University of Arkansas at Little Rock Law Review

Volume 8 | Issue 2 Article 3

1985

Oil and Gas—Overconveyances—Arkansas Adopts a Modified Version of the Duhig Rule

Ranko S. Oliver

NOTES

OIL AND GAS—OVERCONVEYANCES—ARKANSAS ADOPTS A MODIFIED VERSION OF THE DUHIG RULE. *Peterson v. Simpson*, 286 Ark. 177, 690 S.W.2d 720 (1985).

Bullock conveyed land to Baird, reserving 50% of the minerals, which he continued to own throughout various subsequent conveyances. Baird later conveyed the land and the other 50% of the minerals to Payne. Payne then conveyed the land and the 50% of the minerals to Pope. Pope subsequently conveyed to Andrews by warranty deed with the following reservation: "Reserving however, from this conveyance, for the grantors herein, their heirs and assigns forever, ONE-HALF (½) of all oil, gas, coal and other minerals, in and to and that might be produced from the said real estate."[1] After a series of intermediate conveyances, Andrews' interest was finally conveyed to Simpson and his wife. The deed to the Simpsons contained the following language: "This deed is made subject to reservations of one half (½) of all minerals heretofore reserved. It is meant by this deed to convey the surface and one half of all minerals."[2] Pope's heirs brought an action against the Simpsons to quiet title in the one-half mineral interests in the land that Pope purported to reserve in his warranty deed to Andrews.

The plaintiffs argued that in construing the warranty deed, the court should determine Pope's subjective intent at the time he conveyed the land to Andrews. The defendants, on the other hand, urged the court to adopt the rule established in the Texas case of *Duhig v. Peavy-Moore Lumber Co.*,[3] which is an objective rule of construction. Application of this rule would result in ignoring Pope's intent at the time he conveyed to Andrews, and in construing the warranty deeds as conveying all of Pope's interest with no reservation.

The trial court ruled that the warranty deed failed to reserve an undivided 50% interest in the oil, gas and other minerals. The Arkansas Supreme Court affirmed, holding that it would apply the *Duhig* rule

1. 286 Ark. 177, 180, 690 S.W.2d 720, 723 (1985).
2. *Id.* at 180-81, 690 S.W.2d at 723.
3. 135 Tex. 503, 144 S.W.2d 878 (1940).

because the original parties were not involved. However, the court stated that in cases in which the original parties are involved, the reservation in the deed must be given effect, according to the intention of the parties. *Peterson v. Simpson*, 286 Ark. 177, 690 S.W.2d 720 (1985).

The Arkansas Supreme Court traditionally has followed the common law approach of construing mineral deeds according to the intention of the parties.[4] Specifically, it has followed this approach in determining the rights and liabilities of the parties under a grant or reservation of mineral interests,[5] and in determining whether the instrument conveyed, reserved, or excepted the mineral interest.[6] In construing a grant or a reservation of mineral interests, the court has analyzed the instrument of conveyance as a whole to determine the intention of the parties.[7] If the instrument is ambiguous, the court has considered the particular circumstances and understanding of the parties at the time of the execution of the instrument. If ambiguities cannot be resolved by any other rule of construction, the court has applied the general rule of construing the instrument against the grantor, or the party who prepared the instrument.[8]

Construing the document in accordance with the intention of the parties sometimes conflicts with the "repugnancy rule," which states that a reservation or exception not contained in the granting clause of a deed is void as repugnant to the grant.[9] In the past, any attempt to reserve or except a fraction in the habendum clause was ineffective because the reservation or exception derogated the estate conveyed in the granting clause.[10] The modern tendency, however, is to sustain the reservation or exception if the intention of the parties is apparent from an examination of the instrument. This is so even though the result may

4. *See* Barret v. Kuhn, 264 Ark. 347, 572 S.W.2d 135 (1978) (royalty deed interpreted so as to make all parts of instrument harmonize and give effect to intention of parties to oil and gas lease); Schnitt v. McKellar, 244 Ark. 377, 427 S.W.2d 202 (1968) (deed examined to determine intention of parties).

5. *See* Gearhart v. McAlester Fuel Co., 199 Ark. 981, 136 S.W.2d 679 (1940).

6. Keith v. Keith, 183 Ark. 1017, 39 S.W.2d 706 (1931).

7. *See* Gibson v. Pickett, 256 Ark. 1035, 512 S.W.2d 532 (1974) (basic rule in construction of deeds is to ascertain and give effect to the real intention of the parties, particularly the grantor, as expressed by language used, when not contrary to settled principles of law); Wynn v. Sklar & Phillips Oil Co., 254 Ark. 332, 493 S.W.2d 439 (1973) (intention of parties must be ascertained from the four corners of the document); Waters v. Edwards, 196 Ark. 1088, 121 S.W.2d 79 (1938) (document of conveyance was unambiguous and clearly reflected intention of parties).

8. *Gibson*, 256 Ark. at 1041, 512 S.W.2d at 536.

9. R. CUNNINGHAM, W. STOEBUCK, and D. WHITMAN, THE LAW OF PROPERTY § 11.2, at 718-19 (1984).

10. *See* Cole v. Collie, 131 Ark. 103, 198 S.W. 710 (1917).

be contrary to the legal effect of the granting clause considered alone.[11] In a number of cases, courts have abandoned the repugnancy rule and have given effect to a reservation or exception of mineral interests, irrespective of the location of the clause. These courts have looked to whether the language of the deed reflects the grantor's intent to withhold the minerals from the conveyance.[12]

Construing an instrument of conveyance in accordance with the intention of the parties presents an additional problem. In excluding a certain fraction from their conveyance, grantors often use the term reservation when it actually is an exception, and vice-versa. Technically, a clear distinction exists between a "reservation" and an "exception" in a deed. The term "exception" means that the grantor is excluding from the conveyance a previously outstanding interest in a third party. The term "reservation," on the other hand, is generally interpreted as reflecting the grantor's intention to keep a fractional interest for himself.[13] The terms are so often used interchangeably, however, that the technical distinction frequently has been disregarded when the parties' intent can be otherwise determined.[14] Some courts, for example, have construed a reservation as an exception when necessary to carry out the intention of the parties.[15]

However, the distinction between a reservation in the grantor and an exception of a third party's interest is particularly important in conveyances of fractional mineral interests if the total of the fractions reserved and conveyed is greater than 100%. This type of "overconveyance" often results in confusion and litigation. Typically, the

---

11. *See generally* Annot., 58 A.L.R. 2d 1374, 1407 (1958).

12. *See generally* Carter Oil Co. v. Weil, 209 Ark. 653, 192 S.W.2d 215 (1946) (express reservation of oil and mineral rights in separate paragraph folllowing habendum clause not void as repugnant to granting clause). In Beasley v. Shinn, 201 Ark. 31, 144 S.W.2d 710 (1940), the court held that since reservations of mineral rights often appear in the habendum, it is not just to apply the technical rule of limitation. Instead, consideration is to be given to the intention of the parties as gathered from the entire document. *See also* Stewart v. Warren, 202 Ark. 873, 153 S.W.2d 545 (1941) (mineral interest purportedly conveyed in fee by granting clause to be limited to a ten-year period by habendum clause).

13. *See* Hartman v. Potter, 596 P.2d 653 (Utah 1979); Piper v. Mowris, 466 Pa. 89, 351 A.2d 635 (1976). *See also* Annot., 146 A.L.R. 880, at 894-95 ((1943).

14. Meyers and Williams, *Oil and Gas Conveyancing: Grants and Reservations by Owners of Mineral Interests*, 43 VA. L. REV. 639 at 644-45 (1957).

15. *See* Adkins v. Arsht, 50 F. Supp. 761 (E.D. Ill. 1943) (conveyance of land "excepting" all minerals was sufficient to constitute a "reservation" in grantor); Hurd v. Byrnes, 264 Or. 591, 506 P.2d 686 (1973) (no significance attached to terms "exception" or "reservation" since the terms could be used interchangeably); Brown v. Kirk, 127 Col. 453, 257 P.2d 1045 (1953) (intention of parties controls irrespective of the terms used); Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S.W. 345 (1923) (deed reserving mineral rights could be construed as containing an exception).

situation arises when the grantor owns the surface and an undivided ½ interest in the minerals in the land. The other 50% fractional mineral interest is outstanding in a third party. Despite owning only 50% of the minerals, the grantor executes a warranty deed conveying the property but, at the same time, reserves 50% of the minerals. The problem presented by this scenario is in determining what exactly the grantor conveyed and what he reserved.

If the conveyance is by means of a warranty deed, some courts have dealt with the problem by applying the rule of *Duhig v. Peavy-Moore Lumber Co.*[16] In that case, with the facts described above, the Texas Supreme Court held that the grantor had conveyed his 50% of the minerals to the grantee, and thus retained no interest in them. Application of the *Duhig* rule results in the grantor owning nothing. The grantee owns the surface and 50% of the minerals, and the other 50% remains outstanding in a third party. The rule requires that if a previous outstanding interest in a third party precludes the court from giving full effect to both the granted and the reserved mineral interests, the granted mineral interest will take priority over the reserved interest.[17] In effect, the *Duhig* rule deducts the overconveyed fractional interest from the grantor's interest.

Two rationales were given in the *Duhig* case in support of the rule. Writing for himself,[18] Commissioner Smedley identified the problem as one purely of construction. He believed that established rules of construction mandated the result. Applying these rules, Commissioner Smedley found that by using a warranty deed, the grantor showed an intention to convey and warrant title to the grantee of all the surface and 50% of the mineral interest in the land. Since the grantor owned sufficient interest to satisfy the purported conveyance, no breach of warranty occurred. He interpreted the reservation clause as withdrawing or excepting from the conveyance the third party's outstanding 50% interest.[19] Several jurisdictions have adopted this one-step reasoning.[20]

The majority of the court in *Duhig* adopted a different approach, based on a two-step reasoning process. This reasoning required that

16. 135 Tex. 503, 144 S.W.2d 878 (1940).

17. J.S. LOWE, OIL AND GAS LAW 128 (1983).

18. Commissioner Smedley wrote the court's opinion, and agreed with the outcome, even though he did not agree with the analysis of the majority of the court.

19. Meyers and Williams, *Oil and Gas Conveyancing: Grants and Reservations by Owners of Mineral Interests*, 43 VA. L. REV. 639 at 644-45 (1957).

20. *See* Lucas v. Thompson, 240 Miss. 767, 128 So. 2d 874 (1961); Garraway v. Bryant, 224 Miss. 459, 80 So. 2d 59 (1955); Murphy v. Athans, 265 P.2d 461 (Okla. 1953); Montgomery v. Ebony Hills Improvement Co., 229 S.W.2d 830 (Tex. Civ. App. 1950).

both the granting and reservation clauses be given effect; this resulted in a breach of warranty. First, the granting clause of the deed was given effect, transferring all of the surface and 50% of the minerals to the grantee; the grantor owned nothing. Next, the reservation was also given effect, and the 50% interest in the minerals returned to the grantor. At this point, the grantor was in breach of his warranty since he could not honor the 50% mineral interest he purported to guarantee in the warranty deed. In order to rectify the breach of warranty, the court made an analogy to the doctrine of estoppel by deed against the assertion of an after-acquired title.[21] Since giving effect to the grantor's reservation resulted in a breach of warranty, the court held that the grantor was estopped from asserting a reservation to the extent that the reservation would result in an overconveyance. Thus, for the second time, the court transferred the 50% mineral interest to the grantee. Several jurisdictions have adopted this two-step analysis.[22] Some cases following this analysis focus on the reliance of the innocent grantee on the representations made by the grantor,[23] and others on the warranty given by the grantor.

In applying the *Duhig* rule, courts have been inconsistent as to the rationale underlying the rule. Some courts follow the Commissioner's one-step analysis. Others follow the two-step analysis of the majority of the court. Under either rationale, however, the *Duhig* rule deducts a sufficient portion from the grantor's reservation to give effect to the

---

21. The common law doctrine of after-acquired title, also known as the doctrine of estoppel by deed, applies when a grantor conveys property by warranty deed at a time when he does not own the property. If he later acquires the property, title immediately passes to the grantee. The doctrine of after-acquired title gives a grantee additional protection resulting from his warranty deed. The term "estoppel by deed" arises from the fact that the grantor is "estopped" from denying the validity of the deed he delivered. R. HEMINGWAY, THE LAW OF OIL AND GAS § 3.2, at 117 (1983). In Kadrmas v. Sauvageau, 188 N.W.2d 753 (N.D. 1971), a case presenting facts very similar to those of *Duhig*, the court applied the *Duhig* rule, and stated:

> Estoppel by warranty is a species of estoppel by deed. It is an estoppel based on the principle of giving effect to the manifest intention of the grantor appearing on the deed, as to the lands or estate to be conveyed, and of preventing the grantor from derogating from or destroying his own grant by any subsequent act.

Id. at 756 (quoting 31 C.J.S. *Estoppel* § 10, at 297 (1964)).

22. *See* Kadrmas v. Sauvageau, 188 N.W.2d 753 (N.D. 1971); Bryan v. Everett, 365 P.2d 146 (Okla. 1961); Body v. McDonald, 79 Wyo. 371, 334 P.2d 513 (1959); Brannon v. Varnado, 234 Miss. 466, 106 So. 2d 386 (1958); McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341, 304 S.W.2d 267 (Garwood, J., dissenting) (1957); Merchants and Manufacturers Bank v. Dennis, 229 Miss. 447, 91 So. 2d 254 (1956); Brown v. Kirk, 127 Colo. 453, 257 P.2d 1045 (1953); Howell v. Liles, 246 S.W.2d 260 (Tex. Civ. App. 1951); Salmen Brick and Lumber Co. v. Williams, 210 Miss. 560, 50 So. 2d 130 (1951); Klein v. Humble Oil and Refining Co., 126 Tex. 450, 86 S.W.2d 1077 (1935).

23. R. HEMINGWAY, THE LAW OF OIL AND GAS § 3.2, at 120 (1983).

fractional interest conveyed to the grantee.[24] If the grantor's reserved interest is not enough to make the grantee whole, in addition, the grantee can recover damages for the remaining unsatisfied fractional interest.[25]

Ten states have adopted the *Duhig* rule as announced by the Texas Supreme Court or in some modified version.[26] Courts adopting the *Duhig* rule have reasoned that if the grantor has warranted title, then he should bear the risk of losing title in case of an overconveyance. These courts think it is particularly appropriate to adopt this reasoning when the breach of warranty can be remedied by transferring the land from the grantor to the grantee. The determining question for courts adopting the *Duhig* rule has not been what the grantor intended to reserve for himself, but rather what he purported to give to the grantee when he executed the warranty deed.[27] Others, however, have criticized the rule's harsh result to the grantor, who intended to reserve an interest but, merely because of poor draftsmanship in the warranty deed, is left without any property.[28]

---

24. The *Duhig* rule does not affect a grantor who owns a sufficient amount of minerals to satisfy both his conveyance to the grantee and the reservation to himself. *See* Brown v. Kirk, 127 Colo. 453, 257 P.2d 1045 (1953), in which the grantor owned three-fourths of the minerals and conveyed the land by warranty deed, reserving and excepting one-half of the minerals. The court held that the deed conveyed one-half of the minerals to the grantee, that the grantor retained a one-fourth mineral interest, and that the other one-fourth was outstanding in a third party.

25. R. HEMINGWAY, THE LAW OF OIL AND GAS § 3.2, at 118 (1983).

26. Alabama, Colorado, Louisiana, Mississippi, Nebraska, New Mexico, North Dakota, Oklahoma, Texas and Wyoming. J.S. LOWE, OIL AND GAS LAW 128 (1983). For a listing of cases applying the *Duhig* rule, see 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 311 (1981).

27. Meyers and Williams, *Oil and Gas Conveyancing: Grants and Reservations by Owners of Mineral Interests*, 43 VA. L. REV. 639, 655 (1957) (citing American Republics Corp. v. Houston Oil Co., 173 F.2d 728 (5th Cir.), *cert. denied*, 338 U.S. 858 (1949)).

28. *See* Meyers and Williams, *Oil and Gas Conveyancing: Grants and Reservations by Owners of Mineral Interests*, 43 VA. L. REV. 639, 654 (1957), discussing the arguments given by a dissenting justice in Salmen Brick & Lumber Co. v. Williams, 210 Miss. 560, 50 So. 2d 130 (1951). Justice Alexander argued that a reservation of minerals to the grantor should be given effect. He did not think it was necessary for the court to save the grantor anticipatorily from a suit for breach of warranty. *See also* Ellis, *Rethinking the Duhig Doctrine*, 28 ROCKY MTN. MIN. L. INST. 947 (1982). Professor Ellis criticizes the logic of the reasoning behind the *Duhig* rule. He suggests that a proper analysis of the rule, in light of its purpose and function, can only be made after its estoppel trappings have been set aside. He submits that the rule is not intended to uncover the "real" intention of the parties but rather to protect bona fide purchasers. Professor Ellis reinterprets the rule as consisting of two sub-rules, which he says are the "established rules of construction" upon which Commissioner Smedley based his opinion in *Duhig*:

(1) A warranty deed that does not specify the quantum of interest in the minerals being granted purports to grant 100%, or the totality, of the interest in the minerals.

(2) If the grantor of a warranty deed does not own enough interest to fill both the grant and the reservation, the grant must be filled first.

Courts have held the *Duhig* rule inapplicable in various situations. For instance, it has been held inapplicable to oil and gas leases, in part because of their special nature,[29] and because the rule would divest the lessor of his royalties.[30]

Some courts have also held the *Duhig* rule inapplicable to cases in which the grantee has actual or constructive notice of the prior outstanding interest held by a third party. Under the *Duhig* rule, however, the grantee's knowledge of the outstanding interest in a third party is immaterial.[31] The basic question under the *Duhig* rule is determining what exactly the deed purported to convey, irrespective of the grantee's knowledge.[32]

However, courts that view estoppel by deed as the underlying theory of the *Duhig* rule consider the grantee's knowledge to be significant. These courts, therefore, have found the *Duhig* rule inapplicable when the grantee had actual or constructive notice of the outstanding interest in a third party.[33] In these cases, the reservation is given its intended effect, since the grantee cannot argue that the function of the reservation clause was to inform him of the outstanding fractional interest. Since the grantee had knowledge of the outstanding interest, the grantor cannot be said to have warranted title to an innocent grantee. Under the reasoning of these courts, therefore, the grantee's knowledge will preclude application of the doctrine of estoppel by deed.[34]

Id. at 954. Professor Ellis refers to these rules as the "100% rule" and the "allocation of shortage rule," respectively. *Id.*

29. McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341 (1957) (*Duhig* rule not applied because mineral lease is normally prepared by lessee and thus there is no reason to interpret ambiguities against the lesssor). *See also* J.S. LOWE, OIL AND GAS LAW 131 (1983).

30. *See* McLain v. First Nat'l Bank, 263 S.W.2d 324 (Tex. Civ. App. 1953), in which the court adopted the *Duhig* rule with regard to an overconveyance of a mineral interest, but not with regard to the payment of benefits. The court held that parties may contract to divide the economic benefits in proportions different from the proportions in which they own the title. *See also* Benge v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166 (1953).

31. In *Duhig*, the grantee had actual notice of the outstanding interest in the third party, but the court viewed this as irrelevant to the application of the breach of warranty theory. In the court's view, the grantee's actual notice was of no importance, since the grantor's liability arose at the moment he delivered the deed with the intended reservation.

32. 69 OIL AND GAS REPORTER 530 (1981). *See also* Body v. McDonald, 79 Wyo. 371, 334 P.2d 513 (1959); Brown v. Kirk, 127 Colo. 453, 257 P.2d 1045 (1953); and Scarmando v. Potter, 613 S.W.2d 756 (Tex. Civ. App. 1981), in which the *Duhig* rule was applied irrespective of the grantee's knowledge of the prior interest.

33. In Gilbertson v. Charlson, 301 N.W.2d 144 (N.D. 1981), the court specifically rejected *Duhig* and decided the case on ordinary equitable estoppel principles based on the actions and statements of the parties, rather than on formal representations of the warranty deed. *See also* Hartman v. Potter, 596 P.2d 653 (Utah 1979), in which the court simply ignored *Duhig*.

34. *See supra* note 21.

The *Duhig* rule has also been held inapplicable to conveyances made by a quitclaim deed.[35] The rationale of the *Duhig* rule is that since the function of a warranty deed is to warrant title to the property being conveyed, a grantor cannot covenant title and in the same document reserve a fractional interest, if the total of the fractions conveyed and reserved is greater than 100%. The function of a quitclaim deed, by contrast, is to grant only whatever interest, if any, the grantor has in a designated tract.[36] In Arkansas, a quitclaim deed is a substantive mode of conveyance, and is as effective to carry all the right, title, interest, claim and estate of the grantor as a deed with full covenants. However, a quitclaim deed contains no warranty of title.[37]

In view of the absence of warranty of title, the Supreme Courts of Arkansas[38] and Mississippi[39] have found the *Duhig* rationale inapplicable to conveyances made by quitclaim deed. These courts viewed the grantor as having no obligation to protect the grantee against any prior interest in a third party. The courts construed the deed as transferring only the interest the grantor owned at the time of the conveyance. Therefore, since a quitclaim deed does not warrant that the grantor will convey any particular interest, the grantor's mineral reservation is not affected.[40]

In *Hill v. Gilliam*,[41] the Arkansas Supreme Court was faced with an overconveyance by quitclaim deed. The plaintiffs argued that giving effect to the grantor's reservation would result in an overconveyance, since the total of the fractions conveyed and reserved was greater than 100%. They asserted that the *Duhig* rule was, therefore, applicable. The plaintiffs further asserted that the court should construe the deed as conveying all of the grantor's interest, with no reservation to himself. The defendants, in turn, argued that although other jurisdictions had applied the rule to warranty deeds, it should not apply to a quitclaim deed.

The Arkansas Supreme Court ruled for the defendants, holding that the *Duhig* rule was inapplicable because the reservation appeared

---

35. Hill v. Gilliam, 284 Ark. 383, 682 S.W.2d 737 (1985); Rosenbaum v. McCaskey, 386 So. 2d 387 (Miss. 1980).

36. 2 OIL AND GAS REPORTER 1359, 1360 (1953).

37. Smith v. Olin Industries, 224 Ark. 606, 610, 275 S.W.2d 439, 441 (1955) (citing Bagley v. Fletcher, 44 Ark. 153 (1884)).

38. Hill v. Gilliam, 284 Ark. 383, 682 S.W.2d 737 (1985).

39. Rosenbaum v. McCaskey, 386 So. 2d 387 (Miss. 1980).

40. *Rosenbaum*, 386 So. 2d at 389-90, *followed in Hill*, 284 Ark. at 386, 682 S.W.2d at 738.

41. 284 Ark. 383, 682 S.W.2d 737 (1985).

in a quitclaim deed.[42] The court reasoned that since a quitclaim deed only conveys whatever interest the grantor may have, the grantor had not warranted anything by conveying with a quitclaim deed.[43] Additionally, the court found that in executing a quitclaim deed and reserving a 50% mineral interest in the property, the grantor had shown his intention to keep his 50% interest.[44] The court interpreted the reservation contained in the grantor's quitclaim deed as serving one of two possible functions. One function, the court said, could have been to notify the grantee that a third party owned a 50% interest and that the grantor owned only 50% of the property.[45] The other function could have been to inform the grantee of the grantor's intention to keep title to the reserved fractional interest.[46] The court found that the reservation was not designed to serve the first function. The court reasoned that, since the grantee had actual knowledge of the outstanding one-half interest owned by the third party, the reservation could not have been intended to notify the grantee of this fact.[47] Thus, the court concluded that the only function of the reservation clause was to notify the grantee of the grantor's intention to keep title to his 50% interest.[48] The court also found it significant that the reservation appeared in the granting clause, indicating that the grantor meant to reserve that interest to himself.[49]

In the principal case, *Peterson v. Simpson*,[50] the Arkansas Supreme Court was faced with the question of whether to apply the

---

42. 284 Ark. at 387, 682 S.W.2d at 738.

43. *Id.* at 387, 682 S.W.2d at 739.

44. *Id.* at 388, 682 S.W.2d at 739.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id. Hill* is an interesting case because its dictum concerning the grantee's actual notice of the pre-existing interest in the third party indicates that, even in the case of a conveyance by warranty deed, the court might not adopt the *Duhig* rule. The court in *Duhig* viewed the grantee's actual (or constructive) notice as immaterial. It held that, irrespective of the grantee's knowledge, the grantor was estopped from asserting title to the reservation because he had breached the covenant of title he had purported to warrant by the warranty deed. Therefore, if the Arkansas Supreme Court viewed actual notice on the part of the grantee in *Hill* as an important factor, it seems to have followed the reasoning of Gilbertson v. Charlson, 301 N.W.2d 144 (N.D. 1981), which rejected the *Duhig* rule. In that case, the North Dakota court gave effect to the grantor's reservation contained in a warranty deed in view of the grantee's actual notice of the outstanding fractional interest in a third party. The *Hill* case left unanswered the question of whether, in the case of a warranty deed, the Arkansas Supreme Court would follow the reasoning of the *Duhig* court and would view actual or constructive notice as irrelevant, or instead would follow *Gilbertson*.

50. 286 Ark. 177, 690 S.W.2d 720 (1985).

Duhig rule to an overconveyance by warranty deed. The court affirmed the chancellor's ruling that the warranty deed failed to reserve an undivided 50% interest in the minerals. The court held that, in cases not involving the original grantor and his immediate grantee, the deed was to be construed according to objective rules of construction, including the *Duhig* rule. The court held that subjective interpretation was not appropriate in such cases. Since the original parties were not involved, the court reasoned that it would be improper to try to ascertain the intentions of the original grantor. Accordingly, the court held that the grantee was to receive the percentage of the land that the grantor purported to reserve. The grantor's reservation could not be given effect in view of the outstanding interest in a third party. The court held that if both the grant and the reservation could not be given effect, the reservation must fail and the risk of title loss must fall on the grantor.

The court was greatly influenced in its decision by an article written by Professor Willis H. Ellis of the University of New Mexico School of Law.[51] Professor Ellis views the preservation of the recording system as the underlying reason for applying rules of construction such as the *Duhig* rule.[52] He states that:

> Without such objective rules of construction, marketable title, and thus a market in mineral rights, would not be possible. The initial question faced by a court that is dealing with a *Duhig* problem is not whether to follow *Duhig* or some other rule of construction. The first question is whether to set aside all objective rules of construction and engage in a substantive inquiry into the meaning of the deed or to find the intent of the parties objectively according to accepted rules of construction.[53]

Professor Ellis further states that:

> The goal of interpretation is finding, if possible, the actual intent of the parties. Relevant facts, which are admitted by the parties or are proper matters for judicial notice, can be taken into account if doing so will not injure the rights of subsequent purchasers or undermine reliance on the recording system. When, however, fairness to individual parties and preservation of a viable recording system are in conflict, preservation of the recording system, being more important, must control.[54]

---

51. Ellis, *Rethinking the Duhig Doctrine*, 28 ROCKY MTN. MIN. L. INST. 947 (1982).
52. *Id.* at 957.
53. *Id.*
54. *Id.*

In adopting the foregoing reasoning, the court quoted at length from Professor Ellis' article.[55]

Fairness was the basis for the court's adoption of the *Duhig* rule. The court reasoned:

> To decide the issue now on the basis of what Pope subjectively thought, or intended, when he conveyed to Andrews in 1948, when neither the grantees, nor the title examiners were privy to that thought, would be greatly unfair. As Professor Ellis stated in concluding his article on *Duhig*: "The *Duhig* Rule is not intended to uncover the 'real' intent of the parties. It is intended to protect BFP's."[56]

The court reasoned that rejection of the *Duhig* rule would not only be unfair, but would also sacrifice the degree of certainty that the rule can provide to the marketing of mineral rights and would result in an outbreak of lawsuits.[57] In the court's view, "[s]ubsequent purchasers, or grantees, must be able to rely" on an objective interpretation of the document of conveyance.[58]

The court further reasoned that there were "only two reasonable ways to read a warranty deed which does not specify the quantum of interest conveyed, either 'no interest' or 'all the interest there is.' "[59] The court concluded that the deed conveyed all the interest, since interpreting the deed as conveying no interest would be contrary to the expectations of reasonable people.[60] In view of the fact that the grantor did not own enough interest to satisfy both the grant and his reservation, the court found that it was fair to allocate the loss to the grantor, who could have prevented the misunderstanding in the first place.[61]

The dissent argued that if the deed had simply stated that it reserved or excepted 50% of the minerals, then the *Duhig* rule would be useful.[62] In that instance, the deed would be ambiguous and a rule of objective construction would be of some help.[63] However, the dissent argued, since the deed in the *Peterson* case clearly stated that the reservation was "for the grantors herein, their heirs and assigns forever,"[64] it clearly stated the intention of the parties, and thus it was not neces-

55. 286 Ark. at 179-80, 690 S.W.2d at 722-23.
56. *Id.* at 181, 690 S.W.2d at 723.
57. *Id.*
58. *Id.*
59. 286 Ark. at 181-82, 690 S.W.2d at 724.
60. *Id.* at 182, 698 S.W.2d at 724.
61. *Id.*
62. *Id.* at 183 (Newbern, J., dissenting).
63. *Id.*
64. *Id.*

sary to follow the *Duhig* rule.[65] The dissent further argued that by adopting an objective rule of construction, the majority was anticipatorily relieving the grantee from having to pursue his remedy on the warranty.[66]

Peterson is interesting because, while reaching the *Duhig* result, the Arkansas Supreme Court did not, in fact, adopt the reasoning of the majority of the *Duhig* court. The court did not adopt the two-step approach of giving effect to both the grant and the reservation, and then rectifying the breach of warranty by applying the doctrine of estoppel by deed. Instead, the court adopted only the breach of warranty theory and applied the "established rules of construction" discussed by Commissioner Smedley in *Duhig*. In fact, Justice Dudley noted that it was not necessary to accept the Texas majority's two-step estoppel theory in order to accept the *Duhig* result.[67]

Another limitation in the court's adoption of the *Duhig* rule is that it will only be applied "in cases which do not involve the original grantor and his immediate grantee."[68] In cases involving the original parties, the court will continue using a subjective approach in construing the deed. The court may have preferred this approach because the original parties to the deed presumably would be available to clarify ambiguities. Moreover, use of a subjective approach in such cases could not prejudice a subsequent grantee who was not a party to the conveyance.

Peterson did not expressly address the question of the relevancy of the grantee's knowledge of the outstanding interest. However, in view of the subjective approach that will still be used in cases involving the original parties, it should follow that the grantee's knowledge will indeed be relevant. The deed will be construed in accordance with the intention of the parties if the original parties are available. Therefore, the grantor will presumably be permitted to argue that since the grantee knew or should have known of the outstanding interest, his intention to reserve a fractional interest must be given effect, even if such reservation appeared in a warranty deed. In such a case, the actual or constructive knowledge of the grantee will therefore relieve the grantor of the risk of title loss.

Another notable feature of the *Peterson* decision is that the court engaged in a balancing test.[69] On the one hand, the court viewed the

65. *Id.*
66. *Id.*
67. *Id.* at 179, 690 S.W.2d at 722.
68. *Id.* at 181, 690 S.W.2d at 723.
69. *Id.*

Duhig rule as preserving the recording system and protecting bona fide purchasers. On the other hand, it reasoned that in cases involving the original parties, fairness required giving effect to the intentions of the grantor. Such balancing of interests is inconsistent with the objective approach of *Duhig*. Had the Arkansas Supreme Court adopted the two-step analysis of the *Duhig* rule, as opposed to a selective adoption of the *Duhig* result, the grantor, as a matter of law, would be responsible for the overconveyance.

All these limitations indicate that Arkansas has not adopted the two-step analysis of the majority of the *Duhig* court; at most, it has only adopted the Commissioner's analysis and the result of the *Duhig* case. This selective adoption of the *Duhig* result will not bring the certainty to overconveyances of fractional interests that adoption of the *Duhig* rule itself would have done. The *Peterson* decision means that the *Duhig* rule will not be applied in all cases. In some cases resolution of ambiguities created by overconveyances of mineral interests must still depend on subjective standards. In others, when the original parties are not available, objective standards may be used. Decisions such as *Peterson*[70] may be equitable but they diminish the warranty deed's function as a guarantee of title.[71] The result will be that title searches will become more expensive and time consuming, and less dependable. Further, the practical effect of viewing the intention of the parties as the determining factor will be to reduce the covenant of title contained in a warranty deed to substantially meaningless language.[72] Depending upon the court's analysis of the intention of the parties, the grantee may not necessarily be without remedy. However, the primary value of the warranty of title in a warranty deed is undermined where the grantor contends that, notwithstanding his warranty, he did not intend to convey the disputed fractional interest.

The decision of the Arkansas Supreme Court in *Peterson* serves as a warning to lawyers who draft documents conveying fractional mineral interests. Drafters of warranty deeds must exercise the utmost care to avoid the *Duhig* result in subsequent litigation in which the original parties are not involved. Adoption of the *Duhig* result would be very favorable to those claiming under the grantee. On the other hand, if the litigation does involve the original parties, since the court will look

70. Cases rejecting the *Duhig* rule in favor of a subjective determination of the intention of the parties are Gilbertson v. Charlson, 301 N.W.2d 144 (N.D. 1981) and Hartman v. Potter, 596 P.2d 653 (Utah 1979).

71. J.S. LOWE, OIL AND GAS LAW 129 (1983).

72. *Id.* at 130.

to the intention of the parties, the grantee will not necessarily be protected by the grantor's warranty of title.

In order to avoid these overconveyances, three steps have been suggested: (1) The reservation should specifically refer to all previously reserved or conveyed interests; (2) the reservation should be accompanied by a statement of intention that explains what the interests of the parties will be; and (3) the reservation should be carefully worded to avoid ambiguity.[73] Also, if the granting clause is worded properly, language reserving an interest would presumably not be needed.

Ranko Shiraki Oliver

73. *Id.* at 132.