THE $DUHIG$ RULE IN “REAL LIFE”

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THE Duhig RULE IN “REAL LIFE”

I. INTRODUCTION

Being asked to address the topic of “real life” applications of the Duhig rule caused this author to consider that the rule may be perceived by many as esoteric and of little practical significance. On the contrary, many chains of title require attorneys and landmen to understand the rule and apply it correctly. The fact that the rule has been mentioned in more than 75 Texas appellate opinions supports the proposition that the rule is material. Many of these opinions serve as prime examples of real life applications of the rule. They are used herein to develop and demonstrate an analytical framework that will facilitate proper application of the rule.

Failing to recognize a potential Duhig rule situation or to properly apply Duhig can result in substantial expense. A lease might be taken from the wrong party, most likely resulting in a loss of money paid as bonus because the lessor owned no interest in the “leased” premises. A mineral owner with a significant interest in a small tract along a horizontal drainhole might not be leased, resulting in the owner receiving the owner’s mineral interest fraction of 100% of production from the well (e.g., 1/4 of 100% of production), after their share of costs have been recovered from production. Non-participating royalty proceeds might be paid to someone who owns no interest. Pooling consent might not be obtained from the owner of a 1/8 non-participating royalty interest in small tract along a horizontal drainhole, resulting in the royalty owner receiving 1/8 of production from the well. Title attorneys, field landmen, in-house landmen, and division order analysts all need to understand Duhig.

For the most part, the application of the Duhig rule by the courts has been consistent with the analysis in the Duhig opinion, as expanded and clarified by subsequent opinions. Under this analysis, the Duhig rule applies to a deed or other instrument affecting Texas real property if the following factors are present:

1. The chain of title first presents an outstanding mineral interest or interests, including royalty, burdening the subject land.
2. A subsequent owner executes an instrument affecting the land that either reserves an interest or in which the granting clause on its face conveys less than the whole.
3. Either (a) the granting clause of the instrument purports to convey the land or a certain, identified interest therein, or (b) the instrument warrants title to the land or the interest.
4. What the grantor purports to convey or warrants exceeds the grantor’s interest.

Unfortunately, some cases reach a result that may seem outside this analytical framework. Such cases call for protective action (e.g., a comment and requirement in a title opinion and satisfaction of the requirement).
II. THE FIRST “REAL LIFE” APPLICATION: Duhig v. Peavy-Moore Lumber Co.

A. THE FACTS OF THE DUHG CASE

The Duhig rule is derived from a 1940 Texas Supreme Court opinion, Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878. Duhig unsurprisingly presents a classic set of facts for the application of the rule.

The estate of Alexander Gilmer, deceased, conveyed land in the Josiah Jordan Survey in Orange County to W. J. Duhig, but reserved an undivided 1/2 interest in the minerals, creating the outstanding mineral interest. Mr. Duhig thereafter conveyed the survey to Miller-Link Lumber Company. The deed to the Lumber Company contained the requisite reservation language, purporting to retain an undivided 1/2 interest in the minerals. Peavy-Moore Lumber Company succeeded to the title of Miller-Link Lumber Company in 574-3/8 acres of the survey.

Peavy-Moore Lumber Company sued Mrs. Duhig and others who claimed under W. J. Duhig for the title and possession of the 574-3/8 acres. The trial court ordered that the lumber company recover title and possession of the land, except all minerals and mineral rights therein, and that as to the minerals and mineral rights, it take nothing against the defendants. The trial court in effect determined that the reservation was effective to retain 1/2 of the minerals for Duhig, which when taken with the outstanding 1/2 interest left the grantee with only the surface. On appeal by the lumber company, the court of civil appeals reversed the judgment of the trial court and rendered judgment in favor of the lumber company.

Mrs. Duhig’s contention, sustained by the trial court and denied by the court of civil appeals, was that W. J. Duhig reserved for himself in his conveyance of the land to Miller-Link Lumber Company the remaining undivided 1/2 interest in the minerals that had not been reserved by Gilmer. Peavy-Moore Lumber Company took the position that the deed from Duhig did not reserve the remaining 1/2 interest in the minerals, but that it in effect excepted only the 1/2 interest that had theretofore been reserved by Gilmer’s estate. Peavy-Moore argued that Duhig’s deed therefore transferred title not only to the surface estate, but also to Duhig’s 1/2 interest in the minerals.

The deed to Miller-Link Lumber Company is a general warranty deed, in which the granting clause standing alone purported to convey land described as that certain tract or parcel of land in Orange County, Texas, known as the Josiah Jordan Survey, and further identifying the land by survey and certificate number and giving a description by metes and bounds. After the habendum clause and the clause of general warranty appeared the following: “But it is expressly agreed and stipulated that the grantor herein retains an undivided 1/2 interest in and to all mineral rights or minerals of whatever description in the land.”
B. THE ANALYSIS IN DUHIG

Duhig states that the “judgment of the Court of Civil Appeals should be affirmed by the application of a well settled principle of estoppel.” Id. at 880. The analysis following the court’s invocation of estoppel and therefore apparently in support of it, is to the effect that:

a. The granting clause purported to convey all the surface and minerals. Id. at 880.

b. The deed warranted title to “said premises.” Id.

c. Assuming the reservation language is given effect, the warranty was breached upon the execution of the deed, and the grantor would hold the very interest that it warranted but failed to deliver. Id.

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

e. The rule above quoted prohibits the assertion of title in contradiction or breach of the warranty. Id.

f. If such enforcement of the warranty is a fair and effectual remedy in cases of after-acquired title, it is equally fair and effectual and also appropriate under the facts in Duhig. Id.

g. The covenant of general warranty operates as an estoppel denying the grantor and those claiming under it the right to assert a title adverse to the interest in question. Id. at 881.

This analysis seems heavily weighted towards the warranty provision and therefore casts some doubt as to whether the court would have reached the same result if the deed had not contained a warranty clause. The court, however, also considered that the deed as a whole “purported” to convey the surface and 1/2 of the minerals.

Probably as a result of the warranty emphasis in Duhig, subsequent opinions demonstrate some confusion about the proper analysis. See Walker v. Campuzano Enterprises, Ltd., No. 02-10-00061-CV, 2011 WL 945167 (Tex. App.—Fort Worth Mar. 17, 2011, no pet.) (mem. op.). The court in Walker wrote:

Applying the rules and principles of law expressed in Duhig, we conclude that the Walkers breached their warranty at the very time of the execution and delivery of the deed to AAQHR, for the deed warrants the title to the surface estate and to an
undivided one-half interest in the minerals. (citation omitted) The Walkers thereby purported to convey to AAQHR an undivided one-half interest at a time when they owned exactly a one-half interest.

*Id.* at 5. The *Campuzano* analysis confuses the effect of the warranty clause and the granting clause. A covenant of general warranty does not enlarge the title conveyed, nor does it determine the character of the title. *Duhig*, 144 S.W.2d at 880; *Keith v. Seymour*, 335 S.W.2d 862, 868 (Tex. Civ. App.—Houston 1960, writ ref’d n.r.e.). The granting clause, not the warranty, purports to convey a certain interest. *Duhig*, 144 S.W.2d at 880.

### III. THE FIRST RULE OF THE ANALYSIS: Duhig DOES NOT APPLY IF THE GRANTOR OWNS THE ENTIRE MINERAL ESTATE; THERE MUST BE AN OUTSTANDING INTEREST

The *Duhig* fact situation would present no problem if W. J. Duhig had owned 100% of the minerals. He would have been able to convey 1/2 of the minerals and retain the other 1/2, as he may have attempted to do. For the *Duhig* rule to apply, there must be an outstanding interest at the time of the deed in question.

Although the immediately preceding paragraph may seem the obvious, it is not the first such statement. In *Garza v. Prolithic Energy Co.*, 195 S.W.3d 137 (Tex. App.—San Antonio 2006, pet. denied), the court wrote:

> In this case, the grantors owned the entire mineral estate, and the conveyances did not exceed the amount of the mineral estate that was owned. Accordingly, the warranty with regard to the mineral estate conveyed was not breached, and the *Duhig* doctrine is not applicable.

*Id.* at 146.


> There is no competent evidence in the record as to the outstanding ownership of the surface or the mineral estate before the execution of the deed in question, so we do not have the problem considered by the Supreme Court in *Duhig* . . . and its progeny.
IV. APPLICATION OF THE DUHIG RULE DOES NOT REQUIRE THE EXISTENCE OF AN EXPRESS WARRANTY; IT CAN APPLY BASED ON A PURPORTED CONVEYANCE IN A DEED THAT DISCLAIMS WARRANTY

Recognizing that a chain of title first presents an outstanding interest and then an instrument purporting to reserve an additional interest is not rocket science. After these first two steps of the analysis, however, the “fun” begins.

The reasoning in DuHig raises the following question: Does the application of the DuHig rule require a warranty provision? The Texas Supreme Court’s DuHig analysis unquestionably emphasizes the warranty clause in the deed, referring to it no less than six times in its discussion of the basis for applying the principle of estoppel in the case. The court, however, began its analysis by addressing the extent of the estate purportedly conveyed by the granting clause. DuHig leaves room to argue that estoppel should apply, even in the absence of a warranty, to uphold the interest the granting clause purports to convey.

This argument was made successfully in Blanton v. Bruce, 688 S.W.2d 908 (Tex. App.—Eastland 1985, writ ref’d n.r.e.). The deed in question in Blanton contained traditional granting language (i.e., “granted, sold and conveyed” a tract of land). The court indicated the deed was therefore not a “quitclaim.” Id. at 911. The deed, however, did not contain a warranty. The court stated that the deed nevertheless “purports to convey” the described property. Id. In reviewing DuHig, Blanton states, “The court [in DuHig] does not say that the announced rule will apply only when the deed contains a ‘general warranty.’” Id. Blanton held that the DuHig rule applied to the deed because it purported to convey a definite interest in the property. Id. at 914-15.

In DuHig the court looked to the application of the principle of estoppel in after-acquired title cases to support its decision. 144 S.W.2d at 880. The court in Blanton was influenced by that aspect of the analysis, quoting the following from DuHig:

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

688 S.W.2d at 911. Blanton held that the DuHig rule applied to the subject deed because the deed purported to convey a definite interest in the property, noting that under Lindsay v. Freeman, covenants of warranty are not necessary for the passage of after-acquired title by estoppel. Id. at 913-14.

Prior to Blanton, the United States Court of Appeals for the Fifth Circuit, applying Texas law, had indicated in dicta that the DuHig rule should apply in the absence of a warranty. American Republics Corp. v. Houston Oil Co., 173 F.2d 728 (5th Cir.), cert. denied 338 U.S.
858, 70 S.Ct. 101, 94 L.Ed. 526 (1949). The question in American Republics was whether the Duhig rule applied to a deed containing only a special warranty (i.e., a warranty against claims by, through, or under the grantor only). In holding that the estoppel by deed rationale discussed in Duhig was operative even though the deed did not contain a general warranty, the court said:

The district judge seems to have been of the opinion that because the deed contained a covenant not of general, but of special, warranty, that this in some way released grantor from the estoppel which the recitations of ownership in its deed would have otherwise imposed. This will not do. A deed with special warranty, indeed, as we have seen, a deed with no warranty at all, as completely estops the grantor from making a claim of title which would diminish the title of his grantee as would a deed with general warranty.

* * *

For, as we have seen, where the grant is based on an affirmation of ownership and is a conveyance of title as opposed to a chance of title, there is an effectual estoppel at once raised to assert title in diminution of the grant whether the covenant of warranty is general or special, or, indeed there is no covenant of warranty at all.

* * *

In Duhig’s case, as here, what is important and controlling is not whether grantor actually owned the title to the land it conveyed, but whether, in the deed, it asserted that it did, and undertook to convey it. (citations omitted and emphases added)

173 F.2d at 734.

As noted in Blanton, leading authorities in the field of oil and gas law have suggested that the rule of estoppel by deed announced in Duhig should apply to a deed purporting to convey a definite interest without regard to the presence or scope of the warranty. Hemingway, The Law of Oil and Gas, § 3.2, at 118 (2d ed. 1983); Hemingway, After-Acquired Title in Texas-Part II, 20 Sw. L. J. 322 (1966); 1 H. Williams and C. Myers, Oil and Gas Law, § 311.1, at 584. 688 S.W.2d at 913.

Although the Texas Supreme Court has yet to decide that the Duhig rule applies in the absence of an express warranty, the proposition nevertheless enjoys substantial support. A contrary decision by the Supreme Court would go against the apparent grain. It therefore seems relatively safe to apply estoppel in the absence of an express warranty, if the deed otherwise supports the application.

As a matter of semantics, one could argue that the rule applied in cases where there is no warranty is the Blanton rule, rather than the Duhig rule. After all, Duhig was a case involving a general warranty, whereas at issue in Blanton was a deed with no warranty. The court in
Blanton, however, construed Duhig as applicable to the facts in Blanton, regardless of the warranty or lack thereof.

V. **DUHIG DOES NOT APPLY TO QUITCLAIMS**

Corollary to the concept that the Duhig rule applies based on a purported grant is the proposition that the rule does not apply to a quitclaim, which purports to convey no specific interest, only whatever the grantor owns. Although the Texas Supreme Court has not definitively addressed the issue, there is substantial authority for the proposition that the Duhig rule does not apply to a quitclaim.

Before discussing the authority, an understanding of the nature of a quitclaim is helpful. As stated in Leopold, Texas Practice: Land Titles and Examination Vol. 5, § 31.2, at 218-19 (3d ed. 2005):

> The character of an instrument as constituting a deed or merely a quitclaim is determined according to whether it assumes to convey the property described, and on its face has that effect, or merely professes to assign the grantor’s title, if any, to the property. If according to the face of the instrument, its operation is to convey the property, it is a deed. On the other hand, if it purports to transfer no more than the title of the grantor, it is only a quitclaim. (footnotes and citations omitted)

By their very nature, quitclaims fall outside the reasoning which the Duhig court relied on to apply the doctrine of estoppel. In deciding whether an instrument is a quitclaim, courts look to whether the language of the instrument, taken as a whole, conveyed property itself or merely the grantor’s rights. Geodyne Energy Income Production Partnership I-E v. Newton Corp., 161 S.W.3d 482 (Tex. 2005). “A quitclaim deed is not a conveyance or a muniment of title.” Rogers v. Ricane Enterprises, Inc., 884 S.W.2d 763, 769 (Tex. 1994). “By itself, it does not establish any title in those holding the deed, but merely passes the interest of the grantor in the property.” Id. If an instrument neither purports to convey any interest nor warrants any interest, under the reasoning of the court in Duhig, there would be no basis for the Duhig rule to apply.

The Texas Supreme Court has declined to apply estoppel to quitclaims in other types of cases (i.e., estoppel-by-deed and after-acquired-title, as opposed to over-conveyance). In Kerlin v. Sauceda, 263 S.W.3d 930 (Tex. 2008), the plaintiffs sued for royalties under reservation clauses in various quitclaims to various portions of Padre Island. The court determined that the doctrine of estoppel by deed did not apply to prevent the defendants from denying the grantors had title because the deeds in question were quitclaims. Id. at 930. The court has also declined to apply the estoppel doctrine of after-acquired title to quitclaims. Rogers, 884 S.W.2d at 769; Halbert v. Green, 293 S.W.2d 848 (Tex. 1956); Lindsay v. Freeman, 18 S.W. 727, 730 (Tex. 1892). It is therefore unlikely that the court would reach a different result in an over-conveyance case.
Before applying the *Duhig* rule in *Blanton* the court first concluded that the deed in question was not a quitclaim, *id.* at 911, suggesting the court would have arrived at a different result had the deed in question been a quitclaim.

The Arkansas Supreme Court has held *Duhig* inapplicable to a deed which “warranted nothing but conveyed by quit-claim.” *Opaline King Hill v. Gilliam*, 284 Ark. 383, 682 S.W.2d 737 (Ark. 1985).

Additional support for the proposition that the *Duhig* rule does not apply to quitclaims appears in treatises. *See, e.g.*, RESTATEMENT (FIRST) OF PROPERTY §§ 166-67 (noting that “a quitclaim deed . . . affords no foundation for . . . an equitable transfer”). The *Duhig* rule results in an equitable transfer. Under the Restatement rule, equitable transfer by estoppel, and therefore *Duhig*, do not apply to a quitclaim.

VI. HOW WILL I KNOW A QUITCLAIM IF I SEE ONE?

An instrument with a granting clause which purports to convey title to the land or a certain interest in the land is not a quitclaim, and an instrument which conveys only whatever right, title or interest the grantor owns is a quitclaim, assuming there is no other language in the deed that is relevant to the classification. Unfortunately, determining whether an instrument is a deed or quitclaim is not as simple a matter as looking to the granting clause. Whether a particular instrument is a quitclaim depends on whether the instrument conveys the land itself or a mere chance of title, viewing the instrument as a whole. *Geodyne Energy*, 161 S.W.3d at 486; *Porter v. Wilson*, 389 S.W.2d 650, 654 (Tex. 1965); and *Cook v. Smith*, 174 S.W. 1094, 1095 (Tex. 1915). The instrument should be given effect as a conveyance if the language of the instrument as a whole indicates an intent to convey the property or a defined interest therein, not just whatever interest the grantor may own therein.

In *Geodyne* the deed (1) conveyed “all of [Geodyne’s] right, title, and interest” in the described lease “AS IS, AND WHERE IS, WITHOUT WARRANTY OF MERCHANTABILITY,” (2) provided that “this Assignment hereby conveys to Assignee . . . all of Assignor’s right, title, and interest on the effective date hereof in and to the Property,” and (3) concluded in the habendum clause that the assignment was “WITHOUT WARRANTY OF TITLE, EITHER EXPRESS OR IMPLIED.” The court held that as a matter of the law this was a quitclaim. 161 S.W.3d at 486-87. The *Geodyne* analysis is logical and straightforward.

*Cook*, at least in this author’s opinion, is a “stretch.” In *Cook* the court construed an instrument which contained the following clauses:

Granting Clause: “. . . have bargained, sold, released and forever quitclaimed, and by these presents do hereby bargain, sell, release and forever quitclaim, . . . all my right, title and interest in and to that certain tracts of parcels of land [sic]. . .”
Habendum Clause: “To have and to hold the said premises, together with all and singular the rights, privileges and appurtenances thereto in any manner belonging to the said A. A. Neff and his heirs and assigns forever, so that neither I, the said R. Potts, nor my heirs nor any person or persons claiming under me, shall at any time hereafter have, claim or demand any right or title to the aforesaid premises or appurtenances or any part thereof.”

Intention Clause: This clause follows a description by block and number of a large number of lots including the lot in controversy and also several small tracts by metes and bounds. The clause reads as follows:

“. . . and all other real estate that I now own and am possessed of in the town of Paducah, in Cottle county, Texas. All of the above town property is situated in the town of Paducah, in Cottle county, Texas, as shown by the original recorded plat of said town, of record in vol. 5, page 81, in the deed records of Cottle county, Texas; and it is my intention here now to convey to the said A. A. Neff all the real estate that I own in said town of Paducah in Cottle county, Texas, whether it is set out above or not.”

The Court made special reference to the granting clause and the habendum clause of the instrument and wrote, “If the character of the instrument were dependent, alone, upon the construction of [the granting and habendum clauses] . . . there could be no doubt . . . of its being simply a quitclaim . . . .” Id. at 1095. The court held, however, that when the instrument was construed as a whole and the intention clause given due weight and consideration, the instrument was properly construed as one purporting to convey the land rather than such interest the grantor might have therein. Id. at 1097. Whether the intention clause contained language sufficient to evidence an intent to convey the lots, as opposed to the grantor’s interest therein, is at best arguable.

In Porter, the court limited the effect of its Cook decision based on the existence of the intention clause:

We have heretofore set out the clauses under consideration in Cook v. Smith, supra, wherein it was said that the habendum clause would not convert a “right, title and interest” instrument into one purporting to convey the land itself, although it was held that the “Intention Clause” would have that effect. In our opinion Cook v. Smith sets forth the better rule insofar as the construction and effect of the habendum clause is concerned. It seems that a grantor who deliberately chooses the words, ‘right, title and interest’ would not intend to destroy the effect of such words by using an habendum clause using the common phrase, ‘To have and to hold the above described premises.

Id. at 657.
In *Bryan v. Thomas*, 365 S.W.2d 628 (Tex. 1963), the court held the deed under consideration was more than a quitclaim deed. Although it recited that the grantors “have granted, sold, conveyed, assigned and delivered and by these presents do grant, sell, convey, assign and deliver unto the said grantee all of our undivided 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 situated in Hunt County, Texas,” it also granted to Thomas the right of ingress and egress at all times for the purpose of mining, drilling and exploring the land for oil, gas and other minerals and removing the same therefrom. It also provided that the grantee shall own all gas and other minerals in and under the lands, together with all royalties and rentals that might be provided in future oil and gas leases. The deed concluded with the “usual” habendum and general warranty clauses. In applying *Cook*, the court said:

To remove the question from speculation and doubt we now hold that the grantee in a deed which purports to convey all of the grantor’s undivided interest in a particular tract of land, if otherwise entitled, will be accorded the protection of a bona fide purchaser.

*Ids.* at 630. The court did not expressly overrule the previous opinions which held that one who takes under a quitclaim is not a bona fide purchaser, but the court’s holding implies such a result.

Neither *Cook*, *Porter*, *Bryan* nor *Geodyne* is an estoppel case. The purpose of the analysis by the Texas Supreme Court therein was to determine whether the grantee had constructive notice of unrecorded instruments (*Cook* and *Bryan*), could rely on the instruments as color of title under one of the limitation statutes (*Porter*), or could bring a fraud claim based on the instrument (*Geodyne*). Based on the holding in *Bryan*, it can be argued that whether an instrument is a quitclaim is irrelevant to the determination of whether the grantee is a bona fide purchaser. It is conceivable that a court might distinguish *Cook* and *Bryan* as inapplicable to estoppel questions. One problem with such a distinction is that it would result in a deed being a quitclaim deed for one purpose but not another, unless one assumes that whether an instrument is a quitclaim is no longer relevant to the *Cook* and *Bryan* question (i.e., whether the grantee is a bona fide purchaser).

The recent court of appeals opinion, *Enerlex, Inc. v. Amerada Hess, Inc.*, 302 S.W.3d 351 (Tex. App.—Eastland 2009, no pet.), strayed from the *Bryan* analysis, returning to the *Cook* analysis, deciding whether an instrument was a quitclaim to determine whether the grantee was a bona fide purchaser. Putting aside the question there discussed of whether the deed purported to convey all minerals in seven sections or only the grantor’s interest in those minerals, and assuming the deed in fact conveyed only the grantor’s interest, the *Enerlex* opinion is instructive on the issue of whether a warranty clause is sufficient to invoke the *Duhig* rule. The court had held that the granting clause addressed only the grantor’s right, title and interest. The warranty clause in the deed was as follows:

Grantor does hereby warrant said title to Grantee it’s [*sic*] heirs, successors, personal representatives, administrators, executors, and assigns forever and does hereby agree to defend all and singular the said property unto the said Grantee herein it’s [*sic*] heirs, successors, personal representatives, administrators,
executors, and assigns against every person whomsoever claiming or to claim the same or any part thereof.

The court recognized the existence of the general warranty provision, but held that such language did not preclude the deed from being a quitclaim. As support for this conclusion, the Court cited Clark v. Gauntt, 161 S.W.2d 270 (Tex. 1942).

In Clark, a deed of trust purported to convey the grantor’s interest at the time it was executed and not any greater interest or estate. The warranty was as to “the title to said property conveyed herein.” The court determined that the warranty was with reference to the property described in the granting clause as the grantor’s right, title and interest in the lots and that the grantor was not estopped by the deed of trust from asserting ownership of the interest that she thereafter acquired from her father, because the deed of trust did not purport to convey that interest and the warranty in the deed of trust did not relate to it.

Roberts v. Corbett, 265 S.W.2d 127 (Tex. Civ. App.—Galveston 1954, writ ref’d) followed Clark and reached the same result based on the following warranty language:

... and I do hereby bind myself, my heirs, executors and administrators to Warrant and forever defend all and singular the above title unto the said T. J. Poole, Jr., heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Although the clauses in Clark and Roberts are not identical, they both refer back to the title conveyed, specifically in the case of Clark and implicitly in the case of Roberts. Logic supports these decisions and the rule that a warranty referring back only to whatever interest the grantor owned does not render the deed something other than a quitclaim and will not support the application of estoppel and therefore the Duhig rule.

A clause that warrants something greater arguably yields a different result. Consider an instrument in which the granting clause purports to transfer only the grantor’s “right, title and interest” in a certain, specifically described tract of land, but warrants title to the “tract of land described above.”

Another issue in determining whether the language of an instrument indicates a quitclaim appears in Enerlex, 302 S.W.3d 351. The grantee argued that the deed was not a quitclaim deed because it was not restricted to any interest the grantor may have had and, therefore, the deed conveyed an interest in property. The grantee argued that the grantor conveyed “all right, title and interest” in the seventy-one sections rather than “my right, title, and interest” or “all right, title, and interest that I may own.” The court believed the grantee read too much into this distinction and decided that the phrase “all right, title, and interest” was necessarily limited to the grantor’s right title and interest. Id. at 355. This decision may be surprising to many.

Despite Clark and Roberts, the Cook, Porter, Bryan, Geodyne and Enerlex opinions should be kept in mind in trying to determine whether a deed is a quitclaim for the purpose of avoiding application of the Duhig rule. In any event, the analysis will require more than just a
review of the granting clause. The instrument must be considered in its entirety. A cautious approach would be to consider the construction of similar instruments as uncertain and to take necessary precautionary measures (e.g., taking a top lease).

VII. **DUHIG DOES NOT APPLY TO A PARTITION DEED BECAUSE A PARTITION DEED DOES NOT PURPORT TO CONVEY ANYTHING**

*Zapatero v. Canales*, 730 S.W.2d 111 (Tex. App.—San Antonio 1987, writ ref’d n.r.e.) held that *Duhig* does not apply to a partition deed.

Zapatero and Canales each owned the surface of adjoining tracts of land. Each also owned 1/2 of the minerals in both tracts. The tract in which Canales owned the surface was burdened by an outstanding 1/16 non-participating royalty interest. They executed a partition agreement covering the mineral estate in both tracts. They partitioned the executive rights, bonus and delay rentals to correspond to surface ownership. The partition agreement gave each a 3/32 non-participating royalty interest in the other’s tract. The parties did not discuss the existence of the outstanding 1/16 royalty interest in Canales’ tract, nor is it mentioned in the partition agreement.

Canales contended that Zapatero alone should bear the 1/16 royalty, asserting *Duhig*, because Zapatero conveyed 1/2 of the minerals to Canales and should therefore bear the full non-participating royalty interest. The court of appeals wrote:

The *Duhig* rule is based on an estoppel theory that one who purports to convey a mineral interest through warranty deed and, at the same time, reserves a mineral interest is estopped from asserting any title to the reserved minerals until the grantee is made whole. (citation omitted) Clearly, in order for *Duhig* to apply, there must be a conveyance of a mineral interest. However, in the case before us, no conveyance was made. The parties executed a partition agreement. It has long been the law in Texas:

that a partition deed does not operate as a conveyance or transfer of title, the effect being to divide the property and to give to each the share which he already owned by virtue of some prior deed or other conveyance, (citations omitted), the reason being that the parties already owned their respective interests and a partition deed from one to another is not the conveyance of title but merely the division of the property so that each may have exclusive use and occupancy and the right to dispose of as he sees fit his own land, to make it in a form certain instead of an undivided interest in the whole.

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730 S.W.2d at 115-16. The court held that *Duhig* does not apply to partition deeds because, in partition deeds, no conveyance occurs. *Id.* at 116.

VIII. THE EFFECT OF “SUBJECT TO” CLAUSES AND OTHER REFERENCES ON THE *DUHIG* RULE: THEY LIMIT WHAT THE DEED PURPORTS TO CONVEY AND THEREFORE APPLICATION OF THE *DUHIG* RULE

Even though an instrument constituting a deed, as opposed to a quitclaim, contains a granting clause that purports to convey more than the grantor owns, the *Duhig* rule does not necessarily apply. Application of the *Duhig* rule to a deed will be avoided by a properly drafted “subject to” clause and other language as well.


“It is a general rule, supported by many authorities, that a deed purporting to convey a fee simple or a lesser definite estate in land and containing covenants of general warranty of title or of ownership will operate to estop the grantor from asserting an after-acquired title or interest in the land, or the estate which the deed purports to convey, as against the grantee and those claiming under him.” *Duhig*, 144 S.W.2d at 880. The “subject to” clause excepts from the grant the matters referred to therein. The deed therefore does not purport to convey it, and the *Duhig* rule should not apply. Several Texas opinions are in agreement as to this point. See e.g., *Wolfe v. Devon Energy Production Co.*, 2012 WL 851678 (Tex. App.—Waco 2012, pet. for review filed June 29, 2012); *Bright v. Johnson*, 302 S.W.3d 483 (Tex. App.—Eastland 2009, no pet.); *Haddad v. Boon*, 609 S.W.2d 609 (Tex. Civ. App.—Amarillo 1980, writ ref’d n.r.e.). Other Texas cases, however, involve unique fact circumstances rendering the effect of the “subject to” clause on a *Duhig* claim less certain.

Few Texas cases directly address the effect of a specific “subject to” clause on the *Duhig* rule. This gap leaves room for questions about whether all “subject to” clauses avoid its application. Some clauses surely leave no doubt, such as a clause that expressly makes a grant subject to a well-defined interest in a particularly described prior instrument (e.g., subject to the 1/8 mineral interest reserved by M. Steve Smith in that certain deed dated May 15, 2008, recorded in Volume 777, Page 666, Official Public Records, Lavaca County, Texas). Others, however, may be so limited as to have no impact on the rule, depending on the underlying facts. Consider the effect of a clause making the grant subject to all previously reserved mineral interests, if the outstanding interest was created by grant, rather than reservation.
A strong argument was made in *Philipello v. Taylor*, 2012 WL 1435171 (Tex. App.—Waco 2012, pet. for rev. filed June 7, 2012), that the “subject to” clause there was not sufficient to avoid *Duhig* based on the facts of the case, which are as follows: Bill and Velma Clements owned a tract of land in Robertson County; in 1982 they conveyed an undivided 1/2 mineral interest in the land to their sons, Billy and Larry, as a gift; the gift deed was timely recorded in 1991; Bill and Velma conveyed part of the tract to the Nelson Family Farming Trust; the deed to the trust included a clause purporting to reserve a 1/4 mineral interest to the Clements; the deed to the trust did not specifically reference Billy and Larry’s 1/2 mineral interest; instead, it provided, “It is specifically agreed and understood by and between the Grantors and Grantee that this conveyance is subject to all leases, easements, restrictions, covenants, encroachments and ordinances of record and actually affecting the property on the ground.” The court recognized that each of the following positions was arguable:

a. The 1991 deed implicitly referenced the 1982 conveyance of 1/2 of the minerals to Billy and Larry, even though it did not expressly refer to the deed or the interest.

b. Including the terms “restriction” and “covenant” in the deed supported the contention that the 1991 deed implicitly referenced the 1982 conveyance to Billy and Larry and the deed, thus, did not support application of *Duhig*.

*Id.* at 8. The court noted that “restriction” is defined and commonly used to mean “[a] limitation (esp. in a deed) placed on the use or enjoyment of property,” citing *BLACK’S LAW DICTIONARY* 1054 (7th ed. 2000), and that “covenant” is defined as “[a] formal agreement or promise, [usually] in a contract.” *Id.* The court said that either of these terms arguably supports the assertion that the 1991 deed implicitly referenced the 1982 conveyance, especially considering the 1982 deed was properly recorded. *Id.*

Another unusual case involves a deed with two “subject to” clauses. The deed at issue in *Gore Oil Co. v. Roosth*, 158 S.W.3d 596 (Tex. App.–Eastland 2005, no pet.) purported to reserve a 1/8 non-participating royalty interest in a tract burdened by a 1/16 non-participating royalty interest. The deed contained two “subject to” clauses. The deed provided in relevant part:

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

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

In addition to the latter, more traditional “subject to” clause, the deed contained a “subject to” provision in the reservation clause. If the deed contained only the second “subject to” clause, under the principles discussed hereinabove, the grantee would bear the outstanding 1/16 royalty. *See, e.g.*, *Bass v. Harper*, 441 S.W.2d 825 (Tex. 1969). To give the first, more specific “subject
clause” any meaning, however, would instead subject the grantor’s reserved interest to the 1/16 royalty.

Consistent with that analysis, the working interest owners in the case argued that the second “subject to” clause limited the conveyance to all other reservations of record after first deducting the outstanding 1/16 royalty interest from the 1/8 royalty reservation. They further contended that the second clause is “belt and suspenders” language often used by scriveners and should be subjugated to the first clause. The court, however, indicated that such a construction would render the second clause superfluous. *Id.* at 600.

The court said that the paragraphs quoted above appear to make both the reservation and the conveyance “subject to” the prior outstanding conveyances and reservations, and that the parties could not intend for both the grantor and grantee to bear the full burden of the outstanding royalty interest. *Id.* at 600-01. The court held the deed was reasonably susceptible to more than one meaning and therefore ambiguous. *Id.* at 600. When a written instrument is determined to be ambiguous, extrinsic evidence may be introduced to show the intent of the parties. *Smith v. Allison*, 301 S.W.2d 608, 612 (1956). In *Roosth*, other than the deed itself, the only evidence regarding the intent of the parties to the McKnight deed was an affidavit that had been filed in the county clerk’s office. 158 S.W.3d at 601. On the basis of the affidavit, the court upheld the trial court’s interpretation of the deed as reserving a full 1/8 interest. *Id.* at 602.

A problem for attorneys and landmen with the holding in *Roosth* is that it requires reliance on matters outside the deed and not necessarily in the public records for the purpose of determining title to the property. Since title attorneys and landmen are often required to interpret a deed based only on its contents, a prudent attorney or landman would be well-advised to take curative action to resolve the doubt in such a situation.

In *Roosth* the court also wrote that if the McKnight deed had not stated that the “conveyance is made and accepted subject to all restrictions, reservations, covenants, conditions, rights-of-way and easements now outstanding and of record” but merely conveyed the entire premises less the grantor’s reservation of a full 1/8 nonparticipating royalty interest, it “might” agree with the leasehold interest owners that *Duhig* would apply. *Id.* at 601.

References to previous instruments outside a “subject to” clause can also avoid the application of *Duhig*. Whether the reference defeats *Duhig* can turn on the stated purpose for which the reference is made.

*Benge v. Scharbauer*, 259 S.W.2d 166 (Tex. 1953), presents a twist on the *Duhig-*”subject to” analysis. In *Benge*, at the time of the deed, the tract was burdened by a 1/4 mineral interest. In *Benge* the grantor attempted to reserve a 3/8 non-executive mineral interest. The Texas Supreme Court first applied *Duhig*, indicating that the grantor purported to convey 5/8 of the minerals and therefore reserved only a 1/8 interest. *Id.* at 168.

The twist in *Benge*, however, was the court’s treatment of the future leases clause, providing to the grantor 3/8 of the bonus, rentals and royalty under future leases. “The difficult question in this case arises because of [that] provision.” *Id.* The court said:
The fractional part of the bonuses, rentals and royalties that one is to receive under a mineral lease usually or normally is the same as his fractional mineral interest, but we cannot say that it must always be the same. The parties owning the mineral interests may make it different if they intend to do so, and plainly and in a formal way express that intention. Here that intention is expressed by clear language in the deed that leases executed by the grantee under the power given shall provide for the payment of 3/8ths of all bonuses, rentals and royalties to the grantors.

Id. at 169.

The court’s holding minimizes the impact of Duhig on the grantor, by providing for the grantor all bonuses, rentals, and royalty under future leases otherwise attributable to the 1/4 mineral interest the grantor was estopped to claim. It does not appear from the opinion that any leases were in effect at the time of the deed in question. It is difficult to conceive of any economic benefit received by the grantee from the additional mineral interest it obtained under Duhig’s application.

Two justices dissented. Id. at 170. In the view of the dissent, the majority’s opinion was more “legalistic” than “realistic or equitable.” Id.

Authorities have cited Benge as applying the much-criticized two-grant theory. It has been written that Texas jurisprudence reflects a continuing trend to reject the “two-grant theory” in favor of a “four corners” construction harmonizing instruments in which multiple fractions are used. See, e.g., Richard F. Brown, Oil, Gas and Mineral Law, 61 SMU L. REV. 957, 961 (2008). The trend is justified:

While any particular case may be difficult to harmonize, the reality is that rarely would any party to these kinds of deeds intend anything other than a simple, single grant. That is, while rights to delay rentals, bonus, access, and to lease have been frequently negotiated, the quantum of interest is generally not expressed as a present interest and as a future interest with a different magnitude.

Id. Were Benge decided today, the result might very well be different.

Harris v. Windsor, 294 S.W.2d 798 (Tex. 1956) addressed the effect of a reference to a previous instrument for “all purposes.” The deed in Harris contained a reservation of 3/8 of the minerals. Following the description by metes and bounds, the deed contained this recital:

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

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

The deed from The Federal Land Bank of Houston to W. C. Windsor, referred to above, contained these provisions:

The terms of General Warranty herein contained are subject to all restrictions and reservations contained in that certain deed executed by G. W. Liverman in favor of L. M. Tems, dated November 12, 1923, and recorded in Volume ‘V-1’, page 188 of the Deed Records of Marion County, Texas, to which said deed and the record thereof reference is hereby made for all legal purposes.

The Federal Land Bank of Houston does bind itself, its successors and assigns to Warrant and Forever Defend all and singular the said premises unto the said W. C. Windsor, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof, in so far as the surface and one-half (1/2) interest in the oil, gas and other minerals in, to, on and under and that may be produced from the above described land are concerned, and no further.

In the deed from Liverman to Tems, Liverman had reserved 1/2 of the minerals in the land. When Harris executed the deed to Windsor he therefore owned only 1/2 of the minerals. The court declined to apply *Duhig* and held that the proper construction was to give full effect to the reservation. *Id.* at 800. The court said:

The construction of the Windsor-Harris deed is dependent upon the effect to be given to the clause “reference to which is made for all purposes,” and to the clause in the Federal Land Bank deed “reference is hereby made for all legal purposes.” . . . We are referred to no decision by this court which limits the expression “for all purposes” to the purpose only of description. The construction of this phrase was squarely presented to the Court of Civil Appeals at Galveston in *Remuda Oil Co. v. Wilson*, 264 S.W.2d 192, 196, writ ref’d n. r. e., where it was given the following construction:

In the present case, the reference is to the Johnson deed ‘for all purposes.’ By virtue of such reference, appellants were required to look to the Johnson deed to determine the extent of their purchase.’

*Id.* at 800-01.
IX. THE EFFECT OF A DEED THAT PURPORTS TO CONVEY A DEFINITE INTEREST LESS THAN THE WHOLE

In *Duhig*, the deed purported to convey all of the land, but reserve 1/2 of the minerals. Stated differently, the deed purported to convey the surface and 1/2 of the minerals. Only the mineral interest was at issue in the case. The *Duhig* rule should also apply to deeds purporting to convey only fractional mineral interests. *Kelln v. Brownlee*, 517 S.W.2d 568 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.) and *Bass v. Harper*, 441 S.W.2d 825 (Tex. 1969) support this proposition.

*Kelln*, although an after-acquired title case, supports the application of *Duhig* when the granting clause conveys only a fractional interest. The fact situation in *Kelln* is unique. The defendants owned an undivided 1/2 interest in the oil, gas, and other minerals in part of a section of land when they executed an oil and gas lease covering only that part. They executed two mineral deeds, each purporting to convey an undivided 50/640 mineral interest in all of the section. The working interest owner under the lease then pooled the entire section. The court determined that as a result of the pooling the defendants acquired for the duration of the pooled unit an undivided interest in the entire section. The court held that the defendants, having after-acquired title in the portion of the section in which they had no interest but for the pooling, were estopped to deny the title which they warranted to their grantees, citing *Duhig*. *Kelln*, 517 S.W.2d at 570.

In *Bass* the facts were as follows: the 90 acres in question had been leased for oil and gas; Bass owned the surface of the land, the executive rights to execute leases, and 8/14 of the 1/8 royalty under the existing lease (*i.e.*, the other 6/14 of the royalty were outstanding); Bass executed a deed in which the granting clause purported to convey a 1/2 interest in the land; and the deed included a clause stating that the grant was subject to reservations in previous deeds of 6/14 of the royalty. *Bass* argued that the grantee’s 1/2 interest was burdened by the outstanding 6/14 interest because of the “subject to” clause. The Texas Supreme Court agreed. Although *Bass* is not a classic *Duhig* rule case, because it contains no reservation clause, it nevertheless demonstrates a good *Duhig* rule analysis in a case where the grantor purports to convey only a certain fractional mineral interest. *Bass* also provides an example of the effect of a “subject to” clause on *Duhig*.

X. THE DUHIG RULE DOES NOT APPLY TO OIL AND GAS LEASES; DOES THAT FIT THE DUHIG ANALYSIS FRAMEWORK?

In a case deciding whether to proportionately reduce an overriding royalty interest reserved in an oil and gas lease, in addition to a 1/8 royalty, the Texas Supreme Court decided that the *Duhig* rule does not apply to oil and gas leases. *McMahon v. Christmann*, 303 S.W.2d 341 (1957). The lessees argued that the overriding royalty was to be reduced based on the lessors’ ownership of less than the full mineral interest in the land. The court held otherwise and wrote:
[T]here is sound reason for declining to extend [Duhig] to, and apply it in, the construction of oil, gas and mineral leases. We . . . know as a matter of common knowledge and experience that mineral leases are usually prepared, or standard forms completed, by the lessee. Even though a lessee knows a lessor owns less than the full fee title to the premises on which a lease is sought, he often, if not usually, prepares and insists upon a lease which purports to convey the entire fee in order to make certain that no fractional interest is left outstanding in the lessor. He is protected against the possibility of being forced to pay royalty on a greater interest than that actually owned by the lessor by the inclusion of a standard proportionate reduction clause in the lease. That clause protects the lessee but it does not operate to reduce the estate which the lessor purports to convey. (citation omitted) In many such cases, illustrated by the instant case, in which the lessor actually owns only an undivided interest in the minerals in the land described in the lease and in which there is a reservation of royalty, the lessee, by resort to the Duhig rule and even though owning through leases the entire 7/8ths working interest in the remainder of the minerals, could take, without paying therefor, the whole of the interest of the lessor in the minerals, including that reserved as royalty, and could, as well, recover damages from the lessor for breach of warranty. It is unthinkable and contrary to all modern human experience in the oil and gas industry to suppose that one owning an interest in the mineral fee would lease that interest for development of the mineral estate with no intention of receiving any of the returns from production of the minerals.

Id. at 344.

This reasoning was not agreed to unanimously by the justices deciding the case. In a concurring opinion one justice expressed his concern that the court undermined the effect of the Duhig rule by refusing its application in the construction of an oil, gas, and mineral lease. The concurrence noted that a deed conveys an interest in land, and an oil, gas, and mineral lease conveys a fee simple determinable interest in land and should therefore be treated equally by Duhig. Id. at 348.

An oil and gas lease purports to convey a fee simple determinable interest in the minerals. Some leases may convey only the lessor’s right, title and interest. Most, however, will purport to convey a fee simple determinable interest in the land, as opposed to only whatever interest the lessor owns. Some leases may not warrant title, but under Blanton, that fact is irrelevant. Leases generally do not contain “subject to” clauses or other exceptions. It is therefore difficult to fit the McMahon decision within the Duhig analysis. However, based on the reasoning of the majority opinion, it is probably a correct result.

XI. CLOSING

Most situations in which attorneys and landmen will be called on to analyze an instrument for the purpose of determining whether Duhig applies will fit neatly within the analytical framework described in Section I of this paper. The inapplicability of Duhig to oil and
gas leases does not fit within the analytical framework, but is a reasonable, recognized exception. Where some fact situations fall within the framework, particularly if the instrument includes traditional quitclaim language, may be difficult to determine. In such cases, it is recommended that protective action be taken, if possible, to avoid that risk.