Conveyance Issues:
“Out of” versus “Of” Problem

“Out of” means subtract. “Out of” defines the source of the interest but not the amount conveyed.

“Of” means multiply. The interest described as being retained is the product of the two fractions.

Exercise on Page 9-2:

A. Grantor signs a lease with a 3/16 royalty in it. Grantor later executes a deed reserving to Grantor “1/16 of the 3/16 royalty” payable under the existing lease. What fractional interest of oil and gas production has Grantor retained?

B. If the Grantor reserved “1/16 out of the 3/16 royalty,” what fractional interest of oil and gas has Grantor retained? What fractional interest has Grantee received?
**Conveyance Issues:**

“**Mother Hubbard Clause**” in Sample Lease

**Paragraph 1**

* * * *

“The lease also covers and includes all land owned or claimed by Lessor **adjacent** or **contiguous** to the land particularly described above, whether the same be in said survey or surveys or in the adjacent surveys, although not included within the boundaries of the land particularly described above. For the purpose of calculating the rentals paid hereinafter provided for, said land is estimated to comprise ____ acres whether it actually comprises more or less.”

NOTE: Generally it is not effective to convey additional large tracts of land.
Smith v. Allison, 301 S.W.2d 608:

1. Facts

2. Court reasoning

“To give the ultimate effect contended for by the respondents would result in the conveyance of one-half of the minerals under the 320 acres particularly described and additionally the conveyance by the general catch-all clause of one-half of the minerals under 1,400 acres. This result just does not comport with the ordinary custom or practice, and we think the parties here could have had no such intention.”
Conveyance Issues:
The “Mineral-Royalty” Problem

Problem: Use of conflicting mineral and royalty terms

Attributes of mineral estate “may” = mineral estate
  1. Executive rights (right to lease)
  2. Right to lease benefits
  3. Right to develop (cost bearing interest)

Does “royalty” label mean “royalty”? 
Conveyance Issues: The “Mineral/Royalty” Problem
Problem Set on Page 9-15

1. X conveys to Y “a 1/16 of all the oil, gas, and other minerals that may be produced, and saved from the following described land.”
2. X grants to Y “an undivided 1/16 of all the oil, gas, and other minerals in and under and that may be produced” from the following described land.
3. X grants to Y “49% of all the oil and gas that may be produced, saved and marketed” from the above described land.
4. Grantor executed a deed and reserved “an undivided ½ interest in and to the royalty rights on all oil, gas, and other minerals in, on, and under or that may be produced from said land.”
5. Grantor conveys a 15/16 interest in and to all the oil, gas, and other minerals in and under and that may be produced from said land and the grantor retains title to a 1/16 interest in and to all of the oil, gas, and other minerals in and under and that may be produced from said land; but it is distinctly agreed that the grantor shall not receive any part of the money rental paid on any future lease; and the grantee shall have authority to lease said land and receive the bonus and rental; and the grantor shall receive the royalty retained herein only from actual production of oil and gas on said land.
6. Junior does hereby grant unto Senior, an undivided 1/16 interest in and to all of the oil, gas, and other minerals in and under and that may be produced from the following described land [description of 348 acres followed]. But grantee does not participate in any rentals or leases, together with rights on ingress and egress for exploring, producing and developing said lands for oil and gas and storing, transporting and marketing same.
7. Grantor reserves “all oil, gas, and other minerals in, under and that may be produced from Blackacre, but grantors will receive no part of any bonus or any delay rentals from any lease on said land; grantors shall receive money from such lease only in the case of actual production of oil or gas from Blackacre.
8. Grantor conveyed a deed reserving:
   SAVE AND EXCEPT an undivided 1/16 interest (same being ½ of the usual 1/8 royalty) in all the oil, gas and other minerals in, to and under and that may be produced from said land to be paid unto Grantor free of cost from royalty oil, gas or other minerals forever, together with rights of ingress and egress for storing and marketing same. Said interest in and to said minerals hereby reserved is a nonparticipating royalty interest and shall not participate in the bonus nor rentals from any lease on said land. In the event oil, gas or other minerals are produced from said land, said Grantor shall receive a full 1/16 portion thereof as property free of cost.

9. Grantors conveyed “an undivided 15/16 interest in, to and of all oil, gas and other minerals that may be produced from Blackacre, reserving: “In respect of the undivided 1/16 interest in the oil, gas and other minerals retained and reserved by Grantor, it is agreed that said 1/16 interest is and shall always be a royalty interest and shall not be charged with any costs of production; if the Grantee shall lease this land, Grantor’s 1/16 royalty interest above referred to shall be delivered free of cost to the Grantor at the wells or to the credit of Grantor. It is agreed that Grantor shall not be required to join in or ratify any lease which Grantee may grant and that Grantor shall be entitled to none of the bonus or rentals paid. Further, any change in ownership of the 1/16 royalty belonging to Grantor shall entitle the respect owners only to their proportionate part of said royalty.

10. Grantor conveyed Blackacre to Grantee with the following reservation in the deed:
    SAVE and EXCEPT an undivided 1/32 royalty interest in and to all of the oil, gas and other minerals in, to and under and that may be produced from the land conveyed, to be paid or delivered unto said Grantor free of cost forever, together with the right of ingress and egress for storing and marketing same. Said Grantor shall participate in ½ of the bonus paid for any lease on said land and ½ of the rentals which may be paid, and said Grantor shall join in the execution of any future leases.
Facts. Deed had “schizophrenic mix” of terms. That I George Calvert (Grantor) . . . do grant, bargain, sell, convey, set over, assign and deliver to Captain M. Paul, an undivided Fifty (50) acre interest, being an undivided 1/656.15th interest in and to all of the oil, gas and other minerals, in under and that may be produced from the following described land.

[Paragph II.]

It is understood and agreed that this conveyance is a royalty interest only, and that neither the Grantee, nor his heirs or assigns shall ever have any interest in the delay or other rentals or any revenues or monies received or derived from the lease of said lands present or future or any part thereof, or the renewal or exention of any lease or leases now on said lands or any part thereof. Neither the Grantee herein nor his heirs or assigns shall ever have any control over the leasing of said lands or any part thereof or the renewal or extending of any lease theron or for the making of any lease contract to develop or prospect the same or oil, gas or to her minerals, which is hereby specifically reserved in the Grantor.

Parties’ Claims: The grantee’s successor-in-interest claimed to own a 1/656.17 royalty interest while the grantor’s successors claimed the deed conveyed only a 1/656.17 mineral interest.

2. Court reasoning

“We interpret the transfer to have conveyed a 1/656.17 mineral interest with reservation of all developmental rights, leasing rights, bonuses, and delay rentals. The conveyance grants, in essence, only a royalty interest, as stated in the second paragraph.”
Example: A owns $\frac{1}{2}$ of the MI in and under Blackacre which is subject to a lease calling for a $\frac{1}{8}$ royalty. A conveys to B a $\frac{1}{4}$th royalty interest in Blackacre.

Question: What is the size of B’s interest?

**Possibility #1:** B gets $\frac{1}{4}$ of the entire lease royalty ($\frac{1}{4} \times \frac{1}{8}$)

**Possibility #2:** B gets $\frac{1}{4}$th of A’s $\frac{1}{2}$ share of the lease royalty ($\frac{1}{4} \times \frac{1}{2} \times \frac{1}{8}$)
**Averyt v. Grande, Inc., 717 S.W.2d 891:**

1. **Facts:** Grande owned 100% of surface and ½ the minerals in an 87-acre tract of land which was subject to an O&G lease that called for payment of 1/8 RI to landowner. Grande conveyed tract to Averyt’s predecessor reserving ½ of RI as follows:

   “There is reserved to the grantor an undivided ¼ of the royalty on oil and gas . . . produced from the lands described above.”

   Issue: Did Grande reserve ¼ of the entire royalty (i.e., ¼ * 1/8 = 1/32) or ¼ of Grantor’s ½ interest (i.e., ¼ * ½ * 1/8 = 1/64).

2. **Court held that Grande reserved ¼ of the royalty on the entire tract (thus reserving 1/32)**

   “The ‘subject to’ clause affects the ownership of the undivided shares of the minerals, not the description of the land containing them. Thus, when the Grande and Fogelman deed reserved a fraction of the minerals in the ‘lands described above,’ it meant the minerals under the entire physical tracts described in the deed by metes and bounds. The dissent correctly notes that here the interest conveyed is the same as the interest described. However, Grande reserved one-fourth of the royalty from the lands described, not from the interest described.”
Conveyance Issues: The “Over-Conveyance” Problem

Example: A owns ½ of Blackacre. A conveys ½ of Blackacre to B and reserves ½ interest in Blackacre.

Problem: The grantor purports to deal with a larger fraction of the minerals than what A owns. Because the deed on its face grants full title to everything but the interest retained by A, it seems to govern a larger interest in the land than the grantor has the power to deal with.
**Conveyance Issues: The “Over-Conveyance” Problem**

**Duhig v. Peavy-Moore Lumber Co.,** 144 S.W.2d 878:

1. Facts

   ![Diagram showing conveyance from Gilmer to Duhig to Peavy-Moore, with reservations of 1/2 mineral interest]

2. Court reasoning

   “The result is that grantor has breached his warranty, but that he has and holds in virtue of the deed containing the warranty the very interest, one-half of the minerals, required to remedy the breach. Such a state of facts at once suggest the rule as to after-acquired title.”
Notes on Page 9-26

1. Conveyances as follows:

\[
\text{Owen} \xrightarrow{\text{deed}} \text{Scharbauer} \xrightarrow{\text{deed}} \text{Benge}
\]

- Reserving \(\frac{1}{4}\) min. int.
- Reserving \(\frac{3}{8}\) min. int.

What percentage does Benge receive?

2. Drafting around Duhig:

- Baker hereby conveys to Charlie all of Blackacre, reserving to Baker \(\frac{1}{2}\) interest in all the minerals in addition to any prior outstanding reservations held by others.

3. Does the absence of a warranty deed defeat the application of the Duhig rule?

4. Does Duhig apply to royalty interest in addition to transfers of the mineral estate?
Summary of Duhig

Where full effect cannot be given both to the granted interest and to a reserved interest, the courts will give priority to the granted interest (rather than to the reserved interest) until the granted interest is fully satisfied.

Limits on Duhig

1. Does not apply to leases
2. Does not apply to classic quitclaim deeds
3. Does not apply to partition deeds
4. May not apply as a result of deed recitals
5. May not apply if interest reserved is different from interest granted
Nonapportionment Rule in Post-Lease Conveyance: Japhet v. McRae

1. Facts
   15-acre lease which was subsequently divided into a 10-acre tract (owned by Able, say) and a 5-acre tract (owned by Baker). The 10-acre tract had the well. How are royalties from the well divided?

2. Court reasoning
   “It seems to us that the only safe rule, and the only one free from much confusion, is one which gives the oil to the man [or woman] who owns the land upon which the well is located.”

3. But, delay rentals are shared pro rata based on relative tract acreage.

4. Entirety Clause negates the common law rule of nonapportionment.

Bigg Oil Company

Able

Baker

10 acres

5 Acres
Community Lease: Results in Pooling of Tracts
Parker v. Parker

**Parker v. Parker**, 144 S.W. 303:

1. **Facts**
   
   The Parkers sign a lease covering 244 acres that covers 2 separate tracts (a 178-acre tract and a 66-acre tract) that were separate tracts prior to the creation of the lease.

2. **Court reasoning.**
   
   “But in the present instance the clear terms of the lease require the “lessee” to pay the cash consideration to the “lessor” (i.e., to all the owners) on the basis that the tract is leased as a whole, and to pay the royalties to the same “lessor” in the proportion that the property belonging to each bore to the entire 244 acres, no matter in what part of the tract production is had. The lease here in question by its terms is a unitized lease as a matter of law.”

---

Note: Community Lease cannot pool an NPRI unless the NPRI ratifies the lease.
Two Grant Theory: “Subject to” Ambiguity
The Problem

1. History
   Estate Misconception: Confusion about ownership when land is subject to a lease. Parties focused on the 1/8 lease royalty.

2. Multi-clause or Two-Grant Deed Form
   - Granting clause  1/16
   - “Subject to” clause  1/2
   - “Future lease” clause  1/2
   *What does this deed convey?
Two Grant Theory: “Subject to” Ambiguity  
Hoffman v. Magnolia

**Hoffman v. Magnolia, 273 S.W. 828:**

1. **Facts**  
   Grantor owned a 320 acre tract of land which was under lease to an oil company. The grantor subsequently conveyed ½ of the minerals in and under 90 acres out of the 320 acre tract to the grantee. The deed contained a “subject to” clause which read as follows:  
   “This sale is subject to said lease but covers and includes ½ of all royalties and rents to be paid under the terms of said lease.”

2. **QUESTION:** Was the grantee, Hoffman, entitled to ½ the royalties attributable to the entire 320 acres covered by the lease or only to ½ the royalties attributable to the 90 acres conveyed to him under the granting clause of the lease?

3. **Court reasoning.** The court adopted a “two grant theory” as follows:
   **Grant #1:** The granting clause granted the grantee a reversionary interest in the minerals in and under the 90 acres.
   **Grant #2:** The subject to clause granted the grantee the right to share in the lease benefits under the entire 320-acre tract.
Concord Oil Co. v. Pennzoil Exploration and Production, 966 S.W. 451:

1. Facts. Grantor owned a 1/12 MI and subject to O&G lease that paid 1/8 royalty.
   Granting clause purported to convey 1/96 MI.
   “Subject to” clause purported to convey 1/12 in all rents & royalties
   No future lease clause.

   That I A.B. Crosby . . . Grant, Sell, and Convey unto Southland . . . an undivided one-ninety sixth (1/96) interest in and to all of the oil, gas and other minerals in and under, and that may be produced from Survey Sixty-four . . . .
   While the estate hereby conveyed does not depend upon the validity thereof, neither shall it be affected by the termination thereof, this conveyance is made subject to the terms of any valid subsisting oil, gas and or mineral lease or mineral lease or leases on above described land or any part thereof, but covers and included one-twelfth (1/12) of all rentals and royalty of every kind and character that may be payable by the terms of such lease or leases insofar as the same pertain to the above described land, or any part thereof.

2. Court holding is that a 1/12 mineral interest was conveyed, using “four corners approach,” and rejecting Two Grant Theory in the context of the facts in that specific case. But, the court was deeply divided (1 concurrence and 4 dissents).
Fractional Royalty versus Fixed Royalty Conveyance
Ambiguity:  Hysaw v. Dawkins


1. **Facts.** Grantors deeded a tract to Grantee, reserving unto Grantors:
   “That each of my children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced from any of said lands, the same being a non-participating royalty interest.”
   Land was leased for a 1/5th royalty.

2. **Issue:** Do the NPRIs have a fixed 1/24th royalty interest or a "floating" royalty of 1/3rd of whatever royalty is negotiated in a lease? That is, does it reserve a "fraction of royalty" or a "fractional royalty?"

3. **Court holding is that a 1/15th mineral interest was conveyed, using “four corners approach” that looked to the intent of the conveyance.**
   **Reasoning**
   “When the terms of a mineral conveyance are in dispute, our objective is to effectuate the parties’ intent as expressed within the four corners of the conveying instrument. Intent must be determined by a careful and detailed examination of the document in its entirety, rather than by application of mechanical rules of construction that offer certainty at the expense of effectuating intent. Ethel Hysaw’s will, when so considered, demonstrates her intent to convey an equal royalty interest to each of her three children. We therefore reverse the court of appeals’ judgment and render judgment that the Hysaw will devised a 1/3 fraction of royalty, not a 1/24 fractional royalty.”
Rule Against Perpetuities: Introduction

1. Base Rule:
The RAP is a common law rule that invalidates interests that may not vest in certain time period; does not apply to vested interests such as a “possibility of reverter” (interest retained after a lease) or a fee simple determinable (interest conveyed by lease to lessee). Does apply to a “springing executory interest”).

2. Common Examples

Illustration #1: O conveys minerals to A for ten years and as long thereafter as oil, gas or other minerals is produced; then to B and his heirs. The interest in B is classified as an executory interest. This executory interest may shift from A to B at a date later than 21 years from its creation because oil and gas may be produced for a longer period than 21 years. Thus, B’s interest violates RAP. Under RAP, B’s interest is void from the outset and is completely disregarded. Despite O’s intent, B receives nothing. A has a fee simple determinable and O has a possibility of reverter.

Illustration #2: O conveys minerals to A for ten years and as long thereafter as oil, gas or other minerals is produced. O conveys to B and his heirs. If the conveyance to B is considered to be a present transfer of O’s possibility of reverter, the RAP is not violated because the possibility of reverter is a vested interest and immune from RAP. But, if the conveyance from O to B is conditioned by words such as “this conveyance to take effect when the interest in A expires,” B takes a springing executive interest that violates RAP.

Illustration #3: O conveys fee simple to A and his heirs. O excepts or reserves all minerals for ten years and as long thereafter as oil, gas or other minerals is produced; when production ceases, the minerals to pass to A and his heirs. As written, the interest in A is a springing executive interest and void from the outset because it may not vest within the period allowed by RAP.
1. Alternative RAP compliant drafting

**Illustration #1:** The use of two deeds would have repelled the RAP. The first deed from O to A for 10 years and as long as oil, gas or other minders is produced. The second deed would convey a present interest in the possibility of reverter to B and his heirs.

**Illustration #2:** O could convey the possibility of reverter to B as a present conveyance without delaying the vesting until A’s estate terminated. B would then own a presently vested possibility of reverter.

**Illustration #3:** O could convey fee simple to A and his heirs. A could then reconvey a determinable fee to O for ten years and as long as minerals are produced. A would unquestionably have a vested possibility of reverter after the deeds, not an executory interest that violates the RAP.
Rule Against Perpetuities: Peveto v. Starkey

**Peveto v. Starkey**, 645 S.W.2d 770:

1. Facts. Term royalty deed.
   - Bottom Deed. $X \rightarrow Y$ “for 15 years and as long as oil and gas are produced”
   - Top Deed $X \rightarrow Z$ “to become effective only upon the expiration of #1

2. Court holding is that the 2nd Deed (the Top Deed) violated RAP. The deed created a springing executory interest that may never vest.

3. Solution: Vest interest immediately, not at expiration of bottom deed.
Rule Against Perpetuities: Hamman v. Bright

Hamman v. Bright, 924 S.W.2d 168:

1. Facts.

“[L]ease shall be for a term and period (now called “primary term”) covering and embracing and including also, ten (10) years after and subsequent to the expiration, of said lease [to Shell/Superior]

2. Court holding: Top lease violated Rule Against Perpetuities.

“Instead, the top leases conveyed interests that would vest in the grantee only upon termination of the bottom leases, and it is undisputed that the bottom leases could continue for an indeterminate amount of time. Consequently, the interests conveyed by the top leases had the potential for vesting outside the period provided by the Rule, and are void as a matter of law.”
Rule Against Perpetuities: Bagby v. Bredthauer

Bagby v. Bredthauer, 627 S.W.2d 190:

1. Facts. Grantor retained 1/16 royalty for term of 15 years or for so long thereafter as O&G is produced.

2. Court holding. Does not violate rule against perpetuities. The reservation of the 1/16 royalty created a FSD in Kuehn with a possibility of reverter in Gerdes— all of which were currently vested property rights.

“[T]he law implies that the grantor conveyed his entire estate in the premises to his grantee, who in turn “re-granted” the defeasible term interest to his grantor. Thus, the applicable fiction of a “re-grant” vested in Kuehn’s entire fee simple estate in Gerdes, who by implication of law “re-granted” the one-sixteenth royalty interest, a defeasible term interest, to Kuehn.”
1. Drafting Point #1: state that the top lease will terminate two years from the date of its execution (or use any number of years less than 21 years). Most top leases are only interested in a tract subject to a bottom lease if they can secure the lease within a relatively short period of time.

2. Drafting Point #2: state that the top lease is subject to a prior lease and shall become effective upon expiration of the prior lease; however, if the existing lease has not expired within one year after its primary term, the top lease shall terminate automatically.

3. Draft Point #3: state that “this lease is granted on lessor’s reversionary interest in said premises and is hereby vested in interest, but is subject to an existing oil and gas lease between lessor and lessee, dated __________ and recorded in __________. The interest covered shall vest in possession upon termination of this lease” This example appears in Kuntz, Lowe, Anderson, Smith & Pierce, Teacher’s Manual to Oil and Gas Law (3d ed.).
1. State owns all the unleased oil and gas in place in Relinquishment Act lands.

2. Surface owner is an agent of the state and as such has primary authority to negotiate oil & gas leases.
   
   A. Section 52.189(b) of the Natural Resources Code sets forth the landowner’s duties under a section entitled “Fiduciary Duty of An Agent” and says that the owner of the soil owes the state a fiduciary duty and a duty of utmost good faith.
   
   B. Specific rules exist for conflict of interest leasing situations.
   
   C. In return for acting as the state’s agent, the surface owner is entitled to $\frac{1}{2}$ of the lease benefits.