**DING DONG DUHIG IS DEAD!***

By Terry E. Hogwood, Attorney

Recently, the author participated in the litigation of a case which involved, in part, the interpretation of a deed in light of the rule set down in the *Duhig v. Peavy-Moore Lumber Co*, Inc., 144 S.W.2d 878 (Tex. - 1940) (herein referred to as “Duhig” without further citation). That litigation spawned an investigation into the *Duhig* principles/cases and this resultant paper. It became apparent that there are separate and distinct exceptions to the *Duhig* Rule. Such exceptions, when combined with the legislative/judicial rules concerning constructive notice, appear to severely weaken the *Duhig* Rule and make it suspect as a true rule of property.

This paper will:

1. explore the specific exceptions to the *Duhig* Rule as set forth by the Texas courts and
2. look at the law of constructive notice and how the *Duhig* Rule could evolve.

The *Duhig* Case

The case of *Duhig v. Peavy-Moore Lumber Co.* was decided in 1940. A brief rendition of the facts, as disclosed from quotes in the case, will assist the reader in the evaluation of the legal principles set forth in the case.

“Through conveyance from the executor of the estate of Alexander Gilmer, deceased, W. J. Duhig became the owner of the Josiah Jordan survey in Orange County, subject however, to reservation by the grantor of an undivided one-half interest in the minerals. Thereafter Duhig conveyed the survey to Miller-Link Lumber Company, and in the deed it was agreed and stipulated that the grantor retained an undivided one-half interest in all of the mineral rights or minerals in and on the land... *Duhig* at Page 878 (emphasis added)

“The ownership by Gilmer's estate, and its assignees of an undivided one-half interest in the minerals in the land through the reservation in the first deed, which was duly recorded, is admitted by the parties. Plaintiffs in error, Mrs. Duhig and others, make no claim of title to the surface estate, but their contention, sustained by the trial court and denied by the Court of Civil Appeals, is that W. J. Duhig, their predecessor, reserved for himself in his conveyance of the land to Miller-Link Lumber Company the remaining undivided one-half interest in the minerals. Defendant in error, Peavy-Moore Lumber Company, takes the position that the deed last referred to did not reserve to or for the grantor such remaining one-half interest in the minerals, but that it in effect excepted only the one-half interest that had theretofore been reserved by Gilmer's estate and invested the grantee with title to the surface estate and an undivided one-half interest in the minerals.” *Duhig* at Page 879 (emphasis added)
"The deed from W. J. Duhig to Miller-Link Lumber Company is a general warranty deed, describing the property conveyed as that certain tract or parcel of land in Orange County, Texas, known as the Josiah Jordan Survey, further identifying the land by survey and certificate number and giving a description by metes and bounds. After the metes and bounds the following matter of description is added: "* * * and being the same tract of land formerly owned by the Talbot-Duhig Lumber Company, and after the dissolution of said company, conveyed to W. J. Duhig by B. M. Talbot". After the habendum and the clause of general warranty and constituting the last paragraph in the deed, appears the following: "But it is expressly agreed and stipulated that the grantor herein retains an undivided one-half interest in and to all mineral rights or minerals of whatever description in the land." Duhig at Page 879 (emphasis added)

A short restatement of the facts at this point is appropriate:

1. The deed at issue was a general warranty deed. One-half of the minerals were reserved in a prior, recorded instrument.
2. The granting clause preceded the warranty clause.
3. The mineral reservation was placed in the instrument after the habendum/warranty clause.

"...But the granting clause in this deed describes what is conveyed as the tract or parcel of land known as the Jordan survey. This description includes the minerals, as well as the surface, and thus the granting clause purports to convey both the surface estate and all of the mineral estate. Holloway's Unknown Heirs v. Whatley, 133 Tex. 608, 131 S.W.2d 89, 123 A.L.R. 843; Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543; Bibb v. Nolan, Tex.Civ.App., 6 S.W.2d 156, application for writ of error refused. Likewise the clause of general warranty has reference to "the said premises", meaning the land described in the granting clause, and, but for the last paragraph of the deed retaining an undivided interest in the minerals, would warrant the title to the land including the surface estate and all of the minerals.” Duhig at Page 879 (emphasis added)

“The granting clause of the deed, as has been said, purports to convey to the grantee the land described, that is, the surface estate and all of the mineral estate. The covenant warrants the title to "the said premises". The last paragraph of the deed retains an undivided one-half interest in the minerals. Thus the deed is so written that the general warranty extends to the full fee simple title to the land except an undivided one-half interest in the minerals.” Duhig at Page 880 (emphasis added)

“The language used in the last paragraph of the deed is that "grantor retains an undivided one-half interest in * * * the minerals". The word "retain" ordinarily means to hold or keep what one already owns. 54 C.J. p. 738; 37 Words & Phrases, Perm.Ed., p. 510; Websters New International Dictionary. If controlling effect is given to the use of the word "retains", it follows that the deed reserved to Duhig an undivided one-half interest in the minerals and that the grantee, Miller-Link Lumber Company, acquired by and through the deed only the surface estate. We assume that the deed should be given this meaning. When the deed is so interpreted the warranty is breached at the very time of the execution and delivery of the deed, for the deed warrants the title to the surface estate and also to an undivided one-half interest in the minerals. The result is that the grantor has breached his warranty, but that he has and holds in virtue of the deed containing the warranty the very interest, one-half of the minerals, required to remedy the breach. Such state of facts at once suggests the rule as to after-acquired title, which is thus stated in American Jurisprudence: "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

“In the instant case Duhig did not acquire title to the one-half interest in the minerals after he executed the deed containing the general warranty, but he retained or reserved it in that deed. Plaintiffs in error, who claim under him, insist that they should be permitted to set up and maintain that title against the suit of defendant in error and to require it to seek redress in a suit for breach of the warranty. What the rule above quoted prohibits is the assertion of title in contradiction or breach of the warranty. If such enforcement of the warranty is a fair and effectual remedy in case of after-acquired title, it is, we believe, equally fair and effectual and also appropriate here. Duhig at Page 880 (emphasis added)

“We recognize the rule that the covenant of general warranty does not enlarge the title conveyed and does not determine the character of the title. Richardson v. Levi, 67 Tex. 359, 365--366, 3 S.W. 444; White v. Frank, 91 Tex. 66, 70, 40 S.W. 962. The decision here made assumes, as has been stated, that Duhig by the deed reserved for himself a one-half interest in the minerals. The covenant is not construed as affecting or impairing the title so reserved. It operates as an estoppel denying to the grantor and those claiming under him the right to set up such title against the grantee and those who claim under it.” Duhig at Page 880 (emphasis added)

This is Duhig. Basically, if the grantor in a deed only owns, for example, one-half of the mineral estate and conveys all of Blackacre via general warranty deed, reserving one-half of the mineral estate, without:

1. **specifically** identifying the previously reserved one-half mineral interest and

2. without stating that, in addition to that outstanding mineral interest, the grantor is reserving an additional one-half mineral interest,

the Duhig Rule will operate to vest the one-half remaining mineral interest in the grantee.

**Expansion of Duhig**

Texas courts could not leave Duhig alone. As seen in the key expansion case, Blanton v. Bruce, 688 S.W.2d 908 (Tex.Civ.App. — 1985), estopping a grantor in a general warranty deed was not enough. No, the court had look at conveyances with “special” warranties (such as “by, through and under the Grantor, but not otherwise”) or **no** warranty at all.

The Blanton case dealt with a deed with no warranty clause. As stated by the court, even without an expressed warranty, the deed was not a quitclaim deed but rather a conveyance of the therein identified lands. It was argued that Duhig did not apply because there was no general warranty contained in the instrument. The argument was rejected. The court analogized the application of the doctrine of after acquired title (with no warranty present) to the Duhig situation with no warranty. Specifically:

“Duhig must be viewed in the context of its facts. There, with the deed containing a "general warranty," the court cites cases which use the covenant of warranty as a vehicle to support the passage of after-acquired title. See Hemingway, After-Acquired Title in Texas-Part I, 20 Sw.L.J. 97 (1966). The court does not say that the announced rule will apply only when the deed contains a "general warranty." In Lindsay v. Freeman, 18 S.W. 727 (1892), the Supreme Court held that covenants of warranty are not necessary for the passage of after-acquired title by estoppel if the conveyance purports to convey a definite estate.” Blanton v. Bruce, 688 S.W.2d 908 at Page 911 (Tex.Civ.App. — 1985)
“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...” Blanton v. Bruce, 688 S.W.2d 908 at Page 912 (Tex.Civ.App. — 1985)

“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. Thomas v. Southwestern Settlement & Development Co., 132 Tex. 413, 123 S.W.2d 290; Greene v. White, 137 Tex. 361, 153 S.W.2d 575, 136 A.L.R.” Blanton v. Bruce, 688 S.W.2d 908 at Page 912 (Tex.Civ.App. — 1985)

Thus, Duhig today appears to have application, where there is one or more outstanding mineral reservations in third parties, to not only attempted reservations by the grantor of undivided mineral interests in general warranty deeds but also to attempted reservations by the grantor of undivided mineral interests where there is no express warranty. In the author’s opinion, if the Duhig Rule had no glaring exceptions, it could properly be said to the a rule of property. However, as will be seen, there are large and significant exceptions to the Rule which work against an even, equal application of it.

The First Battlefield

Miles v. Martin, 321 S.W.2d 62 (Tex. 1959)

Miles ranks above all cases when it comes to powerful, well reasoned arguments against the application of the Duhig Rule. As will be seen, some of the arguments against the application of Duhig were not accepted IN THIS CASE. However, certain of the rules as found in the case have been followed in subsequent cases.

The case is not a case between a grantor and grantee. Rather, it involves a remote grantee in the chain of title and the argument over what was conveyed and what was reserved in an earlier conveyance by the grantor/respondent. The court started its analysis of the factual situation by identifying the interest sold/retained and the fact that the deed contained a covenant of general warranty.

“...The parties recognize that the Walls own an undivided one-fourth interest in the minerals by virtue of the reservation in their deed to respondent, subject to the leasing rights granted thereby. Although this interest was outstanding,[159 Tex. 340] it is not mentioned in the conveyance executed by respondent to the Pratts. The latter instrument purports to convey all of the surface, three-fourths of the bonus money, delay rentals and royalties, and all leasing privileges. It also contains a covenant of general warranty, and there is no contractual provision limiting the title, rights and powers which the grantees were to acquire thereunder. The form of the conveyance thus brings the case squarely under the Duhig holding, and we shall consider the facts and circumstances found by the trial court which respondent says render such rule inapplicable.” Miles v. Martin, 321 S.W.2d 62 at Page 65 (Tex. 1959) (emphasis added)

The deed from respondent to the first grantee in the chain of title reserved an express vendor's lien. The grantee executed a deed of trust on the land which recited that it was subject to the mineral interest reserved in the deed from L. A. Wall and wife to the respondent and to a mineral interest reserved in deed from respondent to the grantee. The deed and deed of trust were properly filed and recorded. The grantee stated in a contemporaneously executed instrument, clearly intended to be a part of the transaction, what interest was reserved by the respondent in its deed. The respondent argued that taking the deed/deed of trust together took the case out of the Duhig Rule. That is, even though the respondent was not a party to the deed of trust, it became not only part of the total contract surrounding the conveyance but also, since it was recorded, notice to
the petitioner in this case what quantum of interest was reserved by respondent in the earlier conveyance. The court enunciated the following rule, quoted not only here but in dozens of later cases citing the Miles case.

“[159 Tex. 341] It is well settled that separate instruments executed at the same time, between the same parties, and relating to the same subject matter may be considered together and construed as one contract. Howards v. Davis, 6 Tex. 174; 26 C.J.S. Deeds § 91, p. 840; 16 Am.Jur. Deeds 537, § 175. This undoubtedly is sound in principle when the several instruments are truly parts of the same transaction and together form one entire agreement. It is, however, simply a device for ascertaining and giving effect to the intention of the parties and cannot be applied arbitrarily and without regard to the realities of the situation.” Miles v. Martin, 321 S.W.2d 62 at Page 65 (Tex. 1959) (emphasis added)

However, quoting a rule and applying the facts, as understood by the court, to the rule were two different propositions. The court makes the following legal conclusion based on nothing more than its apparent desire to reach the holding of the case:

“.......There was a reasonable basis for construing the instruments together or treating them as one contract in these cases, but that is not true of the deed and deed of trust now under consideration. The conveyance and mortgage were executed as parts of the same transaction in the sense that both were necessary to effectuate the sale, but not in the sense that they together form one entire agreement. A vendor who sells his land for cash and retains a vendor's lien for the convenience of the purchaser and to enable the latter to obtain a loan with which to pay part of the purchase price is not concerned with the terms of a security [159 Tex. 342] instrument executed by the purchaser in favor of the lender in such a transaction the deed of trust is usually prepared by or under the direction of the lender and the seller has no interest in and does not attempt to acquaint himself with its provisions. There is nothing in the present record to suggest that respondent participated in the preparation of the deed of trust or knew any of its terms. Under these circumstances respondent could not be bound by recitals therein tending to enlarge his obligations under the deed or indicating that additional property or a greater estate was conveyed thereby. It would hardly be appropriate then to lay down a rule that the deed of trust might be read into the deed for the purpose of showing that the grantee acquired less property than the latter instrument purports to convey. Extrinsic declarations by one party to an unambiguous conveyance which are not binding upon the other party thereto cannot be used to create an ambiguity in the deed or alter the rights of the parties thereunder. We hold that the deed and deed of trust are not to be construed together for the purpose of ascertaining the intention of the parties to the conveyance. Miles v. Martin, 321 S.W.2d 62 at Page 66 (Tex. - 1959) (emphasis added)

The respondent further argued that the provisions of the deed of trust: 1) constituted a contractual stipulation as to the amount of mineral interest conveyed by respondent's deed and/or 2) constituted a conclusive admission against interest in recognition of respondent's reservation as distinct from the Wall reservation and/or 3) created an estoppel of record against the grantee in the deed to claim an estoppel against respondent and/or 4) constituted a waiver of the right to invoke an estoppel against respondent. The court again disagreed with no citations.

What the court never addresses is the actual knowledge of the grantee in the original deed i.e. what was intended to be reserved by the respondent as evidenced in the deed of trust. After all, the grantee executed the deed of trust and adopted its terms and provisions by that execution. At the least, these two documents, properly of record, raise a duty of inquiry by all subsequent grantees in the chain of title to determine what was reserved by the respondent. Complicating the issue are the contract of sale and loan application documents which make it clear that the parties intended for respondent to reserve a one-fourth mineral interest in addition to that previously reserved by the Walls. As between respondent and its grantee, the grantee having actual knowledge of the quantum of interest intended to be reserved by the respondent, it is the author’s opinion that the grantee would clearly be estopped/deemed to have waived/have made an admission of interest of the quantum of
mineral interest it received under the deed. The question is whether petitioner (and subsequent purchaser) is a good faith purchaser for value with no knowledge and thus not bound by such a conclusion.

The court also addressed the issue of reformation:

"The record suggests that the parties to the deed may have been mutually mistaken as to the legal effect of its provisions and believed that the instrument effectively reserved to respondent a one-fourth mineral interest in addition to that already owned by the Walls. Against such a mistake of law, equity will grant relief by way of reformation if the circumstances otherwise warrant an exercise of its power. Kelley v. Ward, 94 Tex. 289, 60 S.W. 311; Norris v. W. C. Belcher Land Mortgage Co., 98 Tex. 176, 82 S.W. 500, 83 S.W. 799; Gilbert v. Smith, Tex.Com.App., 49 S.W.2d 702, 86 A.L.R. 445. These decisions are in harmony with § 51 of the Restatement on Restitution, which states that 'a person who, because of a mistake of law as to the effect of words used in a conveyance, has transferred to another more than he intended and more than the parties mutually agreed he should do, is entitled to restitution of the excess * * *.' The authorities indicate that the Pratts, while [159 Tex. 344] they owned the property, may also have held the mineral interest under a constructive trust for respondent's benefit.

Respondent is not entitled to equitable relief against a bona fide purchaser, however, and he has the burden of showing that petitioner does not enjoy that status. The present record points to only two grounds that might be urged in support of the conclusion that petitioner is not an innocent purchaser for value. Respondent contends and the Court of Civil Appeals held that the deed executed by the Pratts to petitioner and Haley is a mere quitclaim. We do not agree. Miles v. Martin, 321 S.W.2d 62 at Page 67 (Tex. 1959)

The court further held that the Respondent was not entitled to equitable relief against a bona fide purchaser (petitioner). It preliminarily overruled the appellate court which had held that the deed at issue was a quitclaim deed and thus, any claimant thereunder, was not a bona fide purchaser. More significantly, however, was the issue of constructive notice. The court makes the following surprising ruling on what constructive notice is and what effect it had on the petitioner.

"Petitioner undoubtedly had constructive notice of the deed of trust executed by the Pratts to Kansas City Life, because the instrument was duly recorded before his purchase. With the qualification announced in Carter v. Hawkins, 62 Tex. 393, however, the rule is established in this state that the records operate as notice only of the facts actually exhibited thereby, and not those which might have been ascertained by such inquiries as an examination of the record would have induced a prudent man to make. See Wiseman v. Watters, 107 Tex. 96, 174 S.W. 815, and authorities there cited. The recital in the deed of trust quoted above and the mineral reservations referred to therein do not in themselves disclose that the parties to the deed executed by respondent were mutually mistaken as to its legal effect and intended to convey only the surface and one-half of the minerals. The mere recording of the deed of trust is not, therefore, sufficient to charge petitioner as a matter of law with constructive notice of the mistake. Miles v. Martin, 321 S.W.2d 62 at Page 68 (Tex. 1959)

The evidence fails to show whether petitioner was acquainted with the provisions of the deed of trust, but it does indicate that he knew of the existence of the instrument. The conveyance from the Pratts recites his assumption of the balance unpaid on the encumbrance to Kansas City Life 'secured by a certain deed of trust covering the following described property, of record in the Deed of Trust Records of Taylor County, Texas.' In the light of this showing and since no attempt has been made to develop the facts bearing on respondent's right to equitable relief, we think it should be assumed for the purpose of this opinion that petitioner had actual knowledge of the provision making the rights of the trustee subordinate to the mineral interests reserved in the two deeds. This recognition by the grantees in the second conveyance of the existence of two distinct mineral reservations might well suggest to a
prudent purchaser that the provisions and legal effect of the deed were not in accordance with the agreement and understanding of the parties. Whether a person of ordinary prudence with knowledge of this recital would have been put on inquiry and whether a diligent search would have led to a discovery of the mistake are issues to be determined by the trier of fact under all the evidence. See Gibson v. Morris, Tex.Civ.App., 47 S.W.2d 648 (wr. ref.). Miles v. Martin, 321 S.W.2d 62 at Page 69 (Tex. 1959) (emphasis added)

The court addressed the statute of limitations issue for equitable relief as follows:

“The statute of limitation began to run when the mistake was, or in the exercise of reasonable diligence should have been discovered. See Texas Osage Co-operative Royalty Pool v. Garcia, Tex.Civ.App., 176 S.W.2d 798 (wr. ref. w. m.); Clopton v. Cecil, Tex.Civ.App., 234 S.W.2d 251 (wr. ref. n. r. e.). While the record does not disclose when respondent discovered the mistake, he stated that there was no question about the mineral reservation in his favor until oil was discovered about five years after the deed was delivered. This testimony suggests that he may not have discovered the mistake more than four years before the suit was filed, and the evidence showing that he was paid one-fourth of the delay rentals for about five years indicates that there may be an issue of fact as to whether he should have done so. With the record in this condition, we think the justice of the case requires that the cause be remanded for a trial of respondent's right to equitable relief. Rule 505, Texas Rules of Civil Procedure.”

Miles v. Martin, 321 S.W.2d 62 at Page 69 (Tex. 1959) (emphasis added)

So what happened? Where did the remand lead? We do not know. Does Miles portend an end, in whole or in part, to Duhig? Not so far.

Exception 1 - Bonus, Rentals and Royalty Reserved in a Deed

Benge v. Scharbauer, 259 S.W.2d 166 (Tex. 1953)

In 1941, Clarence Scharbauer and wife owned six surveys of land situated in Midland County. There was an outstanding one-fourth mineral interest in a third party which was not identified or mentioned in the deed from Scharbauer to Benge. Excluded from the conveyance was:

“... saving, excepting and reserving to the grantors herein, however, an undivided three-eights (3/8) of all the oil, gas and other minerals, in, to and under said above described lands, but the grantee and his assigns shall have the sole power to execute all future oil, gas and other mineral leases without the joinder of the grantors herein, but said leases shall provide for the payment of three-eighths (3/8) of all the bonuses, rentals and royalties to the grantor.” Benge v. Scharbauer, 259 S.W.2d 166 at Page 168 (Tex. 1953)

The Supreme Court in this case addresses the differences under Duhig in the mineral reservation and the contractual obligation for the payment of bonuses, rentals and royalties to the grantor. It recognizes that owners of land may reserve mineral rights and/or bonuses, royalties and rentals or any one or combination of same. Thus, the court held:

“An instrument may convey two separate estates in the minerals, one of which may be a full mineral interest and the other a royalty, or other interest in the minerals.” Benge v. Scharbauer, 259 S.W.2d 166 at Page 168 (Tex. 1953)

The court held under the Duhig Rule:
Under the decision in *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878, the effect of the deed, by reason of the outstanding 1/4th interest in the minerals and the general warranty, was that the grantee acquired by the deed the surface and a 5/8ths mineral interest, and the grantors reserved only a 1/8th mineral interest.” *Benge v. Scharbauer*, 259 S.W.2d 166 at Page 168 (Tex. 1953)

Thus, the court took *Duhig* one step further. Instead of just taking the mineral interest reserved and causing it to vest in the grantee due to a failure of the grantor to identify an outstanding mineral interest in a third party (such interest reserved in a deed in the grantee’s chain of title), the court rearranged the trade and the interests of the parties.

However, this part of the decision only addressed the mineral interest attempted to be reserved by the grantor. The court then turned its attention to the bonuses, rentals and royalties attempted to be reserved by the grantor. It distinguished the later reservation by holding that:

“The provision is not an agreement that the parties to the deed shall participate in the bonuses, rentals and royalties in proportion to their ownership of mineral interests. It is rather a contractual provision that the grantors shall receive a specified part of the bonuses, rentals and royalties; namely, 3/8ths....” *Benge v. Scharbauer*, 259 S.W.2d 166 at Page 169 (Tex. 1953) (emphasis added)

The court reasoned:

“The stipulation that all leases shall provide for payment of 3/8ths of all bonuses, rentals and royalties to the grantors is part of and a limitation upon the power given to the grantee to execute leases. The rule of the Duhig case, in order to remedy the breach of warranty, takes from the grantors part of what the deed purported to reserve to them, but that rule should not be extended to change the express agreement as to what interests the grantors shall receive in bonuses, rentals and royalties under leases to be executed by the grantee.” *Benge v. Scharbauer*, 259 S.W.2d 166 at Page 169 (Tex. 1953) (emphasis added)

The *Benge* case was thereafter followed in the case of *McLain v. First Nat. Bank of Fort Worth*, 263 S.W.2d 324 (Tex.Civ.App. —1953). It has not, to the knowledge of the author, been expressly overruled.

*Exception Two - Oil and Gas Leases (Royalty Reserved in Excess of Proportionate Mineral Ownership)*

*McMahon v. Christmann* 303 S.W.2d 341 (Tex. 1957)

The lessor involved in this case owned an undivided 1/6th interest in the mineral estate. It granted an oil and gas lease and reserved, in addition to the royalty provided for in the royalty provision of the printed form oil and gas lease, an overriding royalty interest of 1/32nd of 8/8ths of all oil or gas produced and saved from the leased premises. This overriding royalty reservation was found in an addendum to the oil and gas lease. The reservation specifically provided that the overriding royalty interest was not subject to proportionate reduction under the proportionate reduction clause found in the printed form lease. One of the lessee’s arguments raised the specter of *Duhig*, albeit in a new application - oil and gas leases.

“The respondents insist here, as they did in their motion for an instructed verdict, that in the final analysis the question in the case is governed by the rule of estoppel laid down in *Duhig v. Peavy-Moore Lbr. Co.*, 135 Tex. 503, 144 S.W.2d 878.” *McMahon v. Christmann* 303 S.W.2d 341 at Page 345 (Tex. 1957)
The court cited its ruling in *Benge v. Scharbauer*, 259 S.W.2d 166 (Tex. 1953) where it declined to extend *Duhig* to a transfer to a grantee of a part of an undivided 3/8ths royalty while at the same time giving effect to the Rule for a transfer to the same grantee of an undivided 3/8ths interest in the mineral fee where the grantor did not own all of the mineral estate in the lands conveyed. The court in this case then expressly refused to apply *Duhig* to the instant fact situation as well.

“What has been said with reference to the history of the adoption of the rule of the Duhig case is not said in disparagement of the ultimate decision of the court to adopt and apply it. *It is said, rather, in justification of our refusal to extend it to and apply it in the construction of oil, gas and mineral leases.*” *McMahon v. Christmann* 303 S.W.2d 341 at Page 345 (Tex. 1957) (emphasis added)

The court reasoned as follows:

“ *What did the parties intend? No doubt they intended that the covenant of warranty should have some operative effect or they would not have included it in the lease. No doubt they also intended that petitioners as lessors should have title to and enjoy the fruits of the reserved royalty. The parties were bargaining with respect to an interest of an undivided 16/96ths and not with respect to the whole of the minerals in the 240 acres of land. Respondents knew that petitioners owned only a 16/96th interest. They knew, moreover, as did petitioners, that they themselves and third persons owned all interest in the minerals over and above the 16/96th interest. Respondents paid a cash bonus on a 16/96th interest; they paid no bonus on a greater interest. There was no occasion for respondents to exact from petitioners or for petitioners to furnish a warranty of title to any interest greater than the 16/96th interest which they undertook to convey. It is evident that the parties intended the covenant of warranty to extend only to the 16/96th interest in the minerals title to which passed to respondents under the lease, and we so hold on this record as a matter of law. So holding preserves the reserved royalty and preserves the warranty for its intended purpose. There has been no breach of the warranty as we have interpreted it and the warranty cannot, therefore, be used by respondents as a vehicle for obtaining or for cutting down the royalty reserved to petitioners in the lease. McMahon v. Christmann* 303 S.W.2d 341 at Page 347 (Tex. 1957) (emphasis added)

*Exception 3 - Contemporaneous Agreements and Ambiguity*

Ignoring the “constructive notice” argument of recorded documents for the moment, what effect can contemporaneously executed documents (pertaining to one real property transaction by and between a grantor/grantee) have on the actual knowledge of the parties of the true ownership of the mineral estate of a specific tract of land *at the time of the conveyance*. That is, if the complainant (party alleging the application of *Duhig*) signed and/or was furnished a contemporaneous document(s), which document(s) was directly involved in the real property transaction chain of title, and that document(s) clearly set forth the mineral ownership of the tract of land at the time of the conveyance, can the complainant avail him/herself of the *Duhig* doctrine? The author could not find any case directly on point on this issue.

There is one case, however, which appears to contradict the general principles of law regarding construing multiple instruments as one transaction with the result that the information contained in one of the instruments, if signed by the party to be charged, should have been binding on that party. See *The First Battlefield - Miles v. Martin* above.

The quotes from that case are significant. The holder of title to the land, as a remote grantee from the grantee in the deed at issue, was held not to be bound by the recitations found in the deed of trust actually executed by the grantee. That is, the case had to find that the grantee was not bound by the recitations found in the deed of trust; otherwise the remote grantee would have been bound as well.
Respondent argues that under these circumstances the several instruments held in escrow by Bond are to be construed together as parts of the same transaction. He says that the deed of trust plainly recognizes the existence and validity of two mineral reservations, and that this must be read into and becomes part of the deed and thus takes the case out of the Duhig Rule. **We do not agree.** *Miles v. Martin*, 321 S.W.2d 62 at Page 65 (Tex. 1959) (emphasis added)

And the reason for the disagreement?

There was a reasonable basis for construing the instruments together or treating them as one contract in these cases, but that is not true of the deed and deed of trust now under consideration. The conveyance and mortgage were executed as parts of the same transaction in the sense that both were necessary to effectuate the sale, but not in the sense that they together form one entire agreement. A vendor who sells his land for cash and retains a vendor's lien for the convenience of the purchaser and to enable the latter to obtain a loan with which to pay part of the purchase price is not concerned with the terms of a security [159 Tex. 342] instrument executed by the purchaser in favor of the lender. In such a transaction the deed of trust is usually prepared by or under the direction of the lender and the seller has no interest in and does not attempt to acquaint himself with its provisions. There is nothing in the present record to suggest that respondent participated in the preparation of the deed of trust or knew any of its terms. Under these circumstances respondent could not be bound by recitals therein tending to enlarge his obligations under the deed or indicating that additional property or a greater estate was conveyed thereby. It would hardly be appropriate then to lay down a rule that the deed of trust might be read into the deed for the purpose of showing that the grantee acquired less property than the latter instrument purports to convey. Extrinsic declarations by one party to an unambiguous conveyance which are not binding upon the other party thereto cannot be used to create an ambiguity in the deed or alter the rights of the parties thereunder. **We hold that the deed and deed of trust are not to be construed together for the purpose of ascertaining the intention of the parties to the conveyance.** *Miles v. Martin*, 321 S.W.2d 62 at Page 66 (Tex. 1959) (emphasis added)

The key to the case is the acknowledgment by the court that the deed of trust specifically identified the prior mineral reservation and that the deed of trust was subject to it. No question, the grantee in that deed knew of (actual knowledge) and acknowledged that the deed of trust did not mortgage all of the mineral interest in and under the lands at issue. Rather, only three fourths of the mineral estate thereunder was mortgaged. The remote grantee is now arguing that, in spite of a specific acknowledgment by his predecessor in title that he only owned 3/4 of the mineral estate in a properly recorded deed of trust, the remote grantee was entitled to apply the Duhig Rule and limit the quantum of the mineral estate reserved by the grantor in that deed.

Go ahead. Read the above quote again. Note, no citations. Note, even though the original grantee could not apply Duhig under any circumstances, the remote grantee was held to be able to avail itself of the Duhig Rule. The party who would have sought to apply Duhig had actual knowledge of the quantum of his mineral interest **BECAUSE HE SIGNED THE DEED OF TRUST.** However, his remote grantee is apparently not bound by any such recitation of acknowledgment of mineral ownership.

Looking at the law relating to construing multiple instruments as one transaction, the following general rules are noted:


2. Separate instruments which are contemporaneously executed as part of the same transaction and which relate to the same subject matter may be construed together as a single instrument. *Rudes v. Field*, 204 S.W.2d 5 (Tex. 1947)
3. Once a legal determination has been made that multiple instruments may be construed as a single instrument, such determination will be upheld even though the result is to modify one of the instruments which, standing alone, would have lead to a different construction. *Rudes v. Field*, 204 S.W.2d 5 (Tex. 1947)

4. The rule set out in 2. applies to conveyances of realty even though the contemporaneously executed documents do not expressly refer to each the other. *Rudes v. Field*, 204 S.W.2d 5 (Tex. 1947)

5. “Written contracts executed in different instruments whereby a single purpose or transaction is consummated are to be taken together as one contract. Estate of Griffin v. Sumner, 604 S.W.2d 221, 228 (Tex.Civ.App.--San Antonio 1980, writ ref'd n.r.e.). The instruments are to be read together although they do not expressly refer to each other and were not executed at the same time. Board of Insurance Commissioners v. Great Southern Life Insurance, 150 Tex. 258, 239 S.W.2d 803, 809 (1951).”*U.S. Life Title Co. of Dallas v. Andreen*, 644 S.W.2d 185 at Page 189 (Tex.Civ.App. —1982)

The rules cited above pertaining to construing multiple instruments as constituting one transaction do not arise out of an assertion of ambiguity. Rather, the cases arise out of an assertion by one party to the transaction that there was more than one instrument executed by and between the parties which, when taken together, constitute one complete transaction. These rules are summarized by the following quote:

“Texas courts have long applied the rule of statutory construction that "[w]here several instruments, executed contemporaneously or at different times, pertain to the same transaction, they will be read together although they do not expressly refer to each other." Board of Ins. Comm'r's v. Great Southern Life Ins. Co., 150 Tex. 258, 239 S.W.2d 803, 809 (1951). The court in Great Southern Life held that multiple insurance policies, endorsements attached to the policies, a pension trust agreement, and a fully executed commitment letter were all part of the same transaction and should be construed together. See id.; see also U.S. Life Title Co. v. Andreen, 644 S.W.2d 185, 189-90 (Tex.App.--San Antonio 1982, writ ref'd n.r.e.) (holding that warranty deed and repurchase agreement formed a single contract); Estate of Griffin v. Sumner, 604 S.W.2d 221, 224, 228 (Tex.Civ.App.--San Antonio 1980, writ ref'd n.r.e.) (construing as one contract two warranty deeds dated August 22, 1960 and an option contract executed "shortly thereafter"). Powell v. Old Texas Min. & Oil Co., 332 S.W.2d 398 (Tex.Civ.App.-1959)” *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662 at Page 675 (Tex.Civ.App. -1998)

Although not yet applied directly to a *Duhig* situation (except, in the author’s opinion, incorrectly applied in the *Miles* case), the issue raised by these principles could directly impact the application of *Duhig* in a multiple document situation where the grantee (or remote grantee) is charged with the knowledge contained in one of the instruments to the transaction and thus prevented from asserting the estoppel principle found in *Duhig*. For example, in the factual situation found in *Miles v. Martin*, 321 S.W.2d 62 (Tex. 1959), if properly asserted would a grantee (remote grantee) be prohibited from asserting the quantum of mineral interest it acquired under a deed where the accompanying deed of trust clearly set forth said interest? In the author's opinion, the party seeking to apply *Duhig*, but knowing and acknowledging in writing that he only owned a lesser interest (as found in the deed of trust), would be prohibited from doing so.

**Exception 4- Magic Words**

Does Texas recognize certain “magic” words which, under the facts as set out in *Duhig*, would have one result but which actually take the case and facts outside of *Duhig*. Yes, Texas does in two leading cases:
Remuda Oil Co. v. Wilson, 264 S.W.2d 192 (Tex.Civ.App. — 1954) and Harris v. Windsor, 294 S.W.2d 798 (Tex. 1956) And those magic words - repeated often?

“...reference to which is made for all purposes” and “reference is hereby made for all legal purposes”.

What competent drafter of deeds/deeds of trust fails to include such language in instruments of conveyance when referring to previous instruments in the chain of title, especially when those prior instruments contain or further refer to one or more reservations of oil, gas and other minerals?

The Remuda case was decided by the Court of Civil Appeals. The Harris case was decided by the Texas Supreme Court and expressly affirmed the holding in Remuda.

Remuda dealt with the following mineral reservation

“Prior to February 25, 1944, American National Insurance Company owned the fee simple title to the 2012.92 acres in question. On that date it conveyed the land to M. G. Johnson and wife but reserved to itself a 1/16 royalty in all the oil, gas and minerals produced from the land, said reservation being in the following language: It is expressly agreed and understood that out of the grant hereby made there is excepted and reserved to the grantor, its successors and assigns, an undivided ½ of 1/8 of all the oil, gas and other mineral royalty in and under and that may be produced from the above described land (said ½ of said 1/8 royalty being a 1/16 of all the oil, gas and minerals produced from said land).” Remuda Oil Co. v. Wilson, 264 S.W.2d 192 at Page 193 (Tex.Civ.App. — 1954) (emphasis added)

Thereafter, American National Insurance conveyed a royalty interest utilizing the following language:

“On May 5, 1948, American National Insurance Company executed a royalty deed to Gillette Hill. It is under this deed that appellants hold title...It should be noted that all deeds out of Gillette Hill to the various appellants contain the same reference for all purposes to the Johnson deed as appears in Exhibit A.” Remuda Oil Co. v. Wilson, 264 S.W.2d 192 at Page 196 (Tex.Civ.App. — 1954) (emphasis added)

The court cites the following two rules of law:

1. The construction of a written instrument is a question of law for the court

2. It is the court’s job to determine the intention of the parties to the instrument by examining the instrument itself in light of the circumstances which existed at the time of its execution.

The court held that the appellants were charged with constructive notice of all previous recorded instruments in the grantee’s title as well as holding that it could discern the intention of the parties.

“... We believe the latter intention is discernible. Appellants were, of course, charged with notice of the Johnson deed not only because it was a muniment in their title and of record, but also because it was expressly referred to for all purposes in the Hill deed, under which they hold. Inspection of the Johnson deed would disclose that American National Insurance Company owned by reservation ½ of 1/8 royalty. In the Hill deed there is described 1/4 of 'the royalty' and as a part of the description reference is made to the Johnson deed 'for all purposes.'” Remuda Oil Co. v. Wilson, 264 S.W.2d 192 at Page 194 (Tex.Civ.App. — 1954) (emphasis added)

The Remuda court announced the following rules:
“In Loomis v. Cobb, Tex.Civ.App., 159 S.W. 305, 307 (writ refused), the general rule is stated in the following language: 'It is a familiar and thoroughly well-settled principle of realty law that a purchaser has constructive notice of every matter connected with or affecting his estate which appears by recital, reference, or otherwise upon the face of any deed which forms an essential link in the chain of instruments through which he deraigns his title.” Remuda Oil Co. v. Wilson, 264 S.W.2d 192 at Page 195 (Tex.Civ.App. — 1954) (emphasis added)

“The court held that the reference to the previous deed put the grantee on notice thereof and that the deed under consideration even though it did not expressly except minerals, did not purport to convey to the grantee any mineral rights.” Remuda Oil Co. v. Wilson, 264 S.W.2d 192 at Page 195 (Tex.Civ.App. — 1954) (emphasis added)

The court concluded:

“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. Such inspection would disclose that the grantor in the Hill deed did not own 1/4 of any royalty that might be payable under any future leases. It owned only a fractional ½ part of a 1/8 royalty, which is less than 1/4 of the royalty which, under certain circumstances, as payable under the terms of the leases to which the land is presently subject. It would be difficult to believe that the grantor in the Hill deed intended to convey an estate greater than it owned, after referring in that deed for all purposes to an instrument which disclosed the limits of its ownership. And equally difficult would it be to believe that appellants, required as they were to look to the reference deed to determine the extent of their purchase, could have thought that they were purchasing an estate greater than such reference deed disclosed that their grantor owned. To hold that such was the intention of the parties would result in a construction which plainly leads to injustice, and would produce unusual results.” Remuda Oil Co. v. Wilson, 264 S.W.2d 192 at Page 196 (Tex.Civ.App. — 1954) (emphasis added)

This case was not like by aficionados of the Duhig Rule. Magic words had meaning for sure under the above rules. Words like “for all purposes” or “for all legal purposes” set the legal bar high. The grantee in a deed, seeing such words, was required to look at the instruments which were referred to so that it could determine the extent of the estate granted. No hiding behind inaction and then, in spite of the intention of the parties, claiming a larger estate than was ever contemplated by the parties. It should be noted that the court also pointed out that, even without these words, the grantee was still charged with and had constructive notice of all matters found in its chain of title. No magic words needed.

Remuda was not a Texas Supreme Court case. Its precedential value was questionable at best. That is, until Harris v. Windsor, 294 S.W.2d 798 (Tex. 1956). Remuda and its holding was specifically affirmed by the court. Again, the use of the words “reference to which is made for all purposes” was found in the relevant deed. Specifically:

“And being the same land described in Warranty deed from 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.” Harris v. Windsor, 294 S.W.2d 798 at Page 799 (Tex. 1956) (emphasis added)

It appears that the Texas Supreme Court removed the absolute strict construction demanded by Duhig. It allowed evidence of the intention of the parties to be admitted so that the court would not have to use rules of law unrelated to the bargain of the parties. That is:
“... In the deed from Liverman to Tems, referred to above, Liverman reserved one-half the minerals in and under this tract of land. It is thus disclosed that when respondent, Windsor, executed the deed to petitioner, Harris, he owned but one-half the minerals in and under the land. That he meant to reserve to himself three-eighths of the minerals and convey to Harris the surface and one-eighth of the minerals is made certain by the testimony of Harris himself, outlined in the opinion of the Court of Civil Appeals. If the deed is of doubtful meaning, the evidence clearly made a prima facie case for its reformation. However, both courts below have held that the deed is not ambiguous, and that when properly construed its effect was to reserve to Windsor three-eighths of the minerals and convey to Harris the surface and one-eighth of the minerals. We have concluded that the deed has been correctly construed below.”  

*Harris v. Windsor*, 294 S.W.2d 798 at Page 800 (Tex. 1956) (emphasis added)

Finally, *Harris* appears to nullify the unyielding result brought about by *Duhig* and substitute in its place the true intention of the parties.

“...Under the construction placed upon the deed by petitioner, respondent reserved nothing to himself, but conveyed to petitioner all of his one-half of the minerals and also an additional one-eighth which he did not own, thereby subjecting himself to an action for damages for breach of warranty, which action has been filed against him by petitioner. It is apparent that such construction would not serve the ends of justice, and should be adopted only if demanded by rules established by prior decisions of this court. We have long since relaxed the strictness of the ancient rules for the construction of deeds, and have established the rule for the construction of deeds as for the construction of all contracts,—that the intention of the parties, when it can be ascertained from a consideration of all parts of the instrument, will be given effect when possible. That intention, when ascertained, prevails over arbitrary rules. *Benskin v. Barksdale*, Tex.Com.App., 246 S.W. 360; *Sun Oil Co. v. Burns*, 125 Tex. 549, 84 S.W.2d 442.”  

*Harris v. Windsor*, 294 S.W.2d 798 at Page 800 (Tex. 1956) (emphasis added)

Did *Harris* do away with the *Duhig* principle? Apparently not. *Duhig* type cases are still reported today. Is this the various courts’ fault or that of the attorneys involved in the case?

The recent case of *Gore Oil Co. v. Roosth*, 158 S.W.3d 596 (Tex.Civ.App.—2005) further erodes the *Duhig* principle where, again, magic words are involved. The case involved the issue of whether a grantor, who reserved a non-participating royalty interest, should bear the burden of outstanding non-participating royalty interests. The case involved two “subject to” clauses. The first clause appeared to clearly reserve a 1/8 NPRI subject to any previously conveyed or reserved mineral interests. The court very clearly held that the clause, standing alone, would have made the grantor’s reserved interest subject to any previously reserved interests.

However, there was a second clause. It read as follows:

“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.” *Gore Oil Co. v. Roosth*, 158 S.W.3d 596 at Page 598 (Tex.Civ.App.—2005)

The foregoing words are “new” magic words. Very clearly the court holds, on the basis of the foregoing provision, that the *Duhig* provision does not apply in this case.

“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, we might agree with the leasehold interest owners that Duhig v. Peavy-Moore Lumber Co., supra, and its progeny apply. ... In this case, however, the McKnight deed contained an additional limiting clause stating that the conveyance was subject to all outstanding reservations, covenants, and restrictions. Consequently, we hold that Duhig does not apply and that the grantor and his successors in interest are not estopped from claiming title to the full 1/8 royalty.” Gore Oil Co. v. Roosth, 158 S.W.3d 596 at Page 601 (Tex.Civ.App.— 2005)

**Exception No. 5 - No Failure of Title**

Duhig does not apply in all mineral/royalty reservation situations. Apparently, first and foremost, there must be a *prior failure of title* before Duhig can have any effect on the reservation at issue. The case of Stewman Ranch, Inc. v. Double M. Ranch, Ltd., 192 S.W.3d 808 (Tex.Civ.App.— 2006) best illustrates this principle.

The issue in the Stewman Ranch case was based on the interpretation of the following clause:

“        There is, however, excepted and reserved to the Grantors an undivided one-half (½) of the royalties to be paid on the production of oil, gas and other hydrocarbons from the described lands which are presently owned by Grantors for and during the lives of Helen A. Stewman and O. T. Stewman, Jr.; and, upon the death of the survivor of them, this retained royalty interest will vest in Grantee, its successors and assigns.” Stewman Ranch, Inc. v. Double M. Ranch, Ltd., 192 S.W.3d 808 at Page 810 (Tex.Civ.App.— 2006)

The question before the court was whether the grantor intended to reserve one-half of the royalty then owned by the grantor or one-half of the total royalty. The grantee under the deed argued that the Duhig doctrine would result in a holding that the grantor in the deed only intended to reserve one-half of the royalty then owned by it at the time of the conveyance. That is, under the grantee’s theory, Duhig estopped the grantor from asserting title to one-half of the total royalty.

The court stated the following:

“        Duhig is inapplicable to this case because there has been no failure of title. There is a dispute over the interpretation of the mineral reservation, but not all deed construction disputes constitute a breach of warranty. The warranty serves to indemnify the purchaser against a loss or injury he may sustain by a defect in the seller's title. Gibson v. Turner, 156 Tex. 289, 294 S.W.2d 781, 788 (1956). The warranty clause does not convey title nor does it determine the character of the title conveyed. Davis v. Andrews, 361 S.W.2d 419, 424-25 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.). Rather, it warrants that the same estate or any right, title, or interest therein has not been conveyed to any person other than the grantee and that the property is free from encumbrances. Chapman v. Parks, 347 S.W.2d 805, 808 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.).” Stewman Ranch, Inc. v. Double M. Ranch, Ltd., 192 S.W.3d 808 at Page 810 (Tex.Civ.App.— 2006) (emphasis added)

“        Unlike Duhig, the Stewmans' deed did not purport to convey title that the grantors did not own. The deed here specifically provided that it was subject to the exceptions and reservations contained in it, and those were set out in four paragraphs of the deed. Consequently, the title that the Stewmans warranted did not include any interest specifically excepted or reserved. Duhig does not apply.” Stewman Ranch, Inc. v. Double M. Ranch, Ltd., 192 S.W.3d 808 at Page 811 (Tex.Civ.App.— 2006) (emphasis added)
Exception 6 -- Ambiguity

*Duwig* cannot apply in every situation where there is an issue as to the quantum of mineral/royalty interest conveyed/reserved in a deed. The antithesis of a fact situation where *Duwig* is applicable is where there is a finding of ambiguity in the interpretation of the instrument and parol evidence is admitted to determine the intent of the parties. *Duwig* cannot be applied in cases where parol evidence is specifically admitted. That is, the archaic rule of *Duwig* cannot be applied where a contrary intent of the parties arises from the evidence presented on the trial of the case.

The case of *Brown v. Havard*, 593 S.W.2d 939 (Tex. 1980) sets forth the following test for ambiguity:

“... In Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154 (1951), we stated the test for ambiguity as follows:

‘In other words, if after applying established rules of interpretation to the contract it remains reasonably susceptible to more than one meaning it is ambiguous, but if only one reasonable meaning clearly emerges it is not ambiguous.’

In Smith v. Liddell, 367 S.W.2d 662 (Tex.1963), we said that where the language contained in the instrument is subject to two or more interpretations, extrinsic evidence may be used to ascertain and give effect to the true intention of the parties.” *Brown v. Havard*, 593 S.W.2d 939 at Page 941 (Tex. 1980)

Ambiguity of a contract/deed is a question of law to be decided by the trial court.

“... Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances existing when the contract was made. Coker, 650 S.W.2d at 394. We will consider the contract as a whole, and read each part in light of all other parts; meaning should be afforded to all language used by the parties if that can be done and a reasonable construction achieved. Id. at 393. A contract is not ambiguous if it can be given a definite or certain meaning as a matter of law. Coker, 650 S.W.2d at 393; Hussong v. Schwan's Sales Enter., Inc., 896 S.W.2d 320, 324 (Tex.App.--Houston [1st Dist.] 1995, no writ). On the other hand, if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, which creates a fact issue regarding the parties' intent. Coker, 650 S.W.2d at 394.” *North Central Oil Corp. v. Louisiana Land and Exploration Co.*, 22 S.W.3d 572 at Page 576 (Tex.Civ.App. —2000)

Once a court has concluded that a contract/deed is ambiguous, parol evidence is admissible to resolve the ambiguity. It is important to note that not all ambiguous contracts/deeds have to be reformed. Where the parties are seeking to clarify the proper interpretation of an ambiguous contract/deed, once parol evidence is admitted the court/jury can place the proper interpretation on the ambiguous provision(s) at issue. The court in *Smith v. Allison*, 301 S.W.2d 608 (Tex. 1956) held the following:

“... This is not a suit for reformation of the deed. The rules of law applicable to the construction of a deed capable of more than one interpretation and the rule applicable to suits to reform instruments are different...” *Smith v. Allison*, 301 S.W.2d 608 at Page 614 (Tex. 1956)

“The ultimate purpose in construing a deed is to ascertain the intention of the grantor, and when this intention is ascertained, that construction which carries the intention into effect, when such
intention is lawful, governs and controls.” *Smith v. Allison*, 301 S.W.2d 608 at Page 614 (Tex. 1956)

Based on the author’s research, once the initial threshold of ambiguity has been decided, and parol evidence admitted, it does not appear that *Duhig* has any applicability. Rather, the intent of the parties, as disclosed from the parol evidence, will determine the interpretation of the contract/deed.

*Where Is the Constructive Notice Doctrine? The Beginning of the End of Duhig*

In the author’s opinion, *Duhig* is applied in spite of and with total disregard to the rules regarding constructive notice as found in the Texas statutes and case law governing same.


An instrument that is properly recorded in the proper county is:

(1) notice to all persons of the existence of the instrument; and

(2) subject to inspection by the public.” (emphasis added)

Texas case law on the subject of constructive notice, and the legal effect of properly recording an instrument in the appropriate county deed records is as follows:

“...While not all public records establish an irrebuttable presumption of notice, the recorded instruments in a grantee's chain of title generally do. HECI Exploration Co. v. Neel, 982 S.W.2d 881, 886-87 (Tex. 1998); Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982); Sherman, 152 S.W.2d at 321; Kuhlman v. Baker, 50 Tex. 630, 637 (Tex. 1879); see also Tex. Prop. Code § 13.002. 235 S.W.3d 615 (Tex. 2007), 06-0293, Ford v. ExxonMobil Chemical Co.” *Ford v. ExxonMobil Chemical Co.*, 235 S.W.3d 615 at Page 617 (Tex. 2007)

“...This, however, is not the rule with regard to references made in documents appearing in one's chain of title. It is well settled that "a purchaser is bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims." (emphasis added). Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668 (Tex.Civ.App.--Eastland 1952, writ ref'd). See also Williams v. Harris County Houston Ship Channel Navigation District, 128 Tex. 411, 99 S.W.2d 276 (1936); Texas Co. v. Dunlap, 41 S.W.2d 42 (Tex.Comm'n App.1931, jdgmt adopted); Guevara v. Guevara, 280 S.W. 736 (Tex.Comm'n App.1926, jdgmt adopted); Tuggle v. Cooke, 277 S.W.2d 729 (Tex.Civ.App.-Fort Worth 1955 writ ref'd n.r.e.); Abercrombie v. Bright, 271 S.W.2d 734 (Tex.Civ.App.--Eastland 1954, writ ref'd n.r.e.); Lange, Land Titles and Title Examination Sec. 816 at 259 (1961). As stated in Loomis v. Cobb, 159 S.W. 305 (Tex.Civ.App.--El Paso 1913, writ ref'd),

The rationale of the rule is that any description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and he is bound to follow up this inquiry, step by step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained. *Westland Oil Development Corp. v. Gulf Oil Corp*, 637 S.W.2d 903 at Page 908 (Tex. 1982)

“.....The recorded partition deed in this case was an essential link in appellants' chain of title to the 290.85 acres. Because it was, appellants were charged with constructive notice of the
recitations, references, and exceptions contained in the partition deed. As held in Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668 (Tex.Civ.App.--Eastland 1952, writ ref'd), a grantee is charged with constructive notice of each "recital, reference and reservations contained in ... any instrument which forms an essential link in the chain of title under which [they claim]." Id. at 670. This holding was reaffirmed by the Supreme Court in Westland Oil Development Corp. v. Gulf Oil, 637 S.W.2d 903, 908 (Tex.1982)."


Except for Duhig cases! To heck with notice, inquiry, investigation. Even asking the most relevant question of all outside of the rules of constructive notice- Why are you, the grantor, reserving an undivided one-half mineral interest? Many courts in the Duhig cases even mentioned the duty of the grantee to research the title of its grantor, mentioned constructive notice of the status of the title vis a vis the recorded instruments affecting the mineral title and, in spite of the legally mandated constructive notice of the status of that title, blindly applied Duhig.

Blindly applied? Hardly! Here follows a probable scenario involving a typical Duhig issue ie one-half of the minerals outstanding in a third party and the present grantor “attempting” to reserve the remaining one-half of the mineral estate. Remember, the grantor must get past a summary judgment applying Duhig in order to get to a trial on the following issues. It might be possible to get these issues defined in depositional testimony but, under present legal interpretations, may never get a grantor’s arguments to a jury or convince a judge on the conflict between the recording statutes and court made law (the Duhig Rule).

Direct Testimony

Q - “So, Mr. Jones, did you have the complete chain of title to Blackacre run and copies of all documents furnished to you for review prior to closing?

A - “Yes. I reviewed all of the instruments plus I had an attorney render a title opinion on the mineral estate.”

Q - “So, you knew before your acquisition of Blackacre of the prior one-half mineral reservation in Mr. X back in 1932?”

A - “Yes.”

Q - “So, when Mr. Black reserved an undivided one-half of the minerals to himself in the deed to you, did you understand that he made that reservation for himself or was he merely protecting his warranty and he intended to convey his one-half mineral interest to you?”

This could be where the modern Duhig case encounters its first legal issues.

1) If Mr. Jones answers that he understood the reservation made by Mr. Black to be actually only a protection by Mr. Black on his warranty and in reality he, Mr. Jones, was to get the mineral interest owned by Mr. Black, why not so state that fact in the instrument itself? Is it even believable that Mr. Black intended to have the remaining one-half mineral interest go to Mr. Jones when he reserved it to himself? But for Duhig, would there be any question who KEPT the one-half mineral interest?

2) Or, if Mr. Jones answers Mr. Black intended to reserve the remaining one-half mineral interest for himself but that he, Mr. Jones, “understood” that he was to get the interest, Mr. Jones is out
of luck. The agreement cannot be reformed where only one party believes that a mistake has been made.

“There are two basic requirements which must be met before the remedy of reformation is granted: first, the party claiming the relief must show what the parties' true agreement was, and second, he must show that the instrument incorrectly reflects that agreement because of a mutual mistake. We have so held recently in Champlin Oil and Ref'g Co. v. Chastain, 403 S.W.2d 376 (Tex.Sup.1965):

'Despite hardship, relief by reformation will be denied in the absence of proof of a definite agreement between the parties which has been misstated in the written memorandum because of a mistake common to both contracting parties. Estes v. Republic National Bank of Dallas, 462 S.W.2d 273 at Page 275(Tex. 1970) (emphasis added)

Mr. Black did not make a mistake in the terms of the trade nor the contents of the deed. Only Mr. Jones is asserting that a mistake has been made and that he should be “given” the remaining one-half mineral interest.

Problem! This issue can never be raised. Mr. Jones gets the mineral interest under the Duhig Rule. Period! Actually, an estoppel in reverse (to Duhig) could arise where the grantee could be estopped from claiming title to the mineral estate due to its prior knowledge of the outstanding mineral reservation and his understanding that Mr. Black intended the mineral reservation to be for his benefit and the grantee’s failure to timely bring suit for reformation. Let the reader not forget the issue of the ownership of the remaining undivided one-half mineral interest never becomes an issue unless and until mineral development of the land is proposed - an event that could well take more than four (4) years from the date of the instrument (thus in all probability foreclosing a suit for reformation).

Does Mr. Jones have a duty of inquiry? Yes! To whom would he direct his inquiries concerning the exception and reservation of the one-half mineral interest by Mr. Black in the deed? Mr. Black of course. Assuming Mr. Jones even read the deed he accepted, if Mr. Jones actually knows that one-half of the mineral estate is outstanding in third parties and that the effect of the deed is to convey the surface estate only to him, if Mr. Jones believes that this is not the correct trade agreed upon by the parties, he must inquire of Mr. Black AND NOT ACCEPT THE DEED AS WRITTEN. That is, “of course” if the actual knowledge of the existence of the outstanding one-half mineral interest in Mr. X was known prior to the time of the execution of the deed from Mr. Black to Mr. Jones.

What if the actual knowledge of the existence of Mr. X’s mineral reservation was not discovered until after the closing of the acquisition by Mr. Jones and the reservation of the mineral interest by Mr. Black? Same result in the author’s opinion. Actual or constructive, Mr. Jones was charged with the existence of Mr. Black’s mineral reservation.

Q - “So, Mr. Jones, you did not any title research at all to determine if your mineral title was subject to any prior conveyances? You relied solely on title insurance which, as you know, does not cover or insure the mineral estate? Is that right?
A - “I had no actual knowledge of the outstanding mineral interest.”

Mr. Jones did have constructive notice of the mineral reservation in favor of Mr. X as a matter of law. Mr. X’s mineral reservation was in Mr. Jones chain of title and, under Portman v. Earnhart, 343 S.W.2d 294 (Tex.Civ.App. — 1960) the constructive notice of same was imputed to Mr. Jones. There is no breach of any warranty, no misunderstanding between the parties and no mistake of what the trade was as between the parties.
Alternatively, what if Mr. Jones answers that he did not believe that Mr. Black was reserving one-half of the minerals for himself? Is there any evidence to the contrary of Mr. Black’s intent? Perhaps a contemporaneously executed document such as a contract for sale? More significantly, if Mr. Jones says he did not believe Mr. Black intended to reserve the one-half mineral estate for himself, and Mr. Black says he did, is this a case of ambiguity of intent of the parties? If so, as set out above, Duhig may no longer be applicable and parol evidence would be admissible to determine the intent of the parties.

The author has attempted (but probably not succeeded) to read every Duhig case found in Texas jurisprudence. Out of all of the cases read, the author could not find one case which negated the recording statutes and their legal effect of constructive notice for a properly recorded instrument in a grantee’s chain of title. What the author has found is statement after statement that Duhig is not about breach of warranty but rather estoppel - estopping the grantor from claiming that he did not convey that which he represented to convey to the grantee.

What the Duhig cases never directly look at is the totality of the factual underpinnings of the trade in light of the recorded instruments in the grantee’s chain of title, including all previous mineral reservations. Duhig was decided in 1940. This is prior to computers, digitized indexes, even xerox machines. All transcription of instruments was done by hand/typewriter. The author understands that, at the time of Duhig, firm, understandable rules had to be in place regarding what was and was not conveyed by the grantor. However, this is 2010. Many county records are on line from sovereignty. Determining one’s chain of title as well as the mineral reservations in that chain is no longer difficult, time consuming nor do inaccuracies result from improper title searches in the numbers that they once did.

“Magic words” take a case out of Duhig as seen above. Magic words require the grantee to read the therein referred to instruments. Whether read or not, the grantee is charged with the contents of the specific instrument identified.

Constructive notice is a legislative scheme, coupled with applicable case law, whereby a grantee is charged with constructive notice of all documents in his/her chain of title and their content. Period! Not just the instrument identified in an instrument which also utilizes magic words but all instruments in the grantee’s chain of title. Why is the grantee charged with constructive notice of the one document so identified (coupled with the use of the magic words) but not the same identical instrument under constructive notice? The author has no answer. It simply makes not sense.

The bottom line is this. Millions upon millions of dollars have changed hands under the application of the Duhig Rule. In the author’s opinion, in most if not all of the recorded cases, the grantors intended to except from the conveyances and reserve to themselves the exact interest set forth in the respective deeds. No mutual mistake, no fraud, no schrivner’s error. Only after mineral production became a possibility did the grantee (or its successors in interest) raise the issue. The author believes that Duhig should be overruled for the more accurate rules of:

1. All grantees are charged with the contents of all instruments in their chains of title.
2. No grantor should loose his reserved mineral interest simply because there is a prior mineral interest in the chain of title since the grantee is charged with knowledge of its existence.
3. The grantee should be charged with the contents of the instrument it accepts as well as its terms and provisions as written and not be allowed to vary same unless there is a mutual mistake of the parties as to actual terms of the trade ie what was or was not to be reserved by the grantor.
4. Duhig should be retired as a rule of law, immediately!
The author takes full responsibility for the content of this article. The title was suggested by Mr. Michael Jones, Attorney, Jones & Gill LP.

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