86, 357 P.2d 917.

California – There are no cases in California related to Duhig issues, but it is assumed by many that California would most likely reject the Rule.

Louisiana – Louisiana adopted the rule in the case of *Dillon v Moran* (362 So. 2d 1130, La. App. 2d Circuit, (1978). It was also applied in *Continental Oil Co. v. Tate*, 211 La. 852, 30 So.2d 858 (1945).

Michigan – There are no cases in Michigan related to Duhig issues, but is is assumed that Michigan would follow the majority of Duhig states.

Mississippi – A Mississippi Court distinguished the Duhig rule stating, "A quitclaim deed operates only as a conduit to pass the grantor's interest to the grantee. To determine what interest passes by a quitclaim deed, a grantee, or any interested person, must look to the chain of title prior to the deed to determine what interest the grantor had to convey and subtract therefrom any express reservation in the quitclaim deed. If the grantor had a smaller interest than the deed purports to convey, the grantee may not complain. The grantor by a quitclaim deed makes no representation, covenant, or warranty of title and has no duty or obligation to protect the conveyance against any prior conveyance to others in the chain of title." *Rosenbaum v. McCaskey*, 386 So. 2d 387 (Miss. 1980).

Montana – While the Montana Supreme Court has not specifically adopted the Duhig Rule, but relies upon the doctrine of "estoppel by deed" upon which the Duhig is actually based. *Hart v Anaconda Copper Mining Co.,* 222 P. 419, 421 (MT 1924).

North Dakota – North Dakota has adopted the Duhig rule. *Kadrmas v. Sauvageau*, 188 N.W.2d 753 (N.D.1971); *Sibert v. Kubas*, 357 N.W.2d 495, 497 (N.D.1984). The Duhig rule does not apply when the grantee had actual notice of the outstanding mineral interest. *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D.1981). North Dakota has made it clear that actual knowledge violates the use of the Duhig rule.

The Duhig rule was premised upon a breach of warranty until *Miller v. Kloeckner*, 600 N.W.2d 881 (N.D. 1999) held a general warranty is not necessary. "The key question is, not what the grantor purported to retain for himself, but what he purported to give the grantee. If he undertook to convey half the minerals and had the power to do so, he should be held to his undertaking." *Id.* at 885, 1 Williams & Meyers, at 580.36.

The rule has also been adopted in the North Dakota Mineral Title, "Where full effect cannot be given both to the interest conveyed in the granting clause of a warranty deed and to the interest reserved therein because of a previous outstanding interest in a third party, priority will be given to the interest conveyed in the granting clause rather than to the interest reserved until full effect is given to the interest conveyed."

Oklahoma – Oklahoma adopted the rule in *Murphy v. Athans*, 265 P2d 461, (1954). The rule applies to warranty deed conveyances where the grantor, who owns a fractional interest in the minerals, reserves a portion of the mineral estate without setting forth the previous mineral reservations. *Birmingham v. McCoy,* 358 P.2d 824 (Okla. 1960). *Bryan v. Everett,* 365 P.2d 146 (Okla. 1961).

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

Utah – In *Hartman v. Potter,* 596 P.2d 653 (Utah 1979) the court rejected the Duhig Rule without referring to the Duhig case.

Wyoming – *Body v. McDonald*, 79 Wyo. 371, 334 P2d 513 (Wyo. 1959). The following states have not yet adopted the Duhig Rule: California, Pennsylvania, West Virginia, New York, Kansas, Georgia, Michigan, Utah, and Montana.

A Third Party Reservation

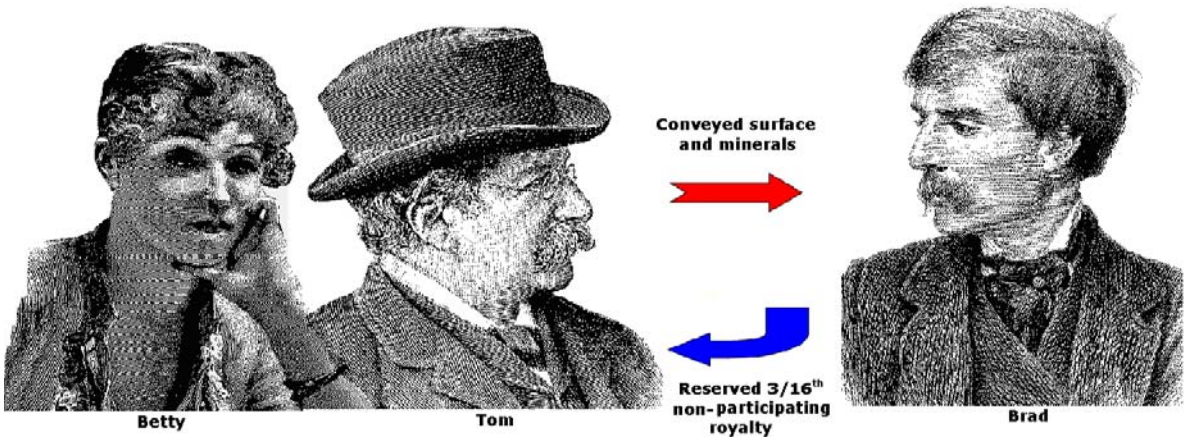
It should be quite clear that if someone were selling a tract of land and wished to reserve minerals, they could only reserve the minerals that they owned. In other words, they could not reserve the minerals under their neighbor's tract of land when they were selling their own tract of land.

In the same vein, assume that Betty owned, in fee simple, a certain tract of land as her sole property. Betty has two friends, one named Tom and the other named Brad. The tract of land is conveyed to Brad, but the deed contains the following reservation:

"Excepting and reserving, however, unto Betty and Tom an undivided 75% in and to the oil and gas minerals…."

It is clear that the intent is to reserve an equal share of minerals between Betty and Tom; however, the tract of land was Betty's separate property. None of the property belonged to Tom, and he would be considered a stranger in title or a third party to the reservation; therefore, none of the minerals estate can transfer to Tom. Betty would own all of the reserved interest, and the only way Tom could come into title would be through a specific grant from its owner. In other words, Tom could not keep an interest in a tract of land where he did not currently own any interest.

According to Black's Law Dictionary 1309 (7th ed. 1999), words of "reservation" are not deemed to be words of "grant." Therefore, most states would not consider the third party or a stranger in title interest to be valid.



West Virginia – Courts have concluded that a reservation to a third party is void, but that the grantor retains the mineral rights. *Meadows v. Belknap*, 199 W. Va. 243, 250, n. 14, 483 S.E.2d 826, 833, n.14 (1997).

Virginia – Courts have concluded that under the common law, in order for a reservation to be good, it "must be made to all, some, or one of the grantors and not to a stranger to the deed". *Shirley v. Shirley*, 259 Va. 513, 525 S.E.2d 274, 2000 Va. LEXIS 34 (2000).

Arkansas – Courts have concluded "that reservation to a stranger to the instrument is void for all purposes." *Rye v. Baumann*, 231 Ark. 278, 329 S.W.2d 161, 165 (Ark. 1959).

Oklahoma – "A reservation or exception in favor of a stranger to a conveyance is void or inoperative." Howard H. Harris, *Reservations in Favor of Strangers to the Title*, 6 Okla.L.Rev. 127 (1953).

New York – "A deed with a reservation or exception by the Grantor in favor of a third party, a so-called 'stranger to the deed,' does not create a valid interest in favor of that third party." *Estate of Thompson v. Wade*, 509 N.E. 2d 309, 310 (N.Y. 1987)

Exceptions to the rule:

Wyoming – The court determined that a grantor may reserve an interest to a third party as long as conveying or granting language is used. *Simpson v. Kistler Investment Co.,* 90 O&GR 364, 713 P.2d 751 (Wyo. 1986). For example: "excepting and reserving all mineral rights in favor of Jim Johnson 50% and Jane Johnson 50% with the express provision that all such mineral rights shall be distributed, vested and granted in such persons."

North Dakota – North Dakota has a third party reservation rule, often referred to as the Malloy rule. Assume one spouse owns 100% of the surface and subsurface interest. The property is conveyed to a third party and the non-owning spouse signs the conveyance because of homestead rights. In 1983, the Supreme Court decided that such a conveyance was effective to reserve a mineral interest in the other spouse. *Malloy v. Boettcher*, 334 N.W.2d 8.

Montana - A mineral reservation "to the grantors" can, indeed, reserve a mineral interest to a non-mineral owning spouse, if the spouse executed the deed for homestead purposes. In *Kelly v Wallace*, 972 P.2d 1117 (MT 1998), the Montana Supreme Court found that when intent can be shown, the court will give effect to a "non-party to the transfer." Thus, where intent can be shown, the courts in Montana will recognize a third party mineral reservation as being effective.

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The Words "Out Of" vs. "Of"

It is often difficult to determine the amount of interest being conveyed or reserved when the grantor, who only owns an undivided portion of the minerals, references that undivided interest at the time of the conveyance. The land professional must determine if the percentage being granted comes *out of* the grantor's fractional mineral interest owned at the time or if the percentage being granted is a percentage *of* the grantor's interest. Understanding the impact of the words, "out of" or "of" becomes very important to the land professional.

The Words "Out Of"

Example 1: Assume Abe owned an undivided 50% mineral interest in a 200-acre tract of land. His brother owned the other 50%. Abe conveys 25% of something to Ben. Read the conveying language in the deed and determine if Abe conveyed

- **50 net mineral acres (200 gross X 25%)**
- **25 net mineral acres (100 net acres owned by Abe X 25%)**

WARRANTY DEED

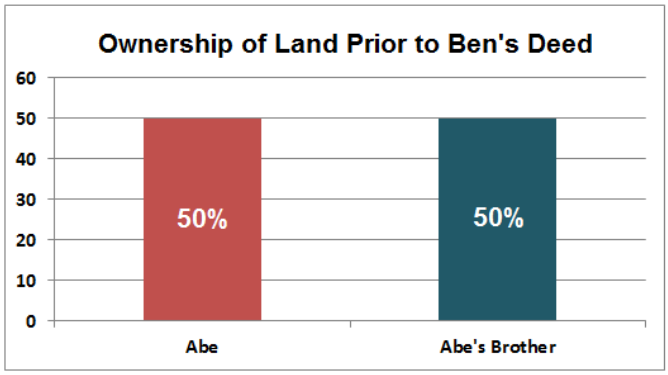
KNOW ALL MEN BY THESE PRESENTS THAT

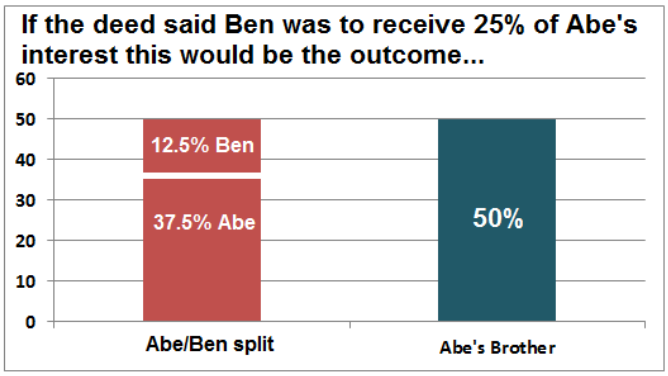
Abe hereinafter called Grantor, for and in consideration of the sum of Ten and no/100 --------Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto **Ben**, hereinafter called Grantee

"an undivided Twenty-Fifty Percent (25%) mineral interest in and to all oil, gas and other minerals *out of* the interest owned by the grantor at the time of this conveyance".

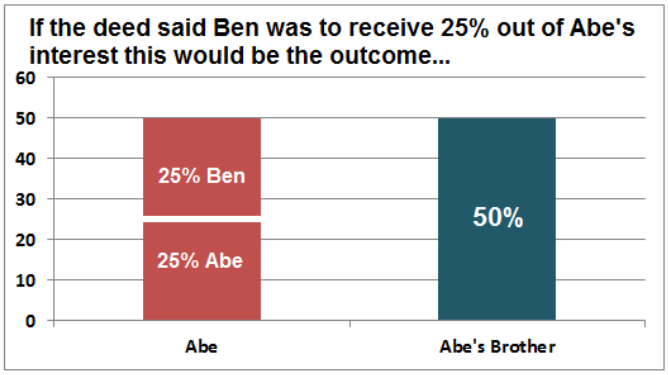
ANSWER: If your answer was that Abe was only conveying 25% of what he owned at the time or 25 net mineral acres, you would not have interpreted the language the same as some courts. According to Hemingway Oil and Gas Law and Taxation, Fourth Edition, p.113-114, the phrase *"out of"* held the key and refers back to only the *source of the interest* from which the 25% *interest is to be taken*. The 25% is to be taken *out of* the grantor's 50% but it does not mean that the grantor is conveying 25% of his 50%. If

the deed simply used the word "of" the result might be different in that the word "of" is the same as "times" in a multiplication formula. The grantor would be conveying 25% of his 50%. In this regard, Williams and Meyers, 1 Oil and Gas law 654, Sec 319 commenting on case law says, "The position adopted by the court appears to be a tenable construction of the phrase "out of." When the words "out of" are used the term refers to the *source of the interest from which the 25% interest is to be taken* and will not operate to reduce the amount of the mineral interest acquired by Ben, the grantee. Therefore, in this deed, Abe would have conveyed a full undivided 25% mineral interest that comes "out of" his undivided interest in the 200 gross acre tract of land. He is not conveying 25% of his undivided interest. *Black v. Shell Oil Company, 397 S.W.2d 877 (Tex. Civ. App. – Texarkana 1965); Minchen v. Hirsch, 295 S.W.2d 529 (Tex. Civ. App. 1956).*





The term "out of" refers to the source of the interest from which the 25% interest is to be taken from. Abe clearly says that Ben's interest it to come *"out of his source"* not out of his brother's source of interest.



Use the term "Interest Conveyed" vs. "Land

Described”

One of the basic rules of contract law is that if the court is attempting to determine the meaning and effect of a conveyance, they must restrict themselves to the document itself. The restriction does not allow the court to look at other extrinsic evidence such as prior agreements, side agreements, or verbal interactions either before or after the creation of the contract. If terms or conditions in the contract appear to be clear and unambiguous, the court must accept the *“plain meaning”* of the terms and will not be influenced by outside evidence.

This strict view bases the outcome on the *words* and the *words* alone. Over the years, court decisions based on certain words or phrases have become the “law of the land” in the states where the decisions have been made.

Texas

For instance, in Texas, if a grantor reserved a subsurface interest in what was being conveyed, the grantor’s reserved interest would be proportionately reduced by the interest he conveyed.

On the other hand, if the grantor reserved a subsurface interest in the lands that were described in the conveyance, the grantor’s reserved interest would not be proportionately reduced by the interest being conveyed. Averyt v. Grand, Inc., 717 S.W.2d 891 (Tex. 1986)

Oklahoma

In Oklahoma, courts have determined that when an ambiguity exists the court will try and determine the intent of the parties based on the words themselves in light of the circumstances that existed at the time of the conveyance.

Often conveying language in deeds will contain the phrase:

“The Land Described.”

This has very specific meaning. On the other hand, conveying language can contain the phrase:

“The Interest Conveyed.”

This has very specific meaning.

Other On-Line Classes

An Introduction to Petroleum Land Management

Choosing a career as an oil and gas landman or land administration professional is a job path that is highly sought by many individuals. These types of jobs can be rewarding both personally and financially, offering an income that can be substantially greater than many other professions that require far more training. This class is excellent for those wishing to examine the subjects and tasks the land professional is called upon to manage, including: land and mineral ownership in the United States, leasing available minerals, land strategies, pooling, unitization, and searching for and drilling for oil and gas.

A Comprehensive Study of the Oil & Gas Lease, Lease Obligations, and Lease Clauses

This class is perhaps the best resource available for those wanting to learn about the management of a company's oil and gas lease assets. It is designed to offer specialized instruction for the landman, land tech., and lease or title analyst as they deal with particular lease and lease related issues.

A Comprehensive Study of Property Ownership and Transferring Title

This course takes an in-depth and thorough look at property ownership, beginning with the origins of ownership in the United States. Other topics include: differing types of property ownership such as real property, personal property, community property, separate property, homestead laws or dower estates; the rules surrounding mineral and royalty ownership including surface, divided, and undivided interests; the rules for conveying property; varying types of conveyances, testate and intestate succession laws; and, the many types of title transfers that result from court actions.

Contracts Used by Petroleum Land Management

Contracts are the heart and soul of the oil and gas industry, which uses a number of unique agreements in order to explore for, develop, produce, and market oil and gas. This course will provide an understanding of contract law and is designed for all oil and gas professionals or those having a desire to work directly or indirectly in land or land administration. Contracts examined will include the Joint Venture Agreement, Area of Mutual Interest Agreement, Seismic Agreements, Surface Agreements, unit operating agreements, unit agreements, the AAPL Joint Operating Agreement, and the Farmout Agreement.

Numbers Tell a Story, Calculating the Division of Interest

This on-line class comes with both a textbook and the Calculating Your Division of Interest Workbook and will be of tremendous value in helping the land professional calculate all types of interests, including net mineral acres, royalty, net revenue, gross working, and overriding royalty interest. Chapters also include Unit calculations, calculating payouts, non-consents, farmouts, and calculating overrides based on farmout language.

Becoming a Great Negotiator

By its very definition, a negotiation is a dialogue between two people intending to resolve disputes or produce an agreed consensus. We negotiate for many reasons. However, we are not born as a great negotiator. Great negotiators learn their craft! The purpose of this course is to reveal practical negotiating tools that, if mastered, can help anybody negotiate through business and the issues of life.

Critical Legal Concepts

Crucial information dealing with a myriad of critical concepts surrounding the land profession and the oil and gas industry are covered in this class. Subject matter covers state specific title issues and statutes that impact how oil and gas interests are interpreted, calculated, and maintained; specific language in conveyances and how each word or the placement of the words impact the conveyance outcome; and state-specific legal concepts surrounding doctrines of oil, gas, royalty, trespass, pooling, types of ownerships, and ownership theories.