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Estate Misconception & Presumed Grant: Navigating Mineral-Ownership Disputes After *Van Dyke*

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I. Introduction

Van Dyke v. Navigator Group, 668 S.W.3d 353 (Tex. 2023) was likely the most consequential and controversial oil-and-gas-related opinion issued by the Supreme Court of Texas in 2023.

The Court's primary holding—which established a new rebuttable presumption in some mineral-deed disputes—was monumental in and of itself. But the Court's secondary holding—arguably entirely dicta—could have even larger ramifications for resolving what will no doubt end up being billions of dollars in title disputes. This article attempts to answer two questions for each of the Court's historically significant holdings in *Van Dyke*: (1) how did we get here, and (2) where are we headed?

Part II discusses the Supreme Court of Texas's ordinary rules of instrument construction—which typically favor a holistic, plain-language interpretation of contracts and deeds so as to implement the intent of the parties as evidenced by the words of their agreement. Part III summarizes the *Van Dyke* opinion—including both of the Court's groundbreaking holdings. Part IV analyzes the history of the "estate misconception" and "legacy of the 1/8th" mistakes that ultimately led to the Court's creation of the *Van Dyke* rebuttable presumption. Part V analyzes the history of the "presumed grant" doctrine upon which the Court based its second historical *Van Dyke* holding. And Part VI discusses the questions answered by the Court's opinion as well as the many questions created (or at least left unanswered) by the opinion—which are likely to be litigated in the decades to come, as history determines the ultimate ramifications of the opinion's landmark rulings.

II. Plain Meaning, Holistic Construction, and Textualism

No one should be surprised that Texas's ordinary rules of instrument construction emphasize the actual words of the deeds as selected by the parties—*not* what the parties may have or likely intended but did not say. The Texas Supreme Court has made clear that the goal of construing an instrument "is to determine and enforce the parties' intent as expressed within the four corners of the" instrument. *Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 743-44 (Tex. 2020). The Court has said that its "primary" duty is to give effect to the "intentions of the parties *as expressed in the instrument*." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (emphasis added). "To achieve this objective," courts "must examine and consider the entire writing in an effort to harmonize and give effect to all of the provisions of the contract so that none will be rendered

meaningless." *Id.* (citing *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 158 (1951)). Finally, courts construing an instrument should neither disregard contract terms that don't support a favored construction nor "rewrite the parties' contract." *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 239 (Tex. 2016) (quoting *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003)). These plain-text-construction rules are in place because parties to an agreement "are free to decide their contract's terms, and the law's 'strong public policy favoring freedom of contract' compels courts to 'respect and enforce' the terms on which the parties have agreed." *Endeavor Energy Res., L.P. v. Discovery Operating, Inc.*, 554 S.W.3d 586, 595 (Tex. 2018) (citations omitted).

In recent years, the Texas Supreme Court has emphasized a "holistic approach" to construing an instrument's text. *E.g.*, *Hysaw v. Dawkins*, 483 S.W.3d 1, 13 (Tex. 2016). For the Court, that means construing "words and phrases … together and in context, not in isolation," and harmonizing "inconsistencies or contradictions … by construing the document as a whole." *Id.* (citing *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789 (Tex. 1995); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995); *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991)). Further, the Court has recently said that it "eschew[s] reliance on mechanical or bright-line rules as a substitute for an intent-focused inquiry rooted in the instrument's words." *Hysaw*, 483 S.W.3d at 13.

The Court's description of its approach to instrument construction in some ways matches, and in some ways departs from, the version of textualism that Justice Antonin Scalia and Bryan Garner advocated for in *Reading Law: The Interpretation of Legal Texts*. In describing their "Supremacy-of-Text Principle," Scalia and Garner write that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012). But Scalia and Garner make a key distinction between intent and meaning. For them, the purpose of focusing on an instrument's words is to give effect to *the instrument's meaning*—not *the drafter's intent*. *See id.* Said another way, the meaning of the text is what must be operative. *Id.* at 397. The text isn't evidence of what governs but is instead the thing that governs. *Id.* Criticizing a focus on *intent* rather than *meaning*, the authors wrote, "there is hardly a better way to unshackle oneself" from an instrument's text "than to minimize [the text] by calling it mere 'evidence'" of intent. *Id.* at 398.

Scalia and Garner also argue that although a document's purpose may inform its meaning, "the purpose is derived from the text, not from … an assumption about the legal drafter's desires." *Id.* at 56. They wrote that, "except in the rare circumstances of an obvious scrivener's error, purpose—even purpose as most narrowly defined—cannot be used to contradict text or to supplement it. Purpose sheds light only on deciding which of various *textually permissible meanings* should be adopted." *Id.* at 57.

But both the Court and Scalia and Garner agree that words must be construed based on their meaning at the time the instrument was executed. *Hysaw*, 483 S.W.3d at 13 ("Words must be given the meaning they had when the text was adopted.") (quoting Antonin Scalia & Bryan Garner at 78)). As the Court wrote in *Van Dyke v. Navigator Group*:

> One fundamental premise … is that a text retains the same meaning today that it had when it was drafted. Thus, the ordinary meaning at the time of drafting remains the meaning to which courts must later adhere.

668 S.W.3d 353, 359-60 (Tex. 2023).

III. *Van Dyke v. Navigator Group*

Van Dyke adjudicated a dispute over the meaning of a reservation of minerals in a 1924 deed conveying a ranch from George and Frances Mulkey to G.R. White and G.W. Tom. *Id.* at 357. The reservation stated:

> It is understood and agreed that *one-half of one-eighth of all minerals and mineral rights* in said land are reserved in grantors, Geo. H. Mulkey and Frances E. Mulkey, and are not conveyed herein.

Id. (emphasis added) Successors to Grantees favored a literal construction of the reservation—arguing that the deed reserved to the Grantors one-sixteenth of the ranch's minerals. *Id.* at 358. Successors to the Grantors, on the other hand, argued that the deed reserved a full one-half of the ranch's minerals. *Id.* at 358.

A. What meaning means.

The Court began by emphasizing that words in an instrument must be given their original meaning—*i.e.*, the meaning they had at the time of the instrument's execution. *Id.* at 359-60. "The test is what the text reasonably meant to an ordinary speaker of the language who would have understood the original text in its context." *Id.* at 360. Pointing to the United States Supreme Court's decision in *New Prime Inc. v. Oliveira*, __ U.S. __, 139 S. Ct. 532, 202 L.Ed.2d 536 (2019), the Court emphasized that to determine what the meaning of words meant at the time of their execution, courts undertake "careful analysis of [the words'] public meaning at the time" of their use—examining "contemporary legal and lay dictionaries, judicial decisions," statutes, "and the like." *Van Dyke*, 668 S.W.3 at 360.

Nevertheless, the Court "emphasize[d] that the initial analysis remains confined to the four corners of the document as usual," *id.* at 361, and that "[w]e do not start with extrinsic evidence," *id.* Finally, the Court emphasized the need for "consistent and stable judicial construction of terms used in deeds." *Id.* "The meaning of a deed, in other words, matters to the public writ large, not merely to those who wrote it." *Id.*

B. Estate misconception and the legacy of the 1/8th royalty

Turning to the meaning of the deed's disputed text—"one-half of one-eighth of all minerals"—the Court began with the premise "that, at the time the parties executed this deed, '1/8' was widely used as a term of art to refer to the total mineral estate." *Id.* at 362. The Court emphasized that "it is *that* fraction—not 1/3, 2/7, 6/241, or any other—that is so repeatedly deployed." *Id.* Then, pointing to *Hysaw*, the Court said that "two related circumstances … explain why 1/8" in instruments containing double fractions "did not typically bear its arithmetical meaning: the historical use of 1/8 as the standard royalty and the estate-misconception theory." *Van Dyke*, 668 S.W.3d at 362 (citing *Hysaw*, 483 S.W.3d at 8). "[T]hese historical features," said the Court, "confirmed that 1/8 was a widely used term of art." *Id.*

The Court then summarized the two "historical features." *Id.* "The estate-misconception theory reflects the prevalent (but, as it turns out, mistaken) belief that, in entering into an oil-and-gas lease, a lessor retained only a 1/8 interest in the minerals rather than the *entire* mineral estate in fee simple determinable with the possibility of reverter of the entire estate." *Id.* at 363 (citing *Hysaw*, 483 S.W.3d at 10; *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 460 (Tex. 1998)). "Therefore, for many years, lessors would refer to what they *thought* reflected their entire interest in the 'mineral estate' with a simple term they understood to convey the same message: '1/8.'" *Id.* (citing Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 88 (1993)). The Court said that this "widespread and mistaken belief ran rampant in instruments of this time," "so much so that courts have taken judicial notice of this widespread phenomenon." *Id.* (citing *Hysaw*, 483 S.W.3d at 9-10). "Therefore," according to the Court, "the very use of 1/8 in a double fraction 'should be considered patent evidence that the parties were functioning under the estate misconception.'" *Id.* (citing Burney at 90).

The legacy-of-the-1/8th theory recognizes the "near ubiquitous nature of the 1/8 royalty" in oil-and-gas leases. *Id.* (quoting *Hysaw*, 483 S.W.3d at 9-10). According to the Court, 1/8th was so standard a royalty amount that "parties mistakenly assum[ed] the landowner's royalty would *always* be 1/8." *Id.* "Therefore," according to the Court, "parties would use the term 1/8 as a placeholder for future royalties *generally*—without anyone understanding that reference to set an arithmetical value." *Id.* This mistake "is something that 'influenced the language used to describe the quantum of royalty in conveyances of a certain vintage.'" *Id.* (citing *Hysaw*, 483 S.W.3d at 9-10). "Working in tandem," the Court reasoned, "these widely recognized principles provide objective indications about what the parties to [a] deed meant by deploying a double fraction." *Id.* at 363-64.

C. The new rebuttable presumption

Relying exclusively on the two presumed-mistake doctrines (and no apparent objective, contemporary sources), the Court formally adopted a new framework for construing mineral deeds that include double fractions:

> [W]hen courts confront a double fraction involving 1/8 in an instrument… we *begin* with a presumption that the mere use of such a double fraction was purposeful and that 1/8 reflects the *entire* mineral estate, not just 1/8 of it.

Id. at 364. But, the Court said, the presumption "is readily and genuinely rebuttable," *id.*—even though the Court appeared skeptical:

> No one has presented us with examples of parties to instruments of the relevant era who used a double fraction just for its arithmetical purpose, but courts should be ready to find not just confirmation but contradictions of the presumption. A rebuttal could be established by express language, distinct provisions that could not be harmonized if 1/8 is given the term-of-art usage …, or even the repeated use of fractions *other* than 1/8 in ways that reflect that an arithmetical expression should be given to all fractions within the instrument. In such cases, the rebuttal may be sufficiently clear that, as a matter of law, the double fraction can only be held to require simple multiplication. The key point is that there must be some textually demonstrable basis to rebut the presumption.

Id. at 364-65.

Applying the new framework, the Court held that the deed's double fraction triggered application of the presumption—that 1/8 means the entire mineral estate—and that nothing in the deed rebutted the presumption. *Id.* at 366. Accordingly, "the deed did not use 1/8 in its arithmetical sense but instead reserved … grantors a 1/2 interest in the mineral estate." *Id.*

D. Presumed grant

Even though the Court determined the parties' title dispute based on its new rebuttable-presumption framework, the Court went on to hold that it could have reached the same conclusion based on the "presumed grant" doctrine. *Id.* at 366-68.

"The presumed-grant doctrine, 'also referred to as title by circumstantial evidence, has been described as a common law form of adverse possession.'" *Id.* at 367 (quoting *Fair v. Arp Club Lake, Inc.*, 437 S.W.3d 619, 626 (Tex. App.—Tyler 2014, no pet.)). The doctrine has three required elements:

(1) A long-asserted and open claim, adverse to that of the apparent owner; (2) nonclaim by the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim.

Id. (citing *Magee v. Paul*, 221 S.W. 254, 257 (1920)).

Applying those elements to the facts of the case, the Court held that "the parties' history of repeatedly acting in reliance on each having a 1/2 mineral interest conclusively satisfies the presumed-grant doctrine's requirements"—thereby confirming title to 1/2 of the ranch's minerals in the grantors' successors. *Id.* at 366-67. The Court specifically pointed to the "ninety-year history [that] includes conveyances, leases, ratifications, division orders, contracts, probate inventories, and a myriad of other recorded instruments that provided notice." *Id.* at 367. Thus, "[t]here was a long and asserted open claim—for nearly a century, *both* parties acted in accordance with *each* side owning a 1/2 interest." *Id.* "Accordingly," said the Court, "if the presumed-grant doctrine were in fact necessary, we would find that the … [grantors' successors] have conclusively established it." *Id.*

But how did we get here? What led to the Supreme Court's surprising holdings that (1) courts must presume that parties to oil-and-gas deeds containing double fractions misunderstood the nature of their oil-and-gas interests; and (2) mineral-deed title disputes may now be determined not on the instrument's text but instead on the parties' course of conduct after executing the deed? The history of the "legacy of the 1/8th," the "estate misconception," and the "presumed grant" doctrines help shed light on the *Van Dyke* opinion.

IV. The History of the "Legacy of the 1/8th" and "Estate Misconception" Doctrines

Although oil-and-gas practitioners have now had a year to digest the Court's decision and opinion in *Van Dyke*, many have continued to express consternation and puzzlement over the Court's analysis. What happened to plain-language construction? Didn't prior precedent from the Court multiply double fractions? And how do we know if parties to a particular deed were mistaken in their understanding of oil-and-gas law at the time they executed their deeds? The history of the two "mistake" doctrines—and the Court's historical precedent construing mineral deeds—provides at least some insight into why the Court created its new rebuttable-presumption framework.

A. *Jones v. Bedford* and *Allen v. Creighton*

Among the Court's earliest opportunities to construe an oil-and-gas deed with a double fraction was *Jones v. Bedford*, 56 S.W.2d 305 (Tex. App.—Eastland 1932, writ ref'd) (op. on reh'g). In *Jones*, the issue was how to resolve apparently conflicting provisions of a deed that stated (1) it conveyed a "1/8 of 1/8 royalty"; (2) it conveyed "an undivided 1/8 of 1/8 of the lease interest and all future rentals," and (3) the grantee received "1/8 of 1/8

of all oil, gas and other minerals." *Id.* at 307-08. The Eastland Court of Appeals—in an opinion adopted by the Supreme Court of Texas—noted that it could be argued that the parties used "1/8 of 1/8," rather than "1/64th," because the existing leases provided for a 1/8th royalty (and therefore one of the 1/8 fractions stood for 100% of the royalty interest). *Id.* at 308. However, the Court rejected that argument—deeming it "not reasonable"—because "some future lease …, as we well know, may provide a different royalty than 1/8 of the production." *Id.*

In other words, *in 1932*, the Supreme Court of Texas expressly rejected the argument that it should presume parties to a double-fraction mineral deed misunderstood the nature of their interest—rejecting the "legacy of the 1/8th" concept as a matter of policy because, at that time, it was already widely understood that a lease could have a royalty fraction that differed from the typical 1/8th royalty. *Id.* at 308. Accordingly, the Court held that "a reading of the entire instrument" demonstrated that "the interest conveyed [is] a 1/64th mineral interest." *Id.*

The Supreme Court of Texas appeared to apply the same reasoning in rejecting (albeit implicitly) the "mistake" doctrines when adopting the opinion of the Beaumont Court of Appeals in *Allen v. Creighton*, 131 S.W.2d 47 (Tex. Civ. App.—Beaumont 1939, writ ref'd). There, the Court reasoned that a deed describing an interest in "[o]ne-eighth (1/8) of the usual one-eighth (1/8) royalty on oil" had "expressly conveyed 1/8 of the 1/8 royalty interest—a 1/64th interest in the oil produced." *Id.* at 48, 50.

B. *Tipps v. Bodine*, *Murphy v. Dilworth*, and *Watkins v. Slaughter*

On the other hand, in 1936, the Texarkana Court of Appeals—in another opinion adopted by the Supreme Court of Texas—made the "estate misconception" mistake when determining the meaning of a deed with conflicting *single* fractions. *Tipps v. Bodine*, 101 S.W.2d 1076 (Tex. App.—Texarkana 1936, writ ref'd). In *Tipps*, the deed conveyed "an undivided *1/16* interest" in the minerals and "*[o]ne-half* of all the oil royalty and gas rental due" under the current lease and future leases. *Id.* at 1076-77. The two fractions conflict because the royalty accompanying a 1/16th mineral interest would be 1/16th of whatever the lease's royalty fraction is—not 1/2 of the lease's royalty fraction.

The Court construed the deed—and resolved the conflicting fractions—by expressly miscomprehending the nature of the estate owned by a lessor after executing an oil-and-gas lease with a 1/8th royalty fraction. The Court wrote:

> It will be noted that … the grantor conveys to the grantee an undivided one-sixteenth interest in *all* the minerals in and under the land described. In the second paragraph it is expressed that the conveyance is made subject to the terms of a lease …. The lease interest conveyed by the … lease consisted of a determinable fee in seven-eighths of all the minerals in place and the right

> of exploration. …[T]he fee owner and lessor in that lease … retained one-eighth of all the minerals in place, subject to the lease. Hence, the conveyance of an undivided one-sixteenth in *all* the minerals … conveyed one-half of all the minerals in place then owned by [the lessor].

Id. at 1078. The Court didn't identify the mistake and construe the deed to correct for the mistake, but instead actually made the mistake itself—stating (incorrectly) that an oil-and-gas lease conveys 7/8ths of the minerals to the lessee and retains 1/8th of the minerals for the lessor. *Id.* That said, the Court's use of the mistake did reconcile the deed's conflicting single fractions.

That was not the only time the Supreme Court itself misstated the nature of the estate owned by a mineral lessor after the interest was leased for a 1/8th royalty. The Court repeated the "estate misconception" mistake four years later in *Murphy v. Dilworth*, 151 S.W.2d 1004, 1006 (Tex. 1941) ("The outstanding lease had the effect of placing the title in the lessee to 7/8 of the minerals for the purpose of exploration and development, but subject to reversion upon termination of the lease; and of retaining in the lessor the title to 1/8 of the minerals with the possibility of reversion of the remaining 7/8 interest."). And again three years after that in *Watkins v. Slaughter*, 189 S.W.2d 699, 699 (Tex. 1945) (describing execution of lease as conveying "the usual 7/8 leasehold estate").

Of course, the modern Supreme Court of Texas does *not* agree with that description of the interests conveyed in a lease (and reserved by the lessor). As the Court wrote half a century later in *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, "[w]hen the lessor owns all the mineral estate (8/8) and executes an oil and gas lease, the lessor has conveyed all the mineral estate (8/8) but has retained a possibility of reverter in the entire mineral estate (8/8)." 966 S.W.2d 451, 460 (Tex. 1998); *see also Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003) ("In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee. Consequently, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor.").

C. *Garrett v. Dils Company*

A decade after *Watkins*, the Court seemed to recognize that it would be a mistake to assume that 1/8th would always be a lease's royalty, but—unlike in *Jones*—the Court was willing to assume that the parties made that mistake in order to resolve conflicting descriptions of the interest conveyed in a deed. *Garrett v. Dils Co.*, 299 S.W.2d 904 (1957). In *Garrett*, the deed's granting clause stated that the deed conveyed "an undivided one sixty-fourth interest in and to all of the oil, gas and other minerals in and under … the land," *id.* at 905—which describes a 1/64th mineral interest. But the deed later stated that

it "covers and includes one-eighth of all of the oil royalty and gas rental or royalty due" under an existing lease, and "one-eighth of the lease interest and all future rentals." *Id.* The Court acknowledged that the granting clause, by itself, would have conveyed a 1/64th mineral interest. *Id.* at 906. But the Court reasoned that within the context of the rest of the deed, the deed had actually conveyed a 1/8th mineral interest. *Id.* at 907. The Court referenced the "legacy of the 1/8th" in reaching its conclusion:

> The court takes judicial knowledge of the fact that the usual royalty provided in mineral leases is one-eighth. The parties doubtless assumed that the royalty under future leases would be one-eighth, as it was under the lease in existence when the deed was executed.

Id.

In reality, however, it appears that the Court was applying the "estate misconception" doctrine—*not* the "legacy of the 1/8th." The parties' initial express grant of a 1/64th mineral interest—when the Court believes they intended to convey a 1/8th mineral interest—makes sense only if we assume that the parties mistakenly believed that the existing lease had conveyed 7/8ths of the minerals to the lessee and that the lessors had retained only 1/8th of the minerals. Thus, if they had intended to convey one eighth of the full mineral interest (which they mistakenly believed was only a 1/64th mineral interest after leasing—*i.e.*, 1/8th of 1/8th), they would describe their mistakenly conveyed interest as a 1/64th mineral interest as they did in the deed.

D. *Luckel v. White*

In *Luckel v. White*, the Texas Supreme Court rejected an argument based on the "legacy of the 1/8th" mistake doctrine—reasoning that intent is derived from the words of the instrument and that, in any event, knowing that some parties to oil-and-gas deeds may have mistakenly believed 1/8th would always be a lease's royalty doesn't tell us one way or another what any particular deed's parties intended. 819 S.W.2d at 462. There, the Court was faced with a deed stating that it conveyed "an undivided one thirty-second (1/32nd) royalty interest," but also stating that under the deed, the grantee would receive "one-fourth of any and all royalties" paid under the existing or any future leases. *Id.* at 461. The Court harmonized the provisions by reasoning that the deed's description of a 1/32nd royalty interest was merely a description of the interest granted "until the existing lease expired"—which had a 1/8th royalty. *Id.* at 464. Thus, "[t]he interest conveyed was an undivided one-fourth of the total reserved royalty interest." *Id.*

In reaching its decision, the Court criticized the court of appeals for "assuming that the parties to the deed contemplated that all future leases would provide for one-eighth royalty"—even though it was true that "[o]ne-eighth was the 'usual' royalty so standard in the 1920s and 1930s that all Texas courts took judicial notice of it." *Id.* at 462 (citation

omitted). The Court reasoned that relying on a presumed mistake "is not a proper 'harmonizing' under the four corners rule, and conflicts with a number of this court's decisions." *Id.* Furthermore, the Court reasoned, parties could use the "legacy of the 1/8th" mistake doctrine to argue either of two conclusions—that the parties to the deed intended to convey "a fixed 1/32nd interest" *or* that they intended to convey "one-fourth of all future royalties." *Id.* In other words, even knowing for certain that the parties mistakenly assumed a future 1/8th lease royalty doesn't inform the analysis as to the scope or character of the interest the parties actually intended to convey. *Id.* The Court explained:

> Even if the court could discern the actual intent, it is not the actual intent of the parties that governs, but the actual intent of the parties *as expressed in the instrument as a whole*, "without reference to matters of mere form, relative position of descriptions, technicalities, or arbitrary rules."

Id. at 462 (quoting *Sun Oil Co. v. Burns*, 84 S.W.2d 442, 444 (Tex. 1935)).

E. *Concord Oil Co. v. Pennzoil Exploration & Production Company*

In 1998, the Texas Supreme Court effectively applied the "estate misconception" doctrine in a case in which it said that it *didn't* apply the doctrine. *See Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451 (Tex. 1998). The case involved the construction of "two differing fractions … within the [same] conveying instrument": a granting clause that conveyed "a 1/96 interest in minerals" and another clause stating that the lease conveys "1/12 of all rentals and royalty of every kind and character." *Id.* at 452-53. The Court appears to have essentially disregarded the granting clause's language conveying a 1/96 interest, instead reasoning that the conveyance of the *attributes* to a 1/12 mineral interest conveyed a 1/12 mineral interest. *See id.* at 458-59.

Interestingly, the Court acknowledged the "estate misconception" doctrine, but stated that it did not base the decision on the doctrine. The Court wrote:

> Concord and some commentators suggest that conflicting fractions appear in so many deeds because of a common misconception of what an owner of a mineral interest retains after the execution of a lease. Commentators have also observed that most grantors do not intend to convey interests of differing magnitudes. Under a typical lease providing for a 1/8 royalty, the lessor may think that the interest retained is 1/8 of the minerals including 1/8 of the royalties. This misconception is evidenced in a few decisions. In actuality, a lease conveys a fee simple determinable with the possibility of reverter. When the lessor owns all the mineral estate (8/8) and executes an oil and gas lease, the lessor has conveyed all the mineral estate (8/8) but has retained a possibility of reverter in the entire mineral estate (8/8). The lessor also receives, of course, all rights that are bargained for in connection with the

> lease, which usually include the payment of royalties, delay rentals, and bonuses.
>
> …
>
> We are thus mindful of extant circumstances at the time the Concord and other deeds were executed. But we do not base our decision in this case on the theory of an "estate misconception." An understanding of the misconceptions under which some operated is helpful and instructive, but not dispositive.

Id. at 460 (citations omitted). It is unclear why the Court said that it didn't base its decision on the "estate misconception" doctrine given that the presumed mistake is the only way to harmonize the deed's conflicting single fractions conveying a 1/96th mineral interest and 1/12th of the minerals' attributes. *See id.* at 452-53.

F. *KCM Financial LLC v. Bradshaw*

An often-overlooked recent case that touches upon the meaning of a "1/8" fraction in an oil-and-gas deed is *KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70 (Tex. 2015). In that case, the Supreme Court of Texas noted that it was an early "common" practice in royalty deeds to place upon the party holding the executive rights a duty to obtain at least "the usual 1/8th royalty" in any future mineral leases. *Id.* at 75-76. This was true even though the 1/8th royalty was so "standard" that it was considered a "default" minimum. *Id.* at 76. The Court explained that "it was not unusual to reserve [a floating] interest in a royalty of 'not less than' the customary one-eighth to allow the non-executive to share in enhanced royalties secured by the executive." *Id.* The Court further explained that it was "common practice" in floating mineral deeds "to include an express provision in the grant or reservation … to the effect that subsequent leases shall provide for a royalty of not less than the usual 1/8." *Id.* "Such a provision would seem to afford the non-participating owner ample protection and entitle him to a share in any royalty, as such, in excess of the usual 1/8." *Id.* (quoting Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 576 (1948)). Such language, explained the Court, is "neither unusual nor particularly idiosyncratic." *Id.*

At least two more cases seem to confirm that it was not uncommon to use a "1/8" fraction in deed language designed to set a minimal royalty. In *Range Resources Corporation v. Bradshaw*, for example, the deed confirmed a 1/2 interest in "royalty" but also stated that the non-participating royalty owners "shall receive not less than one-sixteenth (1/16) portion (being equal to one-half (1/2) of the customary one-eighth (1/8) royalty)." 266 S.W.3d 490, 494 (Tex. App.—Fort Worth 2008, pet. denied). Likewise, in *Flippen v. Flippen*, a deed reserving a floating royalty interest required any future lease to "provide for at least a royalty on oil of the usual 1/8th," although the court allowed the

parties to reform the instrument to provide for a fixed 1/8th royalty interest on account of mutual mistake. 628 S.W.2d 462, 465 (Tex. App.—Eastland 1981, no writ).

Another case touching upon this idea was *Schlittler v. Smith*, 101 S.W.2d 543 (Tex. 1937). There, the Supreme Court of Texas held that the trial court was not permitted to judicially add—to a floating interest of 1/2 of royalties—a requirement that the royalty owner "receive not less than one-half of the usual one-eighth royalty" even though it was "very likely neither of the parties thought [any lease royalty] would be less." *Id.* at 545-55.

G. *Laborde* and *Hysaw*

In two recent "fixed vs. floating" royalty opinions, the Supreme Court of Texas signaled its openness to presuming that parties to oil-and-gas instruments had made mistakes in drafting their instruments—and a potential willingness to retroactively fix those mistakes even in the absence of evidence corroborating that the parties in fact intended something other than what they said. *See U.S. Shale Energy II, LLC v. Laborde Props., L.P.*, 551 S.W.3d 148 (Tex. 2018); *Hysaw v.*, 483 S.W.3d at 10.

In *Hysaw*, the Court was asked to determine the meaning of a will stating that (1) each child of the testatrix would receive "one-third (1/3) of an undivided one-eighth (1/8) of all oil … that may be produced from any of said lands, the same being a non-participating royalty interest"; and (2) if any of the testatrix's royalty is sold during her lifetime, then each child will receive "one-third of the remainder of the unsold royalty." 483 S.W.3d at 5. The issue was whether the will's "double-fraction language" provided each child with a fixed 1/24th royalty interest or a floating interest equal to 1/3rd of royalty. *Id.* at 4. The Court held that because the second clause indicated that the testatrix intended her children to share royalty equally, "[t]he only plausible construction supported by a holistic reading of the will is that [the testatrix] used 'one-eighth royalty' as shorthand for the entire royalty interest a lessor could retain under a mineral lease." *Id.* at 15. Accordingly, the Court read the will as conferring upon each child a floating interest of 1/3rd of royalty—not a fixed 1/24th royalty interest. *Id.* at 16.

In *Laborde*, the Court was tasked with determining the meaning of a deed stating that the grantor reserved "an undivided one-half (1/2) interest in and to the Oil Royalty, … the same being equal to one-sixteenth (1/16) of the production." 551 S.W.3d at 150. The parties disagreed as to whether the deed reserved a floating 1/2 royalty interest or a fixed 1/16th royalty. The Court reasoned that, standing alone, the first part of the clause created a "floating royalty interest equal to one-half of the royalty." *Id.* at 152. It characterized the issue presented as whether the second half of the clause "indicates an interest fixed at 1/16 of production despite the language in the first [half] tying it to the royalty." *Id.* The Court answered that question "no," reasoning that "the only reasonable way" to read the

deed is to construe it as reserving a floating 1/2 royalty interest that, at the time the deed was executed, conferred a 1/16th royalty interest (given the existing lease's 1/8th royalty). *Id.* at 153-54.

In construing both deeds, the Court indicated a willingness to look beyond the text of the instruments to determine the parties' intent. Specifically, the Court indicated that a holistic view may consider whether the parties' selected terms were evidence of mistakes that caused them to use terms they didn't really mean.

H. *Thomson v. Hoffman*

Thomson v. Hoffman, 674 S.W.3d 927 (Tex. 2023) (per curiam) is the only post-*Van Dyke* opinion from the Supreme Court of Texas related to double-fraction deed construction. The parties disputed the meaning of a 1956 deed that reserved "an undivided three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth ($1/8^{th}$) royalty) in and to all of the oil, gas and other minerals." *Id.* at 928. "Other parts of the deed then referred only to 3/32 without using the double-fraction description." *Id.* "The question presented [was] whether the reservation was a floating 3/4 interest of the royalty—whatever it may be—rather than a fixed 3/32 interest." *Id.*

The San Antoinio Court of Appeals held that the deed reserved a floating royalty interest—*i.e.*, an interest in 3/4ths of whatever a lease's royalty fraction is. *Id.* That court "reasoned that the deed used the term '3/32' merely as a substitute for the longer double-fraction description and that the longer description of the reservation used the term '1/8' as a placeholder for the royalty interest generally." *Id.*

Although the Supreme Court of Texas had a chance to review the San Antonio Court's decision, it instead elected to reverse and remand the case back to the court of appeals for reconsideration in light of the *Van Dyke* opinion. *Id.* at 928-29. The Supreme Court noted that "[t]he parties to this case filed briefs on the merits in this Court before we heard or decided *Van Dyke*," and that "[t]he court of appeals … did not have the benefit of our decision or the parties' competing responses to it." *Id.* at 928. Because *Van Dyke* presented "a new legal formulation," the Supreme Court concluded "that the most prudent course is for the court of appeals to apply *Van Dyke* to this record in the first instance." *Id.*

I. Observations from historical precedent

It is not easy to reconcile the Court's historical treatment of the "estate misconception" and "legacy of the 1/8th royalty" mistakes over time. But if there is one current that seems to run within the Court's various decisions, it seems true—*historically*—that the Court has *not* always believed that parties to deeds with double-fraction language necessarily misunderstood the nature of their interests, that "1/8" in a double-fraction deed is a "term of art," or that it is the job of courts to fix parties mistakes based on presumptions of their

intent. *E.g.*, *Jones*, 56 S.W.2d at 307-08 (multiplying double fraction); *Allen*, 131 S.W.2d at 48, 50 (same). To the contrary, the Court has at times called out—and criticized—the idea that Texas courts might presume that parties mistakenly believed that 1/8th would always be a lease's royalty. *Jones*, 56 S.W.2d at 308 (calling the argument "not reasonable" given public knowledge that a lease could have any royalty fraction); *Luckel*, 819 S.W.2d at 462 (criticizing court of appeals for "assuming that the parties to the deed contemplated that all future leases would provide for one-eighth royalty"). It is not possible to reconcile the Court's rebuttable-presumption framework in *Van Dyke* with these historical realities.

On the other hand, the Court *has* on many occasions used the mistake doctrines (even if the Court said that it wasn't using them) to reconcile conflicting fractions within the same deed—regardless of whether any of those conflicting fractions were "double fractions." *E.g.*, *Tipps*, 101 S.W.2d at 1078; *Garrett*, 299 S.W.2d at 906-07; *Concord*, 966 S.W.2d at 452-53. The Court has also made the estate-misconception mistake itself when, for about a decade, it mischaracterized the scope of a mineral interest subject to a lease with a 1/8th royalty. *E.g.*, *Tipps*, 101 S.W.2d at 1078; *Murphy*, 151 S.W.2d at 1006; *Watkins*, 189 S.W.2d at 699. And in recent years, the Court's precedent had clearly signaled an openness to the possibility of construing historical deed language in light of one or both of the mistake doctrines. *E.g.*, *Hysaw*, 483 S.W.3d at 9-10; *Laborde*, 551 S.W.3d at 152.

The real leap made by the Court in *Van Dyke* was to turn the *possibility* that some parties to oil-and-gas deeds *might* have misunderstood their interests into a *presumption* that *all* parties to a certain category of deeds *necessarily* misunderstood their interests and purposefully used a "term of art" (albeit, in retrospect, a mistaken one) to identify the nature of their interests. The Court's leap in this regard further requires lower courts to construe some deeds in a way that fixes the parties' presumed mistakes unless there is language in the deed demonstrating that the parties didn't misunderstand the nature of their interests.

Although the mistake doctrines are sometimes noted (negatively and positively) in the historical treatment of mineral deeds, it is not at all clear that such mistakes were "rampant" or otherwise widespread in Texas during any period—as the opinion repeatedly indicates. The opinion further states that to construe historical instruments, courts should look to contemporary objective sources of meaning. But the opinion does not appear to reference such sources for its conclusion that the misconceptions were widespread (nor have the authors of this paper located such authority). Likewise, there does not appear to be significant historical authority for imposing the rebuttable presumption on deeds containing double fractions (as opposed to deeds containing *conflicting* fractions).

For all of these reasons, the Court's new rebuttable-presumption framework came as a surprise to many oil-and-gas practitioners and scholars.

V. The History of "Presumed Grant" Doctrine

History also provides a useful backdrop on which to consider the Court's use of the presumed-grant doctrine. The presumed-grant doctrine, historically referred to as the lost grant theory, title by circumstantial evidence, or proof of title by circumstances, can most easily be understood as a rule of evidence that presumes a conveyance based on circumstances. *See* Jerome J. Curtis, Jr., *Reviving the Lost Grant*, 23 REAL PROP. PROB. & TR. J. 535, 535 (1988) ("In effect, the lost grant theory supplies a rule of evidence that can bolster, or indeed establish, the claims of trespassers."); *Fair*, 437 S.W.3d at 626 (describing the doctrine by the terms "presumed lost deed or grant" and "title by circumstantial evidence"); *Magee,* 221 S.W. at 256-57 ("the rule . . . permits the inference that an apparent owner has parted with his title from evidence, first, of a long-asserted and open claim, adverse to that of the apparent owner; second, of nonclaim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim").[1] It has been conceived of as a common-law form of adverse possession, allowing a party to establish title by circumstantial evidence. *Fair*, 437 S.W.3d at 626; *Conley v. Comstock Oil & Gas, LP*, 356 S.W.3d 755, 765 (Tex. App.—Beaumont 2011, no pet.); *San Miguel v. PlainsCapital Bank*, No. 04-18-00450-CV, 2019 WL 2996975, at *5 (Tex. App.—San Antonio July 10, 2019, no pet.) (mem. op).

The doctrine has a long history within Texas property law, arising in the nineteenth and twentieth centuries as a means to quiet title in an age where records frequently went missing. At that time, it was often described as "essential to the ascertainment of the very truth of ancient transactions." *Magee*, 221 S.W. at 256-57. However, in the twenty-first century, the doctrine entered a period of decline, being used less and less frequently until the Supreme Court of Texas evoked it again in *Van Dyke*. The doctrine's resurgence in the middle of a case that initially seemed to raise only a lease-interpretation question is itself interesting, but to help ascertain what role the presumed-grant doctrine will play going forward, the more interesting inquiry is *why* the presumed-grant doctrine arose in the first place. What purpose did it serve in earlier centuries, and does that purpose still govern?

A. Early background

The presumed-grant doctrine has its roots in English law. 23 REAL PROP. PROB. & TR. J. at 537. The doctrine evolved to meet a specific legal problem: how to square Western

[1] *See also, e.g. Fowler v. Tex. Expl. Co.*, 290 S.W. 818, 823 (Tex. App.—Galveston 1926, writ ref'd) ("The law further is that where the fact or deed, as the case may be, which is sought to be presumed, lies back thirty or more years, and the parties claiming the presumption, or those whose estate they have, or both combined, have during such period openly and notoriously, and with the acquiescence of their adversaries, claimed and exercised acts of ownership over the land in question, such as might reasonably be expected from owners thereof, and the circumstances in evidence, taken in their entirety, are consistent with the presumption sought to be indulged, and it is more reasonably probable that the facts sought to be presumed existed than that they did not, then the jury are at liberty to presume them and find accordingly." (quoting *Frugia v. Trueheart*, 48 Tex. Civ. App. 513, 106 S. W. 742)).

understandings regarding permanent ownership and ancestral inheritance with the realities of a system dependent on fragile paper and the ability to read the words written on it. The first formulation attempted to designate a time of "legal memory," and enjoyment since that year, 1189, was considered conclusive evidence that the right claimed had been conferred. *Id.* This iteration was imperfect. Time passed, increasing the span since that designated year and necessitating the rise of other, less functional, presumptions to smooth the rule's application. *Id.* The doctrine subsequently evolved again to resolve those issues, leading to the earliest form of the presumed-grant doctrine as we would recognize it today: the notion that "long enjoyment of [a] right raises a presumption that the claimant had been granted the right." *Id.*

The doctrine saw early uses in the context of easements and rights of way. *Id.*; *Taylor v. Watkins*, 26 Tex. 688, 696-97 (1863). It was also applied to resolve disputes outside of land such as whether debts had been paid. *Watkins*, 26 Tex. at 694-97. Interestingly, it was actually a subject of some debate whether a similar presumption should be applied to land ownership at all. *Id.* at 696-97.[2]

Once the presumption began to be applied in land disputes, early cases nailed down underpinnings of the theory that provide key rationales for the rule's application. For one, the rule is based on a common-sense understanding of human behavior, best articulated by Justice Field in *Fletcher v. Fuller*, 120 U.S. 534 (1887):

> The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property.

Id. at 673; *see also Baldwin v. Goldfrank*, 31 S.W. 1064, 1066 (1895) ("[L]ong and continuous acts of ownership, acquiesced in knowingly by those who hold an apparently adverse title, lead to the conclusion that the persons so exercising such acts have acquired the title."). Second, while the doctrine was sometimes called the lost-grant doctrine, it was not necessary for a jury to decide that an executed deed had, in fact, actually existed. *Id.* at 678 ("If the execution of a deed was established, nothing further would be required than

[2] Once the rule was applied to land ownership disputes, scholars also originally contemplated a difference between recognizing grants between private individuals and presumption of grants from the crown. *See id.* at 694 ("Grants from the crown may be presumed, but where such a presumption has been made, it has been under particular circumstances, and after a much longer period of time than has been deemed sufficient for raising the presumption of a grant from private individual.").

proof of its contents; there would be no occasion for the exercise of any presumption on the subject."). Rather, the point of the presumption was to quiet title, despite uncertainty, based on longevity of uncontested ownership. *Id.*

These early cases also continually emphasized the need that the doctrine was designed to meet. Paper was fragile. Literacy was less common. Memories fade. And in an age where copies were rare and deals were frequently made orally, chains of ownership could easily be interrupted:

> It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged so as to be recorded, or may have been mislaid or lost.…The death of parties may leave in the hands of executors or heirs papers constituting muniments of title, of the value of which the latter may have no knowledge, and therefore for the preservation and record of which may take no action; and thus the documents may be deposited in places exposed to decay and destruction. Should they be lost, witnesses of their execution, or of contracts for their execution, may not be readily found, or, if found, time may have so impaired their recollection of the transactions that they can only be imperfectly recalled, and of course imperfectly stated.
>
> *The law, in tenderness to the infirmities of human nature, steps in, and by reasonable presumptions that acts to protect one's rights which might have been done, and in the ordinary course of things generally would be done … [and] affords the necessary protection against possible failure to obtain or preserve the proper muniments of title, and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions, and thus gives peace and quiet to long and uninterrupted possessions.*

Fuller, 120 U.S. 534, 545-46 (emphasis added).

Thus, over time, the presumed-grant doctrine was applied to land disputes and proved useful to alleviate evidentiary problems common to an age where the destruction of a courthouse could permanently erase chain of title. *See, e.g.*, *Adams v. Slattery*, 156 Tex. 433, 436 (1956) (gap in title caused by destruction of records in courthouse fire); *Jeffus v. Coon*, 484 S.W.2d 949, 954 (Tex. App.—Tyler 1972, no writ) (same); *Magee*, 221 S.W. at 256 (records missing where record transporter was attacked by masked men who stole land certificates); *Miller v. Fleming*, 149 Tex. 368, 233 S.W.2d 571, 572-73 (1950) (records missing because a county clerk failed to record part of a general warranty deed); *Page v. Pan Am. Petroleum Corp.*, 381 S.W.2d 949, 953 (Tex. App.—Corpus Christi 1964, writ ref'd n.r.e.) (records either missing due to a storm that blew records "across the prairie" or

an oral conveyance). As best explained in *Jeffus,* the doctrine was almost a patch, covering over a lack of proof to quiet title when living memory and written evidence fell short:

> Because of such conditions as shown by this record, common to this State, the doctrine of the presumption of the execution of a deed, or the proof of its execution by circumstances when no better evidence is obtainable, as established by the decisions of the courts of this State, receive a Liberal application for the protection of land titles long relied on in good faith, the evidence of which has been lost through carelessness or accident, destruction of the records, and the death of all persons originally connected therewith or likely to know anything about the facts.

Jeffus, 484 S.W.2d at 953; *see also Strickland v. Humble Oil & Ref. Co.*, 181 S.W.2d 901, 906-07 (Tex. App.—Eastland 1944, no writ.) ("The rule is essential to the ascertainment of the very truth of ancient transactions. Without it, numberless valid land titles could not be upheld. Its application becomes more and more important with the passing years, as it becomes more and more difficult to get living witnesses to that which long ago transpired.").

B. Development of the Presumed-Grant Doctrine Before *Van Dyke*

By the time the doctrine was circulating widely through American courts, a few rules were clear. The presumption could be applied to land-ownership disputes. *See, e.g.*, *Fuller*, 120 U.S. at 534. Whether to apply the presumption was a question of fact for the jury. *Watkins*, 26 Tex. at 688. And the presumption was rebuttable. *Ricard v. Williams*, 20 U.S. 59, 109 (1822).

The doctrine also was condensed into three primary elements. To establish that an apparent owner has parted with title, a claimant must provide evidence "first, of a long-asserted and open claim, adverse to that of the apparent owner; second, of nonclaim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim." *Magee,* 221 S.W. at 257; *see also, e.g.*, *Strickland*, 181 S.W.2d at 906; *Slattery*, 156 Tex. at 447-48; *Jeffus*, 484 S.W.2d at 953; *Conley*, 356 S.W.3d at 765; *Fair*, 437 S.W.3d at 626.

As was frequently emphasized, the doctrine was a deeply factual inquiry. *See e.g.*, *Taylor*, 26 Tex. at 696, 698. The relevant facts all ultimately lead to the same question: did the apparent owner acquiesce to the competing claim? This primary question also aligns with the theoretical justification for the rule: "owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others." *Fuller*, 120 U.S. at 673. Thus, if there are open acts of ownership by a different party and the apparent owner does and says nothing, the law presumes that the other party lawfully received the right to the possession and use of the property. Otherwise, common sense indicates the apparent owner would object.

Courts also consider whether the party claiming presumed grant made continuous, open use of the property. *Duke v. Houston Oil Co. of Tex.*, 128 S.W.2d 480, 484-85 (Tex. App.—Beaumont 1939, writ dism'd.). Evidence might include consistently taking timber or other resources from the property, *Fuller*, 120 U.S. at 545; *Strickland*, 181 S.W.2d at 906; maintaining tenants, *Slattery*, 156 Tex. at 446, 450; or living there, *Bordages v. Stanolind Oil & Gas Co.*, 129 S.W.2d 786, 788-89 (Tex. App.—Galveston 1938, writ dism'd judgm't cor.). While early courts had emphasized a need to make continuous *and exclusive* use of the property, courts later reasoned that continuous use by the claimant need not be entirely exclusive, so long as other open acts of ownership took place. *See, e.g.*, *Fuller*, 120 U.S. at 552-53. Early applications of the doctrine had also suggested a need for "uninterrupted possession." *Watkins*, 26 Tex. at 698-99. However, courts later stopped emphasizing the necessity of full possession for practical reasons, particularly in remote areas where much of the land was unoccupied. *Baldwin*, 31 S.W. 1064 at 1066. Over time, courts were more likely to frame the issue as whether the person claiming protection of the doctrine made open and notorious claims of ownership, including legal acts such as further conveyances or paying taxes on the land. *See, e.g., Fuller*, 120 U.S. at 552-53; *Brewer v. Cochran*, 99 S.W. 1033, 1035 (Tex. Comm'n App. 1907); *Baldwin*, 31 S.W. at 1066; *Strickland*, 181 S.W.2d at 906; *Purnell v. Gulihur*, 339 S.W.2d 86, 92 (Tex. App.—El Paso 1960, writ ref'd n.r.e); *Slattery,* 156 Tex. at 450; *Howland v. Hough*, 570 S.W.2d 876, 879-80 (Tex. 1978).

That the acts were open and known was necessary to establish that the alleged grantor had acquiesced to the presumed grant, as it would be impossible to acquiesce to something done in secret. *See Duke*, 128 S.W.2d at 484-85 ("While possession is not an indispensable prerequisite to the presumption of the existence of a deed, it is essential that the claim of title be made in some tangible form calculated to bring notice to those who are adversely affected thereby, so as to create a presumption of acquiescence in such claim by the adverse parties."); *Crosby v. Davis*, 421 S.W.2d 138, 143 (Tex. App.—Tyler 1967, writ ref'd n.r.e.) ("The fact that the Mixons may have occasionally cut some undisclosed amount of timber therefrom would not constitute such a continuous, open and notorious claim of ownership as to place the apparent owner on notice of their claim.").

Relatedly, courts consider whether a grantor or later descendants appeared to have knowledge of the claimant's competing claim. *See Love v. Eastham*, 154 S.W.2d 623, 625 (1941). For example, in *Love*, all the open acts of ownership took place after the apparent owners moved to another part of the state. *Id.* Thus, the record failed to establish presumptive grant because acquiescence could not be established if knowledge of the presumptive grantees' claims of ownership could not be attributed to the prior owner. *Id.; see also Grayson v. Lofland*, 52 S.W. 121, 123 (Tex. Comm'n App. 1899) (crediting evidence that the original grantor had recognized claimant's interest during his lifetime); *Sydnor v. Tex. Sav. & Real Est. Inv. Ass'n*, 94 S.W. 451, 454 (Tex. Comm'n App. 1906)

(crediting evidence that predecessor had not listed the property on an inventory of his father's estate); *Jeffus*, 484 S.W.2d at 954 ("[W]where the ostensible owner resides in the immediate vicinity of a tract of land over which another party is exercising open and notorious dominion and control, knowledge of such dominion and control may be thereby imputed to the owner.") (quoting *Love*, 154 S.W.2d at 625)).

Thus, the doctrine ultimately breaks down into two considerations. First, what actions did the claimant and its predecessors take? Were they openly acting as if they owned the property by paying taxes, using the property in whatever way made sense, or conveying it to others? Second, if the record-title owner had knowledge of these actions, how did it respond? Did it act as though it owned the property, or did it take actions inconsistent with that belief?

Adams v. Slattery is a good example of a traditional application of the doctrine. In 1836, a colonist of the Republic of Texas named Conrad Eigeneaur died in the war for Texas's independence, and his heirs were awarded certain public lands in the Republic. *Slattery*, 156 Tex. at 436. Defendants, the Slatterys, took title to the land in 1877 and recorded a deed. *Id.* at 449. However, the local courthouse, which held all land records, was destroyed by fire in 1874. *Id.* at 436. Thus, there was no direct evidence that the land had been conveyed out of the heirs' line, and into the Slatterys' line. In applying the rule, the Court considered that the Slatterys had paid taxes on the land between 1924 and 1949. *Id.* at 450. They also possessed and used the land for a pasture, built a small house on it, and had tenants. *Id.* at 446, 450. In contrast, Eigeneaur's heirs had not made any claim on the land between 1867 and 1895, had no evidence of possession until 1909, and did not file suit until 72 years after the first adverse claim. *Id.* at 455-51. The Court held that this was circumstantial evidence of acquiescence and thus there was some evidence to raise the presumption that there had been a deed from Eigeneaur's heirs to the Slatterys' predecessors. *Id.* at 451.

After considering the evidence, the Court discussed the necessity of the doctrine, in line with the idea that this doctrine was a common-sense solution to the fragilities of ancient documents:

> The doctrine of the presumption of the execution of a deed, or more properly the proof of its execution, by circumstances when no better evidence is obtainable is well established, and especially so by the decisions in this state, and the disposition has been to extend rather than to limit it.… The destruction of the records in so many of the counties of this state, coupled with the carelessness, well nigh universal at an earlier period of our history, on the part of the people in keeping the original deeds after they had been recorded, and the disposition now so prevalent to uncover, by reason of carefully prepared abstracts of title, the absence of such written muniments

> of title as are necessary to make a complete chain, require, in our opinion, a liberal application of this rule for the protection of titles long relied upon in good faith, the evidence of which has been lost through carelessness or accident, the destruction of records, and the death of all persons originally connected therewith, or likely to know anything about the facts.

Id. at 452-53. Thinking about the doctrine in this way, it is no surprise that the doctrine decreased in popularity as technology and other developments decreased the ease with which written proof of title could be destroyed. The doctrine was a solution to a problem that was arising with less and less frequency.

VI. What *Van Dyke* Answered—and the Many Questions That Remain Unanswered

The good news for oil-and-gas litigants and practitioners is that *Van Dyke* provided considerable guidance on both the two "mistake" doctrines and the presumed-grant doctrine that should help resolve many mineral-title disputes. Nonetheless, the Court's rulings in both arenas also left many questions unanswered. This section will discuss both the questions answered and those unanswered by *Van Dyke*.

A. The "mistake" doctrines.

We have a rule!

Whether practitioners, title lawyers, or oil-and-gas industry professionals like it or not, we have a new mechanical rule to apply in title disputes involving deeds that contain double fractions. *See Van Dyke*, 668 S.W.3d at 364-66. In short, the Supreme Court of Texas created a new rebuttable presumption that, in deeds that contain a double fraction and one of those fractions is 1/8, the 1/8 fraction means all of the mineral interest—not 1/8 of the minerals. *See id.* As the Court explained in *Thomson*, the new framework establishes that "antiquated mineral instruments containing '1/8' within a double fraction raise a rebuttable presumption that 1/8 was used as a term of art to refer to the *total* mineral estate, not simply one-eighth of it." 674 S.W.3d at 928 (citing *Van Dyke*, 668 S.W.3d at 359). But, the Court also stated, "the presumption is 'genuinely rebuttable.'" *Id.* (quoting *Van Dyke*, 668 S.W.3d at 364). "A rebuttal could be established by express language, distinct provisions that could not be harmonized if 1/8 is given the term-of-art usage …, or even the repeated use of fractions *other* than 1/8 in ways that reflect that an arithmetical expression should be given to all fractions within the instrument." *Id.*

Van Dyke also resolved at least two additional questions that had been presented in deed-construction disputes. First, the Supreme Court rejected the argument that Texas courts should presume that the parties made the estate-misconception or legacy-of-the-1/8th mistakes only in the presence of textual evidence of the mistakes—such as

"inconsistencies to reconcile within the deed." *Van Dyke*, 668 S.W.3d at 365. According to the Court:

> [I]dentifying a lack of inconsistent provisions that require harmonization gets the analysis backwards. The use of a double fraction in [a] deed, combined with the *lack* of anything that could rebut the presumption, is precisely why we can conclude as a matter of law that [the] deed did not use 1/8 in its arithmetical sense….

Id. at 366. Thus, from now on, courts must presume that the parties to double fraction mineral deeds misunderstood the nature of their interests in the absence of any other textual evidence of such mistakes. *See id.* Moreover, the presumption of the parties' mistaken understanding of their interests may be rebutted only by textual evidence within the deed itself. *Id.* at 365 ("The key point is that there must be some textually demonstrable basis to rebut the presumption."). Accordingly, mistakes will be presumed in the absence of other textual evidence, but the presumption may be rebutted only by the presence of textual evidence showing the absence of the parties' misunderstanding of their interests. *See id.* at 364-65.

Second, the Supreme Court rejected the argument that if the minerals were not under lease (for the typical 1/8th royalty) at the time that the deed was executed, the parties would have understood that they owned all of their minerals at the time—not just 1/8th of them—and therefore would not have been mistaken as to the nature of their interests. *Id.* at 365. According to the Court, "this analysis … misapprehends how the estate-misconception theory affects the reading of instruments like the deed in this case. … [T]he very use of the double fraction *is itself* the primary reason to presume [mistaken] purposefulness." *Id.* at 366.

But the *Van Dyke* opinion left many additional questions unanswered.

Arguably the most important question left mostly unanswered is: what, if anything, will be sufficient textual evidence that a deed's parties were not mistaken in their understanding of their interests as needed to rebut the presumption? The Court provides three hints:

- "express language,"
- "distinct provisions that could not be harmonized if 1/8 is given the term-of-art usage," and
- "the repeated use of fractions *other* than 1/8 in ways that reflect that an arithmetical expression should be given to all fractions within the instrument."

Van Dyke, 668 S.W.3d at 364. But the Court also emphasized that it had never seen such a deed: "No one has presented us with examples of parties to instruments of the relevant era who used a double fraction just for its arithmetical purpose…." *Id.* at 364.

Is a deed's common-form description of an interest as both a double fraction *and* the mathematical product of that double fraction a sufficient "arithmetical expression" to rebut the presumption? The Court had an opportunity to answer that question but declined the petition for review in *Royalty Asset Holdings II, LP v. Bayswater Fund III-A LLC*, No. 08-22-00108-CV, 2023 WL 2533169 (Tex. App.—El Paso Mar. 15, 2023, pet. denied) (mem. op.). In that case, the parties disputed the meaning of the reservation of a non-participating royalty interest described as "1/4th of the land owner's usual 1/8th royalty interest (being a full 1/32nd royalty interest"). *Id.* at *2. The El Paso Court reasoned that because the product of the double fraction was set off by parentheses, it was "non-essential" and "incidental" to the deed's meaning. *Id.* at *5.

If *Thomson* returns to the Supreme Court after remand to the San Antonio Court of Appeals, the Court may have another opportunity to provide guidance on what kind of deed language is convincing enough to demonstrate that the parties were not confused as to the nature of their interests. *See* 674 S.W.3d at 928-29 (remanding for consideration of deed reserving a "three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth (1/8th royalty) in and to all of the oil, gas and other minerals…."). Other cases involving similar common-form deed language include *Permico Royalties, LLC v. Barron Props. Ltd.*, No. 08-22-00168-CV, 2023 WL 4442007, *1 (Tex. App.—El Paso July 10, 2023, pet. filed) (interpreting deed reserving "a one-sixteenth (1/16) free royalty, (being 1/2 of the usual 1/8th free royalty)") and *Johnson v. Clifton*, No. 08-22-00132-CV, 2023 WL 4443016, *1 (Tex. App.—El Paso July 10, 2023, pet. filed) (interpreting deed conveying "a 1/128 (1/16 of the usual 1/8 royalty)" interest in production).

Another issue remaining after *Van Dyke* is whether the rebuttable presumption—or some variation of it—applies to royalty deeds. *Van Dyke* says that courts construing double-fraction mineral deeds should "*begin* with a presumption that the mere use of such a double fraction was purposeful and that 1/8 reflects the *entire* mineral estate, not just 1/8 of it." 668 S.W.3d at 364. This makes sense, according to the Court, because "for many years, lessors would refer to what they *thought* reflected their entire interest in the 'mineral estate' with a simple term they understood to convey the same message: '1/8.'" *Id.* In short, 1/8 means "the *entire* mineral estate" in a double-fraction mineral deed. *Id.*

But what about royalty deeds? A "1/8" fraction in a double-fraction *royalty* deed cannot be a reference to "the entire mineral estate" because—by definition—a royalty interest is only part of a mineral estate. *See KCM Fin. LLC*, 457 S.W.3d at 75. Thus, strictly applying the *Van Dyke* presumption to a double-fraction royalty deed would convert a *royalty* interest into a *mineral* interest—changing both the size and nature of the

interest described in the deed. The "estate misconception" doctrine is fundamentally about what mineral interests some landowners evidently mistakenly believed they owned after executing an oil-and-gas lease with a 1/8th royalty—*i.e.*, they incorrectly believed they owned only 1/8th of the minerals in the ground. *See Hysaw*, 483 S.W.3d at 10. It would take a different "mistake"—that doesn't follow from the "estate misconception" theory—to reason that a 1/8th fraction in a multi-fraction royalty deed means 100% of the royalty interest.

Moreover, the Supreme Court of Texas has previously rejected the idea that a 1/8 fraction in a royalty description represents the entire royalty interest. In *Jones*, the Court held that the term "1/8 royalty" does *not* mean all of the "royalty" because—by 1932—it was "well know[n]" that a lease "may provide a different royalty than 1/8 of the production." 56 S.W.2d at 308. And in *Luckel*, the Court held that the court of appeals improperly reasoned that because 1/8th was the typical royalty at the time, a "1/32" royalty interest represented 1/4th of all royalties. 819 S.W.2d at 462 (criticizing that conclusion as "not a proper 'harmonizing' under the four corners rule"). Furthermore, the Court explained, even presuming that the parties had mistakenly believed that all future royalty fractions would be 1/8 does not answer whether they intended a royalty to be fixed or floating. *Id.*

Will non-arithmetical evidence suffice to show that the parties were not mistaken in their understanding of the nature of their interests? What if, for example, the parties used common double-fraction language describing a royalty interest as a fraction of "the usual 1/8th royalty"? The word "usual" means "ordinary," "customary," or "in common use." BLACK'S LAW DICTIONARY 1544 (6th ed. 1990). It does not mean "automatic" or "mandatory," and its use—by definition—indicates that the authors (1) understood that a lease's royalty may be more or less than 1/8th and therefore (2) were not confused as to the nature of their interest. *See also* A.W. Walker, Jr., *Oil Payments*, 20 TEX. L. REV. 259, 272-74 (1942) ("The usual royalty in oil and gas leases is undoubtedly one-eighth, but it is not at all uncommon for a larger royalty to be reserved….").

And to what "era" of deeds does the presumption apply (and to what "era" of deeds does the presumption no longer apply)? *Van Dyke* says that its new presumption applies to deeds of a "certain vintage" from "the relevant era"—when at least some Texans mistakenly believed that lease royalties would always be 1/8 (and that, after executing a lease with a 1/8 royalty, the lessor owned only 1/8th of the minerals). 668 S.W.3d at 363-65. What is that "era" and "vintage"?

The Supreme Court of Texas reasoned in 1932 that it was already "well know[n]" that a lease's royalty fraction may not be 1/8th. *Jones*, 56 S.W.2d at 308. The Court similarly recognized that a lease may not have a 1/8th royalty fraction in opinions published in 1931, *see Ryan v. Kent*, 36 S.W.2d 1007, 1011 (Tex. Comm'n App. 1931, judgm't adopted)

(comparing lease that included 1/4 and 1/6 royalty as "in excess of the usual in amount"), in 1939, *see Sheppard v. Stanolind Oil & Gas Co.*, 125 S.W.2d 643, 645, 648 (Tex. App.—Austin 1939, writ ref'd) (describing lease providing for 1/6 royalty as "in excess of the usual in amount"), and in 1957, *see McMahon v. Christmann*, 303 S.W.2d 341, 344 (Tex. 1957) ("parties may validly contract for a greater royalty than 1/8th of the lessor's mineral ownership"). Other early Texas appellate opinions recognized the same reality. *E.g.*, *Gresham v. Turner*, 382 S.W.2d 791, 794 (Tex. App.—El Paso 1963, no writ) ("[W]hile the usual royalty was 1/8th, the parties could agree on a different royalty."); *Gibson v. Turner*, 274 S.W.2d 916, 920 (Tex. App.—Eastland 1955), *aff'd*, 156 Tex. 289 (1956) ("There is no question but that the parties to an oil and gas lease may contract for the payment to the lessor as royalty of any desired fractional royalty interest."); *Miller v. Speed*, 248 S.W.2d 250, 254 (Tex. App.—Eastland 1952, no writ) ("Although 1/8 of the oil produced is the usual royalty, any other percent may be agreed upon.").

B. The presumed-grant doctrine.

Given the doctrine's decline in recent decades, the Texas Supreme Court's resurrection of the doctrine in *Van Dyke* was surprising in itself. Even more surprising was the doctrine's application to a deed interpretation dispute.

In applying the doctrine, the Court reconfirmed that the three historic elements would apply: "(1) a long-asserted and open claim, adverse to that of the apparent owner; (2) nonclaim by the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim." *Van Dyke,* 668 S.W.3d at 365 (citing *Magee*, 221 S.W. at 257). It also notably held that the court of appeals's application of a fourth element, a gap in title, was erroneous, as "neither our precedent nor the doctrine's underlying purposes support mandating this additional test." *Id.* at 366.

But the Court's brief analysis raises a variety of issues that will warrant further litigation. *Van Dyke* applied the doctrine in at least three unique ways. First, it applied a doctrine that, in the last 200 years, had been primarily used to resolve title to land in a non-possessory royalty-interest dispute. Second, it established that a "gap in title" was not a necessary element to the doctrine. While not an element of the doctrine in precedent, a gap in title had been at the very least a factual condition precedent to its application in most—if not all— historical cases. Third, *Van Dyke* twice emphasized that the presumed-grant doctrine's application was demanding, a pronouncement at odds with statements by prior courts about its liberal application.

Given the Court's explicit recognition that its presumed-grant holding wasn't necessary to its decision, the entire section of the opinion is likely dicta. Nevertheless, these developments raise questions about the future development of the doctrine. First, what does the Court's use of the presumed-grant doctrine in the context of a textual-

interpretation dispute say about the future of the four-corners doctrine?[3] Could *Van Dyke* be used as a vehicle to avoid consideration of the text when historical evidence is present? The Court did some work in the footnotes to address concerns about its departure from the text and consideration of extrinsic evidence:

> We hasten to emphasize that the secondary analysis here involving the extrinsic evidence of transactions and history between the parties is not probative in the initial analytical process we described in Part II.A, *supra*, because it would go beyond the text. While these transactions confirm our textual conclusion, they are formally relevant only to the Mulkey parties' claim under the presumed-grant doctrine, which is why they present this evidence.

Id. at 367 n.9. Thus, the Court emphasized that it was not changing its plain-text doctrine when it comes to contract interpretation. That said, its use of the presumed-grant doctrine in this context raises the specter of fights over textual interpretation that never reach the text because the presumed-grant doctrine may be applied first. In fact, the Court acknowledged that "[i]n cases where the presumed-grant doctrine is clearly implicated, a court could dispense with the deed-construction analysis." *Id.* at 368 n.11.

This new route in textual-interpretation disputes could displace, or at least circumvent, a host of established doctrines related to the use of extrinsic evidence in contract-interpretation disputes. For example, for years, the Court has made clear that an operator's history of paying royalties in a certain manner cannot be used as evidence to interpret an unambiguous instrument. *See Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 573 S.W.3d 198, 206 (Tex. 2019) ("Burlington emphasizes the course of the parties' performance of the agreements …Texas Crude accepted Burlington's practice of deducting postproduction costs for years before raising an objection…. Where contracts are unambiguous, we decline to consider the parties' course of performance to determine its meaning."); *Sun Oil Co. (Del.) v. Madeley*, 626 S.W.2d 726, 732 (Tex. 1981) (holding that consideration of a company's prior history of royalty payment calculation was erroneous where the meaning of the contract was plain and unambiguous). Could the presumed-grant doctrine create a new outlet to make this evidence accessible in royalty and other disputes?

[3] The Court's typical jurisprudence, as stated, places an emphasis on the considering only the plain text found with four corners of the document to interpret a disputed contract. Its analysis always begins with the text's plain language. "Objective manifestations of intent control, not 'what one side or the other alleges they intended to say but did not.'" *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 763-64 (Tex. 2018) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010)). Thus, courts generally presume parties intended what the words of the contracts say and interpret contract language according to its "plain, ordinary, and generally accepted meaning" unless the instrument directs otherwise. *Id.* (quoting *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)).

Second, the Court held that the court of appeals's application of a fourth element a gap in title was erroneous, as "neither our precedent nor the doctrine's underlying purposes support mandating this additional test." *Van Dyke,* 668 S.W.3d at 366. This statement repudiated the lower court's reliance on the lack of a gap as a reason not to apply the doctrine and also overrules other lower-court precedent holding that the presumed-grant doctrine applies exclusively to patch historical gaps in ownership. *See Balmorhea Ranches, Inc. v. Heymann*, 656 S.W.3d 441, 449 (Tex. App.—El Paso 2022, no pet.) ("The events to which the presumption of lost grant has been applied usually occur when there is a gap in title before the Twentieth century."); *Davis v. COG Operating, LLC*, 658 S.W.3d 784, 797 (Tex. App.—El Paso 2022, pet. denied) ("However, the very cases the Neals cite to indicate the presumed-grant doctrine is only used as a presumption of ownership where there is a gap in title, particularly regarding ancient documents, usually from the nineteenth or very-early twentieth centuries at the latest.").

The lower court's holding was not unreasonable given that the doctrine was ordinarily applied to patch gaps in title. *See Slattery*, 156 Tex. at 436 (gap in title caused by destruction of records in courthouse fire); *Jeffus*, 484 S.W.2d at 954 (same); *Magee*, 221 S.W. at 256 (gap due to miss records where transporter was attacked by masked men who stole land certificates along with other valuables). Nor was it inconsistent with at least some statements of prior caselaw. *See Seddon v. Harrison*, 367 S.W.2d 888 (Tex. App.—Houston [1st Dist.] 1963, writ ref'd n.r.e. ("In the present case there is nothing to show from whom appellants might have derived title under a lost deed or presumption of grant. There is no missing link in their chain of title…. The only defect was in the description of the property in the deed…."); *Howland*, 570 S.W.2d at 879 ("Because the gap in Howland's title occurred 96 to 129 years before this suit was brought, no direct evidence was available as to possession of the land."). Given the historical purpose of the doctrine to quiet title in an age where records were very easily lost and reliance on human memory ineffective, relying on a gap in title might have been a useful guardrail for limiting the doctrine going forward.

That said, in its third new development of the presumed-grant doctrine, the Court itself may have authored a different guardrail. Historically, courts often emphasized that the doctrine was to be given a "liberal" application. *See Fowler*, 290 S.W. at 823 ("The rule has been given the most liberal interpretation and application by our courts."); *Slattery*, 156 Tex. at 452-53 ("[Evidentiary issues] require, in our opinion, a liberal application of this rule for the protection of titles long relied upon in good faith."); *Jeffus*, 484 S.W.2d at 953 ("[T]he doctrine of the presumption of the execution of a deed … receive a Liberal application for the protection of land titles long relied on in good faith…."); *Fair*, 437 S.W.3d at 626 ("The rule has been given the most liberal interpretation and application by our courts."). However, *Van Dyke* suggests that liberality will not extend to this new era of presumed grant. In discussing the rule's evidentiary burdens, the Court stated that

satisfying the doctrine was "properly difficult" and "demanding." 668 S.W.3d at 366, 368 n.11. Thus, it may be that as the presumed-grant doctrine is extended outside of its historical context, the burdens of proof will be higher. It also remains to be seen whether the Court will rely strictly on the types of evidence historically utilized or credit new forms of evidence. In *Van Dyke*, the Court relied on "ninety-year history [that] include[d] conveyances, leases, ratifications, division orders, contracts, probate inventories, and a myriad of other recorded instruments that provided notice." 668 S.W.3d at 366-67. This is consistent with the prior reliance on conveyances as an assertion of ownership, as well as a focus on the actions of both parties' predecessors over a long period. *See, e.g., Love*, 154 S.W.2d at 625; *Brewer*, 99 S.W. at 1035; *Baldwin*, 31 S.W. at 1066. But given that the doctrine is now being applied in new contexts, new forms of proof may be needed.

Another question to be answered is how other property law doctrines will interact with presumed grant. The presumed-grant doctrine has long existed alongside adverse possession and limitations statutes. Frequently, it was applied in instances where adverse-possession was not available. *See, e.g., Purnell*, 339 S.W.2d at 91-92. As an evidentiary tool, it evolved with a bit more flexibility than the adverse possession statutes, even as the forms of proof applied are quite similar.[4] Courts have recognized this similarity, describing the presumed-grant doctrine as a form of "common law adverse possession." *See, e.g., Van Dyke*, 668 S.W.3d at 366; *San Miguel*, 2019 WL 2996975, at *1; *Haby v. Howard*, 757 S.W.2d 34, 39 (Tex. App.—San Antonio 1988, writ denied). However, presumed grant is distinct from adverse possession in that the courts have not established a definitive period of time needed to apply the presumed-grant doctrine. Some courts have stated the requisite period as "thirty years," *see Fowler*, 290 S.W. at 823; *Duke*, 128 S.W.2d at 484, but this time period hasn't been universally adopted. Modern cases do not appear to rely on a specific time period at all. *See Conley*, 356 S.W.3d at 765. Thus, the presumed-grant doctrine will likely be reinvigorated as an alternative to adverse possession when parties can not meet adverse possession's statutory requirements.

On the other hand, the statute of frauds[5] may potentially work to limit new applications of the presumed-grant doctrine, as it requires conveyances of real property to be in writing

[4] Under Texas law, adverse possession requires "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." TEX. CIV. PRAC. & REM.CODE § 16.021(1). The statute requires visible appropriation; mistaken beliefs about ownership do not transfer title until someone acts on them…. The statute requires that such possession be "inconsistent with" and "hostile to" the claims of all others. Joint use is not enough….

Tran v. Macha, 213 S.W.3d 913, 914-15 (Tex. 2006) (per curiam) (quoting *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex.1990)).

[5] A promise or agreement for the sale of an interest in real property is not enforceable unless in writing and signed by the person to be charged. TEX. BUS. & COM. CODE § 26.01. Oil and gas interests are real property and thus

and a presumed-grant does not strictly comply. This issue hasn't yet been raised in the presumed-grant context. When applied to ancient documents before a certain point, the statute of frauds did not raise a concern because "[p]rior to the act of the Fourth Congress of the Republic of Texas of 1840 making sales of land void unless evidenced by an instrument in writing, lands could be sold in Texas orally, no deed of conveyance being necessary for the transfer of title from one to another." *Page*, 381 S.W.2d at 952. That the doctrine wasn't discussed in connection with this rule for conveyances after that date is interesting, but it may be that the legal mechanism of the doctrine itself (it presumes "lawful origin" when the needed facts are in place, *Fuller*, 120 U.S. 534 at 673) simply doesn't raise the issue.

VII. Conclusion

The Supreme Court of Texas's *Van Dyke* opinion issued two sweeping new holdings: (1) that parties to double-fraction oil-and-gas deeds will be presumed to have misunderstood the nature of their interests; and (2) that mineral-deed title disputes may now be resolved without construing the deed's text. There is no doubt that each of the Court's two historic holdings will dramatically change the way that oil-and-gas title disputes are litigated for decades to come. But in those same decades, the questions left unanswered by the Court's opinion must also be litigated. Until then, Texas oil-and-gas practitioners will have plenty of new issues to test across Texas courtrooms.

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their transfer or assignment is subject to the statute of frauds. *Long Trusts v. Griffin*, 222 S.W.3d 412, 416 (Tex. 2006) (citing TEX. BUS. & COM. CODE § 26.01).